Order F24-100

City of Burnaby

Alexander R. Lonergan
Adjudicator

December 12, 2024

CanLII Cite: 2024 BCIPC 114
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 114

Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records about multiple parcels of land and related matters involving the City of Burnaby (the City). The City disclosed responsive records but withheld some information and records under several FIPPA exceptions to disclosure. The adjudicator determined that the City may withhold all of the information withheld under 12(3)(b) (local public body confidences), must refuse access to most of the information it withheld under s. 22(1) (unreasonable invasion of third-party personal privacy), may withhold most of the information at issue under ss.13(1) (advice or recommendations) and 14 (solicitor client privilege), and must refuse access to a small amount of the information under s. 21(1) (harm to third-party business interests). The adjudicator required the City to give the applicant access to the information that it was not required or permitted to refuse to disclose.

Statutes Considered: *Community Charter*, SBC 2003, c 26, ss. 90(1)(e), and 92; *Criminal Code*, RSC 1985, c 46, s. 322; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 12(3)(b), 13(1), 13(3), 14, 21(1), 21(1)(c)(iii), 22(1), 22(2)(c), and 22(2)(g); OIC 382/1892 (BC); OIC 266/1992 (BC).

INTRODUCTION

[1] Under the Freedom of Information and Protection of Privacy Act (FIPPA), an individual (the applicant) requested that the City of Burnaby (City) provide him with various records about four parcels of land and the City's dealings with them.[1]

[1] Applicant's request for review, at pp. 4-6.

[2] The City provided him some records but refused to disclose other records and parts of records pursuant to ss. 12(3)(b) (local public body confidences), 13 (advice or recommendations), 14 (solicitor client privilege), 15(1)(c) (harm to investigative techniques and procedures), 17(1) (harm to public body's financial or economic interests), 21(1) (harm to third party's business interests) and 22(1) (harm to personal privacy) of FIPPA.[2]

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision. Mediation by the OIPC failed to resolve the issues in dispute and the matter proceeded to this inquiry.

[4] At inquiry, the City withdrew its reliance on ss. 15(1)(c) and 17(1) to withhold information.[3] The City then released additional records and information to the applicant. Consequently, I find that ss. 15 and 17 are no longer at issue in this inquiry.

[5] During the inquiry, the OIPC invited a corporate real estate developer (Developer) to provide a submission about the application of s. 21(1) to the records. The applicant, the City and the Developer all provided written submissions for this inquiry.

Preliminary Matters

Information not provided, s. 2(2)

[6] Section 2(2) states that FIPPA "does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public."

[7] In its response to one part of the applicant's request, the City relied on s. 2(2) to refuse to disclose information about how much the taxes were on three specific properties and who paid those taxes.[4] The City also told him where he could get those records.[5]

[8] In addition, the applicant requested information about the City's ownership of two specific properties. The City did not provide responsive records because, the City says, the City never owned those properties and there are no responsive records.[6]

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[2] All sectional references in this Order refer to FIPPA unless otherwise noted.
[3] City's submission, at para. 6.
[4] Applicant's access request.
[5] City's response letter, March 15, 2022, at p. 2.
[6] City's submission, at paras. 2(c) and (e), and 4(c) and (e).

[9] There is no information before me about whether the applicant was successful in obtaining any of these records. What is clear, however, is that neither s. 2(2) nor these aspects of the applicant's request are listed as issues in the notice of inquiry or the investigator's fact report. In addition, the applicant does not discuss s. 2(2) in his request for review to the Commissioner or in his submissions for this inquiry.

[10] I conclude that these aspects of the applicant's access request and the City's response to them are not in dispute in this inquiry, so I will not consider them any further.

Issue Estoppel

[11] Part of the applicant's access request is for records between 2015-17 that relate to the title to a certain parcel of land which he says was unlawfully transferred to the City (Transfer Issue).[7] The City says that this request was already dealt with in a previous OIPC inquiry that resulted in Order F23-91.[8] The applicant did not respond to the City's position on the Transfer Issue.

[12] The City's position is, in substance, about issue estoppel. The legal doctrine of issue estoppel means that an issue should not be heard again if it has already been decided in a previous proceeding. For issue estoppel to apply, the following three requirements must be satisfied:

1. The same question has been previously decided;
2. The judicial decision which is said to create the estoppel was final; and
3. The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. . .[9]

[13] The applicant and public body in this inquiry and the inquiry that resulted in Order F23-91, are the same. After reviewing Order F23-91 and the access request that was at issue in its inquiry, I can see that Order F23-91 dealt with the applicant's right of access to the same records associated with the Transfer Issue. I find the issue of the City's severing decisions in respect of the Transfer Issue was already decided in Order F23-91.

[14] Under these circumstances, I find that issue estoppel bars the applicant from seeking a review of the City's severing decisions in respect of the Transfer

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[7] Applicant's access request, at para. 1.
[8] City's submission, at para. 4(a) and footnote 1, referring to Order F23-91, 2023 BCIPC 107 (CanLII).
[9] *Erschbamer v Wallster*, 2013 BCCA 76 (CanLII), at paras. 12-13; F24-29, 2024 BCIPC 36 (CanLII), at para. 26. Issue estoppel is one branch of a broader principle known as "*res judicata*".

Issue. Consequently, I will not consider that part of the applicant's access request.

New Issue, s. 25(1)

[15] Section 25(1) states 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
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> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
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> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[16] The applicant raises s. 25(1) in his submission.[10] The City did not discuss s. 25(1) in its submissions. Section 25(1) is not listed as an issue in the Notice of Inquiry or the Fact Report. I find that s. 25(1) is a new issue.

[17] Past orders have consistently said that parties may only add new issues in an inquiry if the OIPC permits them to do so.[11] The Notice of Inquiry and the OIPC's *Instructions for Written Inquiries* clearly explain the process for adding new issues to an inquiry.[12] The applicant did not seek prior approval to add s. 25(1) to this inquiry, nor does he explain why I should add it as an issue at this late stage of the OIPC inquiry process.

[18] Nothing in the parties' submissions persuades me that I should add s. 25(1) as a new issue in this inquiry, nor is it apparent that I should consider s. 25(1) for any other reason. Therefore, I decline to add s. 25(1) as a new issue and I will not consider it further.

Matters Outside the Scope of FIPPA

[19] The applicant's submission discusses court proceedings in which he and the City were opposing parties. The City's submissions respond to some of what the applicant says about those proceedings.

[20] I do not have authority under FIPPA to address the parties' dispute or concerns about their court proceedings. Therefore, although I have reviewed the parties' entire submissions, I will only refer to the matters discussed in those submissions insofar as they are relevant to the FIPPA issues before me.

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[10] Applicant's submission, at paras. 7 and 8.
[11] See for example: Order F07-03, 2007 CanLII 30393 (BC IPC), at paras. 6-11; Order F10-37, 2010 BCIPC 55 (CanLII), at para.10.
[12] Available at: https://www.oipc.bc.ca/guidance-documents/3970.

ISSUES AND BURDEN OF PROOF

[21] I must decide the following issues in this inquiry:

1. Is the City authorized under s. 14 to refuse to disclose the disputed information?
2. Is the City authorized under s. 12(3)(b) to refuse to disclose the disputed information?
3. Is the City authorized under s. 13(1) to refuse to disclose the disputed information?
4. Is the City required under s. 22(1) to refuse to disclose the disputed information?
5. Is the City required under s. 21(1) to refuse to disclose the disputed information?

[22] I will address the issues listed above in the same sequence.

[23] Section 57(1) places the burden on the City, which is a public body, to prove that it is authorized to refuse access to the information and records withheld under ss. 12(3)(b), 13, or 14. Section s. 57(1) also places the burden on the City to prove that it must refuse access to any information that it withholds under s. 21.

[24] Section 57(2) places the burden on the applicant to prove that disclosing the personal information at issue would not be an unreasonable invasion of a third party's personal privacy under s. 22(1). However, the City has the initial burden of showing that the disputed information is personal information.[13]

[25] Finally, there are three pages of records that the Developer argues must be withheld under s. 21(1), but which the City does not argue it must withhold under that section. Under these circumstances, s. 57(3)(b) places the burden on the Developer, as a third party, to prove that the applicant has no right of access to the information on those three pages under s. 21(1).

DISCUSSION

Background[14]

[26] Each part of the applicant's access request relates to property disputes between himself and the City. After a series of events, including court proceedings, the City took possession of land that was formerly owned by the

[13] Order 03-41, 2003 CanLII 49220 (BC IPC), at paras. 9-11.
[14] The information in this background section is based on information provided in the parties' submissions and evidence. It is not information that is in dispute.

applicant and his family. Among other reasons, the applicant says that the City took the land because his family's ownership of it prevented the City from proceeding with certain property development projects in the vicinity of the land he owned.

[27] The applicant's access request is for multiple types of records. I have already decided to not consider the parts of his request discussed in paragraphs 6 to 14 above. Therefore, the only issues that remain in dispute are the following parts of the applicant's access request and the City's response to them:

- Information about complaints filed with the City about a certain property formerly owned by the applicant, for the period 2004 – 2016; and
- Information and documentation about a certain housing project located on a parcel of land in the City, for the period 2015 – 2019.

Records and Information in Dispute

[28] The City is withholding information from 88 pages of the approximately 800 pages of responsive records.[15] The Developer agrees with the City's application of s. 21(1) to the records but indicates that it did not go far enough and argues for s. 21(1) severing on three additional pages.[16]

[29] There are many types of records in this matter, including emails and letters between the City and various entities, bylaw enforcement file notes about complaints and bylaw violations, internal City meeting minutes and reports, photographs, and various real estate development and transaction documents. The City produced copies of all disputed records for my review.

Section 14 – Solicitor Client Privilege

[30] The City applied s. 14 to emails between City staff members, the City Solicitor, and the City's external legal counsel.

[31] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. There are two categories of solicitor-client privilege, being legal advice privilege and litigation privilege.[17] The City says that legal advice privilege applies to the records and information it withholds under s. 14.[18]

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[15] City's Release Table dated August 23, 2024.
[16] The Records, at pp. D000641, D000669, and D000670.
[17] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) [*College*], at para. 26.
[18] City's submission, at para. 9.

[32] The applicant takes two positions with respect to the information that the City withholds under s. 14. First, he says that he is part of the client in all solicitor-client relationships between the City and its lawyers because he is a member of the taxpaying public. Secondly, I understand the applicant to be arguing that there can be no legal advice privilege over the withheld information because it is evidence of a criminal act, so the crime/fraud exclusion to privilege applies.[19]

[33] The nature of the applicant's arguments require me to first consider whether legal advice privilege applies to the information withheld under s. 14. If so, I will then consider whether the applicant falls within the relevant lawyer-client relationship or if the exception to privilege that he identifies is applicable in this matter.

Legal Advice Privilege

[34] Legal advice privilege does not protect all communications between a client and their lawyer, but the privilege will apply if the following conditions are met:

1. There is a communication between a solicitor and their client;
2. The communication entails the seeking or giving of legal advice; and
3. The parties intend the communication to be confidential.[20]

[35] Legal advice privilege extends beyond the literal requesting and giving of legal advice. Information that the client gives to their lawyer that relates to the advice sought and internal client discussions about the advice received also fall within the scope of legal advice privilege.[21]

Analysis, s. 14

[36] Most of the records withheld under s. 14 are emails between the City and its lawyers. One of the records withheld under s. 14 is an attachment to an email between the City and its lawyers.[22]

[37] The City provided an affidavit from its City Solicitor who personally reviewed the records withheld under s. 14, and directly participated in many of

[19] Applicant's submission, at paras. 5-6.
[20] *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII), at para. 15, citing *Solosky v. The Queen*, 1979 CanLII 9 (SCC), at p. 837.
[21] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 (CanLII), at paras. 22-24; *Bank of Montreal v. Tortora*, 2010 BCSC 1430 (CanLII), at para. 12, citing *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)*, [1988] O.J. No. 1090 (Ont. S.C.J.).
[22] The Records, at pp. D000654-D000658.

them. The City Solicitor describes the City's communications with its lawyers as "confidential" and says that they reveal legal advice that the City sought and obtained.[23]

[38] Having reviewed the emails between the City and its legal counsel, I can see that these are communications that contain the actual seeking and giving of legal advice. Furthermore, the content of these emails leads me to conclude that the withheld email attachment was integral to the legal advice sought by the City. I find that the emails between the City and its lawyers, including the attachment to one of those emails, are communications that entail the seeking and giving of legal advice.

[39] Some of the City-lawyer communications withheld under s. 14 include express statements that the contents are privileged and confidential. After considering these circumstances and the City Solicitor's evidence, I find that the City and its lawyers intended their communications to be confidential.

[40] The City also withholds a few emails between City employees that do not involve a lawyer's direct participation. Despite this, I find that the information at issue here would, if disclosed, directly reveal the substance of the confidential legal advice that the City sought and received from its lawyers. Therefore, I find that these emails are also protected by legal advice privilege.

[41] Finally, the City withholds a small amount of legal billing information under s. 14.[24] Past orders have said that legal billing information is presumptively privileged because legal fees arise out of the lawyer-client relationship and may be capable of revealing privileged lawyer-client communications.[25] To overcome this presumption, disclosure must have no reasonable possibility of revealing privileged lawyer-client communications.[26] From my perspective, the information at issue here includes itemized descriptions of legal services that may reveal the substance of the confidential advice given to the City. Therefore, I find that this information is subject to legal advice privilege.

[42] The only exception to my findings above is a letter that the City and its lawyers received from another entity's lawyer.[27] The City's arguments and affidavit evidence about privilege do not discuss this letter, and it is clear from the letter's content that the author was not the City's lawyer. Furthermore, the letter does not appear to reveal anyone else's confidential communication with their

[23] Affidavit #1 of City Solicitor, at para. 4.
[24] The Records, at p. D000666.
[25] *Maranda v. Richer*, 2003 SCC 67 (CanLII), at paras. 32-33; *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 [*CCF*], at paras. 60-61.
[26] *CCF, ibid.* at paras. 2, 61, and 83; Order F21-52, 2021 BCIPC 60 (CanLII), at para. 11.
[27] The Records, at p. D000643.

lawyer about legal advice they sought or received. Consequently, I find that this letter is not subject to legal advice privilege.

[43] In short, with the exception of the letter just mentioned, I find that disclosing the information withheld under s. 14 would reveal communications the City had with its lawyers about the seeking and providing of legal advice, and that those communications were intended to be confidential. Therefore, I find that legal advice privilege applies to that information.

[44] In making my decision, I have considered the applicant's argument that as a member of the public, he is the client and is entitled to see any legal advice provided to the City.[28] The essence of the applicant's argument is that the City is effectively the same entity as its constituents (which include himself) because the City is accountable to its constituents. He has provided no case law to establish that this is a binding principle of law, nor am I aware of any.

[45] The City is a distinct entity created by ministerial order and letters patent,[29] existing separately from the individuals that elect its mayor and council. The City can retain and instruct its own lawyers to the exclusion of others. In light of the City's nature as a distinct entity and the absence of evidence establishing that the applicant was the client, I find that the applicant is not a client of the City's legal counsel in respect of the privileged communications. Therefore, the applicant has no right of access to these communications on the basis that he is a client.

[46] I have also considered the second argument advanced by the applicant, which is that "it has been stated by the [Supreme Court of Canada] there is no solicitor client privilege in the event of a criminal act."[30] I understand this argument to refer to the future crime or fraud exclusion to privilege, which says that a lawyer's communications with their client are not privileged if those communications are made to obtain legal advice that facilitates unlawful conduct.[31]

[47] To establish the future crime or fraud exclusion, there must be clear and convincing evidence that the solicitor-client communication facilitated an unlawful

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[28] Applicant's submission, at para. 4.
[29] OIC 382/1892 (BC), at Letters Patent and OIC 266/1992 (BC), at Letters Patent [*OIC Letters Patent*].
[30] Applicant's submission, at para. 6. The applicant did not provide a citation for the principle he attributes to a court decision.
[31] *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565 at para. 55 [*Campbell*]; *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at pp. 835-836; *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (CanLII), at paras. 22-24.

act or that the solicitor otherwise became a dupe or conspirator.[32] As the party seeking disclosure, the applicant has the burden of proving that crime-fraud exclusion applies.[33]

[48] In his submission, the applicant accuses the City and its lawyers of conspiring to illegally take his family's property.[34] However, the applicant does not refer to any evidence establishing that the City or its lawyers engaged in any criminal activity, let alone that the communications at issue here are about facilitating a crime or fraud. Therefore, I find that the future crime or fraud exclusion to privilege does not apply to any of the information I determined may be withheld under s. 14.

Conclusion, s. 14

[49] With the exception of the letter discussed above, I find that all of the information withheld under s. 14 is subject to legal advice privilege.

Section 12(3)(b) - Local public body confidences

[50] The City relies on s. 12(3)(b) to withhold two records that it says would reveal the substance of deliberations of several City council meetings closed to the public. These records are the meeting minutes for a City council meeting and a written report about the matters discussed at that meeting.[35] The applicant did not address s. 12(3)(b) in his submission.

[51] Section 12(3)(b) says that the head of a local public body may refuse to disclose information that would reveal the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under FIPPA authorizes the holding of that meeting in the absence of the public. The purpose of s. 12(3)(b) is to protect a local public body's ability to engage in certain types of discussions in the absence of the public, despite how controversial those discussions might be.[36]

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[32] *Youyi Group Holdings (Canada) Ltd. V. Brentwood Lanes Canada Ltd.*, 2017 BCSC 1587 (CanLII), at paras. 62-63; *Reid v. British Columbia (Egg Marketing Board)*, 2006 BCSC 346 (CanLII), at para. 17.
[33] *USA v. Down, et al*, 2000 BCSC 1532 (CanLII), at para. 18; Order F18-26, 2018 BCIPC 29 (CanLII), at para. 57.
[34] Applicant's submission at paras. 12-14, and 26; The applicant attached a copy of his submission for OIPC File No. F20-83715 to his submission for this inquiry and relies on his statements therein to support his argument for the application of the future crime or fraud exclusion to solicitor-client privilege.
[35] City's submission at paras. 33-35; Affidavit #1 of Corporate Officer at para. 6.
[36] Order F23-96, 2023 BCIPC 112 (CanLII), at para. 22; Order F11-04, 2011 BCIPC 4 (CanLII), at para. 29; Order 04-04, 2004 CanLII 34258 (BC IPC), at para. 72.

[52] Schedule 1 of FIPPA defines a "local public body" to include a "local government body". The definition of "local government body" under Schedule 1 of FIPPA includes a municipality. The City is a municipality, therefore, the City is a "local public body" for the purposes of s. 12(3)(b).[37]

[53] Previous OIPC orders have consistently said that the following three conditions must be met for a local public body to withhold information under s. 12(3)(b):

1. The local public body must have the statutory authority to meet in the absence of the public;
2. The meeting in question must have actually taken in place in the absence of the public; and
3. The information would, if disclosed, reveal the substance of deliberations at the meeting.[38]

[54] If a local public body fails to establish that all three conditions are true, then it cannot use s. 12(3)(b) to refuse to disclose information to an access applicant. I will adopt this approach in the analysis below.

Was the City authorized to hold a meeting in the absence of the public?

[55] The City argues that it was statutorily authorized to hold a meeting in the absence of the public. Specifically, the City refers to s. 90(1)(e) of the *Community Charter*, which says that "A part of a council meeting may be closed to the public if the subject matter being considered relates to [. . .] the acquisition, disposition or expropriation of land or improvements, if the council considers that disclosure could reasonably be expected to harm the interests of the municipality".[39]

[56] Section 92 of the *Community Charter* requires the City's council to state their intention to hold a closed meeting as well as the basis for doing so, in a public meeting and by way of resolution, before the closed meeting (or part of that meeting) proceeds.[40]

[57] The City relies on an affidavit sworn by its Corporate Officer. The Corporate Officer attests that a council meeting was held in the absence of the public on March 20, 2017. The Corporate Officer further explains that this

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[37] *OIC Letters Patent*, *supra* note #29; *Interpretation Act,* RSBC 1996, c 238, at s.29 *sub verdo* "municipality".
[38] Order F20-10, 2020 BCIPC 12 (CanLII), at para. 8; Order F13-10, 2013 BCIPC 11 (CanLII), at para. 8; Order 00-14, 2000 CanLII 10836 (BC IPC), at p. 2; Order 00-11, 2000 CanLII 10554 (BC IPC), at p. 5.
[39] *Community Charter*, SBC 2003, c 26 [*Community Charter*], s. 90(1)(e). The relevant provisions of the *Community Charter* were in effect during the meeting in question.
[40] *Ibid.*, at s. 92.

meeting began as an open meeting in which council resolved to exclude the public to consider matters concerning the acquisition, disposition, or expropriation of land or improvements.[41] This affidavit evidence satisfies me that the meeting in question met the requirements for a closed meeting under the *Community Charter.*

[58] Having considered the applicable statutory requirements and the affidavit evidence sworn by the City's Corporate Officer, I find that the City was authorized to hold the March 20, 2017 council meeting in the absence of the public.

Did the meeting actually take place in the absence of the public?

[59] The City's Corporate Officer attests that a council meeting took place on March 20, 2017 in the absence of the public.[42] The City provided a redacted copy of the March 20, 2017 meeting minutes with its submission.[43] This material satisfies me that the March 20, 2017 council meeting, insofar as the council considered the acquisition, disposition, or expropriation of land or improvements, was held in the absence of the public.

Would disclosure reveal the substance of deliberations at the meeting?

[60] The City says that, while the records it withholds under s. 12(3)(b) are dated March 15, 2017, these are the same records referenced in the March 20, 2017 meeting minutes as the "Closed Reports dated 2017 March 2017". The City explains, with support from the Corporate Officer's affidavit, that reports of meetings held in the absence of the public are recorded as the date of the council meeting instead of the date that the relevant report is submitted.[44]

[61] I have considered the content of the records withheld under s. 12(3)(b), the Corporate Officer's affidavit evidence, and the redacted copy of the March 20, 2017 meeting minutes. Based on what I can see in this material, I am satisfied that the information withheld from these records is about the matters that the City council discussed at the March 20, 2017 meeting. Having considered what this information would reveal if disclosed, I find that disclosing it would reveal the substance of deliberations at the City council's meeting.

Conclusion, s. 12(3)(b)

[62] I find that the information withheld by the City under s. 12(3)(b) would, if disclosed, reveal the substance of deliberations of the March 20, 2017 meeting of

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[41] City's submission, at paras. 34-35; Affidavit #1 of Corporate Officer, at para. 6.
[42] Affidavit #1 of Corporate Officer, at paras. 5-7.
[43] City's submission, at attached document "Closed Council Meeting Minutes – Monday, 2017 March 20".
[44] City's submission, at para. 35; Affidavit #1 of Corporate Officer, at para. 7.

its elected officials, and that the *Community Charter* authorized the holding of that meeting in the absence of the public. Therefore, I confirm the City's decision to withhold all of the information that it withholds under s. 12(3)(b).

Section 13 – Policy advice or recommendations

[63] The City says that s. 13(1) applies to various records, some of which were also withheld under ss. 14 or 12(3)(b). In light of my determinations above, the s. 13(1) analysis below will only consider the information that was not also withheld under ss. 14 or 12(3)(b). The applicant did not discuss s. 13(1) in his submission.

[64] The information that I am considering under s. 13(1) is recorded in file notes written by City staff and email correspondence between City staff members.

[65] Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body. The purpose of s. 13 is to prevent the harm that would occur if a public body's deliberative process were exposed to public scrutiny.[45] It applies not only where the information directly reveals advice or recommendations, but also where the information would permit an accurate inference about the advice or recommendations.[46] This extends to factual or background information that is a necessary and integrated part of the advice or recommendation.[47]

[66] The analysis under s. 13 has two steps. The first step is to determine whether disclosing the withheld information would reveal advice or recommendations developed by or for the City. If so, then the second step is to determine whether any of the categories or circumstances listed in s. 13(2) apply to that information, as well as determining whether the record has been in existence for more than 10 years in accordance with s. 13(3). If either ss. 13(2) or 13(3) apply, then the City cannot withhold the information under s. 13(1).

Would disclosure reveal advice or recommendations?

[67] The term "recommendations" includes material relating to a suggested course of action that the recipient will ultimately accept or reject.[48]

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[45] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII), at para. 52.
[46] Order 02-38, 2002 CanLII 42472 (BC IPC), at 135; Order F17-19, 2017 BCIPC 20 (CanLII), at para. 19.
[47] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII), at para. 94
[48] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) [*Doe*], at para. 23.

[68] On the other hand, the term "advice" has a broader meaning than "recommendations". It includes providing relevant considerations, options, analyses, and opinions, including expert opinions on matters of fact. Advice can be an opinion about an existing set of circumstances and does not have to be a communication about a future action.[49]

[69] The City provided brief explanations for each of its decisions to sever information under s. 13(1).[50] I have carefully considered these explanations and how they apply to the disputed information.

[70] Most of the information I am considering under s. 13(1) is about bylaw enforcement matters and property-use planning discussions between City staff members and law enforcement.[51] In many cases, I can see that the withheld information contains specific recommendations that City employees developed for other City staff. I find that, in these instances, disclosure would directly reveal recommendations developed by and for the City.

[71] Elsewhere, the City withholds a City employee's opinion about a property development matter in a communication to another City employee. After considering the content of this opinion, I can see that it was provided because that employee had special knowledge about the matter that was being considered. In these circumstances, I find that the opinion is advice. Consequently, I find that disclosing this information would reveal advice developed by and for the City.

[72] As I explain below, my findings above do not apply to all of the information I am considering under s. 13(1), however.

[73] One sentence was withheld from a record of City case notes. This sentence is a brief statement that the City had not yet taken certain actions and that another entity needed to first decide how to proceed.[52] It is not apparent to me, and the City does not explain, how this statement constitutes advice or recommendations. Having considered the context of this statement and the other information in the record that contains it, I find that disclosure would not reveal any advice or recommendations developed by or for the City.

[74] Additionally, the City withheld a sentence from a different record of case notes under s. 13(1). This sentence is the author's statement that they will not visit a specific property alone in the future.[53] It is not apparent to me, nor does

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[49] *Ibid.,* at paras. 24-26 and 34; *College*, *supra* note #17 at paras. 103 and 113.
[50] City's submission at para. 21.
[51] The subject of these communications was already disclosed to the applicant through the headings and other disclosed information contained in the same records from which information was withheld under s. 13(1).
[52] This statement was withheld from the records at page B000029.
[53] This sentence was withheld from the records at page B000052.

the City explain, how this sentence constitutes a recommendation or advice. I find that disclosing it would not reveal any advice or recommendations developed by or for the City.

[75] In summary, apart from the two exceptions I identified above, I find that disclosing any of the information I am considering under s. 13 would reveal advice or recommendations developed by or for the City.

Do any of the exceptions in s. 13(2) apply?

[76] Next, I must consider whether any of the circumstances under ss. 13(2) apply to the information that I found would reveal advice developed by or for the City. Subsection 13(2) identifies certain types of records and information that may not be withheld under s. 13(1).

[77] The City says that none of the circumstances or categories of information listed in s. 13(2) apply to the information it withholds under s. 13(1).[54] I have considered whether any of the circumstances set out in s. 13(2) apply, and I conclude that none do.

Does the exception in s. 13(3) apply?

[78] Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for ten or more years. The City says that s. 13(3) does not apply to any of the information it withholds under s. 13(1).[55]

[79] The age of the disputed records is readily apparent from the dates contained in them. I can see that some of the records of communications that I am considering are older than ten years.[56] While these records were not older than ten years as of the date of the City's response to the applicant's access request, they have now reached ten years of age, so if the applicant were to request them today, s. 13(3) would apply and the City would not be authorized to refuse access under s. 13(1).

[80] FIPPA does not state whether s. 13(3) should be assessed based on the date the public body responds to an access request or the date on which a request for review is decided at inquiry. The adjudicator of Order F23-78 determined that the appropriate date in these circumstances is the date at which the inquiry is decided because it would not be practical or reasonable to require

[54] City's submission at para. 24. The City's specific arguments respecting s. 13(2) apply to information that I am not considering because I determined that information was properly withheld under another exception to disclosure.
[55] City's submission at para. 20.
[56] Many of the records of communications were compiled into case file note pages in 2022, however, the dates associated with each communication establishes that the records of communications were first created more than ten years before the date this inquiry is resolved.

an applicant to repeat the FIPPA access request process when the passage of time clearly bars the public body from relying on s. 13(1).[57] I agree with that reasoning and adopt the same approach in this matter.

[81] I find that s. 13(3) applies to the information withheld from several records of communications because those records have existed for more than ten years. The City may not continue to withhold this information under s. 13(1). The remainder of the records containing the information that I am considering were created less than ten years ago, so I find that s. 13(3) does not apply to the information in them.

Conclusion, s. 13

[82] Most of the information I considered under s. 13(1), if disclosed, would reveal advice or recommendations developed by and for the City. In some cases, disclosure would not reveal any advice or recommendations, so I find that s. 13(1) does not apply to that information.

[83] None of the circumstances listed in s. 13(2) apply to any of the information that I find would reveal advice or recommendations. However, approximately half of information has been in existence for more than ten years. Therefore, pursuant to s. 13(3), the City may not withhold that information under s. 13(1).

Section 22(1) – Unreasonable Invasion of Third-Party Personal Privacy

[84] The City relies on s. 22(1) to withhold a small amount of information from the disputed records. The applicant did not discuss any aspect of s. 22 in his submission.

[85] Additionally, there is a small amount of personal information that the City did not withhold under s. 22(1), but given the mandatory nature of s. 22(1) and what this information discloses about a third party, I will include it in my analysis below.[58]

[86] Section 22(1) requires a public body to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.[59] The analytical approach to s. 22 that I will follow is well-established by past orders.[60]

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[57] Order F23-78, 2023 BCIPC 94 (CanLII), at paras. 61-63.
[58] This information appears in the Records at p. D000670.
[59] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons, or organization other than the person who made the request or a public body.
[60] Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58; Order F16-38, 2016 BCIPC 42 (CanLII) at para. 108.

Personal Information

[87] Section 22(1) only applies to personal information, so the first step of the analysis is to determine whether the severed information is personal information.

[88] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information." Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."[61]

[89] Information is about an identifiable individual when it is reasonably capable of identifying an individual, either alone or when combined with other available sources of information.[62]

[90] In this matter, the City withheld a small number of names, phone numbers, email addresses, locations of residences, and some addresses of individuals under s. 22(1). This information is about individuals who complained to the City about bylaw enforcement matters.[63] These individuals are third parties for the purposes of the s. 22 analysis.[64]

[91] The third parties are identified in the records by their names, phone numbers, locations of residences and addresses. The nature and context of this identifying information satisfies me that these third parties provided their information to enable the City to contact them, if necessary, in their personal capacity as complainants and this information was not provided for a business purpose.

[92] There is one email address that appears five times on a real estate developer's preliminary plan approval application forms. The City has withheld the email address in two instances but disclosed the rest.[65] It is clear from the context of all five instances that this is the real estate developer's business email address rather than their personal email address. Therefore, I find that the crossed-out email address is contact information, so it is not personal information and s. 22(1) does not apply.

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[61] Schedule 1 of FIPPA contains the definitions of "personal information" and "contact information".
[62] See for examples, Order F21-17, 2021 BCIPC 22 (CanLII), at para. 12; Order F16-38, 2016 BCIPC 42 at para. 112; Order F13-04, 2013 BCIPC 4 at para. 23.
[63] The City identifies these individuals as bylaw complainants at paras. 1 and 26 of the City's submission but does not disclose other identifying information about them.
[64] A "third party" is defined in Schedule 1 of FIPPA as any person, group of persons or organization other than the person who made the access request or a public body.
[65] The Records, at pp. D000001, D000008-D000011, and D000013.

[93] Apart from the business email address noted above, I conclude that all of the information withheld under s. 22(1) is about identifiable individuals and it is not contact information, so it is personal information.

[94] Finally, the information that I have included in the s. 22(1) analysis on my own initiative directly identifies an individual by name, so I find that it is also personal information.

Section 22(4) – Disclosure Not an Unreasonable Invasion of Privacy

[95] The second step in the s. 22(1) analysis is to determine whether the personal information falls into any of the circumstances listed in s. 22(4). If so, disclosure is not an unreasonable invasion of a third party's personal privacy.

[96] The City argues that none of the circumstances set out in s. 22(4) apply to the information it withholds under s. 22(1).[66] I have considered the types of information and circumstances listed under s. 22(4), and I find that none apply.

Section 22(3) – Presumptively unreasonable invasion of personal privacy

[97] The third step is to determine whether any of the circumstances set out at s. 22(3) apply. If so, then disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[98] The City argues that the disputed personal information does not fall into any of the categories and circumstances set out in s. 22(3).[67]

[99] Most of the personal information that I am considering plainly engages s. 22(3)(b). Section 22(3)(b) says that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[100] Past orders define the term "law" as including a legislative provision, the violation of which could result in a penalty or sanction.[68] This definition includes local government bylaws enacted by local governments.[69] I agree with this definition and adopt it for the present analysis.

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[66] City's submission, at para. 37.
[67] *Ibid.*
[68] Order 01-12, 2001 BCIPC 21566 (CanLII), at para. 17; Order F22-31, 2022 BCIPC 34 (CanLII), at para. 53.
[69] Order 01-12, 2001 CanLII 21566 (BC IPC), at para. 17; *Community Charter, supra* note #39, at s. 8(3).

[101] I can see that the personal information at issue was recorded in the City's permit and plan case file system. Most of the other information in these records, which the City disclosed, is a discussion about the possible bylaw violations relating to the complaints and enforcement options available to the City. The content of this information satisfies me that it was compiled and is identifiable as part of the City's investigations into the possible violation of City bylaws.

[102] I find that s. 22(3)(b) applies to all of the personal information at issue that relates to identifiable third party bylaw complainants. Therefore, disclosing this information would presumptively be an unreasonable invasion of those third parties' personal privacy.

Section 22(2) – Relevant circumstances

[103] The fourth step in the s. 22(1) analysis is to determine whether disclosing the disputed personal information would be an unreasonable invasion of personal privacy. This is done by considering all relevant circumstances, including those listed in s. 22(2). At this stage, the applicant may rebut the presumption created by s. 22(3)(b), that disclosing some of the personal information at issue would be an unreasonable invasion of a third party's personal privacy.

[104] In its submissions, the City says that no factors, including those identified under s. 22(2), would support disclosing the personal information at issue.[70]

[105] The severed records are, in a few instances, marked with s. 22(2)(g) which implies that the City believed this factor was relevant when it withheld personal information under s. 22(1). Additionally, much of the applicant's submission is a discussion of the various ways that he believes he has not received a fair determination of his rights in his dealings with the City. While he did not specifically address the application of s. 22(2)(c), in my view, the applicant's arguments require some consideration of whether this provision applies.

Relevant to a fair determination of an applicant's rights, s. 22(2)(c)

[106] Section 22(2)(c) requires a public body to consider whether the personal information is relevant to a fair determination of an applicant's rights. Past orders have said that s. 22(2)(c) applies where all of the following circumstances exist:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;

[70] City's submission, at para. 37.

2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The withheld personal information must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[71]

[107] The applicant says that the records he requested are about the City's theft of his family home. He submits that the City stole his home because he received more votes in the City's mayoral election than the candidate who was named the winner, and because the applicant and his family were "in the way" of a grocery store and future housing site.[72]

[108] I am not satisfied that s. 22(2)(c) applies here for the reasons that follow.

[109] Despite not including citations to legislation, the applicant's submission in essence refers to his legal right not to have his property stolen as prohibited by the *Criminal Code*.[73] Therefore, I am satisfied that he raises a legal right drawn from statute.

[110] While the applicant's submission refers to his past legal proceedings with the City, he does not refer to any ongoing proceedings or say anything about future proceedings in respect of his rights. Based on my review of the records and the parties' submissions, it appears that the applicant's court proceedings in respect of his former property have concluded several years ago. I find that the applicant's rights in question are not related to any proceedings that are either ongoing or contemplated.

[111] As the second part of the s. 22(2)(c) analytical framework is not met, I find that s. 22(2)(c) is not a relevant factor in this matter.

Information likely to be inaccurate or unreliable, s. 22(2)(g)

[112] Section 22(2)(g) requires a public body to consider whether the personal information is likely to be inaccurate or unreliable. This factor weighs against disclosure if the personal information is likely to be inaccurate or unreliable, or if disclosure could result in third parties being misrepresented in a public way.[74]

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[71] Order 01-07, 2001 CanLII 21561 (BCIPC), at paras. 31-32; Order F15-11, 2015 BCIPC 11 (CanLII), at para. 24; Order F24-09, 2024 BCIPC 12 (CanLII), at para. 48.
[72] Applicant's submission, at paras. 14-16, and 19.
[73] *Criminal Code*, RSC 1985, c C-46, at s. 322.
[74] Order F23-102, 2023 BCIPC 118 (CanLII), at para. 33; F24-09, 2024 BCIPC 12 (CanLII), at para. 64.

[113] The City marked some of the withheld personal information with s. 22(2)(g). However, there is nothing in the material before me that suggests this information is *likely* to be inaccurate or unreliable. A mere possibility of inaccuracy or unreliability is insufficient to make s. 22(2)(g) a relevant factor. Given that there is no clear basis to find otherwise, I find that s. 22(2)(g) is not relevant to any of the personal information in dispute.

Other Circumstances, s. 22(2)

[114] Despite not being listed under s. 22(2), past orders have considered an applicant's existing knowledge of the withheld personal information to be a relevant factor that may or may not favour disclosure.[75]

[115] The disclosed portions of the records reveal the identity of third parties who complained to the City when the City's bylaw enforcement team began investigating the applicant's former property. However, there is nothing in the material before me that establishes whether the applicant knows who the complainants are. The applicant indicates that he still did not know who the complainants were as recently as 2022.[76] Consequently, I find that the applicant's existing knowledge does not favour disclosing any of the personal information at issue.

Conclusions, s. 22

[116] All of the information that the City withholds under s. 22(1) is the personal information of one or more third parties, except for the withheld business email address that I identified above.

[117] Nearly all of the personal information at issue is compiled and identifiable as part of an investigation into a possible violation of law, which means that disclosure is presumptively an unreasonable invasion of third-party personal privacy under s. 22(3)(b). The personal information that I have identified, which the City does not seek to withhold, is not subject to this presumption.

[118] While the applicant's submission shows that he has been severely affected by the City's bylaw enforcement actions, he has not provided any persuasive reasons for disclosing the personal information withheld from the records. The withheld personal information is not relevant to a fair determination of his rights. I find that the applicant has not rebutted the presumption that disclosure is an unreasonable invasion of those third parties' personal privacy, so s. 22(1) applies to that information.

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[75] Order F17-02, 2017 BCIPC 2 (CanLII), at paras. 28-30; Order F15-14, 2015 BCIPC 14 (CanLII), at paras. 72-74; Order F05-13, 2005 CanLII 11964 (BC IPC), at para. 28.
[76] Applicant's submission for file F20-83715, at para. 52, submitted as an attachment to his submission for this inquiry. See note #34 above.

[119] Regarding the information I have proactively included in my s. 22 analysis, this information is about an individual third party's reason for taking leave from their employment for a family-related reason. Disclosure would reveal information about that third party's personal circumstances that are completely irrelevant to the other matters discussed in that record. I find that disclosing this information would constitute an unreasonable invasion of that third party's personal privacy.

[120] In conclusion, I find that disclosing any of the information withheld under s. 22(1) that I determined is personal information, as well as the personal information that I proactively identified in the records, would be an unreasonable invasion of one or more third parties' personal privacy. Therefore, the City must refuse to disclose this information.

Section 21(1) - Harm to Third Party Business Interests

[121] The City withholds some information from the records under s. 21(1). Section 21(1) requires a public body to refuse to disclose information if its disclosure could reasonably be expected to harm the business interests of a third party. The relevant third party in this matter is a private real estate development corporation (the Developer).

[122] During this inquiry, the registrar of inquiries invited the Developer to participate as an interested person in this inquiry.[77] The Developer agreed to participate and provided a one-page submission to support its position that s. 21(1) requires the City to withhold some of the disputed information.[78] The Developer agrees with the City's application of s. 21(1) to the records but believes it did not go far enough and the Developer argues for additional s. 21(1) severing on three additional pages.

[123] The parts of s. 21(1) that are relevant to this inquiry are as follows:

> **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

[77] Registrar's email to the parties and the Developer, September 16, 2024.
[78] Developer's submission, October 4, 2024. After receiving the Developer's submission, the registrar of inquiries invited the City and the applicant to provide a response. The applicant, but not the City, provided a brief response to the Developer's submission on October 25, 2024 that briefly questions the relevance of what the Developer says.

> (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,
>
> (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, . . .

[124] The City must establish that all three of the following criteria are met, in order to withhold the disputed information under s. 21(1):

1. Disclosure would reveal the type of information described at s. 21(1)(a);
2. The information at issue was supplied in confidence, either explicitly or implicitly; and
3. Disclosing the information at issue could reasonably be expected to cause one or more of the harms described at s. 21(1)(c).[79]

Type of Information – s. 21(1)(a)

[125] The first step in the s. 21(1) analysis is deciding whether the information withheld under s. 21(1) is of the type listed in s. 21(1)(a). The City says that this information is the "financial" and "commercial" information of the Developer.[80]

[126] The Developer says that the relevant documents "disclose, in detail, [the Developer's investment return criteria for real estate development projects] and [the Developer's] internal analyses and methodology."[81]

[127] FIPPA does not define "financial" or "commercial" information, but past orders have established a consistent definition for each term:

- "Financial information" is information about money and its uses, for instance, prices, expenses, hourly rates, contract amounts, budgets, cash flow, and accounts receivable or payable.[82]
- "Commercial information" relates to a commercial enterprise but need not be proprietary in nature or have an independent market or monetary

[79] Order 03-02, 2003 CanLII 49166 (BC IPC), at para. 40; Order 03-15, 2003 CanLII 49185 (BC IPC), at para. 18; Order F17-14, 2017 BCIPC 15 (CanLII), at para. 9.
Order F22-33, 2022 BCIPC 37 (CanLII), at para. 25.
[80] City's supplemental submission, at paras. 10-11.
[81] Developer's submission, October 4, 2024.
[82] Order F20-47, 2020 BCIPC 56 (CanLII), at paras. 100-101; Order F21-15, 2021 BCIPC 19 (CanLII), at para. 83.

> value. The information itself must be associated with the buying, selling or exchange of the entity's goods or services.[83]

[128] In the context of housing development projects, past orders have found that a third party's commercial and financial information may include its rental and revenue information, such as rental prices per unit, loan details, and operating budgets.[84] The content of proposals and contracts can also constitute a third party's commercial and financial information if those proposals and contracts are about the goods and services that the third party provides.[85]

[129] The City withholds the following records and information under s. 21(1):

- Correspondence from the Developer to the City (the Developer's Letter);[86]
- A memorandum written by the Developer (the Developer's Memo);[87]
- Bank account numbers on cheques and one chequebook number, given to the City from third party commercial entities (the Account Numbers);[88]
- Numerical information about site densities, contained in a letter from an approving officer with the City's planning department (the Density Chart);[89]
- Handwritten notes about development cost charges in respect of rezoning (the Charge Notes);[90]
- The Developer asks that three pages of correspondence be withheld under s. 21(1). This correspondence was sent to the City from a law firm on behalf of a corporate entity that that managed a specific project in the City for the Developer (the Law Firm's Correspondence).[91]

[130] The Developer's Letter contains information describing the Developer's progress in a building project. This information is directly related to the purchase and sale of the Developer's real estate development services, so I find that it is the commercial information of Developer.

[131] The Developer's Memo contains a substantial amount of information about one of the Developer's projects. This information is of a business-planning nature with an extensive cost analysis element. It is written by the Developer and

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[83] Order 01-36, 2001 CanLII 21590 (BC IPC), at para. 17; Order F08-03, 2008 CanLII 13321 (BC IPC), at para. 63.
[84] Order F20-47, 2020 BCIPC 56 (CanLII), at para. 102.
[85] Order F13-20, 2013 BCIPC 27 (CanLII), at para. 14.
[86] The Records, at pp. D000291-D000292.
[87] The Records, at pp. D000336-D000341.
[88] The Records, at pp. D000026, D000321, D000353, D000461, D000487, D000626, D000737, and D000740.
[89] The Records, at p. D000494.
[90] The Records, at p. D000744.
[91] The Records, at pp. D000641, D000669, and D000670.

appears to apply the Developer's expertise. For these reasons, I conclude that the information withheld from the Developer's Memo is the financial and commercial information of the Developer.

[132] The Law Firm's Correspondence describes the expected next steps of a development project. The information withheld from these records provides some insight into how the Developer planned to deliver its residential development services in the context of a specific project. These characteristics satisfy me that The Law Firm's Correspondence is the commercial information of the Developer.

[133] The cheques that contain the Account Numbers are attached to receipts and invoicing documents issued by third parties. I can see on the face of these records that they relate to third parties' accounts payable in the context of their business dealings with the City, therefore, I find that the Account Numbers are the financial information of the third parties that issued the cheques.

[134] The Charge Notes are handwritten development cost charge calculations relating to a project that is identifiable as relating to one of the Developer's projects. Similarly, the Density Chart is about the maximum floor area that the City would allow for the Developer's project. Given that this information is about the cost and size of the Developer's project in the City, I find that the Charge Notes and Density Chart are the commercial and financial information of the Developer.

[135] In conclusion, I find all of the information withheld under s. 21(1) is financial or commercial information of a third party, satisfying the first part of the s. 21(1) analysis.

Supplied in confidence – s. 21(1)(b)

[136] The second step of the s. 21(1) analysis is to determine whether the information was supplied to the Ministry in confidence. Past orders have separately considered whether the information was "supplied" by a third party before deciding whether it was supplied "in confidence", both of which are required to engage s. 21(1)(b).[92] I will apply the same two-step approach to s. 21(1)(b) in this matter.

Was the information "supplied"?

[137] Information is considered "supplied" under s. 21(1)(b) if it is "provided or furnished" to the public body.[93]

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[92] Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, upheld and cited by *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603; Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.
[93] Order 01-20, 2001 CanLII 21574 (BC IPC), at para. 93.

[138] The Developer's Letter is on the Developer's letterhead, is signed by the president of the Developer, and is addressed to the City. The Developer's Letter is about one of its projects that required attention and certain action from the City. Similarly, the Law Firm's Correspondence is addressed to the City and is about the same subject matter. I accept that these circumstances establish that the information in the Developer's Letter and the Law Firm's Correspondence was supplied to the City.

[139] In considering the Developer's Memo, the City describes this record as the Developer's "internal memo".[94] However, the City also says that the Developer provided the memo to the City to further their discussions, a claim that is also supported by the Developer's appended letter and the fact that the City has a copy of it.[95] Finally, there is a request in the Developer's Memo that is plainly addressed to the City, which establishes that the City was an intended audience of the memo. Based on these statements and circumstances, I conclude that the information in the Developer's Memo was supplied to the City.

[140] The Law Firm's Correspondence is addressed to the City. Additionally, I can see the dates that the law firm transmitted these records to the City. These circumstances satisfy me that the information in the Law Firm's Correspondence was supplied to the City.

[141] The Account Numbers were clearly supplied to the City because they are written onto cheques that were provided to the City as payments. The invoices and other records that accompany these cheques satisfy me that the City received this information from the third parties that issued them, so it is supplied information.

[142] The Density Chart appears in a larger document written by an approving officer in the City's planning department, addressed to the corporate entity responsible for the relevant project of the Developer. This information appears to represent a maximum permissible density that the City granted to the Developer for a certain project. The parties do not explain when or how the Developer supplied this information to the City, and it is not apparent that it was. I find that the Density Chart is not information that was supplied to the City.

[143] The Charge Notes appear on a single handwritten page. Using the information on this page and the other records before me, I cannot determine who recorded the Charge Notes. Moreover, I cannot ascertain whether the Charge Notes were created by the City's planning department or supplied to it by a third party. Neither the City nor the Developer have explained the context or origin of the Charge Notes in their submissions. I conclude that the Charge Notes is not information that was supplied to the City.

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[94] City's supplemental submission, at para. 5.
[95] City's supplemental submission, at para. 6 and Appendix A.

Was the supply of information "in confidence"?

[144] Under s. 21(1)(b), the City must show that the information was supplied in confidence, either implicitly or explicitly. Specifically, the City must establish that the suppliers of this information were under an objectively reasonable expectation of confidentiality when they supplied it to the City.[96]

[145] A reasonable expectation of confidentiality can be shown by pointing to express assurances of confidentiality or by establishing an implicit expectation after considering all of the relevant circumstances. Evidence of a party's subjective intentions with respect to confidentiality is insufficient.[97]

[146] The receipts that appear alongside the Account Numbers establish that the cheque payments were for development fees in respect of projects located in the City. In my view, a reasonable third party would not voluntarily provide their bank account numbers to anyone unless doing so was necessary and under reasonably certainty that it would not be disclosed to others. Consequently, I find that the Account Numbers were supplied to the City under an implicit, mutual, and reasonable expectation of confidentiality.

[147] I find, however, that the information in the Law Firm's Correspondence, the Developer's Letter, and the Developer's Memo was not supplied in confidence for the reasons that follow.

[148] The Law Firm's Correspondence does not bear any express language indicating an expectation of confidentiality other than a boilerplate statement that "This communication may contain information protected by legal advice privilege." The matters discussed in the Law Firm's Correspondence are of a routine nature in the context of parties to a development project exchanging documentation for review and signatures. The Developer's arguments provide no additional context or evidence to establish an expectation of confidentiality.

[149] Having considered these circumstances, I am not persuaded that the Law Firm's Correspondence was sent under any expectation that it would be kept confidential. Therefore, s. 21(1) does not apply to it.

[150] Regarding the Developer's Letter, the parties do not discuss whether the Developer's Letter was supplied in confidence to the City. The Developer's Letter contains no wording to suggest that it was supplied in confidence. Moreover, the content of this letter relates to project scheduling that does not raise any

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[96] Order 01-36, 2001 CanLII 21590 (BC IPC), at para. 23.
[97] Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 28, citing *Re Maislin Industries Ltd. and Minister for Industry* (1984) 1984 CanLII 5386 (FC), 10 DLR (4th) 417 (FCTD) and *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 1997 CanLII 5125 (FC), 148 DLR (4th) 356 (FCTD).

circumstances which would ordinarily attract an implicit expectation of confidentiality. Therefore, I conclude that the Developer's Letter was not supplied under any reasonable expectation of confidentiality.

[151] Turning to the Developer's Memo, the City says that the information in it "was expressly supplied in confidence by [the Developer] for limited purposes".[98] The Developer states in its submission that "the memos and all associated information contained in the attached materials was provided on a strictly confidential internal basis in order to advance discussions with the City, without any expectation that it would be released publicly."[99] I understand these arguments to mean that there was both an explicit and an implicit expectation of confidentiality when the Developer supplied the Memo to the City.

[152] The Developer provided the Developer's Memo to the City because it sought a decision from the City in respect of a development project. The Developer says that the Memo discloses its suitability criteria, internal analyses and methodology. The City says that "given the nature of the information, [the Developer] would never have provided it to [the City] without assurances of confidentiality."[100] I understand these statements to be an argument that the information in the Developer's Memo is of a kind that ordinarily attracts confidentiality when a third party like the Developer supplies it to the City.

[153] The Developer's Memo does not, in my view, reveal anything about the Developer's internal costing methodologies beyond specific characteristics of the project that it is about. It is not apparent to me, nor does the Developer explain, how the Developer's Memo reveals anything about the Developer's general business practices.

[154] I note that there is no express language on the face of the Developer's Memo to establish an expectation of confidentiality. Similarly, neither the City nor the Developer have directed me to any covering letters or emails that accompanied the Developer's Memo to establish confidential expectations over it.

[155] Finally, the Developer's argument that it supplied the information without any expectation of public disclosure is not enough to establish that it held a reasonable expectation of confidentiality at the time of supply. This is a bare and subjective assertion that fails to persuade me that a reasonable expectation of confidentiality existed. I conclude that the Developer had no reasonable expectation of confidentiality, whether explicitly or implicitly, over any part of the Developer's Memo when the Developer supplied it to the City. Therefore, s. 21(1) does not apply to that information.

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[98] City's supplemental submission, at para. 15.
[99] Developer's submission, October 4, 2024.
[100] City's supplemental submission, at para. 15.

Reasonable Expectation of Harm – s. 21(1)(c)

[156] In light of my findings above, the only disputed information that I will consider under the third stage of the s. 21(1) analysis is the Account Numbers.

[157] The third and final step in the s. 21(1) analysis is to determine whether disclosing the Account Numbers could reasonably be expected to result in any of the harms set out in s. 21(1)(c). If so, the City must refuse to disclose that information. The standard of harm under s. 21(1)(c) is "a reasonable expectation of harm", which is "a middle ground between that which is probable and that which is merely possible."[101]

[158] The City does not need to prove on a balance of probabilities that disclosing the Account Numbers will actually result an expected harm. Instead, the City must establish that disclosure will result in a risk of harm that is well beyond the merely possible or speculative. Additionally, there must be a clear and direct connection between disclosing the Account Numbers and the expected harm.[102]

[159] Neither the City nor the Developer discuss how disclosing the Account Numbers may lead to the harms set out at s. 21(1)(c). Therefore, I will consider whether I may draw conclusions that are plain and obvious on the face of the records. It seems to me that the only possible harm under s. 21(1)(c) that may apply to the Account Numbers is the harm set out at s. 21(1)(c)(iii).

Undue financial gain or loss, s. 21(1)(c)(iii)

[160] Section 21(1)(c)(iii) says that the head of a public body must not disclose information if disclosure could reasonably be expected to result in undue financial loss or gain to any person or organization. "Undue" gains or losses are excessive, disproportionate, unwarranted, inappropriate, unfair, or improper, having regard to the particular circumstances of the matter.[103]

[161] The parties have not provided any evidence of a reasonable expectation of undue financial losses if the Account Numbers falls into the hands of a bad actor. However, the risk of disclosing bank account information of the kind found in the Account Numbers, in my view, is sufficiently obvious for me to draw this conclusion.

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[101] Order 10-20, 2001 CanLII 21574 (BC IPC), at para. 57; Order 01-36, 2001 CanLII 21590 (BC IPC), at para. 38; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23, at para. 196; Lav*igne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII), at para. 58.
[102] Order F07-15, 2007 CanLII 35476 (BC IPC), at para. 17.
[103] Order F14-58, 2014 BCIPC 62 (CanLII), at para. 54; Order 00-10, 2000 CanLII 11042 (BC IPC), at pp. 17-19.

[162] It is well-established that disclosure to an applicant is to be considered a disclosure to the world.[104] If the Account Numbers fall into the hands of a fraudster or thief, then I find it reasonable to expect that the third party cheque issuers would experience undue losses when a bad actor creates fraudulent cheques or misrepresents themselves as the third-party cheque issuers using the Account Numbers. Those losses may occur directly as a result of theft or indirectly as the relevant third party spends time and effort combatting attempted theft.

[163] Having considered their vulnerability to financial losses if the Account Numbers is disclosed, I find that there is a reasonable expectation of undue financial loss to the third parties that issued the cheques containing the Account Numbers.

Conclusions, s. 21(1)

[164] I determined that the Charge Notes and the Density Chart are not information that was supplied to the City, so s. 21(1) does not apply to them. Additionally, I found that the information in the Developer's Letter, the Developer's Memo, and the Law Firm Correspondence was not supplied in confidence, so s. 21(1) does not apply to that information either.

[165] I determined that the Account Numbers is information that multiple third parties supplied to the City under a reasonable expectation of confidentiality. Disclosing the Account Numbers can be reasonably expected to lead to undue financial losses to the third parties that supplied them. Therefore, I find that s. 21(1) applies to the Account Numbers.

CONCLUSION

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

1. The City is authorized to refuse access to all of the information it withheld under ss. 12(3)(b).

2. Subject to item 4 below, the City is authorized, in part, to refuse access to all of the information it withheld under s. 14.

3. Subject to item 4 below, the City is authorized, in part, to refuse access to all of the information it withheld under s. 13(1).

[104] Order 01-01, 2001 CanLII 21555 (BC IPC), at para. 39; Order 03-33, 2003 CanLII 49212 (BC IPC), at para. 44.

4. The City is not authorized under ss. 13(1) or 14, to refuse access to the information that I have highlighted in green on pages B000029, B000052, B000053, B000061, and D000643, in a copy of these pages that will be provided to the City along with this order.

5. Subject to item 6 below, the City is required, in part, to refuse access to all of the information it withheld under s. 22(1), and the information I have highlighted in red on page D000670 in a copy of this page that will be provided to the City along with this order.

6. The City is not required under s. 22(1) to refuse access to the information that I have highlighted in green on pages D000001 and D000008 in a copy of these pages that will be provided to the City along with this order.

7. Subject to item 8 below, the City is not required to refuse access to any of the information it withheld under s. 21(1) or any of the information that the Developer requests be withheld under s. 21(1).

8. The City is required under s. 21(1) to refuse access to the information that I have highlighted in red on pages D000026, D000321, D000353, D000461, D000487, D000626, D000737, and D000740 in a copy of these pages that will be provided to the City along with this order.

9. I require the City to give the applicant access to the information described at items 4, 6, and 7 above.

10. The City must concurrently copy the OIPC registrar of inquiries when it provides the applicant with the information described at items 4, 6, and 7 above and all accompanying cover letters.

Pursuant to s. 59(1) of FIPPA, the City is required to comply with this order by January 28, 2025.

December 12, 2024

ORIGINAL SIGNED BY

Alexander R. Lonergan, Adjudicator

OIPC File No.: F22-89586