S 234073

NO. _____
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURES ACT*, RSBC 1996, C. 241 AND IN THE MATTER OF THE DECISION OF THE DELEGATE OF THE INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA, ORDER F23-32

BETWEEN:

WALL FINANCIAL CORPORATION

PETITIONER

AND:

INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA, CITY OF VANCOUVER, REVERA INC., NUMBER TEN ARCHITECTURAL GROUP and KATHLEEN DUFFIELD

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

Information and Privacy Commissioner for British Columbia
4th Floor, 947 Fort Street
Victoria, BC
V8V 3K3

Kathleen Duffield
(c/o her representative, Cathleen Rustad)
Contact information unknown because it was withheld from the Petitioners

Revera Inc.
22 Adelaide Street West, Suite 2010
Toronto, ON M5H 4E3

Attention: **Josh Daniels,** Vice President, Legal Services and **Melanie Steele** (Director, Legal & Corporate Secretarial Services)

Email: josh.daniels@reveraliving.com and melanie.steele@reveraliving.com

City of Vancouver
3rd Floor
453 West 12th Ave
Vancouver, BC
V5Y 1V4

Attorney General of British Columbia
c/o Deputy Attorney General
Ministry of Attorney General
PO Box 9290 Stn Prov Govt
Victoria, BC V8W 9J7

Number Ten Architectural Group
200 1619 Store Street
Victoria, BC
V8W 1K3
(Attention: Barry Cosgrave)

This proceeding is brought for the relief set out in Part 1 below, by

☒ the person named as Petitioner in the style of proceedings above

If you intend to respond to this Petition, you or your lawyer must

(a) file a Response to Petition in Form 67 in the above-named registry of this court within the time for Response to Petition described below, and

(b) serve on the Petitioner

(i) 2 copies of the filed Response to Petition; and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for response.

Time for Response to Petition

A Response to Petition must be filed and served on the Petitioner,

(a) if you were served with the Petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service

(c) if you were served with the Petition anywhere else, within 49 days after that service, or

(d) if the time for Response has been set by order of the court, within that time.

(1)	**The address of the Registry is:** 800 Smithe Street Vancouver, British Columbia.
(2)	**The ADDRESS FOR SERVICE of the Petitioner is:** Lawson Lundell LLP 1600 – 925 West Georgia Street Vancouver, British Columbia V6C 3L2. **Attention: Ryan Berger** Email address for service is: rberger@lawsonlundell.com
(3)	**The name and office address of the Petitioner's lawyer is:** Lawson Lundell LLP 1600 - 925 West Georgia Street Vancouver, British Columbia, V6C 3L2 **Attention: Ryan Berger**

CLAIM OF PETITIONER

Part 1: ORDERS SOUGHT

1. An order in the nature of *certiorari* quashing and setting aside Order F23-32 dated April 25, 2023 (the "**Order**") of a delegate of the Information and Privacy Commissioner for British Columbia (the "**Commissioner**"), in which the Commissioner's delegate ordered the City of Vancouver (the "**City**") to provide Kathleen Duffield with information the City withheld pursuant to section 21 of the *Freedom of Information and Privacy Protection Act,* RSBC 1996, c. 165 ("***FIPPA***");

2. A declaration that the Petitioner was denied their right to natural justice and procedural fairness;

3. An order and/or declaration that section 21(1) of *FIPPA* authorizes the City to refuse to disclose the information that the Order requires it to disclose;

4. In the alternative, an order remitting this matter back to the Commissioner for re-determination *de novo* by the Commissioner, or a different delegate;

5. An order extending the stay of proceedings until the judicial review of the Order is complete;

6. An order preserving confidentiality of the records subject to the Order pending the resolution of this proceeding;

7. An order requiring the OIPC to provide a copy of the within Petition to Kathleen Duffield or her representative, Colleen Rustad, which will be effective service on Ms. Duffield, or in the alternative, an order requiring the OIPC to provide the Petitioner with Ms. Duffield's or her representative's contact information so that the Petitioner can thereby serve the within Petition on Ms. Duffield;

8. Costs of the proceeding against any party who opposes the Petition; and

9. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

The Parties

1. The Petitioner, Wall Financial Corporation ("**Wall Financial**") is a company duly incorporated under the laws of British Columbia with an address for service in these proceedings at 1600–925 West Georgia Street, Vancouver, British Columbia, V6C 3L2.

2. The Respondent, City of Vancouver (the "**City**"), is a municipality incorporated pursuant to the *Vancouver Charter*, S.B.C 1953, c. 55, with an address for service at 3rd Floor, 453 West 12th Avenue, Vancouver, British Columbia, V5Y 1V4.

3. The Respondent, Revera Inc. ("**Revera**") was invited to participate in the proceedings below, with a business address of 22 Adelaide Street West, Suite 2010, Toronto, Ontario, M5H 4E3 (Attention: Josh Daniels, Vice President, Legal Services and Melanie Steele (Director, Legal & Corporate Secretarial Services).

4. The Respondent, the Commissioner is appointed by the Lieutenant Governor to the position of Information and Privacy Commission, and is an officer of the Legislature of the Province of British Columbia. The Commissioner, through the Office of the Information and Privacy Commissioner (the "**OIPC**"), is a tribunal established under the provisions of *FIPPA*.

5. The Respondent, Number Ten Architectural Group ("**Number Ten**") is a British Columbia General Partnership registered under the laws of British Columbia with an address for service in these proceedings at 200 1619 Store Street, Victoria, BC, V8W 1K3. Number Ten was a participant in the proceedings before the OIPC.

6. The Respondent, Kathleen Duffield was the applicant before the OIPC (the "**Applicant**"). The Applicant also had a "representative" in the proceeding before the OIPC, Colleen Rustad. The Applicant's contact information is unknown to the Petitioner at this time, as it was not provided to the Petitioner by the OIPC, as the OIPC served all materials on the Applicant.

The Nature of this Petition

7. Allison J. Shamas, Adjudicator, a delegate of the OIPC (the "**Delegate**") issued the Order.

8. The Order was issued following an inquiry held pursuant to provisions of *FIPPA* and as a result of an access to information request made by the Applicant to the City.

9. The Order requires the City to provide the Applicant with access to certain information and records by June 7, 2023. The Petitioner says that the records that the Delegate ordered the City to disclose contain information that the City must refuse to disclose pursuant to section 21(1) of *FIPPA*, in light of the third party business interests of Wall Financial, Number Ten and Revera.

10. This petition is an application for judicial review of the Order.

Background

11. Revera operates Crofton Manor Seniors' Care Facility (the "**Facility**") situated on a 5.65-acre property located at 2803 West 41st Avenue in Vancouver (the "**Site**"). The Site is owned by Wall Financial. Revera operates the Facility on the Site pursuant to a lease with Wall Financial.

12. In or about August 2017, Revera and Wall Financial began working together to explore options for further development of the Site and Facility. As part of this process, Wall Financial hired Perkins and Will to develop some designs for a Site master plan and residential buildings for potential development options for the Site, and Revera hired Number TEN to develop some design options for the Facility for potential development scenarios.

13. In 2018, Wall Financial began the re-zoning enquiry process with the City in respect of potential options for the Site, the purpose of which was to explore different potential designs and/or concepts for the Site. Several preliminary design options and concepts were explored, and four potential design options were later shown to the community surrounding the Site at an open house.

14. After the open house, Wall Financial, in consultation with Revera, Perkins and Will and Number TEN continued discussions with the City in the enquiry process to explore the options and discuss prospects for potential future re-development of the Site and Facility.

15. Wall Financial's enquiry package included, among other things, a description of the proposed re-development options, drawings, site plans, photos, strategies and options for designs. At all times, the Third Parties, Revera and Perkins and Will have treated the enquiry (including all documentation submitted and discussions and communications with the City) as confidential.

16. In response to and as part of the enquiry, the City provided feedback to Wall Financial and Revera (through their agents Perkins and Will and Number TEN) and engaged in exploratory discussions with Wall Financial and Revera (through their agents Perkins and Will and Number TEN) regarding commentary, proposals, options and suggestions about the enquiry. In turn, Wall Financial and Revera and their agents also made suggestions, proposals, put forward potential options and discussed them with the City's staff as a way of exploring the prospects for future the potential re-development of the Site and the Facility.

17. Currently, the proposed options for the future re-development of the Site have not been finalized and Wall Financial has not submitted a formal re-zoning application to the City.

Procedural History

18. On April 14, 2020, the Applicant made an access request to the City under *FIPPA*. On June 10, 2020, the Applicant submitted a clarified access request to the City for:

> Records (including correspondence and meetings notes, handouts) related to the rezoning of Crofton Manor between February 1, 2020 to June 10, 2020 between:
>
> City of Vancouver (COV) Gil Kelly, Susan Haid, and Tiffany Rougeau and the following owner/developer representatives:
>
> a. the Wall Corporation, including Bruno Wall;
>
> b. Revera Living, including Mike Brcko;
>
> c. Crofton Manor;
>
> d. Perkins + Will Architects, including David Dove
>
> (the "**Access Request**").

19. On July 27, 2020 and August 21, 2020, Wall Financial informed the City that it was their positon that the records responsive to the Access Request contained information that should be withheld under s. 21 of *FIPPA*.

20. On September 21, 2020, the City advised the Petitioner that it would withhold the information identified by the Petitioner under s. 21.

21. On September 22, 2020, the City responded to the access request and provided the Applicant with a package of records consisting of eighty-six (86) pages of responsive records, within which, certain records were redacted/severed pursuant to sections 21(1) and 22(1) of *FIPPA* (the "**Information in Dispute**").

22. On November 9, 2020, the Applicant asked the OIPC to review the City's decision to withhold access to the records.

23. The matter was referred to mediation, and ultimately remained unresolved. On or about August 25, 2022, the OIPC issued a Notice of Written Inquiry pursuant to Part 5 of *FIPPA* (the "**Inquiry**"). On the same day, the OIPC notified the Petitioner (and the other interested parties) of the Inquiry, and provided the Petitioner with a copy of the Notice of Inquiry, the Investigator's

Fact Report and the Request for Review (redacted), and invited the Petitioner (and the other interested parties) to make written representations in the Inquiry.

24. The Petitioner and Number Ten jointly participated in the Inquiry.

25. On September 26, 2022, the OIPC extended the deadlines for providing written submissions and provided a revised Submission Schedule and a Revised Inquiry File Contact List.

26. On October 7, 2022, the Petitioner and Number Ten filed their Initial Submissions in the Inquiry. In their submissions, the Petitioner and Number Ten maintained their positon that the City had properly withheld the records pursuant to section 21 of *FIPPA*. In support of its submissions, the Petitioner and Number Ten filed an Affidavit of Bruno Wall, CEO of Wall Financial.

27. On October 7, 2022, the City filed its Initial Submissions in the Inquiry in doing so, the City deferred to the Petitioner and Number Ten on the issue of harms under 21(1)(c)(i) to (iii) and reserved the right to adopt the evidence and/or submissions of the Petitioner and Number Ten. In support of its Initial Submissions, the City filed two affidavits, one from Cobi Falconer, Director, Access to Information & Privacy for the City and one from Tiffany Rougeau, Planner II in the City's Planning Urban Design and Sustainability Department.

28. On or about November 2, 2022, the Applicant filed their Response Submissions in the Inquiry. The Applicant did not file any evidence in support of their submissions. Accordingly, the Petitioner's, Number Ten's and the City's evidence was entirely uncontroverted.

29. On November 17, 2022, the Petitioner, Number Ten and the City filed their Reply Submissions in the Inquiry. In the City's Reply Submissions, the City adopted the Petitioner's and Number Ten's submissions relating to harms (specifically adopting paragraphs 37 to 66 of the Petitioner's and Number Ten's Initial Submissions).

30. On March 10, 2023, the Delegate wrote to the parties in the Inquiry, informed them that she had reviewed the submissions and determined that information about Revera was in issue in the Information in Dispute, and invited Revera to make submissions in the Inquiry.

31. On March 29, 2023, Revera filed its submissions, in doing so, adopted, and relied upon the submissions filed by the Petitioner and Number Ten.

32. On April 24, 2023, the City filed a response to Revera's submissions, adopted, and relied Revera's submission regarding confidentiality of the Information in Dispute.

33. The Delegate did not request any additional evidence or submissions from the parties during the Inquiry.

The Delegate's Decision

34. On April 25, 2023, the Delegate issued the Order, which contained the reasons for her decision following the completion of the Inquiry.

35. The Delegate determined that the issues before her in the Inquiry were whether the City was required to withhold the Information in Dispute pursuant to section 21(1) and section 22(1) of *FIPPA*. This petition addresses only the Delegate's decision under section 21(1) of *FIPPA*. The relevant parts of section 21(1) are set out below:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> [...]
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (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, [...]

36. The Delegate applied the following test to determine if section 21(1) entitled the City to withhold the Information in Dispute:

> [19] The principles for applying s. 21(1) are well established. The City and/or the Third Parties must establish each of the following elements in order for s. 21(1) to apply:
>
> - Disclosure would reveal one or more of the types of information listed in s. 21(1)(a);

- The information was supplied, implicitly or explicitly, in confidence under s. 21(1)(b); and

- Disclosure of the information could reasonably be expected to cause one or more of the harms in s. 21(1)(c).

[Footnotes omitted]

37. The Delegate initially found that all of the Information in Dispute was a mix of commercial and technical information within the meaning of section 21(1)(a) of *FIPPA*:

> [19] The City withheld information from architectural drawings of the Site and Facility prepared by the Architectural Firms, the body of six email communications from an architect at Perkins & Will to City officials, and minutes from a meeting between representatives of the City, Wall Financial, and Perkins & Will. For the reasons set out below, I find that all of the withheld information is commercial or technical information within the meaning of s. 21(1)(a)(ii).
>
> [Underlining added]

38. However, later on in the Delegate's reasons, the Delegate contradicted the finding that the Information in Dispute was commercial or technical information and determined that some of the Information in Dispute was not commercial or technical information:

> [28] Finally, the general advice from City officials about rezoning does not fit easily under any category of information protected by s. 21(1)(a). However, I need not determine this issue because, as set out below, this information was clearly not "supplied" by the Third Parties as required by s. 21(1)(b).
>
> [...]
>
> [29] In addition to the information that I have found is commercial or technical information, the emails and meeting minutes discussed above also include introductory statements, requests for information from the City, and information about meeting arrangements.
>
> [30] I find that this information is not captured by s. 21(1)(a) as it does not fit the definition of commercial or technical information set out above. The introductory information and questions are too general to be, reveal, or lead to an accurate inference about any technical or commercial information. Past OIPC decisions confirm that this kind of general information is not captured by s. 21(1)(a).15 The meeting arrangement information is administrative and does not contain technical or commercial information. Again, past OIPC decisions have held that meeting arrangements are not captured by s. 21(1)(a)(ii).
>
> [Underlining added]

39. The Delegate went on to find that the parts of the Information in Dispute that had been determined to be commercial or technical information had been supplied in confidence to the City. In coming to this conclusion, the Delegate first considered whether the Information in Dispute had been "supplied" within the meaning of s. 21(1)(b) of *FIPPA* and reasoned and held as follows:

> [34] The City's argument places form over substance. The issue is not how the records containing the information were sent to the public body, but rather whether the information at issue is the kind of "immutable third-party business information" that s. 21 is intended to protect. A determination as to whether the Third Parties' technical and commercial information was supplied to the City requires an examination of the substance of the information at issue, not just its form.
>
> [35] I find that the architectural drawings and the information that remains at issue in the emails was "supplied" to the City. It was prepared by the Architectural Firms for Wall Financial and Revera to assist them in in exploring options for development of the Site and Facility. It was sent to the City as part of the rezoning enquiry process and was not available to the City other than from the Third Parties.
>
> [36] As set out above, the Meeting Minutes contain three kinds of information: technical information from the Architectural Firms, specific advice from City officials about that technical information, and general advice from City officials about rezoning.
>
> [37] The technical information prepared by the Architectural Firms was prepared for Wall Financial and supplied to the City during a meeting. It was not available to the City other than from the Third Parties. I find that it was "supplied" to the City.
>
> [38] I also find that the advice from City officials about the technical information was "supplied" to the City. Past OIPC decisions have held that s. 21(1)(b) can be met in relation to information generated by a public body where the disclosure the information would reveal the underlying confidential information supplied to the public body. The City's advice about the technical information is highly detailed and references specific technical information supplied by the Third Parties. Accordingly, revealing the City's advice would reveal the technical information that was supplied to the City.
>
> [Underlining added]

40. The Delegate then went on to consider the confidentiality aspect of the test and reasoned and held as follows:

> [41] Both the City and the Third Parties submit that the information was supplied to the City in confidence because it was submitted through the City's confidential rezoning enquiry process.

[42] In support of its position the City relies on affidavit evidence from a City planner (the Planner) who is familiar both with the rezoning enquiry process in general, and with the process involving the Site.

[43] The Planner explains that a rezoning enquiry is a confidential process through which a proponent can obtain advice and feedback from City officials. She explains that the documentation provided to the City through the rezoning enquiry process is generally preliminary, includes proprietary information, and is considered confidential. She also states that the City continues to treat information received through the enquiry process as confidential even after a project proceeds to a formal rezoning application because the project is likely to have changed between the enquiry stage and the application stage. Finally, the Planner deposes that to her knowledge the withheld information has not been made public.

[44] The Third Parties rely on affidavit evidence from the CEO of Wall Financial (the Wall CEO). The Wall CEO states that the rezoning enquiry process is confidential and that Wall Financial's participation in the process was premised on its expectation of confidentiality. The Wall CEO also deposes that Wall Financial routinely engages in similar confidential discussions with local government bodies before filing a formal rezoning application, and that it is well known in the industry that these preliminary discussions are confidential and not intended to be public.

[45] The applicant argues that the rezoning enquiry process should not be confidential. The applicant submits that it there is no law or statement on the City's website that the process is confidential, and that there was no indication during the Open House that the remainder of the rezoning enquiry process would be confidential. She argues that confidentiality over the process leaves no room for public consultation or transparency. Ultimately, it is the applicant's view citizens have a right to understand how a rezoning process is proceeding, and confidentiality should not impede that right.

[46] As the applicant identifies, there is no evidence of an express indication that the rezoning enquiry process is confidential. In circumstances where there is no express indication of confidentiality, all of the circumstances must be considered to determine if there was, nonetheless, a reasonable expectation of confidentiality. [...]

[47] I accept the evidence of the Planner and the Wall CEO that all parties involved in the enquiry process understood the process to be confidential and treated the information in a manner that indicates a concern for its confidentiality.[...]

[...]

[49] [...] In my view, preliminary, exploratory information is not the kind of information that would typically be made public. I accept that the information was prepared for a process which would not entail disclosure.

[50] Considering the factors above, I am satisfied that the information the Third Parties supplied to the City was supplied "in confidence."

[Underlining added]

41. The Delegate then went on to consider three types of harms identified by the Petitioner and Number Ten if the Information in Dispute were to be disclosed to the Applicant.

42. The Delegate determined that the City was required to withhold only the architectural drawings of the Facility under s. 21(1)(c)(i), and found as follows:

> [70] The Third Parties' evidence in support of this argument is concerning because they rely exclusively on hearsay evidence and provide no underlying facts to support the assertion that Revera's designs are unique. However, for the reasons that follow, I am persuaded that disclosure of the architectural drawings of the Facility could reasonably be expected to harm significantly Revera's competitive position.
>
> [...]
>
> [73] Turning to the alleged harm, the records support the Wall CEO's statement that disclosure of the architectural drawings of the Facility could allow Revera's competitors to use its unique designs. The drawings contain detailed information about the proposed design for each floor of the Facility. It is clear on the face of the drawings that they provide the kind of information required to replicate Revera's designs. Thus, in light of the Wall CEO's evidence that Revera's designs are unique, I accept that disclosure of the records could allow Revera's competitors to gain access to and use of Revera's unique designs and plans.
>
> [74] The OIPC has recognized that disclosing unique construction designs that could be used by competitors constitutes competitive harm for the purposes of s. 21(1)(c)(i). In my view, the facts of this case support the same result. There is no question that developers will continue to design and construct senior's care facilities in the future. If other developers gain access to Revera's unique designs, Revera could very well lose any competitive advantage it may have as a result of its unique designs. In my view, this circumstance could reasonably be expected to harm significantly Revera's competitive position for the purposes of s. 21(1)(c)(i).
>
> [Underlining added]

43. In footnote 36 the Delegate states, "[t]he architectural drawings of the Facility are found on pages 56 – 69 of the records. My finding is limited to the Facility drawings as it is not clear that any other records contain information related to the design of the Facility, and the Third Parties have not asserted that they do."

44. However, earlier in her reasons, the Delegate herself determined that other portions of the Information in Dispute (aside from the architectural drawings themselves) contained information related to the design of the Facility, including "highly detailed" information from the Architectural Firms:

> [21] The body of five emails of the emails from the architect to the City include detailed specifications and in some instances the architect's thought processes about the plans for the Site. This information belongs to an organized field of knowledge in the mechanical arts, was prepared by a professional with the relevant expertise, and describes the construction of a structure. Furthermore, past OIPC orders confirm that technical information is protected not only when it is in the form of a final work product, but also in the form of emails which contain technical information. I find that the information in the five emails is technical information.
>
> [...]
>
> [25] The minutes contain technical specifications about the designs for the Site and facility prepared by the Architectural Firms, advice from City officials about those technical specifications, and general advice from the City about rezoning applications.
>
> [26] For the reasons set out above in respect of the emails, I find that the technical specifications in the minutes are technical information.
>
> [27] The City's advice about the technical information is highly detailed and references specific technical information from the Architectural Firms. I also find that the advice from City officials about the technical information is captured by s. 21(1)(a) because disclosing that advice would "reveal technical information" within the meaning of the section.
>
> [...]
>
> [38] I also find that the advice from City officials about the technical information was "supplied" to the City. Past OIPC decisions have held that s. 21(1)(b) can be met in relation to information generated by a public body where the disclosure the information would reveal the underlying confidential information supplied to the public body. The City's advice about the technical information is highly detailed and references specific technical information supplied by the Third Parties. Accordingly, revealing the City's advice would reveal the technical information that was supplied to the City.
>
> [Underlining added]

45. The Delegate's findings that the disputed information does not contain information related to the design of the Facility is wrong and unreasonable.

46. The Delegate determined that the Petitioner and Number Ten had "failed to establish that disclosure of the remaining information could reasonably be expected to result in undue financial loss or gain within the meaning of s. 21(1)(iii)."

47. Finally, the Delegate determined that the Petitioner and Number Ten had not established that disclosure of the Information in Dispute could reasonably be expected to result in similar information no longer being supplied to the City in the future:

[88] I am not persuaded that disclosing the information at issue could reasonably be expected to result in similar information no longer being supplied to the City in the future.

[89] Based on the City's evidence, I accept that it is in the public interest that proponents continue to participate fully in the rezoning enquiry process and that there is "significant concern" at the City that disclosure of the dispute information will cause proponents to be less forthcoming in the rezoning enquiry process in the future. However, no party led evidence to substantiate the City's concern about less fulsome participation. In my view, concern from City employees, on its own, is not sufficient to establish a reasonable expectation of probable harm.

[90] I also accept the Wall CEO's evidence that Wall Financial would not participate in the rezoning enquiry process in the future should information it supplied to the City be disclosed. However, the Third Parties did not address how other developers might respond – that is, they provided neither evidence, nor argument to suggest that other developers might also refuse to participate in the enquiry process or supply similar information to the City as a result of the disclosure of the information at issue. In addition, the Wall CEO provided clear evidence that the enquiry process provides financial benefits to proponents.

[91] In my view, as there are clear incentives to participating in the rezoning enquiry process, the effect of disclosure of the disputed information is that future proponents may weigh their interest in confidentiality against their interest in benefitting from the process before deciding whether or how much to participate in the rezoning enquiry process. In these circumstances, absent some evidentiary basis for (or at least argument in support of) doing so, it is not reasonable to speculate that future proponents would make the same calculation as Wall Financial and refuse to participate. Equally, it is not reasonable to assume that they would, as the City fears, participate less fully. The onus is on the City and Third Parties, and I am not satisfied that any entity other than Wall Financial could reasonably be expected to refuse to supply similar information as a result of disclosure of the information at issue.

[92] This determination leads me to a final consideration – whether, on its own, Wall Financial's refusal to similar information going forward is sufficient to satisfy the requirements of s. 21(1)(c)(ii). In my view, for the reasons set out below, it is not.

[93] In general, the OIPC's analyses under s. 21(1)(c)(ii) consider the impact of disclosure on the supply of similar information by community at large, not a single entity. Neither the City nor the Third Parties directed my attention to a case in which the OIPC accepted that evidence about single actor was sufficient for the purposes of s. 21(1)(c)(ii).

[94] Without making any determination as to whether evidence about a single actor could ever engage s. 21(1)(c)(ii), the evidence before me in this case is not sufficient to persuade me that Wall Financial's refusal to supply similar information, alone, engages s. 21(1)(c)(ii). The rezoning enquiry process is open to any proponent considering a rezoning application in the future. Neither the City nor the Third Parties provided any evidence (or even argument) that would

> allow me to assess what proportion of the City's rezoning enquiries Wall Financial was responsible for in the past, or likely will be responsible for in the future. The parties simply did not address this issue. In all of the circumstances, I am not persuaded that Wall Financial's refusal to supply similar information in response to the disclosure of the information at issue is sufficient to engage s. 21(1)(c)(ii).
>
> [95] In previous orders OIPC adjudicators have held that s. 21(1)(c)(ii) generally does not apply where there is a financial incentive for providing the information. On the facts of this case, I am satisfied that the same outcome is appropriate here. While I accept the City and Third Parties' evidence that participation in the process is voluntary and does not guarantee formal approval, in all of the circumstances of the case, the evidence is simply insufficient to persuade me that disclosing the information at issue could reasonably be expected to result in similar information no longer being supplied to the City in the future.
>
> [Underlining added]

48. Accordingly, pursuant to section 58(2)(a) of *FIPPA*, the Delegate ordered the City to disclose the Information in Dispute except the architectural drawings of the Facility to Applicant by June 7, 2023.

Effect of the within Petition for Judicial Review

49. Pursuant to section 59(2) of *FIPPA*, the Order is stayed for 120 days (as defined in Schedule 1 of *FIPPA*, as excluding holidays and Saturdays), beginning on the date that the Petitioner filed the within Petition for judicial review.

50. Pursuant to section 59(3) of *FIPPA*, if a date for the hearing of the within Petition for judicial review is set before the expiration of the stay of the Order referred to in section 59(2), the stay of the Order is extended until the within judicial review is completed or the court makes an order shortening the stay.

Part 3: LEGAL BASIS

Legislative Provisions

1. This Petition is brought pursuant to the *Judicial Review Procedure Act*, RSBC 1996, c. 241.

2. The Petitioner relies on Rules 2-1(2)(b), 14-1 and 16-1 of the *Supreme Court Civil Rules*.

3. The Petitioner relies on the provisions of *FIPPA*, and in particular sections 21(1) and 56(3).

Grounds for Review

4. The Petitioner says that the Order must be set aside because the Delegate's decision was unreasonable with respect to the interpretation and application of section 21 of *FIPPA* to the Information in Dispute the following reasons:

   (a) The Delegate applied the wrong legal test for "supplied in confidence";

   (b) The Delegate applied the wrong legal test in respect of section 21(1)(c)(ii) of *FIPPA*;

   (c) The Delegate failed to undertake a proper analysis of section 21(1)(c)(ii) of *FIPPA*; relied on her own opinions, assumptions, speculation and conjecture, rather than considering and interpreting the evidence that was on the record in the Inquiry; and interpreted and applied this section in a manner that frustrates and undermines the purpose of FIPPA and section 21(1)(c)(ii);

   (d) The Delegate ignored and/or misunderstood the Petitioner's, Number Ten's and the City's evidence and argument;

   (e) The reasons for the Delegate's decision are internally inconsistent, lack intelligibility and do not "add up"; and

   (f) In the alternative, the Delegate breached her duty to be fair by not requesting further submissions from the Petitioner and the other parties to the Inquiry in order to properly consider and evaluate the Information in Dispute, particularly with respect to the use of the Delegate's own opinion in place of uncontroverted evidence in the section 21(1)(c)(ii) analysis, resulting in a failure of procedural fairness and natural justice.

The Standard of Review

5. The standard of review with respect to the Delegate's interpretation and application of section 21(1) of *FIPPA* is reasonableness.

   Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 [***Vavilov***] at paras. 10, 17, and 69

6. The standard of review applicable to questions of procedural fairness is correctness. In determining whether a decision maker treated a party fairly, the reviewing court is not required to give deference to the tribunal's own assessment of whether its procedures were fair.

Mission Institution v. Khela, 2014 SCC 24, at para. 79.

Seaspan Ferries Corporation v. British Columbia Ferry Services Inc., 2013 BCCA 55, at paras. 49 and 52

The Cambie Malone's Corporation v. British Columbia (Liquor Control and Licensing Branch), 2016 BCCA 165, at para. 14

7. The Supreme Court of Canada's decision in *Vavilov* dealt with the review of the merits of an administrative tribunal's decision, and as such, the standard of review with respect to procedural fairness remains unchanged.

The Reasonableness Standard

8. In *Vavilov*, in addition to clarifying the applicable standard of review, the Supreme Court of Canada provided further guidance with respect to the application of the reasonableness standard to administrative decisions. The majority stated that a "reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions."

Vavilov at para. 12

9. The focus of a reasonableness review must be on the decision actually made by the decision maker, which includes both the decision maker's reasoning process and the outcome. Therefore, the reviewing court must consider whether the decision made – including both the rationale for the decision and the outcome to which it led – was unreasonable.

Vavilov at para. 83

10. In reviewing an administrative decision maker's decision and written reasons, the reviewing court must ask whether the decision bears the hallmarks of reasonableness, namely justification, transparency and intelligibility, and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.

Vavilov at para. 99, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, at 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, at para. 13.

11. An administrative decision maker's decision should be set aside where there are sufficiently serious shortcomings or flaws that are sufficiently central or significant to render the decision unreasonable.

Vavilov at para. 100

12. Such sufficiently serious shortcomings or flaws include, but are not necessarily limited to (a) a failure of rationality internal to the reasoning process, and (b) when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it.

Vavilov at para. 101

13. For a decision to be reasonable, it must be based on reasoning that is both rational and logical. The reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" [citations omitted].

Vavilov at para. 102

14. The internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. The reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

Vavilov at para. 104

15. An administrative decision maker must take the evidentiary record into account and the general factual matrix that bears on its decision into account, the decision must be reasonable in light of them. A decision may be unreasonable where a decision maker has shown than their conclusions and/or decision was not based on the evidence that was actually before them.

Vavilov at paras. 125 – 126

The Delegate applied the wrong legal test for "supplied in confidence"

16. While the Delegate ultimately came to what the Petitioner says is the correct determination on this issue, the Delegate did so by applying the wrong test to determine if the Information in Dispute had been "supplied" within the meaning of s. 21(1)(b) of *FIPPA*.

17. The Delegate's reference to "immutable third-party business information" as part of the test for "supplied" is a reference to one of two exceptions to the general rule that information in an agreement or contract will not normally qualify as being "supplied" by the third party for the purposes of s. 21(1)(b). There were no agreements or contracts in the Information in Dispute and

as such, the "immutable third-party business information" exception was not relevant. The Delegate appears to have misunderstood the general test for "supplied" and instead conflated it with the much more stringent test for agreements and contracts.

18. Having found that the Information in Dispute had been supplied within the meaning of s. 21(1)(b) of *FIPPA,* the Delegate then went on to ignore the uncontroverted evidence and applied the wrong confidentiality test, as she applied the test for implicit and not explicit confidentiality.

19. Information is supplied expressly in confidence where a third party provides information 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. There is no requirement that there must be legislation or a statement on the City's website stating that the rezoning enquiry process is confidential. The express agreement is between the City and the Petitioner and/or the Petitioner's agents. The Applicant's knowledge or understanding is not relevant.

20. The uncontroverted evidence of the Petitioner, Number Ten and the City was that the rezoning enquiry process was confidential. The Delegate accepted that "all parties involved in the enquiry process understood the process to be confidential." However, the Delegate went on to find that there was "no evidence of an express indication that the rezoning enquiry process is confidential".

21. While the Delegate ultimately determined that the Information in Dispute had been supplied in confidence, her reasoning and findings are nonsensical, internally inconsistent, ignore the evidence and are based on a misunderstanding of the test for confidentiality under *FIPPA*. This demonstrates that the Delegate lacks a proper understanding of the legislative scheme in *FIPPA*.

The Delegate failed to undertake a proper analysis of section 21(1)(c)(ii); relied on her own opinions, assumptions, speculation and conjecture, rather than considering and interpreting the evidence that was on the record in the Inquiry; and interpreted and applied this section in a manner that frustrates and undermines the purpose of *FIPPA* and section 21(1)(c)(ii)

22. An administrative decision-maker's decision will be unreasonable unless it can be justified in relation to the facts and law that constrain the decision maker. Where "it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances."

Vavilov at 85, 122

23. In the present case, the Delegate determined that the disclosure of the Information in Dispute would not result in further information no longer being supplied to the City, based on the following factors:

(a) No party led evidence to substantiate the City's concern about less fulsome participation;

(b) In the Delegate's view, concern from City employees, on its own, was not sufficient to establish a reasonable expectation of probable harm;

(c) the Petitioner did not address how other developers might respond and whether other developers might also refuse to participate in the re-zoning enquiry process or refuse to supply similar information to the City as a result of the disclosure of the Information in Dispute;

(d) the Petitioner provided clear evidence that the re-zoning enquiry process provides financial benefits to proponents;

(e) In the Delegate's view there were "clear incentives" to participating in the rezoning enquiry process; and

(f) the Petitioner's refusal to provide similar information was not, on its own, sufficient to satisfy the requirements of s. 21(1)(c)(ii).

24. However, the Delegate accepted

(a) the City's evidence "that it is in the public interest that proponents continue to participate fully in the rezoning enquiry process and that there is "significant concern" at the City that disclosure of the dispute information will cause proponents to be less forthcoming in the rezoning enquiry process in the future."

(a) the Petitioner's evidence that "Wall Financial would not participate in the rezoning enquiry process in the future should information it supplied to the City be disclosed."

25. The Delegate's reasoning and findings are internally inconsistent and directly contradictory. The Delegate starts her analysis by saying that no party led evidence to substantiate the City's concern about less fulsome participation and the City's concerns alone were insufficient. However, the Delegate then goes on to accept the Petitioner's evidence that it would not participate in the re-zoning enquiry process if the Information in Dispute were released.

26. Therefore, on the Delegate's own admission, there was clear and uncontroverted evidence before the Delegate directly substantiating the City's concerns. Despite this, the Delegate appears to have ignored this evidence and wrongly concluded that there was no evidence to substantiate the City's concerns. The Delegate's erroneous conclusion on this issue, led her to determine that there was insufficient evidence to establish a reasonable expectation of probable harm under s. 21(1)(c)(ii).

27. A review of the Order reveals that the Delegate failed to apply a legal analysis that properly considered whether it is in the public interest that similar information continue to be supplied to the public body, as required by s. 21(1)(c)(ii).

28. The Delegate's reasons for her decision wrongly focus on the financial incentives that may arise from participating in the re-zoning enquiry process. The Delegate's finding on this issue were central to her determination that the requirements of s. 21(1)(c)(ii) had not been met. However, the Delegate's analysis on this issue is incomplete as she applied the general rule about financial incentives in a strict manner, contrary to the OIPC's jurisprudence. In support of her analysis, the Delegate cited a number of previous OIPC decisions, including Order 03-05, 2003 CanLII 49169 (BC IPC) ("**Order 03-05**") at para. 15. However, the Delegate failed to address and/or ignored the second half of the financial incentive analysis, which was set out by former Commissioner Loukidelis in Order 03-05:

> [16] These are not exhaustive considerations and they are not inflexible rules. After all, s. 21(1)(c)(ii) applies only where the evidence establishes a reasonable expectation that similar information will no longer be supplied to the public body, and it is in the public interest that it continue to be supplied. There may be some cases, for example, where a third party has some sort of incentive to supply the information, but there is nonetheless a reasonable expectation that its disclosure will result in similar information no longer being supplied to the public body. Financial incentives, after all, differ in nature and degree. See, for example, Ontario Order PO-1638, [1998] O.I.P.C. No. 238, where a third party industry stakeholder had a business motivation to voluntarily supply information related to development of policies for resource-based tourism. This motivation did not prevent the comparable provision in the Ontario legislation from being triggered in that case.
>
> [Underling added]

29. The Petitioner, Number Ten and the City specifically addressed the financial incentive aspect of s. 21(1)(c)(ii) in their submissions, including the analysis set out by former Commissioner Loukidelis' in paragraph 16 of Order 03-05. Despite this, the Delegate failed and/or refused to address the Petitioner's, Number Ten's and the City's arguments in this regard.

30. In reviewing and considering whether disclosure of the Information in Dispute could reasonably be expected to 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, the Delegate applied a stringent evidentiary standard than is not supported by OIPC jurisprudence. The Delegate essentially determined (without any jurisprudential authority) that the Petitioner and Number Ten were required to lead evidence about what unrelated third parties to the Inquiry (i.e. other developers) would do if the Information in Dispute were released, and whether or not those unrelated third parties would refuse to participate in the re-zoning inquiry process.

31. While the Delegate attempted to justify this wholly unreasonable evidentiary standard by referring to two previous OIPC decisions (Order F20-41, 2020 BCIPC 49 (CanLII) at para. 57, and Order F20-55, 2020 BCIPC 64 (CanLII) at para. 47), these decisions do not stand for the proposition for which the Delegate cited them. In addition, the facts of those decisions are wholly distinguishable and the comments in Order F20-41 regarding s. 21(1)(c)(ii) are *obiter*.

32. Not only is the evidentiary standard imposed by the Delegate lacking any jurisprudential authority, it essentially frustrates and undermines the purpose of s. 21(1)(c)(ii), which is to ensure that the disclosure of information provided to a public body, does not 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. The balance ought to be in the public interest.

33. The evidence before the Delegate from the City, the Petitioner and Number Ten (which evidence the Delegate accepted), demonstrated that if the Information in Dispute were disclosed, similar information would no longer be provided to the City. Despite this, the Delegate determined that in order to be successful under s. 21(1)(c)(ii), the parties needed to provide evidence of how unrelated third parties to the Inquiry would react to the disclosure of the Information in Dispute. This is an extremely heavy onus and one which the Petitioner says frustrates the purpose of *FIPPA* and s. 21(1)(c)(ii) as it would be unreasonable expectation to discharge and means that a party's ability to successfully rely on s. 21(1)(c)(ii) is wholly dependant upon whether it could involve evidence from third parties unrelated to the Inquiry.

34. As a matter of public policy, the Court should reject the evidentiary burden established by the Delegate on this point.

35. The Delegate did not apply or misapplied the legal test under s. 21(1)(c)(ii). An administrative decision maker's decision will be unreasonable where they fail to apply or misapply the correct legal test.

> *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, at paras. 194 and 201; *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency*, 2012 SCC 37, at para. 37

36. If the Delegate's decision were to be upheld, it would essentially render the exception under s. 21(1)(c)(ii) redundant, as it would be impossible to provide sufficient evidence to meet the evidentiary burden set out by the Delegate. Such a result would be absurd and clearly contrary to the Legislature's intent in permitting certain specified and limited exceptions to the right of access to information in *FIPPA*.

37. Not only did the Delegate not apply or misapplied the legal test under s. 21(1)(c)(ii), she substituted her own opinion and belief for that of the City without any appropriate evidentiary basis to do so. In so doing, the Delegate ignored the uncontroverted evidence of

(a) the City regarding the importance of the re-zoning enquiry process, the need for fulsome participation and the impact on City resources that would arise from the disclosure of the Information in Dispute; and

(b) the Petitioner (as well as Number 10, and Revera supporting these submissions) regarding it no longer participating the re-zoning inquiry process if the Information in Dispute were disclosed;

and instead substituted it with her own speculation about what other developers might do if the Information in Dispute were disclosed.

38. There was simply no basis on the evidence before the Delegate on which she could substitute her own opinion, belief or speculation for that of the City, the Petitioner and Number Ten. The Delegate's failure to acknowledge evidence of harm that will flow from a decision to release confidential documents can render such a decision unreasonable.

> *College of Physicians and Surgeons of British Columbia v British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 354, at para. 99, citing *University of British Columbia v. Lister*, 2018 BCCA 139 [***Lister***], at para. 47.

The Delegate ignored and/or misunderstood the Petitioner's, Number Ten's and the City evidence and argument

39. Throughout the Delegate's decision, she continually ignores and/or misunderstands the Petitioner's, Number Ten's and the City's evidence, such that her decision and the Order are not reasonable.

The Delegate's Section 21(1)(b) Analysis

40. As set out in paragraph 40 of Part Two, and paragraphs 18 - 21 of Part Three, the Delegate ignored the Petitioner's, Number Ten's and the City's evidence regarding the confidential nature of the re-zoning inquiry process. This lead the Delegate to apply the wrong test to determined whether the Information in Dispute was supplied in confidence.

The Delegate's Section 21(1)(c)(i) Analysis

41. With respect to harm to Revera's competitive positon through the disclosure of unique designs, at paragraph 70 of the Order, the Delegate states that "The Third Parties' evidence in support of this argument is concerning because they rely exclusively on hearsay evidence and provide no underlying facts to support the assertion that Revera's designs are unique."

42. The Delegate's finding in this regard is entirely incorrect and completely ignores the content of the Information in Dispute. In the email on page 54 of the Information in Dispute, there is factual information that clearly demonstrates the uniqueness of the designs in question.

43. Therefore, the Delegate's finding that the Petitioner and Number Ten provided no underlying facts to support their position is extremely concerning, because not only does it demonstrate that the Delegate ignored the evidence before her, it also demonstrates that the Delegate has not reviewed the Information in Dispute in any detail and calls into question her ability to make a proper and fully informed determination under section 21.

The Delegate's Section 21(1)(c)(ii) Analysis

44. As set out in paragraphs 23 - 26 of Part Three, the Delegate initially found that there was no evidence to support the City's position that similar information would no longer be supplied. However, the Delegate then went on to accept the Petitioner's evidence that it would no longer participate in the re-zoning enquiry process. The Delegate's finding are entirely inconsistent and directly contradictory.

The Delegate's Section 21(1)(c)(iii) Analysis

45. The Delegate finds that the Petitioner and Number Ten failed to establish that disclosure of the remaining Information in Dispute could reasonably be expected to result in undue financial loss or gain within the meaning of s. 21(1)(iii). The Delegate comes to this conclusion based on the following reasoning:

> [79] First, the Wall CEO's evidence that disclosure could result in "possible loss" and "possible gain" does not satisfy the evidentiary standard established by the Supreme Court of Canada which requires a risk of harm that is "well beyond the merely possible or speculative."
>
> [80] Moreover, the Third Parties do not explain how disclosure of the withheld information could result in financial loss or gain to any entity. On its own, the fact that a competitor could obtain information paid for by a party is not sufficient to establish harm under s. 21(1)(c)(i).43 In this case, as Wall Financial owns the Site, it is particularly unclear what use any other entity could make of the information relating to designs for the Site, and therefore what loss could result to Wall Financial from disclosure of the information.
>
> [Underling added]

46. Contrary to the Delegate's finding in paragraph 80 of the Order, the Petitioner and Number Ten set out the applicable OIPC jurisprudence and a fulsome explanation as to how disclosure of the Information in Dispute could result in financial loss or gain. However, it appears that the Delegate simply ignored the Petitioner's and Number Ten's submissions.

The reasons for the Delegate's decision are internally inconsistent, lack intelligibility and do not "add up"

47. The Order and the Delegate's reasoning regarding same is riddled with internal inconsistencies, including but not limited to the following:

(a) As set out in paragraphs 37 - 38 of Part Two, the Delegate's reasoning and findings with respect to the nature of the Information in Dispute and whether or not it was commercial and/or technical information is internally inconsistent. This is because the Delegate initially states that all of the Information in Dispute is commercial and/or technical information. However, later on in the Delegate's reasons, the Delegate failed to determine if parts of the Information in Dispute were commercial or technical information and in fact, determined that some of the Information in Dispute was not commercial or technical information.

(b) As set out in paragraphs 42 - 44 of Part Two, the Delegate's reasoning and findings with respect to the architectural drawings of the Facility and specifically, the finding that it was "not clear that any other records contain information related to the design of the Facility" is internally inconsistent. This is because earlier in her reasons, the Delegate herself determined that other portions of the Information in Dispute (aside from the architectural drawings themselves) contained information related to the design of the Facility, including "highly detailed" information from the Architectural Firms.

The Delegate's erroneous finding on this issue, resulted in the Delegate failing to consider whether the emails, which contained "highly detailed" information from the Architectural Firms about the Facility should also be withheld under s. 21.

(c) As set out in paragraphs 23 - 26 and 44 of Part Three the Delegate's findings with respect to the evidence of the parties positions under s. 21(1)(c)(ii) is inconsistent and contradictory.

48. Overall, the Delegate's decision-making process and written reasons are not reasonable, as they are not justified, transparent, nor intelligible. On the contrary, they are riddled with serious shortcomings and flaws that are central to Delegate's ultimate decision with respect to the disclosure of the Information in Dispute, such that the decision and Order are unreasonable.

49. In addition, despite splitting the Information in Dispute into distinct categories at the beginning of the Order, the only specific category of Information in Dispute that the Delegate engages with in any meaningful way is the architectural drawings of the Facility. As such, when the Delegate's analysis regarding section 21 of *FIPPA* ends at paragraph 96 of the Order, the reader is left wondering what the Delegate's reasoning/findings are with respect to the other categories of Information in Dispute originally identified by Delegate at the beginning of the Order. Accordingly, the Delegate's reasons lack a proper line of analysis that can be followed through the decision from beginning to end.

The Delegate breached her duty of procedural fairness and natural justice

50. The Delegate breached her duty to be fair by not requesting further submissions from the Petitioner and the other parties to the Inquiry in order to properly consider and evaluate the Information in Dispute, resulting in a failure of procedural fairness and natural justice. In particular, the Delegate made findings of fact with no evidentiary support in contradiction to the

evidence before her, and applied an evidentiary standard without giving the Petitioner and the other parties the opportunity to respond and make representations.

51. The Petitioner and the other parties were entitled to make representations to the Delegate in the course of the Inquiry pursuant to section 56(3) of *FIPPA*. The Delegate has discretion as to how the Inquiry is conducted and has the ability to control the process.

52. As part of its ability to control its own process, and pursuant to the OIPC's Instructions for Written Inquiries, the Delegate had the ability to request further submissions from the parties where necessary or desirable.

Instructions for Written Inquiries, February 2021 at page 8

53. Having determined that the Information in Dispute did include information that was commercial and/or technical information and having accepted

(a) the City's evidence "that it is in the public interest that proponents continue to participate fully in the rezoning enquiry process and that there is "significant concern" at the City that disclosure of the dispute information will cause proponents to be less forthcoming in the rezoning enquiry process in the future."

(b) the Petitioner's evidence that "Wall Financial would not participate in the rezoning enquiry process in the future should information it supplied to the City be disclosed."

the Delegate when on to determine that she was "not persuaded that disclosing the information at issue could reasonably be expected to result in similar information no longer being supplied to the City in the future."

54. The Delegate went on to conclude that:

> [91] In my view, as there are clear incentives to participating in the rezoning enquiry process, the effect of disclosure of the disputed information is that future proponents may weigh their interest in confidentiality against their interest in benefitting from the process before deciding whether or how much to participate in the rezoning enquiry process. In these circumstances, absent some evidentiary basis for (or at least argument in support of) doing so, it is not reasonable to speculate that future proponents would make the same calculation as Wall Financial and refuse to participate. Equally, it is not reasonable to assume that they would, as the City fears, participate less fully. The onus is on the City and Third Parties, and I am not satisfied that any entity other than Wall Financial could reasonably be expected to refuse to supply similar information as a result of disclosure of the information at issue.

> [...]
>
> [94] Without making any determination as to whether evidence about a single actor could ever engage s. 21(1)(c)(ii), the evidence before me in this case is not sufficient to persuade me that Wall Financial's refusal to supply similar information, alone, engages s. 21(1)(c)(ii). The rezoning enquiry process is open to any proponent considering a rezoning application in the future. Neither the City nor the Third Parties provided any evidence (or even argument) that would allow me to assess what proportion of the City's rezoning enquiries Wall Financial was responsible for in the past, or likely will be responsible for in the future. The parties simply did not address this issue. In all of the circumstances, I am not persuaded that Wall Financial's refusal to supply similar information in response to the disclosure of the information at issue is sufficient to engage s. 21(1)(c)(ii).
>
> [Underlining added]

55. While the Delegate stated that it was "not reasonable to speculate that future proponents would make the same calculation as Wall Financial and refuse to participate. Equally, it is not reasonable to assume that they would, as the City fears, participate less fully." That is exactly what the Delegate did, while ignoring the uncontroverted evidence of the Petitioner, Number Ten and the City.

56. The Delegate made findings of fact and law based on evidence not before her in the Inquiry, namely her own opinion, assumptions, speculation and conjecture, without giving the Petitioner and the other parties the opportunity to respond and make representations.

57. It is evident from the Delegate's reliance on her own opinions, assumptions, speculation and conjecture, that it was her view that she did not have sufficient information or evidence before her in the Inquiry to make a proper determination on the issues. As such, the Delegate should have requested additional and/or supplementary submissions from the Petitioner and the other parties to the Inquiry.

58. However, despite the fact that the Delegate implicitly acknowledged that she would have benefited from more information, and the fact it was it was explicitly open to the Delegate to request further submissions from the parties - she chose not to do so – relying instead on her own opinions, assumptions, speculation and conjecture with respect to what she thought users of the re-zoning inquiry process would and would not do if they knew that their confidential information and discussions could be made public.

59. The Delegate's findings with respect to what other users of the City's re-zoning inquiry process would and would not do if they knew that their confidential information and discussions could be made public, were central to her decision to order the disclosure of the Information in Dispute, such that the Petitioner was denied the opportunity to make representations on the Delegate's assumptions with respect to the Information in Dispute.

60. Denial of a hair hearing will always render a decision invalid, even if it appears to the reviewing court that a fair hearing would likely not result in a different decision.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Olena Tkachenko made June 2, 2023;

2. The complete record of the proceedings before the OIPC in the Inquiry (Records to be provided by the OIPC); and

3. Such further and other material as counsel may advise and this Honourable Court may accept

The Petitioner estimates that the hearing of the Petition will take two (2) days.

Dated at the City of Vancouver, in the Province of British Columbia, this 2nd day of June 2023.

Lawson Lundell LLP
Solicitors for the Petitioner

This Petition to the Court is filed by Ryan Berger, of the law firm of Lawson Lundell LLP, whose place of business and address for delivery is 1600 – 925 West Georgia Street, Vancouver, British Columbia V6C 3L2.

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this Petition

☐ with the following variations and additional terms:

_____

_____

_____

_____

Date: _____

Signature of ☐Judge ☐Master

NO. _____
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WALL FINANCIAL CORPORATION

PETITIONER

AND:

INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA, CITY OF VANCOUVER, REVERA INC., NUMBER TEN ARCHITECTURAL GROUP and KATHLEEN DUFFIELD

RESPONDENTS

PETITION TO THE COURT

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