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Order F17-19

CITY OF VANCOUVER

Celia Francis
Adjudicator

April 26, 2017

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Summary: An applicant asked the City of Vancouver ("City") for records showing the calculation of community amenity contributions for a condominium development in the Mount Pleasant area of Vancouver. The City disclosed some information but withheld other information under ss. 13(1) (advice or recommendations), 17(1) (harm to financial interests of a public body), 21(1) (harm to third-party interests) and 22(1) (harm to third-party personal privacy). The applicant argued that s. 25(1)(b) (public interest override) applies to the withheld information. The adjudicator found that s. 25(1)(b) does not apply to the withheld information and that ss. 13(1), 17(1) and 22(1) do. It was not necessary to consider if s. 21(1) applied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, 13(1), 13(2), 17(1), 17(1)(e), 17(1)(f), 22(1), 25(1)(b).

Authorities Considered: B.C.: Order F07-23, 2007 CanLII 52748 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F07-17, 2007 CanLII 35478 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order F15-60, 2015 BCIPC 64 (CanLII); Order F16-32, 2016 BCIPC 35 (CanLII); Order F15-52, 2015 BCIPC 55 (CanLII); Order F15-03, 2015 BCIPC 3 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F10-24, 2010 BCIPC 35 (CanLII); Order F10-34, 2010 BCIPC 50 (CanLII); Order F17-10, 2017 BCIPC 11 (CanLII); Order 00-42, 2000 CanLII 14407 (BC IPC); Order F05-28, 2005 CanLII 30678 (BC IPC); Order F06-13, 2006 CanLII 25573 (BC IPC); Order F17-03, 2017 BCIPC 03 (CanLII); Investigation Report F15-02, 2015 BCIPC 30 (CanLII); Investigation Report F16-02, 2016 BCIPC 36 (CanLII).

Cases Considered: *John Doe v. Ontario (Finance*), 2014 SCC 36; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875.

INTRODUCTION

[1] This order concerns a condominium development called The Independent in the Mount Pleasant area of Vancouver. In November 2014, the applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the City of Vancouver ("City") for spreadsheets and other records showing the calculations of community amenity contributions ("CACs") for the rezoning of The Independent development site. In April 2015, the City told the applicant that it had located one responsive record, which it was withholding under ss. 17(1) (harm to financial interests of public body) and 21(1) (harm to third-party interests) of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the City's decision to deny access to this record.

[2] During mediation by the OIPC, the City located other responsive records. It disclosed these records in severed form in April 2016, withholding information under ss. 13(1), 17(1), 21(1) and 22(1) (harm to third-party personal privacy).[1] During mediation, the applicant raised the issue of whether s. 25(1)(b) of FIPPA requires the City to disclose the responsive records.

[3] Mediation did not resolve the request for review and the applicant asked that the matter proceed to inquiry. The OIPC invited and received inquiry submissions from the applicant, the City and the third-party developer, Rize Alliance Properties Ltd. ("Rize").

ISSUES

[4] The issues before me are whether the City

- is authorized by ss. 13(1) and 17(1) to withhold information;
- is required by ss. 21(1) and 22(1) to withhold information; and
- is required by s. 25(1)(b) to disclose information.

[1] The Fact Report and notice for this inquiry clearly state that s. 13(1) is also an issue, so I am addressing it in this inquiry. I note, however, that the City's decision letters to the applicant state only that it was withholding information under ss. 17(1), 21(1) and 22(1).

[5] Under s. 57(1) of FIPPA, the City has the burden of proof respecting ss. 13(1), 17(1) and 21(1). Under s. 57(2), the applicant has the burden of proving that disclosure would not be an unreasonable invasion of third-party personal privacy.

[6] Section 57 is silent as to who has the burden of proof respecting s. 25(1)(b). Past orders have said that, in light of the absence of a statutory burden of proof, "As a practical matter, both parties should provide evidence and argument to support their respective positions in an inquiry where the applicability of s. 25(1) is in issue." [2]

DISCUSSION

Background

[7] Rize is the developer of The Independent condominium project at Kingsway and East Broadway in Vancouver. Rize applied to the City for, and received approval of, the re-zoning of the site to allow for an increase in both height and density of the development. As part of the re-zoning, Rize and the City negotiated a payment by Rize of $6,250,000 in CACs, to be directed towards cultural uses in the Mount Pleasant area and an affordable housing fund.[3]

Records in dispute

[8] The records consist of 20 pages of emails, covering the period from 2010 to 2012,[4] and three pages of spreadsheets, which the City called a "pro forma". The City withheld portions of the emails under ss. 13(1), 17(1), 21(1) and 22(1). It withheld the entire pro forma under ss. 17(1) and 21(1). The withheld information is the information in dispute in this case.

Section 25(1)(b) – public interest override

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

> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> …
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[2] See, for example, Order F07-23, 2007 CanLII 52748 (BC IPC), and Order 02-38, 2002 CanLII 42472 (BC IPC).
[3] Affidavit of Jerry Evans, Director of Real Estate Services, City of Vancouver; para. 17.
[4] There is some duplication of information in the emails. Page 20 is blank.

[10] Section 25(1)(b) overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.[5] Consequently, there is a high threshold before it can properly come into play.[6] Previous orders have explained this concept as follows: "… the duty under section 25 only exists in the clearest and most serious of situations. A disclosure must be, not just arguably in the public interest, but *clearly* (*i.e.*, unmistakably) in the public interest ..."[7]

[11] More recently, former Commissioner Denham expressed the view that "clearly means something more than a 'possibility' or 'likelihood' that disclosure is in the public interest." She added that s. 25(1)(b) "requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest." The Commissioner provided a non-exhaustive list of factors public bodies should consider in determining whether s. 25(1)(b) applies to information. These factors include whether the information would contribute to educating the public about the matter or contribute in a substantive way to the body of information already available about the matter.[8]

Parties' submissions

[12] The applicant said that the re-zoning process for this development was "one of the most controversial ones in recent memory" and that the "overwhelming majority of the community was opposed to this rezoning". In his view, the CACs should have amounted to $14,141,250 rather than $6,250,000. In the applicant's view, it is clearly in the public interest, under s. 25(1)(b), for the public to know how the CACs in this case were calculated.[9]

[13] The City said that the negotiation of CACs is a routine function, which is not subject to public consultation or input, and the CACs in this case have not been the subject of widespread debate in the media. The City added that CACs are not calculated according to a formula, but are negotiated. It said that records showing the requested information could include "an indeterminate category of information," by which I take the City to mean that it would not be practicable to identify all the responsive records. The City submitted that the re-zoning application in this case was in the public interest and noted that the application was the subject of extensive public consultation and public hearings in 2011 and 2012. It added that all material documents have been disclosed

[5] Section 25(2).
[6] See Investigation Report F15-02, 2015 BCIPC 30 (CanLII), pp. 28-29.
[7] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45, italics in original.
[8] Investigation Report F16-02, 2016 BCIPC 36 (CanLII), pp. 26-27.
[9] Applicant's response submission. All quotes are from this two-page submission. The applicant appeared to focus on the pro forma and did not explicitly address the emails.

on the re-zoning website.[10] In the City's view, the former Commissioner's s. 25(1)(b) factors do not apply here and disclosure of the requested information is not clearly in the public interest. The City argued that a requirement to disclose the requested information proactively would render FIPPA's exceptions meaningless.[11]

[14] Rize also argued that there is no compelling public interest in disclosing the pro forma.[12]

Analysis and finding

[15] I accept that the re-zoning application was the subject of extensive public consultations and hearings. The City has also shown that considerable information on this development proposal is publicly available.

[16] I acknowledge the applicant's point that the development was controversial. His evidence also suggests that many in the Mount Pleasant community objected to the increased height and density of the proposed project.[13] However, it is not enough that the public have an interest in a topic. Disclosure of the information itself must be clearly in the public interest. The applicant did not counter the City's evidence that the amount of the CACs was not controversial and did not involve public consultation. He did not, for example, explain how, or whether, the CACs in this case were the subject of public debate. In any case, the City has already disclosed a summary of how the CACs were arrived at in this case.[14]

[17] In my view, the former Commissioner's s. 25(1)(b) factors do not apply here. The withheld pro forma would not, for example, add in a substantive way to the information the applicant already has about the development in general and the CACs in particular. The withheld information would also not contribute to educating the public on those matters. It is not, in my view, clearly in the public interest for the withheld information to be disclosed. For these reasons, I find that s. 25(1)(b) does not apply to it.

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[10] The City provided a link to the website on the re-zoning application, a printout of the website page with links to relevant documents and a copy of the January 2012 report to Vancouver City Council on the re-zoning application; Evans affidavit, para. 10; Exhibits B & C, Evans affidavit.

[11] City's initial submission, paras. 16-18; City's reply submission, paras. 13-18; Evans affidavit, para. 9; Exhibit E, Evans affidavit, "2015 Annual Report on Community Amenity Contributions and Density Bonusing". All quotations are from the paragraphs cited.

[12] Rize's initial submission, para. 25.

[13] The applicant provided a copy of a summary of public feedback on the proposed development, from an April 2011 open house on the re-zoning application.

[14] Pages 2-4, 7, 13-19 of the records in dispute.

Advice or recommendations – s. 13(1)

[18] Section 13(1) is a discretionary exception which says that a public body "may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister." Section 13(2) of FIPPA states that a public body may not refuse to withhold certain types of information under s. 13(1). Numerous orders have considered the application of s. 13 of FIPPA, for example, Order F07-17,[15] which stated that:

> In making a determination regarding s. 13, a public body must first determine whether the material fits within the scope [of] s. 13(1). If it does, the public body must then go on to determine whether the material falls within any of the categories set out in s. 13(2). If the records at issue are caught by one of the categories under s. 13(2), the public body must not refuse disclosure under s. 13(1). If the public body determines that the material falls within s. 13(1) and is not caught by any of the s. 13(2) categories, the public body must then decide whether to exercise its discretion to refuse disclosure.

[19] Many orders and court decisions have considered the purpose and interpretation of s. 13(1). The Supreme Court of Canada has stated that the purpose of exempting advice or recommendations is "to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice". It interpreted the term "advice" to include an expression of opinion on policy-related matters and also found that policy options prepared in the course of the decision-making process fall within the meaning of "advice or recommendations."[16] The leading case in BC on s. 13(1) is *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*,[17] which found that "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action. The BC Court of Appeal also recognized that some degree of deliberative secrecy fosters the decision-making process. Previous OIPC orders have found that a public body is authorized to refuse access to information, not only when it directly reveals advice or recommendations, but also when it would enable an individual to draw accurate inferences about advice or recommendations.[18]

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[15] Order F07-17, 2007 CanLII 35478 (BC IPC), at para 18.

[16] *John Doe v. Ontario (Finance*), 2014 SCC 36, at paras. 34, 43, 46, 47. The Supreme Court of Canada also approved the lower court's views in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC), that there is a distinction between advice and factual "objective information", at paras. 50-52. In Order 01-15, 2001 CanLII 21569 (BC IPC), former Commissioner Loukidelis said that the purpose of s. 13(1) is to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.

[17] 2002 BCCA 665.

[18] See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), at para. 12. See also Order F16-32, 2016 BCIPC 35 (CanLII). Order F15-52, 2015 BCIPC 55 (CanLII), also discusses the scope and purpose of s. 13(1).

[20] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in the court decisions and orders cited above.

City's submission

[21] The City applied s. 13(1) to portions of a January email and a February email.[19] Given my finding below that s. 17(1) applies to the withheld information in the January email, I need only consider if s. 13(1) applies to the withheld information in the February email.

[22] In the February email, the City withheld comments by the Director of Real Estate Services to the City Manager about a "model pro forma" submitted by a "concerned citizen". The City said that the Director's comments on the pro forma involved the exercise of skill and judgement and his comments were intended to inform the City Manager's response to the citizen.[20]

[23] The withheld comments consist of the Director's assessment and expert opinions on the merits of the citizen's analysis. It includes the matters he took into consideration and implications of his opinions. In my view, this withheld information consists of advice to a public body and s. 13(1) applies to it.

Does s. 13(2) apply?

[24] The City argued, without elaborating, that s. 13(2) does not apply to the February email. I agree. Any "factual material" is intertwined with information to which s. 13(1) applies, such that it would not be reasonable to disclose it. As such, I find that s. 13(2)(a) does not apply to the withheld information in this email. I also find that the information does not, for example, consist of a public opinion poll, a feasibility study or other information listed in ss. 13(2)(b)-(m).

Exercise of discretion

[25] The City argued it had exercised its discretion properly in deciding to apply s. 13(1). The February email in question is one of a series of emails between the City and two "concerned citizens" on the CACs in this case.[21] It is clear that the City conducted a line by line review of the emails, disclosing information which would provide the applicant with an understanding of the valuation of the development and how the CACs were arrived at, while also protecting information to which s. 13(1) applies. I am therefore satisfied that the City exercised its discretion properly in this case.

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[19] The emails are on p. 1, an email of February 10, 2012, 11:42 AM, and on p. 8, an email of January 18, 2012, 08:01 PM.

[20] City's initial submission, para. 26. The applicant did not address the City's arguments on s. 13(1).

[21] Pages 1-7 & 13-19. The City withheld these individuals' names and email addresses.

Conclusion on s. 13(1)

[26] I find that s. 13(1) applies to the withheld information in the February email. I also find that s. 13(2) does not.

Harm to financial interests – s. 17(1)

[27] The City relied generally on s. 17(1), as well as on ss. 17(1)(d), (e) and (f), to withhold the information in the pro forma and in some of the emails.[22] These provisions read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[28] Previous orders have noted that ss. 17(1)(a) to (f) are examples of information the disclosure of which may result in harm under s. 17(1). Information that does not fit in the listed paragraphs may still fall under the opening clause of s. 17(1).[23]

Standard of proof for s. 17(1)

[29] The Supreme Court of Canada set out the standard of proof for harms-based provisions in Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner):

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could

[22] The City applied s. 17(1) to information in the emails on pp. 8-12 and the pro forma (pp. 21-23).
[23] See, for example, Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 43.

> reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground ... This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences" … [24]

[30] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[25] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm and that the burden rests with the public body to establish that the disclosure of the information in question could reasonably be expected to result in the identified harm.

[31] I have applied these principles in considering the arguments on harm under s. 17(1).

Pro forma

[32] A pro forma is a financial analysis of a development proposal. It includes the developer's estimated net sales revenue, total square footage of the development, breakdown of costs, developer's profits, residual land value, land lift and CACs payable.[26]

[33] The City first asks a developer to provide a pro forma on a proposed development. City staff then independently verify the information in the pro forma and may ask for more information or require revisions. Once City staff and the developer agree on a final draft of the pro forma (including the estimated land lift), they use it to negotiate the CACs.[27]

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[24] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, at para. 94.

[25] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.

[26] Land lift is the increase in the property value of a site due to re-zoning. CACs typically represent 70-80% of the increase in property value, after taking into consideration development risks, public interest and developer profit. Evans affidavit, para. 18.

[27] Evans affidavit, paras. 20-23. Affidavit of Christopher Vollan, Vice President, Development, for Rize, paras.14-17. Mr Vollan said he was involved in the CAC negotiations in this case and authored some of the emails in dispute.

CACs

[34] CACs are negotiated cash or in-kind contributions that developers provide when Vancouver City Council grants development rights through re-zoning. The City uses CACs to address the increased demand on City facilities that may result from re-zoning and to mitigate the impacts of re-zoning on the surrounding community. Examples of CACs include childcare facilities and park space, and contributions towards libraries, affordable housing and transportation improvements. In 2015, the City approved 42 applications for additional density. This in turn led to $103 million in public benefits.[28]

City's submission

[35] The City said that the withheld information in the pro forma and the emails is sensitive, highly confidential and proprietary financial information about Rize's project, as well as about the City's CAC negotiations with Rize. The City argued that disclosure of this information would cause Rize and other developers to lose confidence in the City's ability to keep their proprietary and sensitive financial information confidential. This would, the City argued, make future negotiations with Rize more difficult, as it would lead Rize and other developers either to refuse to provide pro formas or to provide more general, and thus less useful, information. This would, the City argued, negatively affect the City's ability to negotiate CACs, causing significant financial harm to the City.[29]

Rize's submission

[36] Rize said that developers rely on pro formas in assessing whether or not to proceed with real estate development projects.[30] It said that the re-zoning of land for large real estate projects "is a significant and lengthy undertaking for a developer", involving "years of planning and dialogue with the relevant municipal officials and staff". Rize said that the re-zoning process for The Independent spanned the years from 2007 to 2014. Rize added that negotiations for CACs "can often be a significant sticking point between [the City] and developers given the amount of time involved and the fact that the developer must absorb the cost of the CAC many years before any revenue is generated by the project". Rize said that the practice of providing pro formas to the City has evolved over years, out of an atmosphere of trust and confidentiality. Rize said

[28] Evans affidavit, paras. 11-16; Exhibit E, Evans affidavit, "2015 Annual Report on Community Amenity Contributions and Density Bonusing".
[29] City's initial submission, paras.36-42; Evans affidavit, paras. 30-36.
[30] Rize said it prepared the pro forma in this case using its confidential market and sales data, land appraisal studies it commissioned and various sources of financial information; Vollan affidavit, para. 17.

it would not be willing to divulge its pro formas to the City "without strong assurances of confidentiality".[31]

Analysis and finding

[37] Past orders have said that ss. 17(1)(e) and (f) apply to information about cost projections, land appraisals or financial information to be used in, or relating to negotiations, as well as negotiating techniques, strategies, criteria, positions or objectives.[32] In my view, the withheld information in this case is similar, in that it consists of Rize's financial projections and costs (which the City and Rize used to negotiate the CACs), as well as back and forth discussions between the City and Rize on aspects of the pro forma and their negotiations on the CACs.

[38] The evidence of the City and Rize is that:

- the payment by developers of CACs is voluntary[33]
- the City has no authority to compel developers to provide pro formas[34]
- the pro forma in this case was provided to the City under express assurances of confidentiality[35]
- the pro forma was kept in confidence by the City, which disclosed it only to those few staff who needed access for their jobs[36]
- Rize otherwise discloses its pro formas only to its project lenders and financial partners, under express terms of confidentiality and non-disclosure[37]
- the information in pro formas is important for accurately estimating land lift and in negotiating CACs[38]
- CAC negotiations are conducted in confidence[39]
- the City expects to have dealings with Rize on future projects[40]
- CACs are a "vital tool" for the City to be able to continue providing appropriate amenities and services to its citizens[41]

[31] Rize's initial submission, para. 9; Vollan affidavit, paras. 10-12, 24-36. All quotations are from these paragraphs.
[32] See, for example, Order F10-24, 2010 BCIPC 35 (CanLII); Order F10-34, 2010 BCIPC 50 (CanLII); Order F17-10, 2017 BCIPC 11 (CanLII).
[33] City's initial submission, para. 40; p. 6, "Community Amenity Contributions: Balancing Community Planning, Public Benefits and Housing Affordability", a guide by the Ministry of Community, Sport and Cultural Development (Exhibit F to Evans affidavit).
[34] Vollan affidavit, para. 34; Evans affidavit, para. 40.
[35] Vollan affidavit, paras.19, 22; Evans affidavit, para. 24.
[36] Evans affidavit, para. 24, 26.
[37] Vollan affidavit, para. 20.
[38] Vollan affidavit, para. 34; City's initial submission, para. 42; Evans affidavit, paras. 34-35.
[39] Vollan affidavit, para. 19.
[40] Evans affidavit, paras. 28, 33.
[41] Evans affidavit, para. 14.

[39] I accept that CACs provide significant financial benefits to the City and its citizens, which the City might not otherwise be able to provide. I also accept that detailed and accurate financial information in pro formas promotes the successful negotiation of optimal CACs, in this case and generally.[42]

[40] I am satisfied from the evidence that the pro forma in this case was provided in confidence and that Rize would not have provided the pro forma, if it had not received assurances of confidentiality from the City. I am also persuaded that Rize would not be willing to provide the same level of financial detail to the City in future development proposals, if the City were not able to assure it of confidentiality, both in the receipt of pro formas and the conduct of CAC negotiations. This in turn could harm the City's interests in negotiating optimal CACs with Rize and other developers, and thus the City's ability to provide and pay for amenities and services for its citizens. Taken together, the submissions of the City and Rize satisfy me that disclosure of the withheld information in this case could reasonably be expected to result in financial harm to the City, for the purposes of ss. 17(1)(e) and (f) and, more generally, under s. 17(1).

[41] In arriving at this conclusion, I place considerable weight on the evidence that developers do not have to pay CACs and are not obliged to provide their pro formas to the City as part of negotiations on CACs. I also give significant weight to the evidence that the City relies on CACs to provide amenities and services for its citizens. I recognize that, in return for paying CACs, Rize received a benefit from the City in the form of the re-zoning approval and the prospect of earning profits from its development. However, I accept that the results of the negotiations on the CACs in this case would have been less beneficial to the City if they had been based on less detailed, and thus less helpful, information than was included in the pro forma. For the same reasons, I accept that the City's ability to negotiate optimal CACs in future developments could be harmed by lack of confidentiality and less detailed pro formas. I also note that the disclosed information indicates that the City's opinion is that candid discussions of the financial details in the pro forma in this case assisted the City in achieving a good bargain with Rize in their CAC negotiations.[43]

Exercise of discretion

[42] I am satisfied that the City exercised its discretion properly in this case. As above, it is evident that the City conducted a line by line review of the records and disclosed portions of the emails which summarize how the CACs were arrived at. Moreover, in exercising its discretion, the City considered appropriate

[42] Mr. Vollan said that, with the evolving practice of developers divulging their pro formas to the City, there is a general recognition that there are efficiency gains in the CAC negotiation process; Vollan affidavit, para. 34.
[43] Page 1 of the records in dispute.

factors (*i.e.*, the anticipated harms to its future ability to negotiate CACs) in deciding to withhold information under s. 17(1).

Conclusion on s. 17(1)

[43] In my view, the City has met its burden of proof in this case. For reasons given above, I find that ss. 17(1)(e) and 17(1)(f) and, more generally, s. 17(1), apply to the withheld information. Given this finding, I need not consider the s. 17(1)(d) arguments.

Third-party privacy – s. 22(1)

[44] The City applied s. 22(1) to the names and email addresses of two citizens who corresponded with the City about the CACs. The City disclosed the body of the emails.[44]

[45] I noted above that the applicant has the burden of proof regarding third-party personal information. He did not address this issue in his submission and, on this basis alone, has failed to meet his burden of proof. However, s. 22(1) is a mandatory exception and I will, therefore, consider whether it applies to the names and email addresses.

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

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[45]

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

[44] Pages 1, 3-6, 13, 14, 17-19.
[45] Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

Is the information "personal information"?

[48] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information.[46] 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." The City argued that the withheld information is not contact information, but is personal information as it pertains to "concerned citizens".[47]

[49] I find that the names and email addresses are not contact information but are about identifiable individuals acting in their personal capacity. I find that it is personal information.

Does s. 22(4) apply?

[50] Section 22(4) of FIPPA sets out a number of situations in which disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. The City argued that this provision does not apply.[48] I also see no basis for its application to the withheld information.

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

[51] The next step is to consider whether disclosure of the information in issue is presumed to be an unreasonable invasion of a third party's personal privacy. The City argued that the information does not fall under s. 22(3).[49] I agree that the withheld personal information does not fall under s. 22(3). However, I must still consider the relevant circumstances.

Relevant circumstances – s. 22(2)

[52] In determining whether disclosure of personal information is an unreasonable invasion of third-party personal privacy under s. 22(1) or 22(3), a public body must consider all the relevant circumstances, including those set out in s. 22(2). At this point, any s. 22(3) presumptions that disclosure of the withheld information would be an unreasonable invasion of personal privacy may be rebutted. The City argued that, considering the relevant circumstances, it is clear that disclosure of the names and email addresses would be an unreasonable invasion of these individuals' personal privacy.[50]

[46] See Schedule 1 of FIPPA for these definitions.
[47] City's initial submission, paras. 58, 59.a).
[48] City's initial submission, para. 59.b).
[49] City's initial submission, para. 59.c).
[50] City's initial submission, para. 59.d).

[53] In my view, no relevant circumstances favouring disclosure of the withheld information apply here. For example, disclosure of the citizens' names and email addresses would not promote public scrutiny of the City.

Conclusion on s. 22(1)

[54] I found above that the withheld names and emails are personal information and that s. 22(4) does not apply to them. I also found that the withheld information does not fall within any of the presumed unreasonable invasions of personal privacy in s. 22(3). However, as previous orders have said in similar circumstances, this does not mean that, under s. 22(1), the information can be disclosed without unreasonably invading third-party privacy.[51] I found above that there are no relevant circumstances favouring disclosure of this information. The applicant has not met his burden of proof in this matter. I therefore find that s. 22(1) requires the City to withhold the names and email addresses.

CONCLUSION

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

1. Under s. 58(2)(b) of FIPPA, I confirm that the City is authorized to deny the applicant access to the information it withheld under ss. 13(1) and 17(1).

2. Under s. 58(2)(c), I require the City to refuse the applicant access to the information it withheld under s. 22(1).

[56] The City applied s. 21(1) to the same information it withheld under s. 17(1). Given my finding on s. 17(1), I do not need to consider whether s. 21(1) also applies to this information.

April 26, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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[51] See, for example, Order 00-42, 2000 CanLII 14407 (BC IPC); Order F05-28, 2005 CanLII 30678 (BC IPC); Order F06-13, 2006 CanLII 25573 (BC IPC); Order F17-03, 2017 BCIPC 03 (CanLII).