Office of the Information & Privacy Commissioner for British Columbia

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Order F19-06

CITY OF SURREY

Celia Francis
Adjudicator

February 7, 2019

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Summary: An employee requested his personnel file under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The City of Surrey (City) disclosed many records but also withheld information related to its investigation of his off-duty conduct under several exceptions in FIPPA: ss. 13(1) (advice or recommendations); 15(1) (harm to law enforcement); 16(1) (harm to intergovernmental relations); 17(1) (harm to public body's financial or economic interests); 19(1) (harm to individual or public safety); and 22(1) (harm to third-party privacy). The adjudicator found that ss. 13(1) and 16(1)(b) applied to some of the withheld information. The adjudicator also found that ss. 15(1)(a) and (d), 17(1), 19(1)(a) and (b) and 22(1) did not apply to the remaining withheld information and ordered that the City disclose this information to the employee.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2)(a), 15(1)(a), 15(1)(d), 16(1)(b),17(1), 17(1)(e), 17(1)(f), 19(1)(a), 19(1)(b), 22(1), 22(3)(b), 22(2)(e), 22(2)(f).

INTRODUCTION

[1] This case is about an employee's entitlement to have access to records related to an investigation into his off-duty conduct. In April 2017, the applicant, an employee of the City of Surrey (City), made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for access to his personnel file. The City responded later that month by disclosing 285 pages of records. The City told the employee that it would not give him access to any of its "investigation

materials" under s. 15(1)(a)[1] of FIPPA because the employee was currently under suspension from the workplace "pending further investigation for serious misconduct."[2]

[2] The employee requested a review of the City's decision by the Office of the Information and Privacy Commissioner (OIPC). During mediation by the OIPC, the City identified another 196 pages of records and disclosed 98 pages in full.[3] The City told the employee that it was withholding the remaining 98 pages under these exceptions: ss. 13 (advice or recommendations); 15(1)(a), (d) and (f) (harm to law enforcement); 16(1)(b) (harm to intergovernmental relations); 17(1)(c) and (f) (harm to public body's financial or economic interests); 19(1)(a) and (b) (harm to individual or public safety); and 22 (harm to third-party privacy).[4]

[3] Mediation did not resolve the matter and it proceeded to inquiry. In its initial submission, the City said that it had disclosed another 20 pages to the employee but was still refusing him access to information in the remaining 78 pages under ss. 13, 15, 16, 17, 19 and 22.

[4] The employee did not respond to the City's initial submission but said he relied on his request for review. Except for disputing the application of s. 15(1), his request for review did not address the issues before me in this inquiry.[5]

ISSUES

[5] The issues before me are these:

1. Whether the City is required by s. 22(1) to withhold information.

2. Whether the City is authorized to withhold information under ss. 13(1), 15(1)(a) and (d), 16(1)(b), 17(1) and 19(1)(a) and (b).

[6] Under s. 57(1) of FIPPA, the City has the burden of proof respecting ss. 13, 15, 16, 17 and 19. Under s. 57(2), it is up to the employee to prove that disclosure of personal information about a third party would not be an unreasonable invasion of the third party's personal privacy.

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[1] Harm to law enforcement.
[2] City's letter of April 11, 2017 to the employee.
[3] Pages B1-B98.
[4] Pages C1-C98.
[5] It dwelt mainly on extraneous matters, such as allegations that the City had breached his privacy.

DISCUSSION

Background

[7] In 2013, the City began an investigation into the employee's conduct outside the workplace. The allegations included that the employee had an illegal marijuana grow operation at his residence and that he was illegally diverting electricity from BC Hydro. In autumn 2013, the City suspended the employee, at first with pay and later without, pending the outcome of the investigation. The employee's doctor then told the City the employee was medically unfit to participate in the investigation.

[8] The City's investigation of the employee's off-duty conduct remains open and is on hold until he is medically cleared to participate in the investigation. The employee remains suspended without pay.[6]

Records in dispute

[9] The 78 pages of records comprise the following:

- Notes of a meeting on September 18, 2013 between the City's three representatives, the employee and his two union representatives (meeting notes);
- Three emails to and from the City's representatives (emails);
- A fax cover sheet;
- Grievance submissions, meeting notes, emails and letters between the employee's union and the City (grievance records); and
- Two reports that the City received (reports).[7]

[10] The information in dispute in these records is withheld under ss. 13, 15, 16, 17, 19 and 22.[8]

Section 13(1) – advice or recommendations

[11] Section 13(1) is a discretionary exception which says that a public body "may refuse to disclose to an employee 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 must not refuse to withhold certain types of information under s. 13(1).

[6] City's initial submission, paras. 12-19; Affidavit of Human Resources Director, paras. 3-12.
[7] One report is dated June 2014 and the other is dated July 2014.
[8] Of the 98 pages of records, the City disclosed 20 pages in full and 33 pages in severed form. It withheld 45 pages in full. City's initial submission, para. 11.

[12] The process for determining whether s. 13(1) applies to information involves a number of steps. First, the public body determines whether disclosure of the information would reveal advice or recommendations developed by or for the public body. If it would, the public body must then consider whether the information falls within any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose the information under s. 13(1).[9] 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.[10]

Principles for applying s. 13(1)

[13] The courts have said 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,"[11] recognizing that some degree of deliberative secrecy fosters the decision-making process.[12] They have interpreted the term "advice" to include an expression of opinion on policy-related matters,[13] as well as expert opinion on matters of fact on which a public body must make a decision for future action.[14] They have also found that advice and recommendations include policy options prepared in the course of the decision-making process.[15] Previous 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.[16]

[14] In addition, the BC Supreme Court had this to say about the type of factual information to which s. 13(1) applies:

> ... if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the

[9] Order F16-30, 2016 BCICP 33, para. 18.
[10] Order F07-17, 2007 CanLII 35478 (BC IPC), at para 18.
[11] *John Doe v. Ontario (Finance)*, 2014 SCC 36 [*John Doe*], 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.
[12] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*].
[13] *John Doe*.
[14] *College of Physicians*.
[15] *John Doe*.
[16] 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).

> deliberative process of a public body or if the expert's advice can be inferred from the work product it falls under s. 13(1) ... the compilation of factual information and weighing the significance of matters of fact is an integral component of the expert's advice and informs the decision-making process. Based on the principles articulated in *Physicians*, the documents created as part of a public body's deliberative process are subject to protection.[17]

[15] 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.

Does s. 13(1) apply to the meeting notes and reports?

[16] The City said that s. 13(1) applies to the meeting notes[18] and the reports.[19] It said it gathered and created these records

> … with the objective of making a recommendation as to how the City ought to address the allegations regarding the Applicant. The purpose of these records is to advance the investigation and, if the allegations are substantiated, to inform and recommend to senior management what sanction to impose on the Applicant.[20]

[17] The City added that "[i]mplicit in all of the records is the anticipation that there will be a recommendation regarding the status of the Applicant's employment with the City."[21]

[18] **Meeting notes** – The City's Human Resources Director (HR Director) said that the City met with the employee in September 2013 to gather information from him to assist the City with its investigation into the allegations of improper conduct against the employee. The HR Director said that, ahead of the meeting and in keeping with its usual practice, the City prepared an outline of the areas to be covered and the questions to be asked. The HR Director deposed that these "outlines often reflect the City's questioning and investigation strategy. Sometimes an investigation meeting ends before all of the issues are addressed or all questions answered." At the meeting, the HR Director said, the employee admitted he was growing marijuana but said he was doing so lawfully. At the end of the meeting, the employee was suspended with pay, pending further investigation.[22]

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[17] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)* [*PHSA*], 2013 BCSC 2322, at para. 94.
[18] Pages C11-C35. The City withheld almost all of the information on these pages.
[19] Pages C64-C84. The City withheld these pages in full.
[20] City's initial submission, para. 27.
[21] City's initial submission, para. 28.
[22] Affidavit of Human Resources Director, paras. 21-26.

[19] The HR Director said that the City considers the notes it takes during such meetings "to be confidential evidence that forms part of the City's investigation file, particularly where an investigation has not yet been concluded." The City submitted that the meeting notes "are not simply a transcript of the questions asked and answered. The outlines prepared ahead of time may also be considered a blueprint of the advice and recommendations being advanced by the line and direction of the questioning." The City argued that s. 13(1) thus applies to the meeting notes.[23]

[20] Each of the City's three representatives took notes at the meeting of September 18, 2013 with the employee and his union representatives. Each set of notes begins with the date, time, place and reason for the meeting, a list of the attendees and a typed introductory statement, followed by a series of typed and handwritten questions. The notes include typed and handwritten notes of the employee's answers to the prepared questions and further questions that arose during the meeting. The City disclosed the date, time, place and reason for the meeting and the list of the attendees but withheld the introductory statement and all of the questions and answers.

[21] The City did not explain how disclosure of the meeting notes could reveal its "questioning and investigation strategy" and thus advice or recommendations developed by or for the City. The introductory statement sets out the reason and conditions for the interview and appears straightforward, as do the questions. The record of the employee's answers appears simply to paraphrase or summarize what the employee said he did. There is no assessment, judgement or analysis of the answers by the City's representatives. Any "strategy" in the meeting notes is not evident.

[22] There is no evidence, and the City did not argue, that the three City representatives are "experts", as discussed in *College of Physicians*. Nor is there any evidence that they were asked to provide their opinions on the question on which the City was deliberating, *i.e.*, how to proceed with the employee's employment status. The meeting notes themselves do not contain, and do not indirectly reveal, any opinions, options, expressions of opinion on policy-related matters, analysis, background explanations, implications or considerations of options or any other type of information to which s. 13(1) has been found to apply in past orders.

[23] While the City may have taken the notes as part of its deliberative process, this does not suffice, in my view, to make the information in the meeting notes advice or recommendations under s. 13(1). The disputed information must reveal, directly or by inference, advice or recommendations developed by or for the City. I also note that the City did not point me to, nor could I find, any orders in which s. 13(1) was found to apply to notes of a meeting at which an applicant

[23] City's initial submission, paras. 30, 34.

himself was present. For these reasons, I find that s. 13(1) does not apply to the meeting notes.[24]

[24] **Reports** – The City said that it received information alleging that the employee had built and was operating an illegal marijuana grow operation at his home and that he was illegally diverting and stealing power from BC Hydro to maintain the grow operation. It said, as part of its investigation into the employee's off-duty conduct, it requested two reports regarding the employee's marijuana grow operation, in an attempt to determine if there had been a theft of hydro power at the employee's residence.[25] In the City's view, s. 13(1) applies to the two reports. The City added that factual information from three pages attached to the June 2014 report[26] was "referenced and discussed throughout" the report and that disclosure of the attachment would reveal all or part of the substance of the report itself. The City argued that s. 13(1) also applies to this attachment.[27]

[25] The reports deal with various questions that the City posed to the reports' authors regarding the employee's marijuana grow operation. They include the authors' professional comments, considerations, analysis and findings, together with the basis on which they arrived at their findings. I infer from the material before me that the City considered these reports as part of its deliberative process in deciding how to proceed with its investigation into the employee's conduct, including his employment status.

[26] In my view, the two reports consist of "expert opinion on matters of fact on which a public body must make a decision for future action." Disclosure of the reports would reveal advice or recommendations as previous orders and court decisions have interpreted these terms. I find that s. 13(1) applies to the two reports.[28] I include here the factual information in the body of the reports that the authors compiled and selected, using their skill, judgement and expertise. This factual information is intertwined with the other information and was, in my view, integral to the authors' advice and recommendations.[29]

Section 13(2)(a) – factual material

[27] Section 13(2) states that a public body must not refuse, under s. 13(1), to disclose certain types of information, *e.g.*, "any factual material" (s. 13(2)(a)). The City argued that s. 13(2) does not apply here.[30]

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[24] In Order F18-01, 2018 BCIPC 01 (CanLII), the senior adjudicator arrived at a similar finding regarding questionnaires about an employee's work performance.
[25] Affidavit of senior City employee, paras. 5-10.
[26] Pages C78-C80.
[27] City's initial submission, paras. 31-34.
[28] Order F16-30, 2016 BCIPC 33, came to a similar conclusion about engineering reports, at para. 24.
[29] See *PHSA* as cited earlier.
[30] City's initial submission, para. 36.

[28] Past orders have discussed the difference between "factual material" to which s. 13(2)(a) applies (and which may not be withheld under s. 13(1)) and factual information which may be captured by s. 13(1):

> It is important to recognize that source materials accessed by the experts or background facts not necessary to the expert's advice or the deliberative process at hand would constitute "factual material" under s. 13(2)(a) and accordingly would not be protected from disclosure. However, if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body, or if the expert's advice can be inferred from the work product, it falls under s. 13(1) and not under s. 13(2)(a).[31]

[29] Three pages attached to the June 2014 report[32] consist of printouts of figures and other facts. The City called these "factual records … which are appended to and form part of" the June 2014 report. It said that the information in these pages is "referenced and discussed throughout the main body of the report and their disclosure would reveal all or part of the substance of the report itself." In the City's view, s. 13(1) applies to this attachment.[33] The City did not, however, point to portions of the attachment which would reveal the "substance" of the report or explain how they might indirectly do so.

[30] It is clear that the author of the June 2014 report drew on information in these pages in arriving at his findings. The report shows that he did not, however, compile or select the information in these pages himself but received them, as a discrete package, from the City. These pages do not, in my view, directly or indirectly, reveal any advice or recommendations developed by or for the City. Rather, they are, in my view, "source materials accessed by" the author while drafting his report. I find, therefore, that s. 13(2)(a) applies to them. This means that the City may not withhold them under s. 13(1).

Section 13(3)

[31] Section 13(3) states that s. 13(1) does not apply to information in a record that has been in existence for more than 10 years. The City argued that this section does apply here, although it did not elaborate. [34]

[32] The reports date from mid-2014 and are clearly not older than 10 years. Therefore, I find that s. 13(3) does not apply to these records.

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[31] Order F16-43, 2016 BCIPC 47 (CanLII), at para. 94, with reference to *PHSA*.
[32] Pages C78-C80.
[33] All quotes in this paragraph are from the City's initial submission, para. 34.
[34] City's initial submission, para. 36.

Conclusion on s. 13(1)

[33] I found above that s.13(1) applies to the two reports[35] but not to the meeting notes.[36] I also found that s. 13(2)(a) applies to the three-page attachment to the June 2014 report,[37] so the City may not refuse to disclose it under s. 13(1).

Exercise of discretion

[34] Section 13 is discretionary. This means that the head of a public body must properly exercise its "discretion in deciding whether to refuse access to information, and upon proper considerations."[38] If the head of the public body has failed to exercise discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where "the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations."[39]

[35] The City did not address this issue. However, I note that the City's investigation of the employee is suspended and no final decision has been made about his employment status. There is also no evidence that the City exercised its discretion in bad faith or that it took into account irrelevant or improper factors. I am, therefore, satisfied that the City exercised its discretion properly in this case.

Section 16 – harm to intergovernmental relations

[36] The City said that s. 16(1)(b) applies to a small amount of information in the emails: the name of an individual who sent and received two of the emails; and four sentences.[40] The relevant provisions read as follows:

> 16 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> (i) the government of Canada or a province of Canada;
> …

[35] Pages C64-C84.
[36] Pages C11-C35.
[37] Pages C78-C80.
[38] Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144.
[39] *John Doe*, at para. 52; see also Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 147.
[40] Pages C87, C98, C91. Three of the four sentences are identical.

> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, …

[37] Section 16(1)(b) requires a public body to establish two things: that disclosure would reveal information it received from a government, council or organization listed in s. 16(1)(a) or one of their agencies; and that the information was received in confidence.[41]

Did the City receive information from an "agency"?

[38] The City said that the organizations from which it received the information in question are "agencies" for the purposes of s. 16(1)(a)(i). I cannot name the agencies in question as to do so would reveal withheld information. Guided by past orders, however, I am satisfied that these organizations are "agencies" for the purposes of s. 16(1)(a)(i).

Did the City receive the information "in confidence"?

[39] The City said that it received the information in confidence from the agencies.[42] In Order No. 331-1999,[43] former Commissioner Loukidelis considered the meaning of the phrase "received in confidence." He said there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information. He also set out several relevant circumstances that public bodies should consider in determining if information "was received in confidence."

[40] The City's submission and evidence satisfy me that the appropriate indicators of confidentiality are present. I find as follows:

- Given the subject matter of the information, a reasonable person would regard it as confidential.
- In light of the fact that the City was conducting an investigation into allegations of misconduct against the employee, the records were not prepared for the purpose of public disclosure.
- The records themselves contain no express markers or statements of confidentiality. However, the City provided evidence that it received a call from one of the agencies, in which the caller provided information in confidence.[44] The City also provided evidence that the City and the

[41] Order F17-56, 2017 BCIPC 61 (CanLII) at para. 83; Order 02-19, 2002 CanLII 42444 (BC IPC) at para. 18.
[42] City's initial submission, paras. 110-111; Affidavit of senior City official, paras. 16(c), 21, 24.
[43] Order No. 331-1999, 1999 CanLII 4253 (BC IPC), at pp. 6-9.
[44] Affidavit of senior City official, para. 16(c). The content of the information was provided *in camera*.

> agencies regularly exchange information with a mutual expectation and understanding of confidentiality.[45]

Conclusion on s. 16(1)(b)

[41] I am satisfied that the organizations from which the City received the withheld information are "agencies" for the purposes of s. 16(1)(a)(i). I am also satisfied that the information was "received in confidence" from these agencies. I find, therefore, that s. 16(1)(b) applies to the withheld information at issue.

Exercise of discretion

[42] Section 16(1)(b) is a discretionary exception to disclosure. In my discussion of s. 13(1) above, I set out the principles for assessing a public body's exercise of discretion.

[43] The City did not address this issue. However, there is also no evidence that the City exercised its discretion in bad faith or that it took into account irrelevant or improper factors. I am also mindful of the importance to the City of maintaining good working relationships with the agencies in question, in which sensitive information is regularly exchanged on a confidential basis. I am, therefore, satisfied that the City exercised its discretion properly in this case.

Standard of proof for harms-based exceptions – ss. 15, 17 and 19

[44] Sections 15, 17 and 19 are harms-based exceptions. A public body must demonstrate that there is a reasonable expectation of harm on disclosure of withheld information. 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 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

[45] Affidavit of senior City official, paras. 21, 24.

> issue and "inherent probabilities or improbabilities or consequences" ... [46]

[45] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[47] 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.

[46] I have applied these principles in considering the arguments on harm under ss. 15(1), 17(1) and 19(1).

Section 17 – harm to public body's financial or economic interests

[47] The City argued that ss. 17(1), 17(1)(e) and 17(1)(f) apply to the withheld information in the meeting notes,[48] the grievance records,[49] the reports[50] and a fax cover sheet.[51] I found above that s. 13(1) applies to the reports, though not to a three-page attachment to the June 2014 report, *i.e.*, pages C78-C80. Therefore, I need only consider if s. 17(1) applies to the meeting notes, the grievance records, the fax cover sheet and the attachment.

[48] The relevant provisions read as follows:

> 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:
> ...
> (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.

[49] Past orders have held that, even if information fits within subsections (a) to (f), a public body must also prove the harm described in the opening words of

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[46] *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.
[47] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.
[48] Pages C11-C35.
[49] Pages C36-C40, C42-C45, C50-C63, C93-C98.
[50] Pages C64-C84.
[51] Page C45.

s. 17(1) *i.e.*, harm to the financial or economic interests of the public body or the ability of the government to manage the economy.[52] Therefore, the overriding question is whether disclosure of the information could reasonably be expected to harm the financial or economic interests of the City.

Meeting notes, attachment and fax cover sheet

[50] The City said that, while the investigation remains open, it wishes to keep these records confidential, to effectively conduct and conclude its investigation. It argued that the premature disclosure of these records would reveal the evidence it has gathered and its investigation strategy or plans. This would, in turn, harm its financial interests, the City argued, as it would give the employee, any potential witnesses or other individuals the opportunity to do the following:

- alter their responses to questions asked in interviews conducted for the investigation;
- destroy evidence;
- be less inclined to cooperate with the ongoing investigation; and
- take steps to adversely affect or thwart the investigation.[53]

[51] **Meeting notes** – The employee and his union representatives were present at the meeting in question. The employee, therefore, knows the questions and answers contained in the meeting notes. The City did not explain how disclosure of the meeting notes, containing information of which the employee is aware, could reveal its "investigation strategy or plans." Moreover, any strategy and plans are not evident on the face of the meeting notes. The City also did not explain how disclosing its strategy or plans could lead to harm to its financial or economic interests. The City has not persuaded me that s. 17(1) applies to the meeting notes.

[52] **Attachment** – As noted above, the three-page attachment to the June 2014 report contains figures and other facts. The City did not explain how disclosure of the attachment would reveal its "investigation strategy or plans" and any such information is not evident on the face of the attachment. Even if disclosure did have this result, the City did not explain how this could harm its economic or financial interests. I am, therefore, not persuaded that s. 17(1) applies to the attachment.

[53] **Fax cover sheet** – The information withheld under s. 17(1) on this record is the name and work email address of an individual who was copied on the fax. The disclosed information on this page shows that the fax was from the City to the freedom of information office of another public body. The City did not explain how disclosure of the withheld information would reveal its strategy or plans. Nor

[52] See, for example, Order F18-51, 2018 BCIPC 55 (CanLII) and Order F18-49, 2018 BCIPC 53 (CanLII).
[53] City's initial submission, paras. 42-50.

did it explain how this could lead to harm to the City's financial or economic interests. These things are not evident from the information itself. I am not persuaded that s. 17(1) applies to the withheld information in the fax cover sheet.

Grievance records[54]

[54] The City said that the employee's union has represented him throughout the investigation into the employee's conduct.[55] The City said that the withheld information in the grievance records

> … sets out the respective negotiating positions of the City and the Union as they carried out discussions regarding the open issues and grievances relating to the Applicant. The back and forth discussions between the Union and the City to resolve a grievance constitute negotiations. The withheld information sets out the positions and, in some cases, the objectives of the parties as they attempted to negotiate settlements of the issues that arose in relation to the Applicant.[56]

[55] The City added that, in each case, once a resolution was reached, "the outcome was communicated to the Applicant directly in writing or to the Union in writing."[57] In the case of one withheld page (C53), the City said that this record reflects an internal discussion between City staff about the City's negotiating strategy and objectives.[58]

[56] The City did not explain how harm to its financial or economic interests might occur on disclosure of the information in the grievance records. For example, it did not say how disclosure of the withheld information would weaken the City's bargaining position in any future negotiations with the union and how that would cause the City financial harm. Furthermore, there can be no reasonable expectation that disclosing this information in response to this FIPPA request could cause this type of harm, since the union received or provided the records in question. Thus, the union already knows the information. The City also did not explain how disclosure might interfere with its ability to achieve its objectives in future negotiations with some other body.

[57] The City also argued that confidentiality is necessary for the effectiveness of negotiations and efficient resolution of labour relations between the City and the union and that the City's future negotiating position and relationship with the

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[54] Pages C36-C40, C42-C45, C50-C63, C93-C98.
[55] City's initial submission, para. 54.
[56] City's initial submission, para. 62.
[57] It also said that copies of all of the resolution and outcome records have been disclosed to the employee in response to his access request.
[58] City's initial submission, paras. 55-60, 64-65; Affidavit of HR Director, paras. 28-37; Affidavit of senior City official, paras. 12-14.

union would be harmed if records of their negotiations were not kept confidential.[59]

[58] I accept that the City and the union find it beneficial to conduct their negotiations in confidence. However, some of the withheld information in the grievance records is the union's presentation of the employee's position or an account of things he has said and done – information the employee provided and knows. It is also reasonable to conclude that the union discussed the issues and the City's position with the employee during negotiations. The grievances have been settled and the employee is aware of the outcomes. He has received copies of the resolution letters, either directly or as a result of his access request. Much of the withheld information summarizes and overlaps with the information in these resolution letters.

[59] In any case, the City's future negotiations with the union on other employees' grievances would involve different issues and circumstances. Negotiation and settlement of these grievances would be based on the factors in those individual cases.[60] The City did not explain how, in light of these factors, disclosure of the withheld information could reasonably be expected to harm its future negotiating position with the union. There is also no evidence from the union on this point.

[60] The City has not persuaded me that disclosure of the withheld information in the grievance records could reasonably be expected to result in harm under s. 17(1).

Conclusion on s. 17(1)

[61] The City has not shown a clear connection between disclosure of the withheld information in the records at issue and the alleged harms contemplated by s. 17(1). It has not, in my opinion, provided "evidence 'well beyond' or 'considerably above' a mere possibility of harm." I find, therefore, that s. 17(1) does not apply to the meeting notes, the grievance records, the fax cover sheet and the attachment.

Section 15 – harm to law enforcement

[62] The City said that ss. 15(1)(a) and 15(1)(d) apply to some of the withheld information. The relevant provisions read as follows:

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

[59] City's initial submission, paras. 67-68, 71-74; Affidavits of HR Director and senior City official.
[60] In Order F17-21, 2017 BCIPC 22 (CanLII), at para. 39, the senior adjudicator expressed a similar opinion.

> (c) harm a law enforcement matter,
> …
> (d) reveal the identity of a confidential source of law enforcement information,
> …
>
> "law enforcement" means
>
> (a) policing, including criminal intelligence operations,
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

Section 15(1)(a) – harm a law enforcement matter

[63] The City said that s. 15(1)(a) applies to the reports[61] and to portions of the emails.[62] In light of my earlier findings,[63] I will only consider whether s. 15(1)(a) applies to the attachment to the June 2014 report and the remaining portions withheld under s. 15(1)(a) in the emails.

[64] The City said that part of its investigation into the employee's off-duty conduct, which it said is still open, included allegations that he had illegally diverted power from BC Hydro and that he possessed a controlled substance. The City said it gathered confidential information from various sources, including the reports, as part of this investigation. The City said that its investigation could reveal "a potential breach of a bylaw or other statutory enactment or criminal conduct" that could "ultimately lead to a penalty or sanction being imposed" and that it would have turned its evidence over to the "appropriate enforcement or policing body" if its investigation had progressed to the point where it had evidence of "criminal or quasi-criminal activity." The City said that there is, therefore, "a direct connection between the City's investigation and one or more law enforcement matters." The City argued that disclosure of the records to the employee or others could reasonably be expected to harm a law enforcement matter, as it would give the employee, any potential witnesses or other individuals the opportunity to do the following:

- alter their responses to questions asked in interviews conducted for the investigation;
- destroy evidence;
- limit their cooperation with the investigation; and

[61] Pages C64-C80.
[62] Pages C87, C90, C91.
[63] I found above that s. 13(1) applies to the reports though not to the attachment to the June 2014 report (pages C78-C80). I also found above that s. 17(1) does not apply to this attachment. I also found that s. 16(1)(b) applies to the name of an individual who sent and received two of the emails and to four sentences in the emails.

- take steps to adversely affect or thwart the investigation.[64]

[65] The City did not specify what "law enforcement matter" it meant could be harmed by disclosure of the information in dispute. It did not say that it considers its own investigation to be a "law enforcement" matter. I understand from its submission and *in camera* evidence, however, that the City likely meant that disclosing the information in dispute could harm a criminal investigation by police.[65] In light of past orders[66] and the definition of "law enforcement" in Schedule 1, I accept that a police investigation would be a "law enforcement" matter.

[66] **Attachment** – The City did not address the attachment specifically. However, it said that the reports include evidence directly related to compliance of the employee's grow operation with "applicable laws."

[67] The City obtained the three-page attachment as a discrete package from another body. The City did not explain how disclosure of the attachment might result in the employee or witnesses doing the things it suggests. It also did not explain how, if they did behave in the way the City suggests, it could reasonably be expected to harm a criminal investigation by police or any other law enforcement matter. The City has not persuaded me that s. 15(1)(a) applies to the attachment.

[68] **Emails** – The City said that the withheld information in the emails annotated with s. 15(1)(a) "relates to a law enforcement matter." It said that disclosure of this information to the employee would harm the "underlying law enforcement matter."[67]

[69] The information withheld under s. 15(1)(a) is the closing sentence at the end of each email. The City did not explain how the information in question even relates to law enforcement, let alone how disclosing it could reasonably be expected to harm "a law enforcement matter," "underlying" or otherwise. It merely asserted that such harm could occur.

[70] The withheld information in these emails is about the employee and is similar in character to information, both in the emails and elsewhere, that was disclosed to the employee. Any harm to a law enforcement matter from disclosure is not, in my view, evident from the information itself. The City has not persuaded me that s. 15(1)(a) applies to the withheld information in the emails.

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[64] City's initial submission, paras. 85-86.
[65] Affidavit of senior City official, paras. 15 and 23.
[66] For example, Order F05-24, 2005 CanLII 28523 (BC IPC).
[67] City's initial submission, para. 87.

Section 15(1)(d) – reveal identity of confidential source

[71] The City argued that s. 15(1)(d) applies to the reports,[68] portions of the fax cover sheet[69] and portions of the emails.[70] In light of my earlier findings,[71] I will only consider if s. 15(1)(d) applies to the attachment to the June 2014 report and to the portions of the fax cover sheet that are annotated with s. 15(1)(d).

[72] The City submitted that the subject matter of the information withheld under s. 15(1)(d) is "clearly law enforcement information" or "a law enforcement matter." It also submitted that

> … the evidence surrounding the provision of the law enforcement information in each instance is evidence of a reasonable expectation, and an implied mutual understanding by the respective sources and the City as recipient of the information, that the identities of these sources were considered confidential and would be treated as such by the City. Therefore, the City submits that Section 15(1)(d) applies so as to allow the information to be withheld.[72]

[73] Previous orders have said that, in order to show that s. 15(1)(d) applies, it is necessary to establish that the public body was engaged in "law enforcement" and that the individual in question provided "law enforcement information", in confidence, to the public body.[73] I have taken this approach in assessing the City's arguments.

[74] **Fax cover sheet** – The disclosed information on this page shows that the fax was from the City to the freedom of information office of another public body. The information withheld under s. 15(1)(d) on this record is the name and work email address of an individual who was copied on the fax. The City's evidence is that this "confidential source has provided confidential information to the City from time to time" regarding certain matters.[74]

[75] The City did not explain what, if any information this individual has provided to the City, either in the past or in this particular case. Thus, I cannot determine if any such information was "law enforcement information" and

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[68] Pages C64-C80.
[69] Page C45.
[70] Pages C87, C89 and C91.
[71] I found above that s. 13(1) applies to the reports though not to the attachment to the June 2014 report (pages C78-C80). I also found above that s. 17(1) does not apply to this attachment. I also found that s. 16(1)(b) applies to the same information in the emails to which the City applied s. 15(1)(d).
[72] City's initial submission, paras. 90-102.
[73] For example, Order 00-18, 2000 CanLII 7416 (BC IPC), and Order F18-15, 2018 BCIPC 18 (CanLII).
[74] Affidavit of senior City employee. Some of this evidence was received *in camera*.

whether it was provided in confidence. I was also unable to identify any "law enforcement information" that this individual may have provided in the records themselves. The City has not persuaded me that s. 15(1)(d) applies to this information.

[76] **Attachment** – The City did not specifically address this three-page attachment to the June 2014 report. However, it said the reports include evidence directly related to compliance of the employee's marijuana grow operation with "applicable laws" and disclosing the reports would reveal the identities of individuals who provided information to the City in the form of the confidential reports.[75]

[77] I noted above that this three-page attachment contains figures and other facts which the City provided to the author of the report. The author of the report did not create the attachment or provide the information contained in the attachment. The attachment also does not identify the author of the report. I do not see, and the City did not explain, how disclosure of the attachment could reveal the identity of a confidential source of law enforcement for the purposes of s. 15(1)(d).

Conclusion on s. 15(1)

[78] For reasons given above, I find that ss. 15(1)(a) and (d) do not apply to the information at issue.

Section 19 – harm to individual or public safety

[79] The City said that s. 19(1) applies to some of the withheld sentences in the emails.[76] I found above that s. 16(1)(b) applies to some of the same information.[77] I will, therefore, only consider if s. 19(1) applies to the remainder of the information the City withheld under this section. This provision reads as follows:

> 19 (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> (a) threaten anyone else's safety or mental or physical health, or
>
> (b) interfere with public safety.

[75] City's initial submission, paras. 85 and 96.
[76] Pages C87, C89, C91. The three emails are almost identical and the same information has been withheld in each one.
[77] A sentence in the middle of each email.

Does s. 19(1) apply to the withheld information in the emails?

[80] The City argued that "the nature of the matters discussed in these records provides a reasonable basis on which to conclude that disclosure of the information may cause mental or emotional harm, including anxiety, stress and fear, to third parties, including the third parties identified in the records, for reasons described in the records" and in its evidence. The City added that the employee has demonstrated "disruptive and odd" behaviour in the workplace and at the union office. Based on this, as well as on other submissions and evidence on the employee's behaviour that the City provided on an *in camera* basis, the City argued that "it is reasonable to conclude that there is a real possibility of similar or more serious harm should the withheld information be released to the Applicant."[78]

[81] The City applied s. 19(1) to approximately 15 sentences, which are repeated in each of the three emails. I cannot say much without revealing withheld information. However, I can say that the withheld information consists principally of comments on the employee's actions and expressions of concern about the employee's past and potential future behaviour. It also appears that, in some cases, these comments and concerns arose out of incidents of which the City's affiant had no direct knowledge. For example, the City's affiant deposed that he "was led to believe" that the employee had done something. He also deposed that, in another case, "at some point I became aware" that something had happened involving the employee. He did not explain how he had learned of these things. He also provided evidence based on reports he had received from others of the employee's behaviour which he himself did not witness.[79] The evidence on the actual incidents involving the employee, as well as on the associated concerns, was provided *in camera*. It corresponds to some of the withheld information in the emails.

Section 19(1)(a)

[82] The emails are dated March 2015. Much of the information in the emails originated with individuals who are not identified or who are referred to collectively. The City did not explain how the employee could identify these individuals.

[83] In past orders where s. 19(1)(a) was found to apply, there was evidence that employees had attacked, threatened, stalked or harassed others. In those cases, former Commissioner Loukidelis concluded that disclosure of the withheld information could reasonably be expected to result in the anticipated harm.[80]

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[78] City's initial submission, paras. 118-122; Affidavit of senior City official, paras. 16, 17, 20, 31.
[79] Affidavit of senior City official, para. 16.
[80] In Order 01-01, 2001 CanLII 21555 (BC IPC), for example, former Commissioner Loukidelis had evidence of threats to the safety of third-party abortion service-providers, such as stalking, harassment and physical attacks, including gunshot injuries. In Order 00-02, 2000 CanLII 8819

[84] In this case, the records indicate that there are some issues respecting the employee's employment and his behaviour in the workplace. However, the City did not provide direct evidence that the employee had behaved violently, or even aggressively, in the workplace or elsewhere. In addition, the City did not provide any information on the employee's actions or behaviour since March 2015. To be clear, I am not suggesting that there is any requirement that the City prove that the alleged harm happened in the past in order to meet the standard of harm under s. 19(1). Evidence about the employee's past behaviour, however, provides important and relevant context about the probability of him responding in the way the City alleges. It is a type of evidence that would demonstrate whether the alleged harm is "well beyond the merely possible or speculative." The absence of such information is only one element that I have weighed here.

[85] In this vein, I note that disclosed information in the emails states that, during one workplace incident, the employee was "well behaved" and left the workplace "peacefully." The City also did not explain what it thought the employee might do upon receiving the withheld information. It also did not, even on an *in camera* basis, link disclosure of the withheld information to the anticipated harm under s. 19(1)(a).

[86] Some orders on s. 19(1)(a) have noted that applicants or others might be upset by disclosure of the requested information and that an applicant might be irate, verbally abusive and challenging to deal with, following disclosure. These orders found, however, that these things did not amount to the type of mental distress or anguish that would satisfy the test of a reasonable expectation of harm under s. 19(1)(a).[81]

[87] In this case, it may be that the employee would be upset or challenging to deal with, on reviewing the withheld information. Other individuals might also be upset. The City has not, however, persuaded me that this would satisfy the test of a reasonable expectation of harm under s. 19(1)(a).

Section 19(1)(b)

[88] Orders on s. 19(1)(b) have considered whether disclosure of withheld information could reasonably be expected to interfere with public safety by, for

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(BC IPC), the former Commissioner had evidence that the applicant had been charged with stalking. He concluded in both cases that disclosure of the information at issue could reasonably be expected to result in the anticipated harm to safety or physical or mental health and found that s. 19(1)(a) applied. See also Order F13-25, 2013 BCIPC 32 (CanLII), where the adjudicator had evidence that the applicant had been the subject of criminal charges, including harassment, and found that the public body had made a rational connection between disclosure and a reasonable expectation of harm.

[81] See, for example, Order F16-32, 2016 BCIPC 35 (CanLII), Order F16-04, 2016 BCIPC 4 (CanLII), Order F14-22, 2014 BCIPC 25 (CanLII), Order 01-15 2001 CanLII 21569 (BC IPC),

example, resulting in vandalism and damage to the City of Vancouver's CCTV systems[82] or causing prejudice to BC Ferries' safety and reporting procedures.[83]

[89] The City did not specifically address s. 19(1)(b) or explain how, in its view, disclosure of the withheld information could reasonably be expected to interfere with public safety. It also did not say what it thought the employee might do that relates to the matters in s. 19(1)(b). There is insufficient evidence before me to establish whether and how disclosure of the information at issue could result in harm under s. 19(1)(b).

Conclusion on s. 19(1)

[90] The City's argument and evidence on s. 19(1) are, in my view, speculative and do not rise to the level of a reasonable expectation of the anticipated harms in s. 19(1). The records themselves also do not assist the City with its position. There is, in my view, no basis on which to conclude that disclosure of the withheld information could reasonably be expected to threaten anyone else's safety or mental or physical health or interfere with public safety. The City has not, in my view, provided evidence that is "well beyond" or "considerably above" a mere possibility of harm. I find that s. 19(1) does not apply to the withheld information.

Section 22 – harm to third-party personal privacy

[91] The City withheld some information under s. 22 on four pages.[84] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03, where the adjudicator said this:

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

[82] Order F14-31, 2014 BCIPC 34 (CanLII).
[83] Order F14-19, 2014 BCIPC 22 (CanLII).
[84] One sentence on page C43 (one of the grievance records) and the same 15 sentences withheld under s. 19 in the emails (pages C87, C89 and C91).

> information would be an unreasonable invasion of a third party's personal privacy.[85]

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

Is the information "personal information"?

[93] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information. "Contact information" is defined in Schedule 1 of FIPPA as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."

[94] Former Commissioner Denham adopted the following approach in determining whether information constitutes "personal information":

> I accept that, in order to be personal information, the information must be reasonably capable of identifying a particular individual either alone or when combined with information from other available sources.[86]

[95] The City argued that the withheld information is "opinions about the Applicant expressed by identified or identifiable individuals" and that the information is not contact information. In its view, the withheld information is the "personal information" of the third parties who expressed the opinions and, because the opinions are about the employee, also the personal information of the employee. In its view, the withheld information is about both the third parties and the employee, and none is solely the personal information of the employee.[87]

[96] Past orders have held that opinions about an individual are the personal information of the individual and of the opinion-holder, where the opinion-holder is identified or identifiable.[88]

[97] **Page C43** – This page contains notes of a telephone call between the City and a named union representative whose name the City has disclosed. The City applied s. 22 to nine words that the union representative said about the employee. It is not contact information.

[98] In my view, these nine words do not constitute the union representative's opinion of the employee. For example, he does not say what he thinks or feels about the employee. Nor does he make a qualitative judgement about the

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[85] Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.
[86] Order F13-04, 2013 BCIPC 4 (CanLII) at para. 23.
[87] City's initial submission, paras. 131, 132.
[88] Order F17-01, 2017 BCIPC 1 (CanLII), at para. 48; Order F16-32, 2016 BCIPC 35 (CanLII), at para. 51; Order F14-47, 2014 BCIPC 51 (CanLII), at para. 47; Order F16-19, 2016 BCIPC 21 (CanLII), at para. 23.

employee. Rather, he states a fact about the employee. However, he is identified as making this statement and I accept, therefore, that the personal information pertains both to him and the employee.

[99] **Pages C87, C89 and C91** – The withheld information in these emails originated with a number of third parties. The senders of the emails are identified and, in three places, they say things about the employee. However, the senders are not, in my view, expressing their opinions about the employee. Rather they are expressing concerns about him, in the sense that they are worried or anxious about his past and potential future behaviour. This is information about the state of mind of these identifiable third parties, so I find that it is their personal information. Thus, I am satisfied that the concerns that the senders of the emails expressed about the employee are the personal information of both the employee and the senders.

[100] The rest of the information withheld under s. 22 in the emails also consists of expressions of concern about the employee's past and future behaviour. However, these concerns originated with individuals who are not identified. As noted above in the s. 19(1) discussion, the City did not explain how the employee might be able to identify them. I find, therefore, that this withheld information is solely the personal information of the employee. This means that there are no third-party privacy concerns about this information and I find that s. 22(1) does not apply to it.

Does s. 22(4) apply?

[101] The City argued that this provision does not apply here. I agree that there is no basis for finding that s. 22(4) applies here. The personal information at issue does not, for example, relate to any third party's position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)).

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

[102] The City said that the withheld information falls under s. 22(3)(b).[89] This provision reads as follows:

> 22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> …
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
> ...

[89] City's initial submission, para. 139.

[103] In Order 01-12,[90] former Commissioner Loukidelis said this about the meaning of "law" in s. 22(3)(b):

> Although I do not foreclose the possibility that there may be other kinds of "law" for the purposes of the Act, I consider that "law" refers to (1) a statute or regulation enacted by, or under the statutory authority of, the Legislature, Parliament or another legislature, (2) where a penalty or sanction could be imposed for violation of that law. The term "law" includes local government bylaws, which are enacted under statutory authority delegated by the *Local Government Act*. I also consider that the definition of "regulation" in s. 1 of the *Interpretation Act* offers guidance in identifying things that may - where a penalty or sanction could be imposed for their violation - properly be considered a "law" for the purposes of the Act...[91]

[104] The City said that the focus of its investigation has been whether the employee had an illegal marijuana grow operation at his residence. It said this included the issue of whether he had a licence to grow marijuana and his usage of electricity. It said that if the employee "had not met all of the legal requirements, his actions could constitute violations of various federal, provincial and municipal laws."

[105] Regarding page C43, the City said that s. 22(3)(b) applies as the "personal opinion appears in the context of a discussion regarding the City's investigation and, in particular, a discussion related to BC Hydro information and a criminal record check involving the Applicant."[92] Regarding pages C87, C89 and C91, the City said s. 22(3)(b) also applies "as the personal opinion arises out of the City's investigation of the Applicant and the Applicant's response to the investigation."[93]

[106] I do not accept the City's characterization of its investigation as an "investigation into a possible violation of law." On the contrary, the City's investigation was, in my view, first and foremost a workplace investigation which the City conducted in its capacity as his employer. The whole tenor of the City's submission and the records themselves support the conclusion that the City was investigating the employee's off-duty conduct in relation to his employment, including whether his conduct warranted discipline or dismissal. Indeed, the City itself admitted that it was acting as an employer, "managing an employee relationship and the workplace."[94] The fact that the City's investigation might

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[90] Order 01-12, 2001 CanLII 21566 (BC IPC).
[91] At para. 17.
[92] City's initial submission, para. 140.
[93] City's initial submission, para. 141.
[94] City's initial submission, para. 144.

uncover evidence of possible criminal activity on the part of the employee, which it might refer to the police, does not, in my view, suffice to establish that the City's investigation was into a possible violation of law for the purposes of s. 22(3)(b).

[107] I find support for this view in former Commissioner Loukidelis's conclusion in Order No. 330-1999[95] that workplace investigations do not normally fall under s. 22(3)(b):

> ... One does not normally think of an employment-related disciplinary investigation, with no statutory disciplinary flavour, as involving a "prosecution" of a "violation of law". An employer's contractual right – under an individual employment contract or a collective agreement – to discipline an employee for misconduct is not, in my view, a "law" for the purposes of this section. Nor can I accept the Ministry's apparent invitation to extend s. 22(3)(b), by analogy, to this information. If s. 22(3)(b), given its ordinary meaning, does not apply to the disputed information, I have no authority to force it to fit. Nor does the Ministry.[96]

[108] Similarly, in Order F08-16,[97] I found that a school district's investigation of a teacher under the *School Act* was not an investigation of a possible violation of law under s. 22(3)(b):

> A workplace investigation into employee performance or conduct is not however an investigation into a possible violation of law under s. 22(3)(b). The fact that a workplace investigation involves allegations or evidence which the employer may or must refer to authorities charged with investigating possible violations of law (police, child protection officials or occupational, professional or other licensing authorities) does not transform the employer's workplace investigation into a direct or proxy investigation into a possible violation of law under s. 22(3)(b).[98]

[109] The City did not specify which law or laws it meant for the purposes of s. 22(3)(b). From its submission on s. 15(1)(a), I infer these laws may include the *Criminal Code*.[99] However, it is the role of the police and BC's Crown Prosecution Service to investigate and prosecute violations of the *Criminal Code*. There is no evidence that they have enlisted the City's help in any criminal investigation into the employee's activities. The City's submission did not give me any assistance

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[95] Order No. 330-1999, 1999 CanLII 4600 (BC IPC).
[96] At p. 12.
[97] Order F08-16, 2008 CanLII 57359 (BC IPC).
[98] Order F08-16, 2008 CanLII 57359 (BC IPC) at para. 23.
[99] The City said that the records relate to "conduct that could be criminal" and that it "would have turned its findings over to the appropriate enforcement or policing body should the investigation have progressed to the point where the City had evidence of criminal or quasi-criminal activity." City's initial submission, paras. 82-83; Affidavit of senior City official, para. 11.

in determining what, if any, other laws might be relevant. The City also did not refer me to, nor could I find, any orders in which this type of workplace investigation was found to be an investigation of a possible violation of law. The City has not persuaded me that it was conducting an investigation into a possible violation of law for the purposes of s. 22(3)(b). I find that s. 22(3)(b) does not apply to the information at issue here.

[110] There is also no basis for concluding that any other s. 22(3) presumptions apply here. For example, the withheld information is not about a third party's employment history (s. 22(3)(d)). I find that s. 22(3) does not apply to the withheld information.

Relevant Circumstances

[111] I found that the withheld personal information at issue does not fall under s. 22(3)(b). However, it is still necessary to consider the relevant circumstances in determining whether disclosure of the withheld information would be an unreasonable invasion of third-party privacy.

[112] The City raised the following provisions in s. 22(2):

> 22 (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
> …
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
> …

[113] The City also said the sensitivity of the information is a relevant factor to consider, as are the purpose of the communications and the subject matter of the withheld information. I have also considered whether the employee has a legitimate interest in, and connection to, the withheld information.

[114] **Supplied in confidence - s. 22(2)(f)** – The City provided evidence that the withheld information on page C43 was supplied in confidence.[100] The City added that "most" of the withheld information in the emails[101] is "the opinion information" of a senior City official involved in the employee's case and of "identifiable individuals described in the records."[102] The City said that these individuals' purpose for providing the opinions is described in the records themselves and in the senior City official's affidavit.

[100] City's initial submission, paras. 146-147. Affidavit of senior City official, paras. 18 and 27.
[101] Pages C87, C89, C91.
[102] City's initial submission, paras. 149-150.

[115] In page C43, the union representative (who is identified) and the City are discussing labour relations matters respecting the employee. In his affidavit and in the emails themselves, the senior City official expresses concerns he has about the employee's behaviour.[103] The senior City official is identified in the emails, as is another City official who conveyed the same concerns. Given that the context was a labour relations matter, I accept that these three individuals were supplying this information in confidence. This factor favours withholding the information they provided.

[116] **Financial or other harm - s. 22(2)(e)** – The City said the records and its evidence describe the harm to which third parties might be unfairly exposed. The City's argument on s. 22(2)(e) appears to rely on the notion that the individuals who provided information about the employee are all identifiable. However, only the union representative and the two senders of the emails are identified. They were all acting in an official capacity.

[117] Much of the City's evidence on this point was provided *in camera*[104] and I am, therefore, constrained in what I can say about it. I can, however, say that the City did not explain what "unfair harm", financial or otherwise, the three identified individuals might be exposed to. It also did not explain how any such harm might result from disclosure of the withheld information.

[118] In light of these factors, I do not understand how the three individuals in question might be exposed unfairly to financial or other harm if the withheld information were disclosed. I find that s. 22(2)(e) does not apply to the withheld information.

[119] **Other factors** – The City said that the "purpose and subject matter of the opinions themselves" and "the sensitivity of the information and the context and purpose for the communication of the opinions" are factors favouring non-disclosure of the information to the employee.[105] As above, much of its evidence on this point was *in camera*. It does not elaborate on the City's argument.

[120] The records arose out of labour relations matters involving the employee. I accept that labour relations matters respecting an individual are sensitive issues, certainly as far as outsiders are concerned. However, as noted above the union representative and the two named senior City officials (the senders of the emails) who expressed their concerns about the employee were all acting in their official capacities. The union representative's statement about the employee is neither controversial nor sensitive. The two City officials' concerns relate to the employee's past and potential future behaviour. I accept, therefore, that this

[103] City's initial submission, paras. 149-150; Affidavit of senior City official, paras. 16, 17, 20.
[104] City's initial submission, para.152; Affidavit of senior City official, paras. 16, 17, 20, 31.
[105] City's initial submission, paras. 151, 153; Affidavit of senior City official, paras. 16, 17, 20, 31.

information is sensitive. However, their concerns are not worded in an inflammatory way but are expressed in impartial and professional terms. I can detect no malice behind what the City officials said about the employee. Rather, they appeared to be genuinely concerned about the employee's health. Moreover, some of the information is second-hand. In my view, these factors temper the sensitivity of the information.

[121] **Legitimate interest in, and connection to, withheld information** – Past orders have said that an applicant's legitimate interest in, and connection to, withheld information are factors weighing in favour of disclosure.[106]

[122] It appears that the City collected and compiled the withheld information during its investigation of the employee's off duty conduct with a view to the potential usefulness of this information in making decisions about the employee's employment status. It is clear, both from the records, the submissions and the employee's request for review, that these decisions have had a considerable impact on the employee. The City also passed the information in the emails on to another organization, apparently for that organization's own use.

[123] The employee was involved in the incidents described in the withheld information in the emails and is thus intimately connected with it. In my view, he has a legitimate interest in knowing what the City said about him during its investigation and what it said about him to this other organization. I also consider he has a legitimate interest in, and connection to, what his union representative said about him to his employer.

Conclusion on s. 22(1)

[124] I found above that some of the withheld personal information (concerns about the employee expressed by unidentified individuals) was solely the personal information of the employee. I found that there are, therefore, no third-party privacy concerns respecting this personal information and that s. 22(1) does not apply to it.

[125] I also found that some of the withheld information (*i.e.*, the union representative's statement about the employee) is the personal information of both the employee and the union representative. I also found that the remaining withheld personal information (*i.e.*, the concerns about the employee expressed by the two senders of the emails) is the personal information of both the employee and the two senders. I also found that no s. 22(3) presumptions apply to this information.

[106] See for example, Order F16-46, 2016 BCIPC 51 (CanLII), Order F17-06, 2017 BCIPC 7 (CanLII), Order F14-47, 2014 BCIPC 51 (CanLII), Order F10-37, 2010 BCIPC 55 (CanLII), Order 01-19, 2001 CanLII 21573 (BC IPC).

[126] In determining if disclosure would be an unreasonable invasion of third-party privacy, I considered the following relevant circumstances: whether disclosure of the information would unfairly expose third parties to financial or other harm (s. 22(2)(e)); whether the information was supplied in confidence (s. 22(2)(f)); the sensitivity of the information and the purpose and subject matter of the records; whether the employee has a legitimate interest in, and connection to, the withheld information.

[127] I found that s. 22(2)(e) does not apply but that s. 22(2)(f) does. I also found that the union representative's statement about the employee was not sensitive or controversial. I also found that, while the withheld joint personal information about the employee and the two senders of the emails was sensitive, this sensitivity was tempered by the professional and impartial way in which it was expressed, the second-hand nature of much of the information and the third parties' genuine concern for the employee's health.

[128] I also found that the employee has a legitimate interest in, and connection to, the withheld information, given the impact the City's decisions have had on him. In my view, these factors outweigh any sensitivity of the information and the factor in s. 22(2)(f), as far as the third parties are concerned.

[129] For all these reasons, I find that s. 22(1) does not apply to the information that the City withheld under this section.

CONCLUSION

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

1. Under s. 58(2)(b), I confirm that the City is authorized to refuse the employee access to the following:

    (a) The information withheld under s. 13(1) in the reports (pages C64-C77, C81-C84); and

    (b) The information withheld under s. 16(1)(b) in the emails (pages C87, C89 and C91).

2. Under s. 58(2)(a), I require the City to give the employee access to the following:

    (a) The information it withheld under s. 13(1) in the attachment to the June 2014 report (pages C78-C80) and in the meeting notes (pages C11-C35); and

(b) All of the information it withheld under ss. 15(1)(a), 15(1)(d), 17(1), 19(1)(a), 19(1)(b) and 22(1).

I require the City to give the employee access to this information by March 22, 2019. The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the employee, together with a copy of the records.

February 7, 2019

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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