



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F19-28

CITY OF VANCOUVER

Lisa Siew
Adjudicator

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Summary: Two applicants requested access to records related to themselves and a particular property. The City withheld information in the records on the basis that s. 13(1) (policy advice and recommendations), s. 14 (solicitor client privilege) and s. 22(1) (unreasonable invasion of third party personal privacy) of FIPPA applied. The adjudicator determined that ss. 13(1) and 14 only applied to some of the withheld information and ordered the City to disclose the remainder to the applicants. The adjudicator confirmed the City's decision to withhold information under s. 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 14, 22.

INTRODUCTION

[1] Two applicants jointly requested the City of Vancouver (City) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records related to themselves, a subscription e-newsletter written by them and a particular rental-only housing complex located in Vancouver, BC (the Property). The applicants jointly made two separate access requests to the City for this combined information covering the total period of January 1, 2016 to October 27, 2016.

[2] The City responded to each access request by disclosing some information to the applicants, but withholding other information relying on ss. 13(1), 14, 15(1)(l), 16(1)(b), 17(1), 21 or 22 of FIPPA. The applicants asked the Office of the Information and Privacy Commissioner (OIPC) to review the

City's decisions. Mediation failed to resolve the issues in dispute and the applicants requested the matters proceed to inquiry.

[3] During the inquiry, the City reconsidered its severing of the records and released additional information to the applicants. It provided the applicants with a newly severed copy of the records, and now only refuses access to information under s. 13 (policy advice and recommendations), s. 14 (solicitor client privilege) and s. 22 (unreasonable invasion of third party personal privacy).

ISSUES

[4] The issues I must decide in this inquiry are the following:

1. Is the City authorized to withhold the information in dispute under ss. 13(1) or 14 of FIPPA?
2. Is the City required to withhold the information in dispute under s. 22(1) of FIPPA?

[5] Under s. 57(1), the burden is on the City to prove the applicants have no right of access to all or part of the records in dispute under ss. 13(1) and 14. On the other hand, s. 57(2) places the burden on the applicants to prove disclosure of the information at issue would not be an unreasonable invasion of a third party's personal privacy under section 22(1).

DISCUSSION

Background

[6] The applicants are real estate professionals who posted a listing to sell the Property. The listing advertised the Property as a potential rental/condominium redevelopment opportunity. The applicants also produced and posted an online video about the Property as part of their marketing efforts. The video apparently advertised the potential or opportunity for future development of the Property.

[7] The City became aware of the sales listing and video for the Property and City staff raised concerns that it did not accurately reflect the current zoning for the area. The City says, "under current zoning, redevelopment on the site is restricted and no market housing and no new rental housing is permitted."¹

[8] The City then took various steps to ensure the applicants communicated accurate policy and bylaw information to potential buyers. These steps included contacting the applicants about these concerns and responding to enquiries from

¹ City's submission dated November 27, 2018 at paras. 7-8.

potential buyers and media requests. The City explains that its staff also “considered alternative courses of action that ultimately were not acted on.”² In particular, the City drafted a letter (the Letter) from the Mayor to the Real Estate Council of British Columbia (the Council) about the sales video that it says it never sent.³

[9] The Council investigated the applicants regarding the video and its claims respecting future development. The matter was referred to the Council because of questions asked by a newspaper reporter about the video and the applicants’ marketing of the Property. Ultimately, the Council concluded there was no evidence that the video contained false and misleading statements or misrepresentations concerning real estate.⁴

[10] The marketing of the Property and the Council’s investigation of the applicants are a source of conflict between the applicants and the City. The applicants allege City staff are responsible for instigating the investigation and for publicly defaming them. They are primarily interested in obtaining a copy of the Letter, and any other documents, as proof of the City’s misconduct in these matters.⁵ The City denies all allegations of misconduct.

Records in dispute

[11] The City is withholding information from approximately 33 pages of records. The information in dispute is in individual emails and email chains, mostly involving City employees.⁶

Section 13 – advice or recommendations

[12] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. Previous OIPC orders recognize that s. 13(1) protects “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.”⁷

² City’s submission dated November 27, 2018 at para. 10.

³ The City disclosed information in the records at pp. 84 and 81 of public body file no. 2016-274 that indicates the Letter was a way to lodge a complaint about the sales video.

⁴ Council Investigation and Assessment Report located at Exhibit “E” of applicants’ submission dated January 16, 2019.

⁵ Applicants’ submission dated January 16, 2019 at para. 1 and Exhibit “I.”

⁶ The records responsive to the first access request are referred to as public body file no. 2016-274 and the records related to the second access request are referred to as public body file no. 2016-397.

⁷ Order 01-15, 2001 CanLII 21569 at para. 22.

[13] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. Numerous orders and court decisions have considered the interpretation and meaning of “advice” and “recommendations” under s. 13(1) and similar exceptions in other Canadian jurisdictions.⁸

[14] I adopt the principles identified in those cases for the purposes of this inquiry and have considered them in determining whether s. 13(1) applies to the information at issue. I note, in particular, the following principles from some of those decisions:

- A public body is authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.⁹
- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.¹⁰
- “Advice” usually involves a communication, by an individual whose advice has been sought, to the recipient of the advice, as to which courses of action are preferred or desirable.¹¹
- “Advice” has a broader meaning than the term “recommendations.”¹² The Supreme Court of Canada in *John Doe v. Ontario (Finance)* found that “advice” includes a public servant’s view of policy options to be considered by a decision maker, including the considerations to take into account by the decision maker in making the decision.¹³
- Advice also includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.¹⁴

⁸ See, for example: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College]; Order 02-38, 2002 CanLII 42472; Order F17-19, 2017 BCIPC 20; Review Report 18-02, 2018 NSOIPC 2 at para. 14.

⁹ Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 at para. 19.

¹⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.

¹¹ Order 01-15, 2001 CanLII 21569 at para. 22.

¹² *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 24.

¹³ *Ibid* at paras. 26, 34 and 47.

¹⁴ *College*, *supra* note 8 at para. 113.

- Section 13(1) does not automatically apply to a document simply because it is a draft.¹⁵ The fact that a record is a draft does not necessarily make the entire record advice or recommendations under s. 13(1).¹⁶
- Section 13(1) extends to factual or background information that is a necessary and integrated part of the advice.¹⁷ This includes factual information 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.¹⁸

[15] If I find s. 13(1) applies, I will then consider if any of the categories listed in ss. 13(2) apply. Section 13(2) identifies certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a).

Records and information withheld under s. 13

[16] The information withheld under s. 13(1) is located in individual emails and email chains. This withheld information can be divided into the following categories:

- i. Communications prepared by City staff provided to other City employees for approval or comment, including two versions of the Letter; and
- ii. Email discussions between City employees on a variety of matters related to the Property and the applicants' marketing efforts.

Parties' positions on s. 13

The City's position

[17] The City characterizes the communications prepared by City staff as drafts and relies on *John Doe v. Ontario (Finance)* and Order F15-33 to argue that "draft communications" may be withheld as advice or recommendations, even if they do not lead to a final communicated version.¹⁹ It claims these drafts are evidence of the deliberative process where input was sought and provided on the drafts.

¹⁵ Order 00-27, 2000 CanLII 14392 at p. 6; Order F17-13, 2017 BCIPC 14 at para. 24; Order F17-39, 2017 BCIPC 43 at para. 37; Order 03-37, 2003 CanLII 49216 at paras. 59-60.

¹⁶ Order 00-27, 2000 CanLII 14392 at p. 6 and Order 03-37, 2003 CanLII 49216 at para. 60.

¹⁷ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

¹⁸ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

¹⁹ City's submission dated November 27, 2018 at paras. 27-28.

[18] The City says alternate or final versions of the drafts are included in the records. It submits that comparing different versions of the draft communications or disclosing its employees' comments "would allow the applicants to gain insight into the advice provided and ultimately what advice was accepted or rejected."²⁰ The City also argues that disclosure of the draft communications would defeat the purpose of s. 13 as it would discourage City staff from sharing drafts.

[19] The City also made specific arguments about the Letter. The City submits the entire Letter should be withheld because it was a policy option that the City considered to address the "highly speculative" development concepts in the marketing of the Property.²¹ The City claims the Letter was a proposed, discretionary course of action that could be accepted, rejected, or modified by the Mayor.

[20] The City also claims the Letter's contents consist of its staff using their specific skills and expertise on existing zoning to provide an opinion about the applicants' marketing of the Property.²² As such, the City argues the Letter is similar to investigative reports which qualified as advice under s. 13 in *College of Physicians of British Columbia v. British Columbia (Privacy Commissioner)*.²³ The City says any facts in the Letter are "background and analysis necessary to consider the opinion."²⁴

[21] For the email discussions, the City says its employees provided advice and recommendations on the following topics and issues: the sales listing, current and future policy and bylaws, the response from the applicants, specific communications, a communications strategy, a presentation and City land holdings.²⁵

[22] The City claims that s. 13(2) does not apply to any of the withheld information and any "purely factual statements" have already been disclosed.²⁶

The applicants' position

[23] Most of the applicants' submissions focus on the Letter. The applicants argue that the entire Letter should not be withheld and that it is unlikely that all of this information would qualify as advice and recommendations. They claim that a complaint letter from the Mayor to the Real Estate Council would contain "factual information forming the basis of a formal complaint."²⁷ They note that it would not

²⁰ City's submission dated November 27, 2018 at para. 35.

²¹ City's submission dated January 21, 2019 at paras. 7-9.

²² *Ibid* at para. 12.

²³ *College, supra* note 8.

²⁴ City's submission dated January 21, 2019 at para. 13.

²⁵ City's submission dated November 27, 2018 at para. 32.

²⁶ *Ibid* at para. 38.

²⁷ Applicants' submission dated January 16, 2019 at para. 9.

make any sense for the Mayor to provide the type of advice or recommendations protected under s. 13(1) to the Real Estate Council. The applicants recognize that City staff may have provided suggestions or revisions for the Letter and submit that only this information should have been withheld and not the entire Letter.²⁸

[24] The applicants also dispute the City's claim that disclosing the Letter, or any related information, would allow them to draw accurate inferences about any advice or recommendations. They stress the fact that they have not received any drafts or a final version of the Letter that would allow them to compare different versions of the Letter to draw accurate inferences about any alleged advice or recommendations. In the event a comparison could give rise to accurate inferences, then the applicants say only the latest draft of the Letter should be disclosed to eliminate this concern.

[25] The applicants also argue "the mere fact that a document is an internally exchanged draft does not automatically trigger the application of subsection 13(1)."²⁹ They claim that the City appears to be arguing the entire Letter should be withheld because it was one of several options being considered by City staff. The applicants submit that this is not a proper application of s. 13(1) which requires the withholding of any information within the Letter that reveals advice or recommendations, rather than the entire document itself. They say if the City's position were to be accepted, it would result in entire documents being withheld, even though the document does not contain or reveal any advice or recommendations.³⁰

Analysis and findings on s. 13

Communications prepared by City staff

[26] The communications prepared by City staff consist of two versions of the Letter,³¹ a draft email response to an inquiry from the City's chief housing officer³² and a draft email to the applicants from the City regarding the listing for the Property.³³

²⁸ Applicants' submission dated January 16, 2019 at paras. 14 and 17.

²⁹ *Ibid* at para. 29(h).

³⁰ *Ibid* at paras. 21-22.

³¹ First draft of the Letter located at p. 83 of public body file no. 2016-274. Second draft of the Letter located at pp. 81-82 of public body file no. 2016-274 (info repeated on pp. 15-16 and on pp. 9-10 of public body file no. 2016-397).

³² Email located at p. 44 of public body file no. 2016-274.

³³ Email located at p. 94 of public body file no. 2016-274 (info repeated on pp. 108-109 and 111).

The Letter

[27] For the reasons to follow, I find the entire Letter, including its earlier version, may be withheld by the City under s. 13(1) since it would reveal advice or recommendations developed by a public body. It is apparent from the records that the City considered how to respond to the sales video and discussed a number of options. I accept that City employees planned to recommend that the Mayor send a formal complaint to the Council as a possible option.

[28] I also conclude City employees intended to recommend that the Mayor file the complaint by way of the Letter and its contents. The City disclosed information in the records that confirms City employees considered the Letter to be the appropriate way to complain about the sales video.³⁴ I, therefore, find the Letter was a central part of a deliberative or decision-making process.

[29] In these circumstances, I find the Letter and its contents were a proposed recommendation from City employees to the Mayor on what to do about the sales video and what the Mayor should say to the Council. Based on the context and content of the various versions of the Letter, I find that each version amounts to advice from City employees to the Mayor on what he should communicate to the Council about the issue. It does not matter that each version of the Letter is a draft or that this information was not ultimately considered by the Mayor since each version of the Letter serves the same purpose.

[30] The City exercised its discretion under s. 13(1) to disclose what City staff recommended the Mayor should do (i.e. send the Letter to the Council). However, it withheld information that reveals what City employees intended to advise the Mayor to specifically say in making a complaint to the Council. In my view, this information qualifies as advice or recommendations under s. 13(1). This conclusion is consistent with Order F14-17 that found s. 13(1) applies to correspondence drafted by a public body since the correspondence itself qualified as advice or recommendations developed by the public body about how to respond to an issue.³⁵

[31] I also note that both versions of the Letter contain factual information. I find this factual information is an integral part of the advice and recommendation to the Mayor as to what the complaint letter should specifically say. Therefore, in this instance, I conclude that s. 13(2) does not apply to any of the information withheld from both versions of the Letter.

³⁴ Information found at pp. 84 and 81 of public body file no. 2016-274.

³⁵ Order F14-17, 2014 BCIPC 20 at para. 40. See also, Ontario's Order P-1102, where the adjudicator found that a draft letter qualified as a recommendation from a public servant because the government employee was, by way of the draft, suggesting a particular course of action.

[32] I have considered the applicants' arguments and concerns about withholding the entire Letter. However, in this case, City employees intended to provide the entire Letter as a recommendation to the Mayor on what to do and say in response to the sales video. In this sense, the Letter and what it says is the recommended course of action to be considered by a decision maker. Therefore, in the specific circumstances and context of this case, I am satisfied the City has proven the entire Letter, including its earlier version, should be withheld under s. 13(1).

The draft response

[33] The draft response is an email that a City employee wrote for the assistant director of planning to send to the City's chief housing officer. It was prepared in response to the chief housing officer's questions about zoning information in the sales video.

[34] Previous OIPC orders have found s. 13(1) may apply to information provided in response to a request for advice.³⁶ In this case, I conclude the assistant director sought advice from other City employees. The withheld information consists of a City employee advising the assistant director about the accuracy of the zoning information in the video and recommending what the draft response to the chief housing officer should say. I find most of this information falls under s. 13(1). The draft response is the City employee's recommended reply for the assistant director to give to the chief housing officer. Therefore, I find disclosing the draft response would reveal advice or recommendations developed by a public body.

[35] I also find that the factual information in the draft response is inextricably interwoven and integral to the City employee's advice and recommendation to the assistant director. I, therefore, conclude it is not "factual material" under section 13(2).

The draft email

[36] The City withheld a draft email addressed to the applicants regarding the sales listing for the Property. A City employee drafted the proposed email and sent it to other employees with the instructions "let me know if you have any changes."³⁷ The draft email appears in several email chains between City employees, including a version where some editorial suggestions are made directly within the draft.³⁸ Where it appears in the records, the City withheld the entire draft email, along with the editorial suggestions.

³⁶ Order F07-17, 2007 CanLII 35478 at paras. 27-29.

³⁷ Email disclosed by the City at p. 110 of public body file no. 2016-274.

³⁸ Information located at p. 94 of public body file no. 2016-274 (info repeated on pp. 108-109 and 111).

[37] I find the City cannot withhold the draft email in its entirety as it does not qualify as a recommendation on a proposed course of action to be accepted or rejected by a decision maker.³⁹ Instead, the draft email reflects a decision already made by the City to send an email to the applicants regarding the sales information for the Property. The draft email is the outcome of this decision and the City employee who wrote it was carrying out that decision.

[38] Further, it is not apparent to me what advice or recommendations this record might reveal. Most of the information in the email is factual information, conclusions and requests on a number of items. The City does not explain or identify what specific information in the draft email it believes is advice or recommendations.⁴⁰

[39] As for the minor editorial suggestions to the draft email, I conclude the disclosure of this information would reveal advice or recommendations given by one City employee to another employee. Therefore, this information may be withheld under s. 13(1). This finding is consistent with previous OIPC orders that have found editorial advice and recommendations regarding the content and wording of correspondence or documents may be withheld under s. 13(1).⁴¹

Email discussions

Information that reveals some advice and recommendations

[40] The remaining records consist of emails between various City employees. I find some information in these emails reveal advice or recommendations developed by or for City employees on a variety of matters.

[41] The City withheld information in an email from the City's communications coordinator to other employees about a media request.⁴² I am satisfied the information withheld in this email reveals advice or recommendations about how the City should respond to the media request.

[42] The City also withheld information from an email chain where several employees discuss the sales video. I find some of the withheld information reveals advice and recommendations that City employees gave to each other about an appropriate response to the sales video.⁴³

³⁹ Email located at p. 94 of public body file no. 2016-274 (info repeated on pp. 108-109 and 111).

⁴⁰ I also note that the City disclosed the draft email elsewhere in the records.

⁴¹ Order F14-44, 2014 BCIPC 47 at para. 32 and Order F18-41, 2018 BCIPC 44 at para. 29.

⁴² Public body file no. 2016-274 at p. 73 (info repeated on p. 116).

⁴³ Public body file no. 2016-274 at pp. 60-61).

[43] There are also two separate emails that consist of advice and recommendations between City employees regarding revisions to certain communications.⁴⁴ As noted previously, s. 13(1) may apply to editorial advice and recommendations between public body employees. I am satisfied s. 13(1) applies to this withheld information since it consists of suggested wording and content revisions between City employees about a proposed email and about a revision to the Letter.

[44] The records also include an email from a City employee to other employees seeking feedback on the response she has decided to send regarding an inquiry about rezoning.⁴⁵ The City withheld the response and some suggested changes by another employee. I find the other employee's suggested changes reveals advice about what to include in the response.⁴⁶

Information that does not reveal any advice or recommendations

[45] There are a number of emails between City employees that do not reveal any advice or recommendations. For instance, the City is withholding two specific emails in an email chain although they are disclosed elsewhere in the records.⁴⁷ Previous OIPC orders have found that information already disclosed to an applicant cannot be withheld under s. 13(1).⁴⁸ Therefore, I find the City cannot withhold this information under s. 13(1) because the advice and recommendations in these emails were earlier revealed to the applicants.⁴⁹

[46] As well, I found previously that s. 13(1) applies to some information in an email since it reveals an employee's recommendation about a revision to the Letter.⁵⁰ However, there is a small amount of information that precedes this recommendation that only reveals a personal opinion or commentary on a matter. I find the City cannot withhold this information since it does not reveal, nor does it allow for any accurate inferences about, advice or recommendations.

[47] I also find some of the information withheld from several emails between City employees consists of factual information about a number of topics.⁵¹ For example, the information withheld from an email between two City employees

⁴⁴ Public body file no. 2016-274 at p. 108 and at p. 81 (info repeated on p. 14 and on p. 9 of public body file no. 2016-397).

⁴⁵ Public body file no. 2016-274 at pp. 118-119 (info repeated on pp. 121-122).

⁴⁶ This information is in purple-coloured font and it is easily severable from the rest of the record.

⁴⁷ Public body file no. 2016-274 at pp. 60-61.

⁴⁸ Order F12-15, 2012 BCIPC 21 at para. 19 and Order F13-24, 2013 BCIPC 31 at para. 19.

⁴⁹ The City may not withhold the emails dated March 8, 2016 sent at 8:18 am and 8:21 am (emails located at pp. 60-61 of public body file no. 2016-274).

⁵⁰ Public body file no. 2016-274 at p. 81 (info repeated on p. 14 and on p. 9 of public body file no. 2016-397).

⁵¹ These emails are located at public body file no. 2016-274 at p.80 (info repeated on pp. 13-14); p. 227; and pp. 118-119 (info repeated on pp. 121-122 – the information that cannot be withheld on these particular pages is in blue-coloured font).

consists of a request to confirm the accuracy of some information and a factual response to the questions being asked.⁵² I conclude that none of this information is advice or recommendations to a decision maker. It is also not apparent to me, and the City does not explain, how any of the factual information in these emails are a necessary or integrated part of any advice or recommendations.

[48] Information was also withheld in an email between City employees about an upcoming presentation.⁵³ I conclude none of this information reveals any advice or recommendations to a decision maker as it only reveals discussions and information between City employees regarding what work needs to be done for an upcoming presentation.

Section 13(2)

[49] I conclude that none of the exceptions in s. 13(2) apply to the information that I have found would reveal advice or recommendations. In particular, I find that s. 13(2)(a) does not apply because the City already disclosed any factual material in these records.

Exercise of discretion – s. 13

[50] Section 13 is a discretionary exclusion to access under FIPPA and the head of a public body must properly “exercise that discretion in deciding whether to refuse access to information, and upon proper considerations.”⁵⁴ In exercising his or her discretion, the head of the public body must “establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception.”⁵⁵

[51] If the head of the public body has failed to properly 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.”⁵⁶

The parties’ position on exercise of discretion

[52] The applicants claim the additional information disclosed by the City during the inquiry demonstrates how the City applied s. 13 improperly in the first

⁵² Public body file no. 2016-274 at p.80 (info repeated on pp. 13-14).

⁵³ Public body file no. 2016-274 at p. 124.

⁵⁴ Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 144. Also cited in applicant’s submission.

⁵⁵ Order No. 325-1999, 1999 CanLII 4017 at p. 4.

⁵⁶ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52. See also Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 at para. 147.

instance. They point to specific examples where material that was previously redacted under s. 13, but later disclosed, does not reveal any advice or recommendations.

[53] The applicants allege that the City applied s. 13 for the improper motive of hiding contentious and controversial material. They claim the City was not acting in a *bona fide* manner when it redacted the records. They say the City is trying to keep the contents of the Letter and the related records secret because the City is worried that the contents will provide further evidence of the City's misconduct and will support legal action against the City and some of its staff.

[54] The City submits that it properly exercised its discretion and considered a number of factors in applying s. 13 to the records, including the purpose of FIPPA and of s. 13 and its duty to assist and respond to the applicants. The City says that it also considered the applicants' interest in the records, the City's previous practices, prior OIPC decisions, the age, nature and sensitivity of the records, and any harm to the City or any third parties if the records were released.⁵⁷

[55] The City also says it exercised its discretion appropriately by disclosing additional information, previously withheld under s. 13, in preparation for this inquiry and given the passage of time. The City cites Order F18-03 as an example of where additional disclosure of information by a public body was found to be evidence of a proper exercise of discretion.

[56] In response to the applicants' allegations, the City explains that it was still actively cooperating with the Council's investigation when the applicants made their access requests. The City notes that the Council had yet to make a decision regarding the applicants' sales video; therefore, at that time, the City was considering whether it would take any further action and decided to redact a wider scope of records under s. 13(1). Lastly, the City submits that its initial redactions were not improper even though that information was subsequently released to the applicants.

Analysis and findings on exercise of discretion under s. 13(1)

[57] I note that there does not appear to be anything sensitive or controversial about the information withheld under s. 13(1). I also find that some of this withheld information is minor editorial advice or ultimately disclosed throughout the records in one form or another. However, it is not my role to determine whether the City should have exercised its discretion differently to release more information within the disputed records since FIPPA "does not contemplate my substituting the decision I might have reached for the head's decision."⁵⁸ Rather,

⁵⁷ City's submission dated November 27, 2018 at paras. 39-40.

⁵⁸ Order 02-38, 2002 CanLII 42472 at para. 147.

I must be satisfied that the public body considered whether to exercise its discretion and that it did not make its decision in bad faith or for an improper purpose or took into account irrelevant considerations or failed to take into account relevant considerations.⁵⁹

[58] I accept that the City took into account a number of factors in applying s. 13 to the records at issue. Further, I agree with the City that its additional disclosure of information to the applicants demonstrates that it exercised its discretion under s. 13(1) to release information to the applicants.⁶⁰ I am, therefore, satisfied the City reflected on whether to release or withhold information under s. 13(1).

[59] There is also nothing in the records or the parties' submissions that supports concluding the City exercised its discretion in bad faith or for an improper purpose or based on irrelevant considerations. I have considered the applicants' arguments and concerns; however, I am not persuaded that the City relied on s. 13 to hide contentious or controversial information from the applicants knowing that s. 13 did not apply.

[60] For all these reasons, I conclude this is not a situation that requires me to order the head of the City to reconsider the exercise of their discretion in applying s. 13(1) to the records.

Section 14 – solicitor client privilege

[61] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The courts have determined that s. 14 encompasses legal advice privilege and litigation privilege.⁶¹ The City is claiming legal advice privilege over information it has withheld in the disputed records.

[62] Legal advice privilege applies to confidential communications between solicitor and client for the purposes of obtaining and giving legal advice.⁶² The courts and previous OIPC orders accept the following test for determining whether legal advice privilege applies:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential character;
3. the communication must be between a client (or agent) and a legal advisor;
and

⁵⁹ *John Doe v Ontario (Finance)*, 2014 SCC 36 at para. 52.

⁶⁰ Order F18-03, 2018 BCIPC 3 at paras. 19-22.

⁶¹ *College*, *supra* note 8 at para. 26.

⁶² *Ibid* at para. 28.

4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.⁶³

[63] Courts have also found that solicitor client privilege extends to communications that are “part of the continuum of information exchanged” between the client and the lawyer in order to obtain or provide the legal advice.⁶⁴ The protection given to these communications ensures that the party seeking the information is unable to infer the nature and content of the legal advice sought or received.⁶⁵

The records withheld under s. 14

[64] The City withheld one full email and the portion of another email under section 14.⁶⁶ The City provided the partially severed email for my review; however, it chose not to provide the full email. Instead, the City describes the fully withheld email in its submissions and an index of records. During the inquiry, I determined that I did not have sufficient evidence to determine whether s. 14 applied to the fully withheld email.

[65] Upon request, the City provided an affidavit from the lawyer directly involved in the communications.⁶⁷ After reviewing this information, I conclude I now have sufficient information and evidence to make a decision regarding s. 14 without seeing the record.⁶⁸

The parties’ position under s. 14

[66] The City says the withheld information consists of one reference to legal advice in an email chain between City staff and one full email between the City’s

⁶³ *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22. See also Order F17-43, 2017 BCIPC 47 at paras. 38-39.

⁶⁴ *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp Development*] at paras. 40-46.

⁶⁵ *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para 39, quoting *Camp Development* at para. 46.

⁶⁶ Emails located on pp. 194 (full email) and 60 (partial email) of public body file no. 2016-274.

⁶⁷ By way of letter dated June 5, 2019, the City objected to my conclusion that I did not have enough evidence to make a decision respecting s. 14. The City requested that I reconsider this decision and it provided the affidavit under protest. I informed the City that I would not change my decision and accepted the affidavit into evidence for this inquiry.

⁶⁸ Section 44 of FIPPA gives the Information and Privacy Commissioner, and his or her delegate, the power to order production of records over which solicitor client privilege is claimed. See Order F19-21, 2019 BCIPC 23 for a full discussion and analysis on when it would be appropriate for the Commissioner to exercise his or her discretionary power under s. 44.

chief housing officer and the City's solicitor that is a privileged communication. I will discuss the City's submissions and evidence further in my analysis.

[67] The applicants did not make any submissions on s. 14, except to say that they defer to the findings of this inquiry on whether s. 14 properly applies to the redacted information.⁶⁹

Analysis and findings on s. 14

Fully withheld email

[68] The City claims this email is a solicitor-client communication between senior staff and in-house legal counsel. It describes the withheld information as "a written request of a confidential character between the Chief Housing Officer and the City Solicitor expressly seeking legal advice."⁷⁰ It says "this type of record falls within the core of legal advice privilege."⁷¹

[69] The City provided an affidavit from the solicitor directly involved in the communications (City Solicitor). The City Solicitor confirms that the City's description of the email is true and accurate. The City Solicitor explains that, as the City's chief legal advisor, she is responsible for providing legal services and advice to City Council, the City Manager, senior management and staff on various matters involving the City. She attests that the email at issue was from the City's chief housing officer to her in her capacity as legal counsel for the City. She deposes that the email "contains an express request for legal advice" and "no other parties are cc'd on the email."

[70] Taking all this into account, I accept that this email is a confidential communication between the City and its lawyer directly related to the seeking of legal advice. Therefore, legal advice privilege applies and the City may refuse to disclose this information under s. 14.

Partially severed email

[71] The City withheld a portion of an email between the chief housing officer, the assistant director and a number of named individuals. This redacted information was provided for my review. The City does not identify some of these named individuals or their roles, but says the email chain is between "City staff." Some of the withheld information, in combination with other disclosed information, reveals the topic of discussions the City had with its lawyer.

⁶⁹ Applicant's submission dated January 4, 2019 at para. 2.

⁷⁰ City's submission dated November 27, 2018 at para. 53.

⁷¹ *Ibid.*

[72] It is clear that this email is not a communication between a lawyer and client. The City says the withheld information “expressly refers to ongoing discussions with legal counsel and includes a request that falls within the continuum of communications that underlie the legal advice.”⁷² The City submits that “legal advice privilege extends beyond the document that actually communicates or proffers legal advice and attaches broadly to the ‘continuum of communications and meetings’ that underlie the legal advice.”⁷³ It says this continuum “specifically includes factual information provided by the client to counsel for the purpose of obtaining legal advice.”⁷⁴

[73] In this case, I am not satisfied legal advice privilege applies to this information. The fact that a matter is at some point the subject of legal advice does not sufficiently establish that a record that mentions that matter is privileged.⁷⁵ None of the withheld information reveals what City staff and the lawyer may have specifically said to each other when they spoke about the matter.

[74] I have considered the City’s submission that the information withheld from this partially severed email is part of the continuum of communications with its lawyer. However, I am not satisfied that any of this information consists of a continuum of communications between a solicitor and a client.

[75] A “continuum of communications” involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as “history and background from a client” or communications to clarify or refine the issues or facts.⁷⁶ The information redacted from this email does not reveal the information that may have been communicated or exchanged between the City and its lawyer for the purpose of seeking, formulating or providing legal advice. Further, considering how the email is so broadly worded, I also find disclosing this information would not allow someone to accurately infer privileged information, including the specific subject matter of any legal advice.

[76] In conclusion, I find the City is not authorized to withhold any information in this email under s. 14.⁷⁷

Section 22 – unreasonable invasion of third party personal privacy

[77] Section 22(1) of FIPPA provides that a public body must refuse to disclose personal information if its disclosure would unreasonably invade a third party’s

⁷² City’s submission dated November 27, 2018 at para. 52.

⁷³ *Ibid* at para. 50.

⁷⁴ *Ibid*.

⁷⁵ The same finding was made in Order F17-53, 2017 BCIPC 58 at para. 21.

⁷⁶ *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 40-48.

⁷⁷ Email located on p. 60 of public body file no. 2016-274.

personal privacy. Numerous OIPC orders have considered the application of s. 22 and I will apply the same approach in this inquiry.⁷⁸

Personal information

[78] The first step in any s. 22 analysis is to determine if the information is personal information. “Personal information” is defined as “recorded information about an identifiable individual other than contact information.”⁷⁹ Information is about an identifiable individual when it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information.⁸⁰ 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.”⁸¹

[79] The City relied on s. 22 to withhold the name of a “third party home owner” in an email.⁸² The City says this information is clearly personal information and not contact information since the name was not provided in relation to any business purpose. I agree with the City and find this information qualifies as personal information.

Section 22(4) – disclosure not unreasonable

[80] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information or circumstances listed in s. 22(4). If it does, then the disclosure of the personal information is not an unreasonable invasion of a third party’s personal privacy and the information should be disclosed.

[81] The City submits that none of the provisions in s. 22(4) apply to the redacted information. The applicants make no submissions on s. 22(4). I have considered the types of information and factors listed under s. 22(4) and find that none apply.

Section 22(3) – presumptions in favour of withholding

[82] The third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply. Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain

⁷⁸ See, for example, Order F17-39, 2017 BCIPC 43 at paras. 71-138; Order F16-36, 2016 BCIPC 40; Order F14-41, 2014 BCIPC 44 at para. 10.

⁷⁹ See Schedule 1 of FIPPA for this definition.

⁸⁰ Order F16-36, 2016 BCIPC 40 at para. 17.

⁸¹ See Schedule 1 of FIPPA for this definition.

⁸² Page 12 of public body file no. 2016-397. City’s submission dated November 27, 2018 at paras. 60-64.

circumstances would be an unreasonable invasion of third party personal privacy.⁸³

[83] Neither the City nor the applicants discuss whether the third party's name falls under any of the s. 22(3) presumptions. I have considered the presumptions under s. 22(3) and, based on the materials before me, I find that none apply.

Section 22(2) – relevant circumstances

[84] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue in light of all relevant circumstances, including those listed under s. 22(2). Neither the applicants nor the City identified any s. 22(2) factors as a relevant circumstance and I find none apply here.

[85] Instead, as a factor for consideration, the City notes the applicants have not specifically asked for the redacted name. The City also says “the name in this circumstance would be of value” to the applicants, but it does not explain why or in what way it would be of value to them.⁸⁴

[86] The applicants did not make any submissions on s. 22, except to say that they defer to the findings of this inquiry on whether s. 22(1) properly applies to the redacted information.⁸⁵

Conclusion on s. 22

[87] Considering all the relevant circumstances, I am satisfied that disclosing the third party's name to the applicants would unreasonably invade a third party's personal privacy. The disclosure of the third party's name to the applicants would reveal where a particular third party may have lived at one time. I have considered whether there were any factors that weigh in favour of disclosing this personal information to the applicants and could find none. In conclusion, the City must refuse to disclose this name under s. 22(1).

CONCLUSION

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

1. I confirm in part the City's decision to refuse to disclose the information withheld under ss. 13(1) and 14, subject to paragraph 3 below.

⁸³ *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information and Privacy Commissioner (B.C.) et al.*, 2006 BCSC 131 at para. 45.

⁸⁴ City's submission dated November 27, 2018 at para. 63.

⁸⁵ Applicant's submission dated January 4, 2019 at para. 2.

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2. I confirm the City's decision to withhold information under s. 22(1) since the disclosure of this information would be an unreasonable invasion of a third party's personal privacy.
 3. The City is not authorized under ss. 13(1) or 14 to refuse to disclose the information noted in paragraphs 37-38, 45-48 and 76 of this order. The City must disclose this information to the applicants and concurrently copy the OIPC registrar of inquiries on its cover letter to the applicants, along with a copy of the relevant records.

[89] Under s. 59 of FIPPA, the City is required to give the applicants access to the information it is not authorized or required to withhold by September 6, 2019.

July 24, 2019

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F16-68139 & F17-69814