



Order F20-27

CITY OF VANCOUVER

Erika Syrotuck
Adjudicator

June 17, 2020

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Summary: The applicant requested records relating to the Brenhill Land Swap from the City of Vancouver (City). The City withheld some of the information from the responsive records, citing ss. 13(1) (advice or recommendations), 14 (solicitor client privilege) and 22(1) (unreasonable invasion of third party personal privacy). The adjudicator found that the City was authorized to refuse to disclose all of the information in dispute under s. 14 and that ss. 13(1) and 22(1) applied to some but not all of the information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 14 and 22(1).

INTRODUCTION

[1] The applicant requested records relating to the Brenhill Land Swap from the City of Vancouver (City) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). In response, the City provided 270 pages of records, withholding some information under ss. 13(1) (advice and recommendations), 14 (solicitor client privilege) and 22(1) (unreasonable invasion of third party personal privacy). The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the City's decision.

[2] Mediation by the OIPC did not resolve the issues and the applicant requested that the matter proceed to inquiry.

[3] During the inquiry, the City released additional information to the applicant that it previously withheld under ss. 13(1) and 14. The City continued to withhold some information under ss. 13(1), 14 and 22(1).

ISSUES

[4] The issues in dispute are:

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

[5] The burden is on the City to prove that the applicant has no right of access to the information in dispute under ss. 13(1) and 14.¹ The applicant has the burden of proving that disclosure of any personal information in dispute under s. 22(1) is not an unreasonable invasion of a third party's personal privacy.

DISCUSSION

Background

[6] The Brenhill Land Swap was a strategic land swap agreement between the City and a development company called Brenhill Developments Limited (Brenhill).² Brenhill agreed to construct an affordable housing development at 1099 Richards Street which it would then exchange with the City for a property at 508 Helmcken Street. Brenhill planned to build a 36-story tower on the site.

[7] The City says that the Brenhill Land Swap has been the subject of intense media and public scrutiny and that it has received a number of access requests under FIPPA for information relating to it.

Records at issue

[8] The records at issue are 270 pages of various emails and documents, including reports and legal documents relating to the Brenhill Land Swap. Most of the pages have been disclosed to the applicant, and the only information the City is refusing to disclose is within the emails.

Section 13(1) – advice and recommendations

[9] Section 13(1) allows a public body to refuse to disclose advice or recommendations developed by or for a public body. However, s. 13(1) does not apply to certain types of records listed in s. 13(2) or to records in existence for more than 10 years under s. 13(3).

¹ Section 57(1) of FIPPA.

² City's initial submissions, para 5.

[10] This exception protects a public body’s internal decision making and policy making processes while considering a given issue by encouraging the free and frank flow of advice or recommendations.³

[11] “Recommendations” include material relating to a suggested course of action that will ultimately be accepted or rejected by the decision maker.⁴ “Advice” is broader than “recommendations”⁵ and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.⁶ It also includes expert opinion on matters of fact on which a public body must make a decision on future action.⁷

[12] The City applied s. 13(1) to portions of emails on eight pages of the records in dispute. These emails relate to the City’s response to certain news stories and the City’s decision to release certain records relating to the Brenhill Land Swap. The City provided a table explaining its rationale for withholding each portion.⁸ The applicant disputes the City’s application of s. 13(1) and asks that the OIPC review the City’s decision in this regard, but does not elaborate.

Analysis and findings

[13] There are several instances where the information in dispute would reveal advice or recommendations within the meaning of s. 13(1).

[14] First, the City withheld information in some emails that relates to the City’s response to media about the Brenhill Land Swap. One email recommends a specific course of action.⁹ Another portion of an email outlines considerations about a response to a news story.¹⁰ In my view, these emails clearly express advice about how to proceed.

[15] The City also withheld information in emails relating to disclosure of records about the Brenhill Land Swap.¹¹ In these emails, the City’s Director of Access to Information sets out a proposed course of action and asks for input from City managers and lawyers about how she should proceed.

³ Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 22.

⁴ *John Doe v Ontario (Finance)*, 2014 SCC 36 at para. 23. See also Order F19-28, 2018 BCIPC 30 at para. 14.

⁵ *Ibid* at para. 24. See also Order F19-28, 2018 BCIPC 30 at para. 14.

⁶ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, at para. 113.

⁷ *Ibid*.

⁸ Included in the City’s initial submissions.

⁹ Page 2 of the records in dispute.

¹⁰ Page 155 (in part) of the records in dispute.

¹¹ Pages 160, 250, 252 (both withheld portions), 254, 265 (in part) of the records in dispute.

[16] In my view, these emails would reveal advice or recommendations within the meaning of s. 13(1). The City submits that none of these records are of a type listed in s. 13(2) and I agree.

[17] However, the City also withheld some information that does not reveal advice or recommendations.

[18] First, there is one portion of an email that the City withheld which it says recommends a potential course of action about a statement on a news story.¹² The disclosed information shows that the withheld email is in response to a request from the City Manager to prepare a statement on a news story. In my view, the withheld information in no way reveals any advice or recommendations about the City's response to this news story.

[19] In addition, the City says that one portion of an email in dispute under s. 13(1) contains a request for advice or recommendations on a proposed course of action.¹³ However, in my view, this email is a request for direction and does not contain advice or recommendations: there is nothing deliberative about the information contained in this email.

[20] Finally, there are two portions of an email in dispute¹⁴ that the City submits would allow accurate inferences to be drawn about advice or recommendations given by a City employee.¹⁵ In my view, these excerpts describe a set of circumstances but do not reveal advice or recommendations about them. Without more, I do not see how these portions would allow an accurate inference to be drawn about any advice or recommendations.

[21] For these reasons, I am not satisfied that these portions of the City's emails would reveal advice or recommendations within the meaning of s.13(1).¹⁶

[22] I now turn to whether the City is authorized to withhold information in dispute under s. 14.

Section 14 – solicitor client privilege

[23] Section 14 allows a public body to refuse to disclose information that is subject to solicitor client privilege. This exception encompasses both legal advice privilege and litigation privilege. In this case, the City submits that legal advice privilege applies to information on approximately 20 pages of the records in dispute.

¹² Page 151, and again at page 155 of the records in dispute. See City's initial submissions, at para. 30.

¹³ Page 159 of the records in dispute. See City's initial submissions at para. 30.

¹⁴ Page 265 (in part) of the records in dispute.

¹⁵ City's initial submissions at para. 30.

¹⁶ At pages 151, 155 (in part), 159 and 265 (in part) of the records in dispute.

Legal advice privilege

[24] Legal advice privilege does not apply to every communication between a client and lawyer.¹⁷ If the following four conditions are satisfied, then the communications (and papers relating to it) are privileged;

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 his agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.¹⁸

[25] Legal advice privilege extends to communications which do not specifically offer or request advice, but are on the continuum of communications in which a lawyer tenders advice.¹⁹ However, advice given by lawyers on matters outside the solicitor client relationship is not protected.²⁰

[26] The information in dispute under s. 14 is entire email chains, single emails or portions of emails. All are related to the Brenhill Land Swap.

[27] The City did not provide the information at issue under s. 14 for my review. Instead, it provided affidavit evidence from the Assistant Director Regulatory Litigation (Assistant Director), along with a table of records (Table 1).²¹ I decided that this affidavit and the table of records did not contain enough information for me to make a decision about s. 14. Given the importance of solicitor client privilege, I gave the City an additional opportunity to submit evidence.²² The City provided a second affidavit from the Assistant Director, along with a second, more detailed, table of records (Table 2).²³ This information was sufficient for me to make a decision about s. 14.

[28] The Assistant Director is a practicing member of the Law Society of British Columbia and regularly provides legal services and advice to the City.²⁴ The Assistant Director says he personally authored most of the emails from City lawyers, but also gives evidence about some emails written by other lawyers for

¹⁷ *R v B*, 1995 CanLII 2007 (BC SC) at para. 22.

¹⁸ *Ibid.*

¹⁹ *Samson Indian Nation and Band v Canada* 1995 CanLII 3602 (FCA).

²⁰ *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 36.

²¹ Included in the City's initial submissions, dated October 19, 2019.

²² By way of letter, dated April 30, 2020.

²³ Post-reply submissions, dated May 29, 2020.

²⁴ See Affidavit of the Assistant Director dated October 19, 2019 at paras. 2 and 3.

the City.²⁵ He says that he was well aware of the context of the emails written by the other lawyers and was copied or directly consulted on many of them.²⁶ Although it is preferable to have evidence directly from the lawyer involved in a given communication, in the circumstances of this case, I accept that the Assistant Director is in a position to give reliable evidence about his colleagues' communications.

[29] For the reasons that follow, I am satisfied that the email communications that the City refused to disclose under s. 14 are privileged.

[30] I am satisfied that the emails at issue are written communications between a lawyer and client and that they are confidential. I can see from both tables of records that all of the emails or portions of emails at issue include lawyers for the City and City senior management, and in some cases also include staff from the mayor's office. There are no other parties involved.

[31] Further, I am satisfied that the communications directly relate to giving, seeking or formulating legal advice. The Assistant Director explains that he and the other City lawyers provided legal advice within an established solicitor client relationship.²⁷ He confirms that he and other City lawyers, were acting in their capacity as legal counsel and not in a business or managerial capacity.²⁸

[32] After reviewing the second table of records, I am satisfied that the email chains, emails, or portions of emails at issue:

- contain legal advice or relate directly to giving legal advice;
- refer to or would reveal legal advice already given; and/or
- discuss a request for legal advice and the process of formulating legal advice;

[33] In addition, I am satisfied that there are no emails in any email chains that are unrelated to the seeking, formulating or giving of legal advice.

[34] There are two records that bear further comment. The City has withheld portions of two emails sent by its Director, Access to Information.²⁹ I note that City lawyers are either direct recipients or copied on these emails. The Assistant Director says that these emails expressly reference legal advice previously provided by City lawyers.³⁰ I am satisfied that disclosing these records would reveal privileged information.

²⁵ Affidavit of the Assistant Director dated October 19, 2019 at para. 8.

²⁶ Affidavit of the Assistant Director dated October 19, 2019 at para. 9.

²⁷ Affidavit of the Assistant Director dated May 29, 2020 at para. 4.

²⁸ Affidavit of the Assistant Director dated October 19, 2019 at paras. 10 and 11.

²⁹ At pages 252 and 265 of the records in dispute.

³⁰ Affidavit of the Assistant Director date October 19, 2019 at para. 7 and on the entry for page 252 on Table 2.

[35] In summary, I am satisfied that all of the information in dispute under s. 14 is subject to solicitor client privilege.

Section 22

[36] Section 22(1) requires a public body to withhold personal information if its disclosure constitutes an unreasonable invasion of a third party's personal privacy.

[37] The City applied s. 22(1) to a small amount of information on two pages of the records at issue in this inquiry.³¹

[38] On one of these pages, the City withheld the name and email address of a member of the public. The disclosed information on the rest of the page shows that a member of the public contacted the City to ask it questions about the Brenhill Land Swap.

[39] The withheld information on the other page is information the City describes as "personal health information." The disclosed information on this page shows that this information is about a City employee.

[40] The City submits that since the applicant has not made submissions on s. 22, the applicant cannot meet the burden of proving that the information in dispute is not an unreasonable invasion of third party personal privacy.

Personal information

[41] The first step in any s. 22 analysis is to determine if the information in dispute is personal information.

[42] According to Schedule 1 of FIPPA, "personal information" means recorded information about an identifiable individual other than contact information. "Contact information" means 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.

[43] Both the name and email address of the member of the public and the information the City describes as "personal health information" are about an identifiable individual.

[44] None of the information is contact information as defined in FIPPA. In particular, the email address of the member of the public is clearly a personal

³¹ At pages 15 and 150 of the records in dispute.

email address, not one related to a business. Therefore, this information is not contact information because it would not enable this individual to be contacted at a place of business.

Section 22(4)

[45] The next step is to consider whether any of the information in dispute falls into any category in s. 22(4). Section 22(4) sets out a list of circumstances where disclosure is not an unreasonable invasion of a third party's personal privacy. The City submits that none of the circumstances apply here and I agree.

Section 22(3)

[46] Section 22(3) identifies circumstances where the information in dispute is presumed to be an unreasonable invasion of a third party's personal privacy. The City did not specifically submit that any circumstances under s. 22(3) apply.

[47] I do not see how any of the s. 22(3) presumptions apply to the name and email address of the private citizen.

[48] Given that the City describes the personal information in the other email as "personal health information", I considered whether s. 22(3)(a) applies. Section 22(3)(a) states that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

[49] In my view, the personal information at issue in that email does not fall into the ambit of s. 22(3)(a) because it cannot be properly characterized as "medical, psychiatric or psychological". Rather, it is more general information about a person's temporary state of being.

Section 22(2)

[50] Next, I must consider all the relevant circumstances in order to determine whether disclosure of the information at issue would be an unreasonable invasion of a third parties' personal privacy, including those enumerated in s. 22(2).

[51] Neither the City nor the applicant submit that any of the enumerated circumstances in s. 22(2) are relevant.

[52] However, the City submits that the applicant has not specially asked for the information in dispute. This is not a relevant circumstance. Applicants are not required to specifically request each piece of information in dispute.

[53] Past orders have considered the sensitivity of the information in dispute. If the information is sensitive, this can weigh in favour of a finding that s. 22 applies; conversely, if the information is not sensitive, this may favour disclosure.³² In my view, the information the City describes as “personal health information” is innocuous, non-sensitive information. In the circumstances of this case, this favours disclosure.

Finding

[54] With regards to the name and email address of the member of the public, there are no relevant circumstances weighing for or against disclosure. As a result, I find that this information is subject to s. 22(1). This finding is consistent with past orders dealing with names and email addresses of members of the public. For example, in Order F17-19, Adjudicator Francis found that there were no relevant circumstances applying to the name and emails of community members who corresponded with the City. However, she required the City to withhold the information because the applicant did not meet his burden of proof.³³

[55] I found that the “personal health information” was non-sensitive and that this weighs in favour of disclosure. I conclude that disclosing it would not unreasonably invade the third party’s personal privacy.

CONCLUSION

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

1. I confirm the decision of the City, in part, to refuse to disclose the information in dispute under s. 13(1). The City must give the applicant access to the highlighted information on pages 151, 155, 159 and 265 in the copy of the records given to the City along with this order.
2. I confirm the decision of the City to refuse to disclose the information in dispute under s. 14.
3. The City is required to withhold some but not all of the information in dispute under s. 22(1). The City must give the applicant access to the highlighted information on page 150 in the copy of the records given to the City along with this order.
4. The City must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

³² Order F19-38, 2019 BCIPC 43, at para. 161.

³³ Order F17-19, 2017 BCIPC 20, at para. 54. See also Order F18-14, BCIPC 17 at para. 26.

[57] Under s. 59(1), the City of Vancouver must to give the applicant access to the highlighted information by July 30, 2020.

June 17, 2020

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F17-72455