Order F21-15

CITY OF VANCOUVER

Elizabeth Barker
Director of Adjudication

April 14, 2021

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Summary: An applicant made a request to the City of Vancouver under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for records related to the Brenhill land swap transaction. Both the applicant and a third party requested a review of the City's access decision. The adjudicator confirmed, in part, the City's decision to refuse access under s. 13 (advice or recommendations) but ordered the City to disclose other information that had been severed under that exception. The adjudicator also confirmed the City's decision to refuse access under ss. 14 (solicitor client privilege) and 22 (unreasonable invasion of third party personal privacy) but found that s. 21 (harm to third party business interests) did not apply. The adjudicator rejected the applicant's argument that s. 25(1)(b) (public interest override) applies.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2)(m), 14, 21(1), 21(1)(a), 21(1)(b), 21(1)(c), 22(1), 22(2), 22(3), 22(4), 25(1)(b).

INTRODUCTION

[1] A reporter for *The Vancouver Sun* newspaper (applicant) requested the City of Vancouver (City) disclose all records relating to the "Brenhill land swap transaction" under the *Freedom of Information and Protection of Privacy Act* (FIPPA).[1]

[2] Prior to issuing its decision to the applicant, the City provided Brenhill Developments Limited (Brenhill) an opportunity to make representations concerning the information the City was planning to disclose.[2] Brenhill requested that portions of the records be withheld under s. 21 (harm to third party business interests) and s. 22 (unreasonable invasion of third party personal privacy).

[1] May 26, 2017 access request.
[2] Notice was provided in compliance with s. 23 of FIPPA on August 4, 2017

[3] The City notified Brenhill that the City had decided to release the information to the applicant without the redactions Brenhill had requested. In October 2017, Brenhill requested the Office of the Information and Privacy Commissioner (OIPC) review the City's decision.[3]

[4] In November 2018, the City issued its decision to the applicant and disclosed 108 pages of records with some severing under ss. 13 (advice or recommendations), 14 (solicitor client privilege), 17 (harm to public body's financial or economic interests), 21 and 22.[4] The City did not disclose the parts of the records that were still in dispute between the City and Brenhill under ss. 21 and 22.

[5] By the time the City disclosed the records to the reporter, he was no longer an employee of *The Vancouver Sun*. The records were eventually received by a second *Vancouver Sun* reporter, who had taken over handling the access request.

[6] On March 28, 2019, the applicant requested a review of the City's severing and also asserted that s. 25 of FIPPA applies because disclosure of the withheld information is in the public interest.[5]

[7] Mediation did not resolve the issues in dispute between the City and Brenhill or between the City and the applicant and both matters proceeded to this inquiry.

[8] The City subsequently released all the information withheld under s. 17.[6]

Preliminary Issues/Matters

The applicant's standing

[9] Brenhill raises an issue about the applicant's standing that is not listed in the notice of inquiry or the investigator's fact report.

[10] Brenhill submits the first reporter is the applicant, and the second reporter and *The Vancouver Sun* have no standing to make submissions or obtain any order in this inquiry.[7] Brenhill says only the "person" who makes the request can ask the Commissioner to review the City's decision, that the second reporter is not the person who made the request, and *The Vancouver Sun* is a publication

[3] OIPC file F19-78848.
[4] City's November 22, 2018 decision letter and City's initial submission at para. 5.
[5] Applicant's March 28, 2019 request for review. OIPC file F17-71817.
[6] City's initial submission at para. 5.
[7] Brenhill's initial submission at paras. 21-27.

and "not a natural or a statutory person."[8] Brenhill also submits that "any purported 'transfer' by the [first journalist] to [the second journalist] or *The Vancouver Sun* confers no rights under FIPPA and is void and of no legal effect. Neither [the second journalist] nor Postmedia is an applicant in this inquiry."[9]

[11] Brenhill references ss. 4(1) and 52(1) of FIPPA, which say (emphasis added):

> Information rights
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> 4 (1) A ***person*** who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
> …
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> Right to ask for a review
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> 52 (1) A ***person*** who makes a request to the head of a public body, other than the commissioner or the registrar under the *Lobbyists Transparency Act*, for access to a record or for correction of personal information may ask the commissioner to review any decision, act or failure to act of the head that relates to that request, including any matter that could be the subject of a complaint under section 42 (2).
> ...

[12] The City did not say anything in response to Brenhill's argument about the applicant's standing.

[13] The applicant says that the issue of standing is a new issue and outside the scope of the inquiry. Nonetheless, the applicant also says the first reporter submitted the access request while employed as a reporter for *The Vancouver Sun*, which is published by Pacific Newspaper Group, a division of Postmedia Network Inc.[10] The applicant says, "With respect to the naming of *The Vancouver Sun* newspaper rather than Postmedia as Applicant in this inquiry, this naming decision was made by the OIPC, not the Applicant."[11]

[14] The OIPC does not normally allow new issues into an inquiry without prior approval, which Brenhill did not obtain in this case. Despite that, this issue is easily addressed, so I will do so.

[15] The term "person" is not defined by FIPPA. However, s. 29 of the *Interpretation Act* states that "In an enactment…'person' includes a corporation,

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[8] Brenhill's initial submission at para. 28.
[9] Brenhill's reply submission at para. 5.
[10] Applicant's response submission at paras. 5, 7 and 51-54.
[11] Applicant's response submission at para. 55.

partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law".[12] Postmedia Network Inc. is a corporation, and I am satisfied that it is a person for the purposes of making an access request and requesting a review under FIPPA.

[16] I conclude that the actions of the two journalists with regards to the access request and request for review were taken on behalf of their employer. I can see that the City's August 4, 2017 response to the access request is addressed to the first reporter's "postmedia.com" email address. Further, the applicant's request for a review was sent on behalf of *The Vancouver Sun* by its lawyers. I am not persuaded by Brenhill's arguments that the applicant has no standing in this case.

ISSUES

[17] The issues to decide in this inquiry are the following:

1. Is the City required to disclose information under s. 25?
2. Is the City authorized to refuse to disclose information under ss. 13 and 14?
3. Is the City required to refuse to disclose information under ss. 21 and 22?

[18] Section 57 of FIPPA states who has the burden of proof. The City must prove that the applicant has no right to access the information in dispute under ss. 13 and 14, and Brenhill must prove that the applicant has no right of access under s. 21. However, it is the applicant who must prove that disclosure of any personal information about a third party would not be an unreasonable invasion of the third party's personal privacy under s. 22.

[19] FIPPA does not say who has the burden of proving that s. 25 applies. However, previous BC orders have said that it is in the interests of both parties to provide the adjudicator with whatever evidence and argument they have regarding s. 25.[13]

DISCUSSION

Background

[20] The Brenhill land swap transaction was an agreement between the City and Brenhill by which they swapped land. Brenhill is a British Columbia company that owns, develops and operates real estate assets.[14] Brenhill constructed and

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[12] *Interpretation Act*, R.S.B.C. 1996 c. 238.
[13] For example, see: Order 02-38, 2002 CanLII 42472 (BC IPC) and Order F07-23, 2007 CanLII 52748 (BC IPC).
[14] Brenhill's initial submission at para. 8.

turned over to the City an affordable housing project on a property Brenhill owned at 1099 Richards Street. In return, Brenhill received the City's property at 508 Helmcken Street to build a 36 story, mixed use tower.[15] The land exchange contract, related agreements, permits and rezoning bylaws were signed-off several years ago.

[21] The City says that there has been litigation and much public and media scrutiny of the Brenhill land swap transaction.[16] The City says it received a total of 23 access requests for records relating to it.[17]

The Records

[22] The City says that in preparing for the inquiry, and given the passage of time, it reconsidered its decision and disclosed some information it had withheld under ss. 13 and/or 14 and 22.[18]

[23] The City provided me with 108 pages of records, only a portion of which remain in dispute in this inquiry. The information in dispute is in emails and a draft Administrative Report.[19]

Public Interest, s. 25

[24] Section 25 requires public bodies disclose information about a risk of significant harm or when disclosure is clearly in the public interest. Section 25 says:

> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
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> (b) the disclosure of which is, for any other reason, clearly in the public interest.
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> (2) Subsection (1) applies despite any other provision of this Act.
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> …

[25] This s. 25 obligation overrides every other section in FIPPA, including the mandatory exceptions to disclosure found in Part 2 and the privacy protections

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[15] City's initial submission at para. 12.
[16] *Community Assn. of New Yaletown v. Vancouver (City)*, 2015 BCCA 227, leave to appeal to Supreme Court of Canada dismissed, 2015 CanLII 69439 (SCC).
[17] Affidavit of City's Director of Access to Information (Director), at para. 5.
[18] City's initial submission at paras. 18 – 19 and 57. Director's affidavit at para. 25.
[19] The draft Administrative Report is at pp. 18-32 of the records in dispute. Brenhill provided a "Schedule 2 Concordance" to align its page numbers with those the City assigned to each page.

contained in Part 3. Given this, the threshold for proactive disclosure under s. 25 is very high, and it only applies in the clearest and most serious situations.[20]

Parties' submissions

[26] The applicant submits that the City should disclose the information in dispute pursuant to s. 25(1)(b). The applicant says, "The Records relate to a significant proposal for the development of affordable housing in Vancouver and the terms by which a significant piece of public property was disposed of. This is a matter of significant public interest in the city."[21] It adds that because it cannot see the information, it is not able to assess whether that specific information would contribute in a substantive way to the body of information that is already available.

[27] The City submits the information in the records "does not approach the level of magnitude or broader public significance required to engage that section" and it is "plain and obvious on the face" of the records that s. 25 does not apply.[22]

Clearly in the public interest, s. 25(1)(b)

[28] What constitutes "clearly in the public interest" is contextual and determined on a case-by-case basis. A public body must consider whether a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that the disclosure is plainly and obviously in the public interest.[23]

[29] The first question to answer when deciding if s. 25(1)(b) applies is whether the information concerns a matter that engages the public interest. For example, is the matter the subject of public debate or discussion by the media or the Legislature, or does it relate to a systemic problem rather than an isolated situation?

[30] If the information is about a matter that engages the public interest, the next question is whether the nature of the information meets the high threshold for disclosure. The factors to consider include whether disclosure would:

- contribute to educating the public about the matter;

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[20] See, for example, Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3.
[21] Applicant's submission at para. 49.
[22] City's initial submission at paras. 36-37.
[23] For the principles discussed here, see also OIPC Investigation Report F16-02 at pp. 26-27 (https://www.oipc.bc.ca/reports/investigation-reports/) and the OIPC guidance document titled "Section 25: The Duty to Warn and Disclose", December 2018 (https://www.oipc.bc.ca/resources/guidance-documents/).

- contribute in a substantive way to the body of information that is already available;
- facilitate the expression of public opinion or allow the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions.

[31] Based on the content and context provided by the records, I am easily satisfied that the matter addressed by the records is one that engages the public interest. The City's unrefuted evidence is that there has been litigation and much public and media scrutiny of the Brenhill land swap transaction, and the City has received a total of 23 access requests for records relating to it. I also note that this is the sixth OIPC inquiry regarding Brenhill land swap records.[24]

[32] While the matter of the records is one that is of public interest, I cannot see how the specific information that the City refused to disclose meets the required threshold for disclosure under s. 25(1)(b). I do not think it would contribute in any substantive or meaningful way to the information that has already been disclosed elsewhere in the records, or assist the public to better understand what occurred, make more informed political decisions and hold the City to account. The specific information at issue in this case simply does not meet the level of magnitude that would engage s. 25(1)(b) and warrant overriding all other provisions in FIPPA. (The nature of the records and the severed information are described below in the discussion of ss. 13, 14, 21 and 22).

[33] In conclusion, I find that the City is not required to disclose the information in dispute pursuant to s. 25(1)(b).

Advice and recommendations - s. 13

[34] Section 13(1) says that the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[25]

[35] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate

[24] The other five cases were: Orders F20-52, 2020 BCIPC 61 (CanLII); Order F20-47, 2020 BCIPC 56 (CanLII); F20-27, 2020 BCIPC 32 (CanLII); Order F20-04, 2020 BCIPC 04 (CanLII) and Order F20-05, 2020 BCIPC 05 (CanLII).
[25] *John Doe v. Ontario (Finance*), 2014 SCC 36 at paras. 45-51.

inferences about the advice or recommendations.[26] In addition, the BC Court of Appeal in *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner*) [*College*], said that the term "advice" includes "an opinion that involves exercising judgment 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."[27]

[36] The first step in the s. 13 analysis is to determine whether disclosing the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then I must decide if the information falls into any of the categories listed in s. 13(2) which a public body must not refuse to disclose under s. 13(1). Finally, if the records have been in existence for more than ten years, s. 13(3) says that they may not be withheld under s. 13(1). In this case the records are not that old, so s. 13(3) is not called into play.

City's submission

[37] The information the City is refusing to disclose under s. 13(1) are excerpts from emails as well as a draft Administrative Report. The City says that this information does not fall into any of the categories of information listed in s. 13(2).

[38] The City submits that disclosure of the draft Administrative Report would allow a third party to draw accurate inferences as to the advice provided by City staff in the deliberative process that led to the final version.[28] The City provides a copy of the final version of the Administrative Report.[29] The City says that the changes between the draft and final public version of the Administrative Report are substantive. The City says:

> The extent of the changes are evidence in the fact that the body of the Final Report is approximately 1 ½ pages longer than the Draft Report. There are also material differences in the both the subject line and recommendations brought forward that would allow an informed observer to draw conclusions as to advice and recommendations given as to both the structure and terms of the proposal."[30]

[39] The City provides an affidavit from its Director of Access to Information (Director) who says the Administrative Report was intended to provide advice and recommendations to city council at an *in camera* meeting. She says this type of report typically goes through numerous iterative drafts as it is circulated to

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[26] Order 02-38, 2002 CanLII 42472 (BCIPC) and Order F10-15, 2010 BCIPC 24 (CanLII).
[27] *College*, 2002 BCCA 665 at para. 113.
[28] City's initial submission at par. 46.
[29] The Director's affidavit provided the website address for the final version of the report and the City provided a copy of it with its reply submission.
[30] City's reply submission at para. 2.

relevant City departments for comment. She says the draft version at issue here differs in material respects from the final version which has been publically disclosed online.[31]

[40] As for the emails, the City submits they contain City staff's advice and recommendations as well as some opinions that involve the exercise of judgement and skill. The City submits it has "pin point redacted" only the comments that contain advice or recommendations, or would allow an inference to be drawn as to advice or recommendations.[32]

[41] The Director says the portions of the emails that have been withheld under s. 13 consist of internal discussions regarding on-going negotiations, appropriate staff for a particular task, and the authority for a particular course of action.[33] She says the emails are between senior City staff and she identifies who they are.[34] The Director also says:

> I am concerned that if the records containing advice and recommendations were released it could harm the free flow of ideas within the City and prevent staff from raising concerns or proposing courses of action that they believe is in the best interest of the public that may be controversial with certain stakeholders.[35]

Applicant's submission

[42] The applicant says it is unable to assess whether the information would reveal advice to the City because it cannot see the withheld information. The applicant also says that not all information regarding public decision-making reveals advice or recommendations, and s. 13 only applies if the information reveals advice or would permit accurate inferences to be drawn about the content of advice or recommendations. The applicant submits s. 13 does not automatically apply to a draft and it only applies to those parts of a draft which would reveal advice or recommendations.

Findings - emails

[43] I have reviewed the information withheld under s. 13 and all of it is emails between executives in the City's Planning and Development Services, Real Estate Services, Central Area Planning, and Legislative Operations departments. The City has withheld only small excerpts from the emails, and I find that information is as follows:

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[31] Director's affidavit at para. 19.
[32] City's initial submission at paras. 49-52
[33] Director's affidavit at para. 20.
[34] Director's affidavit at para. 21.
[35] Director's affidavit at para. 23.

- Executives' analysis and opinions on various issues pertaining to the City's negotiations with Brenhill;[36]
- An executive's opinion about a pending staffing decision;[37] and
- Executives' analysis and opinion about a proposed course of action or decision regarding building density.[38]

[44] It is apparent that the executives are using their professional expertise in planning and land development to provide analysis and opinions about the matters that the City is deciding. I find that all of this information withheld from the emails is the type of opinion and analysis that the *College* says is "advice" under s. 13(1).

Findings – draft Administrative Report

[45] The City is refusing to disclose any information in a draft version of the Administrative Report although the final version has been disclosed publicly on its website. The City submits that a comparison of the differences between the two versions will reveal what advice and recommendations were provided about the report and its contents.

[46] It is apparent that the City applied s. 13(1) in a blanket fashion to the draft Administrative Report and did not conduct the line-by-line analysis required under FIPPA.[39] This is not the appropriate approach as s. 13(1) does not apply to draft versions of records simply because they are drafts/earlier versions.[40] The usual principles apply and a public body may withhold only the information in a draft/earlier version that would reveal advice or recommendations developed by, or for, a public body or a minister.

[47] The draft Administrative Report in its own right, and without needing to compare it to the final version, contains information that is advice or recommendations. For instance, there are multiple recommendations under the heading "Recommendation". There is also analysis and professional opinion about the recommendations and the factual details and issues that the City's council members are being asked to decide. That is the type of information that *College* said is "advice".

[48] The only information in the draft Administrative Report that I find is not advice or recommendations is headings, page numbers, the date of the

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[36] Records at pp. 55, 56, 58, 60 and 61.
[37] Records at p. 66.
[38] Records at p. 95, with duplicates at pp. 89 and 90.
[39] Order F11-04, 2011 BCIPC 4 (CanLII) at para. 8.
[40] Order 00-27, 2000 CanLII 14392 (BC IPC) at p. 6, Order 03-37, 2003 CanLII 49216 (BC IPC) at paras. 59; Order F14-44, 2014 BCIPC 47 (CanLII) at para. 32; Order F15-22, 2015 BCIPC 36 (CanLII) at para. 23; Order F18-38, 2018 BCIPC 41 (CanLII) at para. 17; Order F17-13, 2017 BCIPC 14 at para. 24; F20-37, 2020 BCIPC 43 at para. 33.

document, who is the contact person, and header and footer information. Section 13(1) does not apply to that type of information.

[49] I am not persuaded by the City's argument that s. 13(1) applies to the draft Administrative Report in its entirety because a comparison to the final version would allow accurate inferences to be made about advice or recommendations. To my mind, the differences between the two versions reveal only that the author(s) of the report changed their mind about what to say and how to structure the report. It is not apparent how the differences between the two versions would allow accurate inferences about what advice or recommendations were given to the author(s) who had the decision-making power about the final structure and content of the report.

[50] Based on my comparison of the two versions of the report, I find that they are almost identical. While I recognize that there are some small differences, for the most part the differences are only in how the information has been arranged on the page and the fact that the final version is more fleshed-out. Thus, almost all of the information that I find is advice or recommendations in the draft version has already been publicly disclosed in the final version. Disclosing information a second time by giving the applicant access to the draft version would not "reveal" that information. Therefore, I find that disclosing that same information again would not reveal advice or recommendations under s. 13(1).[41]

Section 13(2)

[51] I find that the advice and recommendations in the emails does not fall into any of the categories of information in s. 13(2).

[52] However, the fact that some information in the draft version of the Administrative Report is the same as the information in the publicly disclosed version suggests that s. 13(2)(m) applies. Section 13(2)(m) says that the head of the public body must not refuse to disclose under s. 13(1) "information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy."

[53] The City's evidence is that the Administrative Report was intended to provide advice and recommendations to City Council on a particular course of action. It is apparent that after deciding what to do about the matters raised by the Administrative Report, the City posted it online. By doing so, I am satisfied that the City cited that information as a basis for its decision. I find that any information in the draft Administrative Report that is the same as what has been publicly cited online in the final version cannot be withheld under s. 13(1) because s. 13(2)(m) applies.

[41] For similar findings about already revealed information see: Order F20-32, 2020 BCIPC 38 at para. 36; Order F12-15, 2012 BCIPC 21 at para. 19; Order F13-24, 2013 BCIPC 31 at para. 19.

Conclusion, s. 13

[54] In conclusion, I find that the City is authorized to refuse to disclose the information in the emails that it refused to disclose under s. 13(1). However, it is not authorized to refuse to disclose the headings, page numbers, document date, contact person, or header and footer information in the draft Administrative Report because that information is not advice or recommendations under s. 13(1). While I find the rest of the draft Administrative Report contains advice or recommendations, the City is not authorized to refuse to disclose any of that information under s. 13(1) if it has already been disclosed in the final, public version of the report.

Exercise of Discretion

[55] The City submits it properly exercised its discretion under s. 13(1) and it lists the factors it considered.[42] The applicant did not say anything about the City's exercise of discretion.

[56] Section 13(1) is a discretionary exception to disclosure which means that it authorizes, but does not require, a public body to withhold advice or recommendations. When considering whether to withhold information under a discretionary exception, a public body must first determine whether the information fits within one of the discretionary exceptions. If it does, the public body must then decide whether to exercise its discretion in favour of releasing or withholding the information.

[57] If the public body has failed to exercise its discretion, the Commissioner can require it to do so. The Commissioner can also order 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. [43]

[58] Based on the City's evidence, I am satisfied it exercised its discretion, it acted in good faith and it did not consider improper or irrelevant factors.

Solicitor client privilege - s. 14

[59] Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The law is well established that s. 14 of FIPPA encompasses both legal advice

[42] Director's affidavit at para. 24 and City's reply submission at para. 3.
[43] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52 and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at para. 71.

privilege and litigation privilege.[44] The City submits that legal advice privilege applies to the information it is withholding under s. 14.[45]

[60] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking, formulating and giving legal advice. In order for legal advice privilege to apply to the information in dispute under s. 14, the information must reveal:

(i) a communication between solicitor and client;
(ii) which entails the seeking or giving of legal advice; and
(iii) which is intended to be confidential by the parties.[46]

Section 14 records not provided

[61] The City did not provide a copy of the records or parts of records it is refusing to disclose under s. 14 for my review. Instead it provided an *Index of Records - Section 14* (Section 14 Index) which identifies page numbers, dates, parties involved, type and brief description of each record. The City also provides an affidavit from the lawyer working in the City's in-house legal department (Lawyer). The Lawyer says she is a practicing member of the Law Society of BC and she provides legal services and advice to the City's council, senior management and staff on various legal issues involving the City.

[62] The applicant submits that the City's evidence is not sufficient to prove that all of the records withheld under s. 14 are privileged, and I should order the City to provide an unredacted copy of the records or, alternatively, a better description of the records.

[63] The City replies that it has provided sufficient evidence to support its claim of privilege and disclosing any additional details of the records would pose a significant risk of revealing privileged legal advice.[47] It also submits that the fact that a lawyer owes a professional duty as an officer of the Court to ensure that privilege is properly claimed may be considered as a factor in support of a claim of privilege.[48]

[64] The Commissioner has the power pursuant to s. 44(1) of FIPPA to order production of records. However, given the importance of solicitor client privilege to the operation of the legal system, and in order to minimally infringe on that privilege, this office would only order production of records if necessary to adjudicate the issues in the inquiry. And, in any case, before deciding to do that,

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[44] *College, supra* note 28 at para. 26.
[45] City's initial submission at para. 66.
[46] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837.
[47] City's reply submission at para. 4.
[48] City's reply submission at para. 8.

the Commissioner would first give the public body an opportunity to provide additional evidence.

[65] I agree with the following statement in Order F20-16 about the type of evidence need to establish privilege in an inquiry before the Commissioner:

> In addition to a proper description of the records, public bodies must provide evidence to substantiate the privilege claim. It is not enough to merely assert that privilege applies. The evidence may include the very records in dispute, with or without affidavit evidence, or it may be that only affidavit evidence is provided. It is also open to the parties to seek the OIPC's consent to submit evidence *in camera*. While the OIPC has a broad discretion to accept hearsay evidence, ideally, evidence about the communications should come from those with direct knowledge of the communications, who can provide the proper contextual information about the communication, as well as the intentions of the parties to the communication. This makes the evidence more reliable. In addition, it is helpful to have evidence from a lawyer, who as an officer of the court, has a professional duty to ensure that privilege is properly claimed.[49] [citations omitted]

[66] In this case, I find it is unnecessary to order production of the records or request further detail. The City has provided sufficient information to allow me to decide if s. 14 applies. The Section 14 Index contains enough detail to understand the nature of the records, what they communicate and who was involved. Further, the Lawyer deposes that she has personally reviewed the records and the Section 14 Index accurately describes them. She also provides additional details, which will be discussed below. Finally, the parts of the records I can see provide context and additional details about who is communicating.

City's submission

[67] The Lawyer says she has reviewed the Section 14 Index and it accurately describes the records withheld under s. 14, which consist of the following:

- emails between City legal counsel;
- emails from City legal counsel to senior City staff; and
- emails between senior City staff discussing legal advice sought or given and its implications.

[68] The Lawyer says that over the time period of the records, she advised the City on various legal issues relating to the Brenhill land swap. She says she is familiar with all the legal advice sought and given in the records. She identifies the specific emails that she drafted or was a party to (pages 3-7, 34 and 88). She

[49] Order F20-16, 2020 BCIPC 18 (CanLII) at para. 10.

names the City's three other in-house lawyers (all since now retired) who were also party to the communications.

[69] She says that all the people who were party to the communications listed in the Section 14 Index were City employees.

[70] The Lawyer says that the emails she drafted, or was a party to, were sent on a confidential basis. She adds:

> It was my understanding that all emails I drafted, or was a party to, were sent on a confidential basis. I note that I inadvertently copied a City staff member on one of the emails in the email chain described listed at pages 3-7 of the Index of Records - Section 14. I had intended to send this email solely to members of the City legal department. Once I discovered this error, I immediately contacted the City's IT Department and worked with the IT Department to ensure that the email was successfully recalled. While this email was not sent outside of the City, I believed that this action was necessary given the confidential nature of the email.[50]

[71] The Lawyer concludes by saying she believes the records are written communications of a confidential character that are "directly, or within the continuum of communications" between a client and a legal adviser and relate to seeking, formulating or giving legal advice.[51]

Applicant's submission

[72] The applicant submits that the Lawyer's opinion that the criteria for legal advice privilege are made out in this case is inadmissible and should not be accepted at face value because it is an opinion about the application of the law to facts.[52]

[73] The applicant also says that the Lawyer's affidavit contains insufficient factual details to support her opinion. For instance, when the Section 14 Index says the records "relate to the seeking or giving of legal advice" it is unclear if that means the records expressly include advice or a request for legal advice, involve the formulation of advice by counsel, or contain information to be provided to counsel for the purposes of seeking legal advice.[53]

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[50] Lawyer's affidavit at para. 9.
[51] Lawyer's affidavit at para. 10.
[52] Applicant's submission at paras. 28 and 30, citing *Keefer Laundry Ltd. v. Pellerin Milnor Corporation*, 2007 BCSC 899, paras. 9-14.
[53] Applicant's submission at par. 29.

Findings

[74] I have considered the applicant's argument that the Lawyer's opinion is inadmissible and should not be accepted at face value. I have not adopted the Lawyer's opinion as my own. Rather, I have considered what she says about her observations and knowledge of the records, and I accept her evidence about the following:

- Based on her own review of the records, the Section 14 Index accurately describes the records;
- There was an established solicitor client relationship between the City and its lawyers who were involved in the emails, and the lawyers were engaged at that time in providing legal advice about the Brenhill land swap;
- The only people who were party to the emails were City staff and the City's lawyers;
- The Lawyer drafted or was party to the emails on pages 3-7, 34 and 88; and
- The Lawyer understood that the emails she was involved with were sent on a confidential basis.

[75] Based on my own consideration of the Section 14 Index, the records in dispute, including the context they provide, and the Lawyer's evidence, I find that the information withheld under s. 14 reveals:

- direct communications between the City staff and the City's lawyers about legal advice;
- communications between City staff in which they communicate about legal advice the City sought and/or received; and
- communications amongst the City's lawyers and a paralegal about the legal advice requested by, or provided to, the City.

[76] I am also satisfied that all of these communications were intended to be confidential. The Lawyer says that was the intention of her own communications. I also note that the evidence is that the only people who were party to the emails were City staff and the City's lawyers.

[77] In summary, I find that disclosing the information the City withheld under s. 14 would reveal communications between the City and its lawyers about the seeking and giving of legal advice, and those communications were intended to be confidential. The City has met its burden of establishing that the information withheld under s. 14 is protected by legal advice privilege.

Harm to Third Party Business Interests – s. 21(1)

[78] Section 21(1) requires a public body to withhold information the disclosure of which would harm the business interests of a third party. The portions of s. 21(1) that are relevant in this case state:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization,
>
> …

[79] The principles for applying s. 21(1) are well established. The following three elements must be proven in order for s. 21(1) to apply:

- Disclosure would reveal one or more of the types of information listed in s. 21(1)(a);
- The information was supplied, implicitly or explicitly, in confidence; and
- Disclosure of the information could reasonably be expected to cause one or more of the harms in s. 21(1)(c).

Type of information, s. 21(1)(a)

[80] The information that Brenhill submits the City must refuse to disclose under s. 21 is described in its September 5, 2017 letter to the City.[54] Brenhill submits that the information is commercial and financial information of or about Brenhill.

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[54] This letter is at "Schedule 1" of Brenhill's submission. Brenhill also provided "Schedule 2 Concordance" that aligns the City's and Brenhill's different page numbers for the records. The information in dispute under s. 21 is in the City's records at pp. 8, 15, 16, 17, 36, 37, 38, 39, 40, 41, 47, 48, 56, 57, 59, 61, 70 and 78.

[81] The City says all the redactions under s. 21 have been made at the request of Brenhill, and the City only supports Brenhill's application of s. 21 to three paragraphs in a December 14, 2012 email.[55] The City says that the information in these three paragraphs consists of commercial or financial information provided to the City in confidence, but it takes no position on the issue of whether disclosure could reasonably be expected to cause the harms in s. 21(1)(c). The City says Brenhill is in the best position to determine and prove the harm required to meet the burden of proof under s. 21.[56]

[82] The applicant says that Brenhill has provided no evidence, by affidavit or otherwise, to support its assertion that s. 21 applies. It submits that there are no particulars or evidence to demonstrate that the information was supplied in confidence or to support Brenhill's assertions about harm.

[83] FIPPA does not define the terms used in s. 21(1)(a). Past orders have said that "commercial" information relates to commerce, or the buying, selling, exchanging or providing of goods and services, but the information does not need to be proprietary in nature or have an independent monetary or marketable value.[57] Previous orders have found that "financial" information is information about money and its uses, for instance, prices, expenses, hourly rates, contract amounts and budgets.[58]

[84] All the information that Brenhill submits should be withheld under s. 21 is in emails. One email is from Brenhill's president to the City's General Manager of Planning and Development Services.[59] The rest of the emails are communications between City staff only.

[85] The information Brenhill submits should be withheld under s. 21 is information about rent, leases, mortgages, valuation of property and services, and how the Brenhill development project will be completed. I find that this is all financial and/or commercial information because it relates to a commercial arrangement involving the exchange of money, property and services between the City, Brenhill and other third parties and public bodies.

[86] However, not all that information is "of or about" Brenhill. Some of it is of or about the City, as well as other third parties and public bodies.[60] For instance, there is information about the City's internal administrative steps, project

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[55] City's initial submission at para. 22 and 75. The December 14, 2012 email is at pp. 56-57 (repeated at pp. 59 and 61) of the records in dispute.
[56] City's initial submission at para. 22 and 76.
[57] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17.
[58] For example: Order F20-41, 2020 BCIPC 49 at paras. 21-22; Order F20-47, 2020 BCIPC 56 at paras. 100-101; Order F18-39, 2018 BCIPC 42 at para. 19.
[59] At pp. 56-57 (repeated at pp. 59 and 61) of the records.
[60] The information that is not "of or about" Brenhill is on pp. 8, 15-16 (repeat pp. 36-37), 17 (repeat p. 38), 39, 47 (repeat p. 48) and 78.

management, scheduling and staff responsibilities. There is also information about the City's instructions to staff about negotiating lease arrangements with third parties other than Brenhill.

[87] The only information that I find is commercial and/or financial information "of or about" Brenhill is on pages 40, 41, 56-57 (repeated at pages 59 and 61) and 70 of the records.

Supplied in confidence, s. 21(1)(b)

[88] For s. 21(1)(b) to apply, the information that I have found is commercial and financial information must have been supplied, implicitly or explicitly, in confidence. The first step is to decide if the information was "supplied" to the City. The second step is to determine if the information was supplied "in confidence".[61]

Supplied

[89] Brenhill submits that all of the information was supplied to the City, implicitly or explicitly, in confidence.[62] It cites two BC orders which say nothing in the language of s. 21(1)(b) limits it to cases where the information has been supplied by the third party whose information it is, so the fact that information has been supplied to a public body by someone else, and not the third party, does not matter.[63]

[90] I can see that some information in internal City emails on pages 40 and 41 is information that the City could not have known about Brenhill if it had not been provided to the City by an outside entity, presumably Brenhill. I find that information was supplied to the City.

[91] There is also some severed information in the email Brenhill's president sent to the City's General Manager of Planning and Development Services at pages 56-57 (repeated at pages 59 and 61) that I find was supplied to the City.

[92] However, I find that the balance of the information that is about Brenhill is not information that was supplied to the City. It is half a sentence in an email at page 70 between two City executives about the City's workload and timelines. Based on its context and content, I conclude this information was internally generated within the City. Brenhill does not provide any evidence or explanation about the specific information in dispute to show why it believes this information was "supplied" to the City.

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[61] For clarity, I am only considering the commercial and/or financial information "of or about" Brenhill on pages 40, 41, 56-57 (repeated at pages 59 and 61) and 70 of the records.
[62] Brenhill provided submissions but no affidavit evidence.
[63] Brenhill's initial submission at paras. 58-59. Brenhill cites Order 01-26, 2001 CanLII 21580 at para. 29 and Order F13-20, 2013 BCIPC 27 at para. 20.

In confidence

[93] For s. 21(1)(b) to apply, the supplied information must also have been supplied "implicitly or explicitly, in confidence." To establish the element of confidentiality, it must be shown that information was supplied "under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided."[64] Whether the disputed information was supplied in confidence is a question of fact and the test is objective; evidence of only the third party's subjective intentions with respect to confidentiality is not sufficient.[65]

[94] Brenhill's submission does not assert, or demonstrate, that there was an express request or express agreement that the City receive and keep in confidence the information being supplied. The City and Brenhill do not provide any information about what was communicated to, or by, the City when the information was supplied to the City.

[95] I have also considered what the parties' submissions, evidence and the disputed records say about how the supplied information was treated. That can be an indication of what concern, if any, there was to keep the information confidential.

[96] The City employee writing the email on page 40 says the information about Brenhill (it is one sentence only) is being shared "confidentially" with his City colleague. This suggests that the speaker understood the information had been supplied to the City in confidence. I find this information on page 40 was supplied in confidence.

[97] There are no statements about confidentiality related to the balance of the information. However, the context and content of the information in the email Brenhill's president sent to the City satisfies me that it was supplied in confidence.[66] It is information about Brenhill's negotiations with the City. While the email does not expressly say the information is supplied in confidence, it is the type of information that a party to a negotiation would certainly only share with the opposing party in an effort to try and reach a mutually agreeable outcome. Further, Brenhill's senior executive sent the email to a single, senior executive with the City. I find that the information in this email was supplied to the City in confidence.

[98] However, I am not satisfied that the balance of the supplied information was supplied in confidence (it is on page 41). It is about the timing of a step Brenhill was about to take and which by its very nature would become part of the

[64] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 23.
[65] Order F13-20, 2013 BCIPC 27 (Can LII) at para. 22.
[66] This email is at pp. 56-57 (repeated at pp. 59 and 61) of the records.

public record. The fact that this step would occur, and has since occurred, is disclosed elsewhere in the records. That disclosure, plus the fact that the City does not think s. 21 applies, is context that demonstrates the City did not understand the information about the pending step was supplied in confidence. Brenhill provides no evidence or submission specific to this actual information to explain why it asserts it was supplied in confidence. I find that Brenhill's assertion, without any explanation or supporting evidence, fails to establish that this information on page 41 was supplied in confidence.

Harm, s. 21(1)(c)

[99] The standard of proof for s. 21(1) is whether disclosure of the information at issue could reasonably be expected to result in the specified harm. Meeting this standard requires demonstrating that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.[67]

[100] For the sake of thoroughness, I have considered all of the information that Brenhill wants withheld under s. 21, even the information that I found was not supplied in confidence.

[101] Brenhill submits that s. 21(1)(c) applies because disclosure could reasonably be expected to:

> (i) harm significantly Brenhill's competitive position;
> (ii) result in similar information no longer being supplied by Brenhill to the City, when it is in the public interest that similar information continue to be supplied; and/or
> (iii) result in undue financial loss to Brenhill and Brenhill's president and vice president or undue financial gain to other persons or organizations.[68]

[102] Brenhill provides the following explanation about the harm it envisions:

> It could reasonably be expected that the release of the information objected to by Brenhill would be employed in deliberately defamatory publications on the Internet, on Twitter, Facebook, websites, blogs and other media, in which the released information would be presented in a false light, or distorted, manipulated, and taken out of context, thereby causing severe injury to the reputation and hence competitiveness of Brenhill.
>
> Brenhill was in fact the subject of a campaign of deliberate vilification employing outright falsehoods, distortion, manipulation of data, and words taken out of context. This campaign began in March and April of 2017 and

[67] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[68] Brenhill's initial submission at paras. 45 and 71.

> caused, and had the further potential to cause, significant injury and substantial loss, damage and expense to Brenhill.
>
> It is respectfully submitted that serious defamatory injury to reputation would constitute undue financial loss to Brenhill. It is a reasonable inference that Brenhill will probably be subjected again to the publication of defamatory falsehoods on the Internet, by individuals or organizations in blogs, on social media including Twitter, Facebook, Reddit and Instagram, on websites, and in articles and broadcasts in the news media.
> …
> In the instant case, there is the spectre of future distorted and defamatory publications in the mainstream media in print and digital publications on the Internet.
>
> In the circumstances of this case, Brenhill has a valid basis to object to disclosure to an anonymous applicant of information which should be withheld pursuant to FIPPA section 21(1).[69]

[103] I find that what Brenhill says about harm is vague and lacking in the kind of detail that would show how disclosure is linked to a reasonable expectation of harm. For instance, Brenhill does not explain the significance of the specific information at issue and why anyone would care about it. The information seems innocuous and it is almost ten years old, so it is not apparent how it could be used as a tool to harm Brenhill's reputation or financial situation. Brenhill also does not explain, even in broad terms, who it believes would want to use the information in "distorted defamatory publications".[70]

[104] In addition, without some explanation and supporting information, I am not persuaded by Brenhill's argument that the information may be taken out of context and, thus, damage its reputation. Previous BC orders have also found that the argument that information may be taken out of context or misconstrued to be speculative and not persuasive. For instance, in Order F10-06 the adjudicator said:

> In my view it is possible that any information disclosed under FIPPA could, at least in theory, be taken "out of context" by any member of the public. Were this a basis for withholding records, one could easily envision very little information being disclosed by public bodies which are, in many cases, concerned how information might be used and viewed by members of the public. Possible misuse or distortion of material released under FIPPA is not a basis for claiming an exception under s. 21 or any other provision of the legislation for that matter.[71]

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[69] Brenhill's initial submission at paras. 73, 74, 76, 79 and 80.
[70] Brenhill makes no such suggestions about the applicant.
[71] Order F10-06, 2010 BCIPC 9 (CanLII) at para. 129. See also Order F11- 35, 2011 BCIPC 44 (CanLII) at para. 6, Order 22-1994, 1994 CanLL 2990 (BC IPC) at p. 18 and Order F19-39, 2019 BCIPC 44 (CanLII) at paras. 98-100. In *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3

[105] Further, Brenhill's submissions (it did not provide affidavit evidence) do not explain its assertion that disclosure could reasonably be expected to harm significantly its competitive position or result in Brenhill no longer providing similar information to the City, when it is in the public interest that similar information continue to be supplied. There is no evidence of what competitive position or ongoing or pending negotiation Brenhill means. Also, it's reasonable to conclude that there was a significant financial benefit to Brenhill to provide the information to the City and it would do so again in the future, if a similar financial opportunity arose for a land swap development. Brenhill did not provide evidence or argument explaining its assertion that it would not provide similar information in the future.

[106] In conclusion, I find that Brenhill has not established that that there is a direct link between disclosure of the information and a reasonable expectation of harm under s. 21(1)(c). Therefore, the City is not required to refuse to disclose the information to the applicant under s. 21(1).

Unreasonable invasion of third party personal privacy, s. 22

[107] Section 22 requires public bodies to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.[72]

[108] The first step in a s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information." 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."[73]

[109] The City has applied s. 22(1) to withhold some information on page 86 of the records. It is the name, email and physical address and phone numbers of a member of the public who emailed the City. There is also some information about this individual's personal circumstances. The City submits this is personal information.[74] Brenhill and the applicant make no submissions about this information.

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at para. 224 the Supreme Court of Canada also rejected the potential for misinterpretation of information as a legitimate reason for refusing access.

[72] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

[73] See Schedule 1 of FIPPA for the definitions of personal information and contact information.

[74] City's initial submission at paras. 80-83.

[110] I find that the information on page 86 is personal information. It is clear from the content and context that this is personal information, not contact information.

[111] Brenhill's s. 22 submission is exclusively about the email addresses and phone numbers of Brenhill's president and vice president. Brenhill says this is their personal information and it must be withheld under s. 22(1). Brenhill disputes that this is contact information and says, "The definition of contact information, on its face, does not include personal cellular telephone numbers or personal email addresses."[75]

[112] The applicant says it appears the email addresses of Brenhill's president and vice president were being used for business purpose so they are contact information, not personal information.[76] The City also says their email addresses appear to be business contact information.[77]

[113] Brenhill provided no evidence to show that the email addresses are "personal" email addresses. Based on the context, it is clear that this information is provided for the purposes of conducting business with the City and is information to enable the president and vice president to be contacted at their place of business. I conclude the email addresses of Brenhill's president and vice president are contact information, not personal information. Therefore, s. 22(1) does not apply and the City is not required to refuse to disclose that information.

[114] Finally, I could not locate any instances of the president and vice president's cellphone numbers, which Brenhill argued should also be withheld under s. 21. Brenhill did not say where they appear in the records. Therefore, my findings apply to their email addresses only.

Balance of s. 22 analysis

[115] The remaining steps in a s. 22 analysis require considering if the personal information on page 86 meets the criteria identified in s. 22(4). If so, disclosing the information would not be an unreasonable invasion of third party personal privacy. The public body must also decide if s. 22(3) applies. If s. 22(3) applies, disclosure is presumed to be an unreasonable invasion of third party privacy. Whether or not s. 22(3) applies, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy. It is at that stage, that any s. 22(3) presumption may be rebutted.

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[75] Brenhill's initial submission at para. 91.
[76] Applicant's submission at para. 44.
[77] City's initial submission at para. 22.

[116] The City says s. 22(4) does not apply. The parties make no submissions about ss. 22(2) and (3).

[117] I find that ss. 22(4) and 22(3) do not apply to the personal information on page 86 of the records. I also find that none of the circumstances in s. 22(2) are relevant to consider.

[118] The onus is on the applicant to establish that disclosure of the personal information on page 86 would not be an unreasonable invasion of the individual's personal privacy. The applicant said nothing specific about that personal information; therefore, I conclude the applicant has not met its burden. I find that the City must refuse the applicant access to the personal information on page 86 under s. 22(1).

CONCLUSION

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

1. Subject to paragraph 2 below, I confirm, in part, the City's decision that it is authorized to refuse the applicant access to information under s. 13(1).

2. The City is not authorized by s. 13(1) to refuse to disclose the information in the draft Administrative Report that is the same as the information in the final version of the report on the City's website. The City is required to disclose the same information to the applicant.

3. I confirm the City's decision that it is authorized by s. 14 to refuse the applicant access to information.

4. The City is not required by s. 21(1) to refuse access to information in the records. The City is required to disclose that information to the applicant.

5. I confirm the City's decision that it is required to refuse access to only the severed information on page 86 of the records under s. 22(1).

6. I require the City to concurrently copy the OIPC registrar of inquiries on the City's cover letter to the applicant together with a copy of the records disclosed as directed at paragraph 119, items 2 and 4, above.

[120] Pursuant to s. 59(1) of FIPPA, the City is required to comply with this order by May 27, 2021.

April 14, 2021

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File No.: F17-71817 and F19-78848