



Order F23-91

**CITY OF BURNABY**

Lisa Siew  
Adjudicator

October 31, 2023

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**Summary:** An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records related to a residential property. The City of Burnaby (City) withheld information in the responsive records under several FIPPA exceptions to access. In some cases, the City applied one or more FIPPA exceptions to the same information. The City also argued some information was not responsive to the applicant’s access request and, therefore, could be withheld. The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the City’s decision to refuse access. The adjudicator found the information withheld by the City as “non-responsive” was in fact responsive to the access request and ordered the City to disclose some of that information. The adjudicator also determined the City could not withhold any of the information at issue under s. 12(3)(b) (local public body confidences). However, the adjudicator decided the City properly applied s. 13(1) (advice and recommendations), s. 14 (solicitor-client privilege) and s. 22(1) (unreasonable invasion of a third party’s personal privacy) to some of the information withheld from the responsive records. The City was ordered to disclose the information that the adjudicator determined could not be withheld under a FIPPA exception to access.

**Statutes and sections cited in order:** *Freedom of Information and Protection of Privacy Act*, RSC 1996, c 165, ss. 12(3)(b), 13(1), 13(2)(a), 13(2)(d), 13(3), 14, 22(1), 22(2), 22(3), 22(4), Schedule 1 (definitions of “contact information”, “local government body”, “local public body”, “personal information” and “third party”). *Community Charter*, SBC 2003, c. 26, ss. 89(1), 90, 92.

**INTRODUCTION**

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an individual (applicant) requested the City of Burnaby (City) provide access to records related to the City’s purchase of a specific residential property located in Burnaby, BC (Property). The applicant is the former owner of the Property, which the City purchased through a court-ordered sale.

[2] The City provided the applicant with partial access to the responsive records, but withheld information in those records under one or more FIPPA exceptions to access. The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the City's decision.

[3] Not long after, the City provided additional records in response to the applicant's access request. The City also withheld information in those records under several exceptions to access, including ss. 17(1) and 21(1) of FIPPA. It is unclear why those additional records were not part of the City's original response to the applicant's access request. Regardless, the applicant also requested the OIPC review the City's decision to refuse access to the information in those additional records.

[4] The OIPC's investigation and mediation process did not resolve the dispute between the parties. The applicant requested the matters proceed to this inquiry. During the inquiry, the City withdrew its application of ss. 17(1) and 21(1) and released additional information to the applicant. Therefore, I conclude that information and those exceptions are no longer at issue in this inquiry.

## **PRELIMINARY MATTERS**

[5] Based on the parties' submissions, there are a few preliminary matters that I need to address. First, the parties raise additional issues in their submissions that are not included in the OIPC's fact report or the notice of inquiry. Second, the City withheld information in some records on the basis it is not responsive to the applicant's access request; therefore, the City submits it can withhold that information from the applicant. I will consider these two preliminary matters below.

### *Additional issues in the parties' submissions*

[6] The applicant disputes the legality of the court-ordered sale of the Property and alleges other illegal actions undertaken by the City and other individuals. The applicant also made other allegations involving, for example, election fraud, judicial misconduct, estate litigation related to the applicant's extended family and the improper confiscation of family and personal property.

[7] Although I can see how important the applicant finds those additional matters, I conclude those matters fall outside the scope of this inquiry. My role, as the Commissioner's delegate, is limited to determining the issues identified in the notice of inquiry. It is not within my jurisdiction under FIPPA to review or decide the applicant's other grievances and complaints. There is no provision in FIPPA or another statute that allows me, as the Commissioner's delegate, to review those matters.

[8] I also note that as part of its inquiry submission, the City cited s. 3(3)(f) as a reason to withhold certain information in the records. Section 3(3)(f) excludes from the scope of FIPPA a record that is created by or for or is in the custody or under the control of an officer of the Legislature and that relates to the exercise of functions under an Act.

[9] Section 3(3)(f) was not set out in the notice of inquiry as an issue and the City did not notify the OIPC or seek its permission to add this new issue to the inquiry. The OIPC's prior consent is required to add a new issue and there must be a valid reason to warrant introducing issues for the first time at the inquiry stage.<sup>1</sup> The City later requested permission from the OIPC to add s. 3(3)(f) into this inquiry as a new issue, but only after the matter was brought to the City's attention by the OIPC's registrar of inquiries. As the Commissioner's delegate on that matter, I considered and denied the City's request to add s. 3(3)(f) to the inquiry.<sup>2</sup> Therefore, s. 3(3)(f) is not an issue for consideration in this inquiry.

[10] To conclude, although I have reviewed the parties' entire submissions, I will only refer to those submissions where it is relevant to the issues that I will decide in this inquiry.

*“Non-responsive” information in the requested records*

[11] The City has withheld certain information in the disputed records on the basis it is “Outside the Scope of the Request” or “not responsive to the applicant's FOI request.”<sup>3</sup> I understand the City is arguing that there is information in the requested records that is not responsive to the applicant's access request and, therefore, it can withhold that information from the applicant. I find the City's decision to withhold this information in the requested records for that reason is incorrect and shows a misunderstanding of FIPPA.

[12] Previous OIPC orders have consistently found that a public body is not authorized by FIPPA to withhold parts of a responsive record on the basis those parts are, in the public body's view, non-responsive or outside the scope of the access request.<sup>4</sup> If a record is responsive to an applicant's access request, a public body must provide the applicant with access to that record, unless FIPPA does not apply to that record under s. 3 or there is information in the requested record that may be withheld under an exception to access under Part 2 of FIPPA. In other words, even if only a portion of a record is responsive to the applicant's

<sup>1</sup> Order F20-38, 2020 BCIPC 44 at para. 7.

<sup>2</sup> OIPC letter dated September 6, 2023.

<sup>3</sup> Information located on pp. 716, 1125 (duplicated on pp. 1105-1106 and 1111) and p. 1126 (duplicated on pp. 1106 and 1112). Reasons for withholding cited in the City's “List of Records” and marked next to the severed information.

<sup>4</sup> Order F15-26, 2015 BCIPC 28 (CanLII) at paras. 76-88. Order F14-27, 2014 BCIPC 30 (CanLII) at paras. 9-13. Order F15-56, 2015 BCIPC 59 (CanLII) at paras. 12-14.

request, the public body is required to disclose all the information in that responsive record unless an exclusion or an exception applies.<sup>5</sup>

[13] The records here are clearly responsive to the applicant's access request. The applicant requested access to records related to the Property and the records at issue contain information about the Property, along with other information. As a result, I conclude FIPPA does apply to these records and the City must provide the applicant with access to that record unless a FIPPA exception applies. If no exceptions apply to the information in the requested records, then the records must be released to the applicant.

[14] Even though the City argued the withheld information at issue here is non-responsive to the applicant's access request, the City applied s. 22(1)<sup>6</sup> or both ss. 12(3)(b) and 13(1)<sup>7</sup> as a basis to withhold some of the information in those records. Therefore, I will consider further below whether the City properly applied those exceptions to that information.

[15] However, there is other information in a record that the City withheld as non-responsive and for which it did not apply a FIPPA exception.<sup>8</sup> I understand the City intentionally did not apply a FIPPA exception to this information given the City's treatment of the other information in this record. I find the City's severance of this record indicates that it turned its mind as to whether a FIPPA exception applied and decided an exception applied for only some of the information in this record. Therefore, I conclude the City must provide the applicant with access to this record and disclose the information for which it decided not to apply a FIPPA exception.<sup>9</sup>

## **ISSUES AND BURDEN OF PROOF**

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

1. Is the City authorized to refuse to disclose the information at issue under s. 12(3)(b)?
2. Is the City authorized to refuse to disclose the information at issue under s. 13(1)?
3. Is the City authorized to refuse to disclose the information at issue under s. 14?

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<sup>5</sup> Order F14-27, 2014 BCIPC 30 (CanLII) at para. 11.

<sup>6</sup> Information located on p. 1125 (duplicated on pp. 1105-1106 and 1111) and p. 1126 (duplicated on pp. 1106 and 1112) of the records.

<sup>7</sup> Information located on p. 716 of the records.

<sup>8</sup> Information located on p. 716 of the records.

<sup>9</sup> This information is located on p. 716 of the records, under numbered items 1 and 3-6.

4. Is the City required to refuse to disclose the information at issue under s. 22(1)?

[17] Section 57(1) of FIPPA places the burden on the City to prove the applicant has no right of access to the information withheld under ss. 12(3)(b), 13(1) and 14.

[18] On the other hand, s. 57(2) of FIPPA places the burden on the applicant to prove the disclosure of the information at issue would not unreasonably invade a third-party's personal privacy under s. 22(1). However, the public body has the initial burden of proving the information at issue qualifies as personal information.<sup>10</sup>

## **DISCUSSION**

### ***Background***

[19] The applicant is the former owner of the Property.<sup>11</sup> The applicant had accumulated a debt with a bank (Bank). The Bank obtained a default judgment against the applicant for the debt. The judgment was registered against the title to the Property.

[20] The applicant disputed portions of the debt, the lien on their Property and did not pay the amount owing under the judgment. The Bank initiated court proceedings to enforce the judgment against the applicant and obtained a court-ordered sale of the Property.

[21] The City was interested in purchasing the land on which the Property sits to use as part of a community park.<sup>12</sup> With the court's approval, the Bank agreed to sell the Property to the City for a certain price and terms.

### ***Records and information at issue***

[22] The records responsive to the applicant's access request total 1807 pages, with approximately 428 of those pages containing the information at issue. The records in dispute include emails, letters, memorandums, reports and handwritten notes. For most of the information withheld in the responsive records, the City applied one or more FIPPA exceptions to the same information.

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<sup>10</sup> Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

<sup>11</sup> The information in this background section is compiled from the parties' submissions, evidence and information disclosed in the records.

<sup>12</sup> Information disclosed on p. 291 of the records.

**Local public body confidences – s. 12(3)(b)**

[23] The City relied on s. 12(3)(b) to withhold information in the records which it submits would reveal the substance of deliberations of several City council meetings closed to the public.

[24] Section 12(3)(b) authorizes a local public body to refuse to disclose information that would reveal the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

[25] Schedule 1 of FIPPA defines a “local public body” to include a “local government body.” The definition of “local government body” under Schedule 1 of FIPPA includes a municipality. The City is a municipality and, therefore, I find it qualifies as a “local public body” under FIPPA and for the purposes of s. 12(3)(b).

[26] Previous OIPC orders have consistently found three conditions must be met for a local public body to withhold information under s. 12(3)(b):

1. The local public body must have the statutory authority to meet in the absence of the public, that is, to meet *in camera*;
2. The meeting must have taken in place *in camera*, in the absence of the public; and
3. The information would, if disclosed, reveal the substance of deliberations at the *in camera* meeting.<sup>13</sup>

[27] If a local public body fails to prove all three of those conditions are satisfied, then it cannot use s. 12(3)(b) to refuse to disclose information to an access applicant.<sup>14</sup> I agree with this approach and will consider the s. 12(3)(b) requirements below.

*Was the City authorized to hold a meeting in the absence of the public?*

[28] As a municipality, the City is subject to and derives some of its powers and authority from the *Community Charter*.<sup>15</sup> In terms of meetings, council meetings must be open to the public unless an exception under the *Community Charter* applies.<sup>16</sup> Section 90 of the *Community Charter* lists several topics or

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<sup>13</sup> For example, Order 00-14, 2000 CanLII 10836 (BCIPC) and Order F20-10, 2020 BCIPC 12 (CanLII) at para. 8. The City accepts this test at para. 24 of its submission.

<sup>14</sup> Order 00-11, 2000 CanLII 10554 (BCIPC) at p. 5.

<sup>15</sup> SBC 2003, c. 26.

<sup>16</sup> Section 89(1) of the *Community Charter*.

situations that a council may use as a basis to hold a meeting or part of a meeting closed to the public. However, for a municipal council to rely on s. 90 to hold a meeting closed to the public, it must comply with the following requirements under s. 92:

92 Before holding a meeting or part of a meeting that is to be closed to the public, a council must state, by resolution passed in a public meeting,

- (a) the fact that the meeting or part is to be closed, and
- (b) the basis under the applicable subsection of section 90 on which the meeting or part is to be closed.

[29] Furthermore, a local public body must show that the subject matter considered at a closed meeting satisfies the requirements of the s. 90 provision that its council relied on to hold the meeting in the absence of the public.<sup>17</sup> For example, in Order F07-02, the adjudicator concluded the local public body failed to establish that what was discussed at a closed meeting qualified as “potential litigation affecting the municipality,” as required under ss. 90(1)(g) of the *Community Charter*.<sup>18</sup>

[30] In the present case, the City submits the information that it withheld from the records at issue under s. 12(3)(b) was considered at council meetings closed to the public. The City says it had the authority to hold those closed council meetings under s. 90 of the *Community Charter* and cites the following subsections of s. 90 in its submissions:

90(1) A part of a council meeting may be closed to the public if the subject matter being considered relates to or is one or more of the following:

...

(e) the acquisition, disposition or expropriation of land or improvements, if the council considers that disclosure could reasonably be expected to harm the interests of the municipality;

...

(g) litigation or potential litigation affecting the municipality;

...

(i) the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

...

<sup>17</sup> Order F07-02, 2007 CanLII 2529 (BCIPC) at paras. 29-35. Order F19-18, 2019 BCIPC 20 (CanLII) at para. 14.

<sup>18</sup> Order F07-02, 2007 CanLII 2529 (BCIPC) at paras. 31-35.

(m) a matter that, under another enactment, is such that the public may be excluded from the meeting.<sup>19</sup>

[31] The City provided an affidavit from its “Senior Manager and Acting Director, Legislative Services” (Manager) who attests to reviewing the records at issue under s. 12(3).<sup>20</sup> The Manager says they can confirm that the City held closed council meetings on March 21, 2016, April 4, 2016 and May 30, 2016, which were authorized by a resolution.<sup>21</sup> The Manager says those closed council meetings were held for the purpose of considering matters related to the acquisition of the Property. Citing Order F15-56, the City submits this affidavit evidence is enough to satisfy the requirements of s. 92 of the *Community Charter*.<sup>22</sup>

[32] However, I find there is insufficient evidence that shows the City met the requirements of s. 92 of the *Community Charter*. I find the affidavit evidence indicates the City may have held some closed council meetings, but it does not sufficiently establish that the City was authorized under s. 90 of the *Community Charter* to hold those meetings in the absence of the public. The City did not sufficiently demonstrate, as required under s. 92, that a resolution was passed at a public council meeting to hold the meetings on March 21, April 4 and May 30, 2016, closed to the public or that the resolutions identified the specific provisions under s. 90 that authorized those closed council meetings.

[33] I also find Order F15-56 is distinguishable from this case and does not support the City’s position. In that order, the records at issue included a copy of a municipal council’s meeting minutes that showed a resolution was passed to close the meeting and that the resolution identified the relevant provision under s. 90 that authorized the meeting to be held in the absence of the public.<sup>23</sup> Therefore, the adjudicator had evidence which established the municipal council had the proper statutory authority to meet in the absence of the public.

[34] In this case, the Manager did not identify the source of their information and belief, specifically how they know the City was authorized under the *Community Charter* to hold those meetings in the absence of the public. The Manager explains their responsibilities include “ensuring the proper preparation and distribution of agenda and minutes” and “activities related to the proper functioning of Council Meetings.”<sup>24</sup> However, the Manager does not identify whether they oversaw the preparation of the minutes for those three 2016 meetings, attended those meetings or reviewed other information that shows the City’s council properly closed those meetings in accordance with ss. 90 and 92 of

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<sup>19</sup> City’s submission at para. 25.

<sup>20</sup> Affidavit of Manager at paras. 1 and 6.

<sup>21</sup> Affidavit of Manager at paras. 9, 12 and 23.

<sup>22</sup> City’s submission at para. 27, citing Order F15-56, 2015 BCIPC (CanLII) at paras. 30-31.

<sup>23</sup> Order F15-56, 2015 BCIPC (CanLII) at paras. 27-32.

<sup>24</sup> Affidavit of Manager at para. 4.



the *Community Charter*. The Manager also did not provide any supporting documents such as the relevant council minutes to support their statements. There may be council meeting minutes or other documents which shows the requirements of s. 92 are satisfied, but the City did not provide them for my review to support its position on s. 12(3)(b) in this inquiry. Therefore, without more, I find the Manager's evidence is not persuasive.

[35] Moreover, even if the City had provided sufficient evidence about the required resolutions and their contents, I am unable to conclude that the subject matter of those meetings satisfied the requirements of the specific s. 90 provision that its council relied on to hold the meeting in the absence of the public. For example, the Manager says the purpose of those meetings was to consider matters related to the acquisition of the Property. The Manager does not say so, but they may be referring to s. 90(1)(e) which allows the City's council to hold a meeting in the absence of the public where the subject matter relates to the acquisition of land and if the council considers that disclosure could reasonably be expected to harm the interests of the municipality. However, the City did not provide any evidence that the requirements under s. 90(1)(e) were met. While the topic of the meetings may have related to the acquisition of the Property, there is no evidence that the City's council closed the meeting because it thought the disclosure of this information in a public meeting could reasonably be expected to harm the interests of the municipality.

[36] As a result, based on the materials before me and for the reasons given, I am unable to conclude that the City had the proper statutory authority to hold the relevant meetings in the absence of the public as required under s. 12(3)(b). Given my finding regarding the first condition of the s. 12(3)(b) test, it is not necessary for me to consider the remaining requirements since all three conditions must be proven for a local public body to withhold information under s. 12(3)(b). Therefore, I find the City cannot withhold the information at issue under s. 12(3)(b).

### ***Advice and Recommendations – s. 13***

[37] The City applied s. 13(1) to a large amount of the information that it withheld from the applicant. The City also applied s. 13(1) to most of the information that I found the City could not withhold under s. 12(3)(b). Therefore, I will consider whether that information can be withheld under s. 13(1), along with the other information withheld by the City under this provision.

[38] I also note there is some information that the City did not withhold under s. 13(1) that is exactly the same or would reveal the information that it did withhold under s. 13(1).<sup>25</sup> The City applied either one or both ss. 12(3)(b) and 14 to withhold this information. However, given the similarity of this information or

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<sup>25</sup> Information located on pp. 11, 30, 49, 50-65, 66-82 of the records.

what it would reveal, my findings further below about the s. 13(1) information will also apply to this other information.

[39] 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 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.”<sup>26</sup>

[40] 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. The term “recommendations” includes 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.<sup>27</sup> The term “advice” has a broader meaning than “recommendations.”<sup>28</sup> “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.<sup>29</sup>

[41] A public body is also 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.<sup>30</sup>

[42] As well, s. 13(1) extends to factual or background information that is a necessary and integrated part of the advice or recommendation.<sup>31</sup> This includes facts 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.<sup>32</sup>

[43] The analysis under s. 13 has two steps. If I find the information at issue would reveal advice or recommendations under s. 13(1), then the next step is to consider if any of the categories or circumstances listed in ss. 13(2) or 13(3) apply. Subsections 13(2) and 13(3) identify certain types of records and

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<sup>26</sup> For example, Order 01-15, 2001 CanLII 21569 at para. 22.

<sup>27</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.

<sup>28</sup> *Ibid* at para. 24.

<sup>29</sup> *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113.

<sup>30</sup> Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.

<sup>31</sup> *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

<sup>32</sup> *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

### **The City's submission on advice and recommendations**

[44] The City submits s. 13(1) applies to information that it withheld in emails, memos, handwritten notes, reports and other documents.<sup>33</sup> The City describes some of those records as:

- “Internal email communications between City staff.”
- “Confidential Internal Interoffice Memorandums.”
- “Reports and Recommendations marked ‘Closed Council Reports’.”
- “Property estimates of value or comparison.”
- “Interoffice Memorandum with advice about land acquisition.”<sup>34</sup>

[45] The City argues s. 13(1) applies to the information that it withheld in the “Confidential Internal Interoffice Memorandums” because it would either reveal “information about Council decisions” or advice provided about an issue that staff planned to raise at a closed council meeting.<sup>35</sup>

[46] Regarding the “Closed Council Reports”, the City says s. 13(1) applies to the information in the reports because staff compiled this information using their “expertise and judgment.”<sup>36</sup> The City describes this withheld information as “factual and background information, including legal advice” and “recommendations made based on that advice about a proposed course of action.”<sup>37</sup>

[47] Lastly, in terms of the property estimates, the City argues s. 13(1) applies because staff appraisers prepared the estimates based on their “expertise, judgment and skill” and it consists of advice that was “the basis for informing decisions made by Council in its Closed Council Meetings.”<sup>38</sup>

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<sup>33</sup> The applicant did not address the City's arguments and submission on s. 13.

<sup>34</sup> City's submission at para. 16.

<sup>35</sup> City's submission at para. 17.

<sup>36</sup> City's submission at para. 18.

<sup>37</sup> City's submission at para. 18.

<sup>38</sup> City's submission at para. 19.

### Analysis and findings on advice and recommendations

[48] I am satisfied that some of the information the City withheld under s. 13(1) would reveal advice or recommendations developed by City employees. This information was withheld from internal memos, reports, notes, emails and in property value estimates prepared by staff appraisers.<sup>39</sup> It includes recommendations provided by City employees to the City's council for their consideration and approval on a proposed course of action.<sup>40</sup> The s. 13(1) information also includes information where it is clear City employees are using their professional expertise to provide analysis and opinion to the City's council or to other employees about matters related to the City's acquisition of the Property.<sup>41</sup> This is the type of information that other decision-makers have found is "advice" under s. 13(1) and I reach the same conclusion here.<sup>42</sup>

[49] Previous OIPC orders have found editorial advice and recommendations regarding the content and wording of correspondence or documents may be withheld under s. 13(1).<sup>43</sup> I find that reasoning applicable here. Some of the s. 13(1) information is found in emails between City employees and consists of suggestions from one employee to another about the content and wording of certain documents.<sup>44</sup> As a result, I conclude some of the information withheld by the City under s. 13(1) would reveal advice or recommendations that different City employees provided to other employees or to the City's council for a decision.

[50] However, for the reasons that follow, I find the rest of the information withheld under s. 13(1) would not reveal any advice or recommendations developed by or for the City. In most cases, the City applied s. 13(1) in a blanket fashion by withholding the entirety of a record and did not conduct a line-by-line analysis as required under FIPPA.<sup>45</sup> For example, the City withheld the date, author and recipient of a document, memo or an email, page numbers, email signatures, most titles and headings, and the header and footer information in reports and memos, along with the City's logo. I find this information is clearly not advice or recommendations, nor would it reveal that kind of information.

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<sup>39</sup> Information found on pp. 4, 12-29 (same as pp. 100-117), 123 (same as pp. 166, 746, 747, 748, 756), 31-48 (same as pp. 131-148, 303-304), 97-98 (same as 319-320), 118-119, 147-148, 150-165 (same as pp. 50-65, 66-82), 202, 208, 209-211, 298 (same or similar as pp. 11, 30, 778, 779), 300, 303-304, 322-323, 324-325, 326-327, 342, 348-350, 452-454 (same as pp. 494-496), 500-506, 507-508, 509-510, 511-512, 513-514, 609, 613-628 (same as 655-670), 648-649, 650, 654, 712-713, 734, 780, 784-801, 802 (same as p. 49), 803-818, 910, 980 and 987 of the records.

<sup>40</sup> For example, information located on p. 12 of the records.

<sup>41</sup> For example, information located on pp. 97-98 of the records.

<sup>42</sup> For example, Order F21-15, 2021 BCIPC 19 (CanLII) at para. 44.

<sup>43</sup> Order F14-44, 2014 BCIPC 47 at para. 32 and Order F18-41, 2018 BCIPC 44 at para. 29.

<sup>44</sup> Information located on pp. 349, 979, 981 and 982 of the records.

<sup>45</sup> Order F21-15, 2021 BCIPC 19 (CanLII) at para. 46, citing Order F11-04, 2011 BCIPC 4 (CanLII) at para. 8.

[51] Some of the s. 13(1) information reveals a City employee communicating information of a factual nature, giving instructions, providing updates about a matter, clarifying facts or information, asking or answering questions, or explaining what they or others have done or will do regarding a matter related to the Property.<sup>46</sup> I find the information withheld in these records reveals only the gathering or conveying of information or instructions to others instead of any advice or recommendations.

[52] Other s. 13(1) information reveals a City employee's request for advice.<sup>47</sup> Section 13(1) does not typically apply to information that reveals a public body's request for advice and recommendations, even if it discloses the scope of the sought-after advice or recommendations.<sup>48</sup> The request would need to reveal the advice or recommendations to fall within the scope of s. 13(1). I find the information at issue shows a City employee seeking advice from other employees and conclude none of it discloses any of the advice or recommendations given in response to the request.

[53] There is also other information where it is not apparent, and the City does not explain, how this information reveals any advice or recommendations. It consists of information of a factual nature in a document.<sup>49</sup> The City does not discuss or address this information in their submission or affidavit evidence. As a result, without more, I am not satisfied that it reveals any advice or recommendations.

[54] The City also withheld information under s. 13(1) that it then disclosed elsewhere in the records. Previous OIPC orders have found that information already disclosed or known to an applicant cannot be withheld under s. 13(1) since it would not "reveal" advice or recommendations for the purposes of s. 13(1).<sup>50</sup> I find that to be the case here. The City already disclosed some of the information at issue to the applicant so I find its disclosure now would not "reveal" any advice or recommendations under s. 13(1).<sup>51</sup>

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<sup>46</sup> Information located on pp. 1, 2, 3, 4-8, 9-10, 124 (same on pp. 371, 372), 125 (same on pp. 130, 377, 392), 126 (same on p. 351), 127 (same on p. 821), 128 (same on pp. 149, 352, 484), 169-170, 199-200, 202, 204-206, 322-323, 376, 497-499, 551, 714-715, 716, 734, 735, 743-745, 751-752, 755, 759, 770-772, 780, 781, 783, 830-832, 912-913, 914, 952-953, 962-963, 965, 966-970 (same on pp. 972-975), 977-978, 979-982, 983, 988-989, 990, 998 of the records.

<sup>47</sup> Information located on pp. 207, 781, 982, 986, 1201-1205 of the records.

<sup>48</sup> Order F17-39, 2017 BCIPC 43 (CanLII) at para. 37 and Order F15-33, 2015 BCIPC 36 (CanLII) at para. 24.

<sup>49</sup> Information withheld on pp. 651-653 of the records.

<sup>50</sup> For example, Order F13-24, 2013 BCIPC 31 at para. 19.

<sup>51</sup> Information withheld on p. 551 but disclosed on pp. 757 and 765 of the records. Information withheld on p. 497 but disclosed on p. 493 of the records.

[55] Therefore, for the reasons given, I conclude none of the above-noted information reveals any advice or recommendations. As a result, I find the City is not authorized to withhold this information under s. 13(1).

### **Analysis and findings on s. 13(2)**

[56] The next step in the s. 13 analysis is to consider whether any of the circumstances under ss. 13(2) and 13(3) apply to the information that I found would reveal advice or recommendations developed by City employees. Subsections 13(2) and 13(3) identify certain types of records and information that a public body may not withhold under s. 13(1).

[57] The City argues none of the categories listed under s. 13(2) apply, specifically the City submits that none of the information that it withheld under s. 13(1) qualifies as factual material under s. 13(2)(a). The applicant did not address the City's arguments and submission on s. 13(2).

[58] I have considered all the categories under s. 13(2) and find s. 13(2)(d) is a relevant circumstance to consider since it applies to an appraisal. Therefore, I will consider ss. 13(2)(a) and 13(2)(d) below, along with s. 13(3).

#### *Factual material – s. 13(2)(a)*

[59] Section 13(2)(a) says the head of a public body must not refuse to disclose under s. 13(1) any factual material. The term "factual material" does not include facts that are an integral component of the advice or recommendations. Specifically, if the facts are compiled and selected by someone who is using their expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body, then that information falls under s. 13(1) and not under s. 13(2)(a).<sup>52</sup> The protection given to these integral facts ensures no accurate inferences can be drawn about the advice or recommendations developed by or for the public body.<sup>53</sup>

[60] The City says s. 13(2)(a) does not apply because "although some withheld information is not directly the advice, it is integral to that advice because it would be difficult to understand what the advice is without it" or "it would reveal, by inference, what the advice is."<sup>54</sup>

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<sup>52</sup> *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94 and Order F20-37, 2020 BCIPC 43 (CanLII) at para. 40.

<sup>53</sup> *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII) at para. 52.

<sup>54</sup> City's submission at para. 21.

[61] I can see the City withheld some information of a factual nature related to the information that I found would reveal advice or recommendations developed by City employees. However, I am satisfied these facts are an integral part of the advice or recommendations. For instance, the City withheld facts in the reports prepared for City's council consideration. I am satisfied these facts were compiled and selected by City employees for the purpose of providing explanations necessary to understand the recommendations in the report. As a result, I find this information is not "factual material" under s. 13(2)(a).

*An appraisal – s. 13(2)(d)*

[62] Section 13(2)(d) provides that the head of a public body must not refuse to disclose an appraisal under s. 13(1). The City withheld an appraisal report<sup>55</sup> and several estimates from City staff about the Property.<sup>56</sup> Previous OIPC orders have determined that "an appraisal" means the determination of what constitutes a fair price, valuation, or an estimation of worth.<sup>57</sup> I agree with that definition and find the information withheld in these records clearly assesses and determines the value, fair price or worth of the Property and, therefore, qualifies as an appraisal under s. 13(2)(d). As a result, I conclude the City cannot withhold this information under s. 13(1).

*Information in existence for 10 or more years – s. 13(3)*

[63] Under s. 13(3), any information in a record that has been in existence for 10 or more years cannot be withheld under s. 13(1). I find s. 13(3) does not apply because the information I found is advice or recommendations dates back to 2016. Therefore, at the time of this inquiry, this information has been in existence for under 10 years.

***Solicitor-client privilege – s. 14***

[64] The City applied s. 14 to withhold information in emails, memos, reports, and handwritten notes. There was some overlap with the City's application of ss. 14 and 13(1) to some of the information in these records. For that information, I will only consider under s. 14 the information that I found the City could not withhold under s. 13(1). Where I have already determined that a FIPPA exception applies, it is generally not necessary for me to consider whether another FIPPA exception also applies to that information.

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<sup>55</sup> Appraisal located on pp. 14-27 (duplicated on pp. 33-46, 786-799), 102-115, 133-146 of the records.

<sup>56</sup> Information located on pp. 28-29 (same as 47-48, 97-98, 116-117, 118-119, 147-148, 319-320, 326-327, 648-649, 800-801), 158-160 (same as 58-60, 75-77, 452-454, 494-496, 511-512, 621-623, 663-665, 811-813), 208, 209-211, 342, 507-508 (same as 513-514, 712-713), 509-510, 609, 654 of the records.

<sup>57</sup> Order F16-30, 2016 BCIPC 33 (CanLII) at paras. 32-34 and Order F16-38, 2016 BCIPC 42 (CanLII) at para. 65.

[65] Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. It is well-established that s. 14 encompasses both legal advice privilege and litigation privilege.<sup>58</sup> The City is claiming legal advice privilege over the information withheld under s. 14.<sup>59</sup>

[66] Legal advice privilege applies to confidential communications between a solicitor and client for the purposes of obtaining and giving legal advice, opinion or analysis.<sup>60</sup> It is well-established that legal advice privilege can only be claimed document by document, with each document being required to meet the following criteria:

1. A communication between a solicitor and client (or their agent);
2. Which entails the seeking or giving of legal advice; and
3. Which is intended by the parties to be confidential.<sup>61</sup>

[67] Legal advice privilege does not apply to all communications or documents that pass between a lawyer and their client.<sup>62</sup> However, if the conditions set out above are satisfied, then legal advice privilege applies to the communication and the records relating to it.<sup>63</sup>

[68] The courts have also found that legal advice 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.<sup>64</sup> 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.<sup>65</sup> The continuum also covers communications after the client receives the legal advice, such as internal client communications about the legal advice and its implications.<sup>66</sup>

[69] The City submits that it correctly applied s. 14 to withhold information in the relevant records. The City says those records were generated by its legal

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<sup>58</sup> *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para. 26

<sup>59</sup> City’s submission at para. 9.

<sup>60</sup> *College* at para. 31.

<sup>61</sup> *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 838, [1980] 1 SCR 821 at p. 13.

<sup>62</sup> *Keefer Laundry Ltd v. Pellerin Milnor Corp et al*, 2006 BCSC 1180 at para. 61.

<sup>63</sup> *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22.

<sup>64</sup> *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.

<sup>65</sup> *Camp Development* at para. 40.

<sup>66</sup> *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.



department and provided an affidavit from the lawyer who heads that department. I will refer to this individual as the Solicitor. The City also provided a copy of the s. 14 records for my review and a table that lists the records and identifies which FIPPA exception the City is relying on to refuse access.

[70] The Solicitor describes their responsibilities as overseeing the City's legal department and providing legal advice and other legal services to the City's council and to City staff. The Solicitor says, at the relevant time, they were responsible for reviewing "proposals for land acquisitions to confirm the terms and conditions of purchase and sale agreements, providing related legal advice and overseeing the resulting conveyance of the properties being acquired by the City."<sup>67</sup> In their affidavit, the Solicitor discusses and describes some of the information withheld by the City under s. 14. The Solicitor says some of that information reveals legal advice that they provided to the City's council or to City employees.

[71] The Solicitor also discusses some information that the City did not withhold under s. 14 or that the City already disclosed to the applicant.<sup>68</sup> The Solicitor says some of this information contains or reflects their legal advice.<sup>69</sup> Neither the table listing the records nor the records themselves indicate the City relied on s. 14 as a basis to refuse access to this information. Therefore, I conclude there is no need for me to consider whether s. 14 applies to this information. I will only address the information that the City actually withheld under s. 14.

[72] I also note for some of the records at issue there are duplicate copies of a document. Without revealing any of the information at issue, I can see that the City applied s. 14 to a document where it appears in one context, but then chose not to apply s. 14 to a copy of that same document where it appears elsewhere in the responsive records.<sup>70</sup> For instance, the City did not apply s. 14 to a copy of a document that I found could not be withheld under s. 13(1) even though they are duplicates of each other. Given that the analysis under s. 14 depends on the context and the parties to the communications, I can understand why the City applied s. 14 to a document in one context, but not the other. As a result, I find the City intentionally decided not to apply s. 14 to this information. Therefore, where that occurs in the responsive records, I will not consider whether s. 14 applies to this information.

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<sup>67</sup> Solicitor's affidavit at para. 3.

<sup>68</sup> Solicitor's affidavit at paras. 5, 6, 7, 29, 30, 31 and 32, discussing pp. 49, 50-65, 66, 67-82, 500-506, 714-715, 766 (record already disclosed) and 770-772 of the records.

<sup>69</sup> Solicitor's affidavit at paras. 29, 30 and 31.

<sup>70</sup> I am unable to identify the specific records at issue here because doing so would reveal the information that the City withheld under s. 14.

[73] Turning now to the information at issue, as set out below, I find the City properly applied s. 14 to some but not all the information that it withheld under s. 14. I will first discuss the information that I find the City is authorized to withhold under s. 14.

**Analysis and findings: information properly withheld under s. 14**

[74] The City submits s. 14 applies to some information that it withheld in emails, memos, handwritten notes and written reports to council because it reveals confidential communications between the Solicitor and one or more individuals who are City employees or council members.

[75] From my review of the records and evidence, I find the City is refusing to disclose information under s. 14 that consists of the following:

- Communications between the Solicitor and the City, specifically
  - Emails directly between the Solicitor and City employees, or emails between City employees that are copied to the Solicitor, where advice, information or instructions are requested or provided.<sup>71</sup>
  - Memos from the Solicitor providing information to City council members.<sup>72</sup>
  - The Solicitor's handwritten notes capturing their discussions with City employees.<sup>73</sup>
- Information withheld from documents that are a part of communications between the Solicitor and City employees or council members.<sup>74</sup>
- The Solicitor's handwritten notes about discussions with other individuals.<sup>75</sup>
- Emails between City employees and a City legal assistant or a City paralegal about administrative matters related to the City's purchase of the Property.<sup>76</sup>

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<sup>71</sup> Information located on pp. 1, 2 (same as pp. 9-10, 912-913, 914), 169-170, 199-200, 203, 204-206, 207, 219, 322-323, 376, 755, 759, 780, 952-953, 977-978, 979-980, 981-982, 986-987, 998, 1201-1205 of the records.

<sup>72</sup> Information located on pp. 123, 124, 125, 126, 127, 128 of the records.

<sup>73</sup> Information located on pp. 202, 218 and 734 of the records.

<sup>74</sup> Information located on pp. 33-46, 47-48, 102-115, 116-117, 133-146, 147-148, 158-160, 319-320, 324-327, 786-799, 800-801 and 811-813 of the records.

<sup>75</sup> Information located on pp. 167, 168, 216, 241, 735, 749-750, 949, 960-961, 988-989, 1007, 1036 of the records.

<sup>76</sup> Information located on pp. 830-832 and 910-911 of the records.

[76] I will discuss each of these records below, starting with the communications between the Solicitor and City employees or council members.

*Communications between the Solicitor and the City*

[77] The City applied s. 14 to information that would reveal communications between the Solicitor and one or more individuals who are City employees or council members. For legal advice privilege to apply to communications between the City and its in-house legal counsel, the Solicitor must be acting in a legal capacity and not as a business or policy advisor.<sup>77</sup> To determine whether the Solicitor is acting in a legal capacity at the relevant time, I must consider general evidence of the nature of the relationship, the subject matter of the advice and the circumstances in which it was sought or rendered.<sup>78</sup>

[78] To provide some context for those communications, the City explains that it was interested in purchasing the Property from the Bank and the Solicitor negotiated the purchase with the Bank's lawyer.<sup>79</sup> The City also says the sale was approved by the Court and that a "Writ of Possession" was later issued by the Court which required the applicant to provide the City with vacant possession of the Property.<sup>80</sup>

[79] The Solicitor does not say whether they assisted the City with its purchase of the Property. They only gave a general description of their responsibilities at the time and a vague description of their work.<sup>81</sup> However, my review of the disputed records confirms the Solicitor was involved in the City's purchase and possession of the Property.

[80] I am also satisfied the Solicitor was acting in a legal capacity since the City was not asking the Solicitor for business or policy advice. I also find none of the communications are related to the Solicitor's managerial responsibilities as the head of their department. Therefore, I conclude that the first requirement of the legal test is met as the communications at issue were between a solicitor and a client.

[81] I am also satisfied the parties intended those communications to be confidential. Some of the records are marked "confidential", while other communications include only the Solicitor, council members or City employees.<sup>82</sup> There is no evidence that those communications were shared with people from outside the solicitor-client relationship or that their contents were widely

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<sup>77</sup> *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et. al.*, 2006 BCSC 1180 (CanLII) at para. 63.

<sup>78</sup> *Ibid* at para. 64, citing *R v. Campbell*, 1999 CanLII 676 (SCC) at para. 50.

<sup>79</sup> City's initial submission at para. 2.

<sup>80</sup> City's initial submission at para. 3.

<sup>81</sup> Solicitor's affidavit at paras. 2-3, 32-33, 41.

<sup>82</sup> For example, p. 123 of the records.

distributed. As a result, I conclude the parties intended for the communications to be confidential and were treated in that manner.

[82] Lastly, for legal advice privilege to apply, the communications between the lawyer and the client must also entail the seeking or giving of legal advice. The courts have found that legal advice privilege may apply to records related to a conveyancing transaction where a lawyer is acting in their professional legal capacity. In *Balabel v. Air India*, Lord Taylor clarified the scope of legal advice privilege in those situations:

Once solicitors are embarked on a conveyancing transaction they are employed to ensure that the client steers clear of legal difficulties, and communications passing in the handling of that transaction are privileged [if their aim is the obtaining of appropriate legal advice] since the whole handling is experience and legal skill in action and a document passing during a transaction does not have to incorporate a specific piece of legal advice to obtain that privilege.<sup>83</sup>

[83] As well, in *Nathawad v. M.N.R.*, Justice Macaulay confirmed that legal advice privilege may apply to communications between a solicitor and a client in the context of a real estate transaction:

The existence of solicitor-client privilege is not dependent on the nature of the legal advice sought, but on the fact it is sought. Accordingly, it does not matter if the subject matter concerns a simple real estate transaction. It is the seeking of legal advice from a professional legal adviser that is privileged, no matter how mundane the subject may seem.<sup>84</sup>

[84] My review of the responsive records indicates the Solicitor was responsible for advising the City about the Property and overseeing the City's purchase and vacant possession of the Property. I find the information at issue here under s. 14 reveals communications between the Solicitor and one or more individuals who are City employees or council members about those matters and related issues.

[85] For instance, the City withheld what the Solicitor describes as their handwritten notes reflecting discussions they had "about a legal matter with City staff..."<sup>85</sup> I can see some of the information in those handwritten notes reveals what the Solicitor chose to record about those conversations and what was discussed between the Solicitor and City employees about matters related to the Property.

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<sup>83</sup> [1988] 2 W.L.R. 1036 (Eng. C.A.) at p. 1048.

<sup>84</sup> *Nathawad v. M.N.R.*, 1998 CanLII 2666 (BCSC) at para. 11.

<sup>85</sup> Solicitor's affidavit at para. 18.

[86] I also note some of the communications between the Solicitor and the City is not a request for legal advice nor does it reveal legal advice provided by the Solicitor on a specific issue. For instance, I can see that the City withheld several memos where the Solicitor is providing information, and not legal advice, to City council members about matters related to the Property.<sup>86</sup> However, the BC Supreme Court has found that “reporting letters from solicitor to client in conveyancing matters relate to the giving or obtaining of legal advice and are privileged.”<sup>87</sup> I find these informational memos from the Solicitor to City council members are like reporting letters from a lawyer to a client and, therefore, relate to the seeking and giving of legal advice.

[87] Therefore, considering what the courts have said falls under the scope of legal advice privilege, I find the information withheld by the City in the communications and documents at issue here entails the seeking or giving of legal advice or reveals what was said about those matters. As a result, I conclude legal advice privilege applies to the information withheld by the City in those records.

#### *Attachments to solicitor-client communications*

[88] The City applied s. 14 to withhold information in documents that are attached to communications between the Solicitor and City employees or council members. The BC Supreme Court has said that “solicitor-client privilege does not necessarily apply to all attachments, even those attached to genuine legal advice.”<sup>88</sup> However, “if the attachment would provide some basis for a reader to determine some or all of the opinion or advice then the attachment would be privileged.”<sup>89</sup>

[89] Applying those principles, I can see there is some information in the attachments at issue here that would allow a reader to determine what the Solicitor advised the City about the Property and related matters.<sup>90</sup> I considered whether it is possible to sever this privileged information and disclose the rest to the applicant in accordance with s. 4(2) of FIPPA. However, the BC Supreme Court has cautioned that “it makes no practical sense to parse the contents of attachments in order to sever the parts that are privileged from the parts that are not. If some of the attachment is part of the legal advice then all of it is protected by solicitor-client privilege.”<sup>91</sup> As a result, I find legal advice privilege applies to the entirety of the documents at issue here.

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<sup>86</sup> For example, information located on p. 123 of the records.

<sup>87</sup> *Nathawad v. M.N.R.*, 1998 CanLII 2666 (BCSC) at paras. 14 and 21.

<sup>88</sup> *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 (CanLII) at para. 110.

<sup>89</sup> *Ibid* at para. 111.

<sup>90</sup> For example, information located on pp. 35 and 48 of the records.

<sup>91</sup> *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 (CanLII) at para. 112.

*Solicitor's handwritten notes about discussions with other individuals*

[90] The City withheld what the Solicitor describes as their “internal handwritten notes to [their] legal file prepared by [them]” which reflects discussions they had “about a legal matter with...others.”<sup>92</sup> The discussions reflected in the notes are between the Solicitor and the Bank’s lawyer or between the Solicitor and a named individual who does not work for the City.<sup>93</sup> There is nothing to suggest that the individuals participating in these discussions are in a solicitor-client relationship. Instead, the Bank’s lawyer represents the Bank and its interests in the real estate transaction and the other individual is not a City employee or council member. Neither the City nor the Solicitor sufficiently explain why legal advice privilege would apply to this information.

[91] However, I note that prior jurisprudence has found a lawyer’s handwritten notes may be privileged where the notes are part of a legal advisor’s working papers directly related to the seeking, formulating or giving of legal advice.<sup>94</sup> This principle has been applied where the handwritten notes are related to documents or privileged communications between the lawyer and the client.<sup>95</sup> It has also been used to protect a lawyer’s handwritten notes about information obtained from a “non-privileged communication” or “a non-privileged source”, which means information that the lawyer received from a person outside the solicitor-client relationship, also known as a third party.<sup>96</sup>

[92] I also note that in Order F23-78, Adjudicator Davis determined legal advice privilege applied to a lawyer’s handwritten notes about telephone calls the lawyer had with a third party, “if they relate to providing legal advice and risk revealing privileged information.”<sup>97</sup> In making that determination, Adjudicator Davis cited Adam Dodek’s text *Solicitor-Client Privilege* where that author made the following argument about why a lawyer’s notes should be protected under privilege:

...First, the lawyer's notes are not like non-privileged documents that are sent to a lawyer. They are created by the lawyer. Even if such notes purport to be simply a transcription of what the other party said, the lawyer's notes may reveal the lawyer's subjective impressions by the detail or lack of detail about certain information. As one lawyer remarked to me, “notes are inherently interpretive”. They are not the same as a true transcript of an interview. Second, the notes are clearly prepared for the purpose of

<sup>92</sup> Solicitor’s affidavit at para. 18.

<sup>93</sup> Information located on pp. 167, 168, 216, 241, 735, 749-750, 949, 960-961, 988-989, 1007, 1036 of the records.

<sup>94</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, 1969 CanLII 1540 (CA EXC) at p. 33.

<sup>95</sup> Order F18-46, 2018 BCIPC 49 (CanLII) at paras. 22-23. Order F23-78, 2023 CanLII 90556 (BCIPC) at paras. 27 and 38.

<sup>96</sup> *Playfair Developments Ltd v. Deputy Minister of National Revenue*, 1985 CanLII 6226 (ONSC) at p. 307.

<sup>97</sup> Order F23-78, 2023 CanLII 90556 (BCIPC) at para. 44.

providing legal advice to the client and on this basis should fall within the broad ambit as being part of the “continuum of communication” between lawyer and client. In this way, they are analogous to clients' notes that assist the client in communicating with their lawyer....<sup>98</sup>

[93] Adopting that approach, Adjudicator Davis concluded the lawyer’s handwritten notes in that case were “not objective transcriptions of what was said, but [the lawyer’s] subjective impressions of what was said in the context of providing legal advice to the [public body].”<sup>99</sup> Adjudicator Davis was satisfied that disclosing those notes risked revealing privileged information such as the lawyer’s “assessment of evidence, which informed their legal advice to the [public body].”<sup>100</sup>

[94] Based on those authorities, I conclude a lawyer’s handwritten notes about information the lawyer obtained from a third party may be privileged when they were prepared for the purpose of providing legal advice to the client, reflect the lawyer’s subjective impressions or thoughts about that information, and where that information is used to assist the lawyer in communicating with the client in confidence about their legal matter.

[95] Applying those principles, I find the Solicitor created the notes for the purpose of providing legal advice to the City. I can see from reviewing the information at issue and the responsive records that the Solicitor’s conversations with the Bank’s lawyer and the other individual were necessary to advise and assist the City with its purchase and possession of the Property. Those conversations occurred while the Solicitor was engaged in assisting the City with those matters and the Solicitor created the notes to capture those conversations.

[96] I also find the Solicitor’s handwritten notes are their subjective impressions of the conversations they had with the Bank’s lawyer and the other individual. In the notes, the Solicitor does not transcribe those conversations, but chooses what information and details to capture about those conversations.

[97] Finally, I am satisfied the Solicitor uses the information in their handwritten notes to communicate in confidence with City employees or council members about the City’s purchase and possession of the Property. For instance, I can see that the Solicitor relies on their handwritten notes to draft confidential emails and memos to City employees and council members with updates and information about those matters.<sup>101</sup> Therefore, in these circumstances, I find the Solicitor’s handwritten notes are protected under legal advice privilege.

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<sup>98</sup> Order F23-78, 2023 CanLII 90556 (BCIPC) at para. 44, citing Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis, 2014) at ss. 5.80-5.82 (citations omitted).

<sup>99</sup> Order F23-78, 2023 CanLII 90556 (BCIPC) at para. 45.

<sup>100</sup> *Ibid.*

<sup>101</sup> For example, information located on pp. 125 and 126 of the records.

*Communications between City employees and legal support staff*

[98] The City applied s. 14 to emails between City employees and a City legal assistant or a paralegal. The Solicitor describes those records as “an internal email string in which advice is provided by a City Legal Assistant”<sup>102</sup> and “communications between a City paralegal and Burnaby staff about a Closed Council meeting.”<sup>103</sup> Neither the City nor the Solicitor explain how those communications are privileged communications between a lawyer and a client since a legal assistant and a paralegal do not qualify as a lawyer.

[99] However, I note that the Supreme Court of Canada has clarified that legal advice privilege may apply to communications between the client and legal support staff when those communications were made as a part of obtaining legal advice in confidence from the lawyer:

Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.<sup>104</sup>

[100] Previous OIPC orders have applied those principles to find that legal advice privilege applied to communications between the client and legal support staff even on administrative matters.<sup>105</sup>

[101] Based on my review of the emails at issue, I am satisfied that the legal assistant and the paralegal are assisting the Solicitor on administrative matters related to the real estate transaction. Given what is said in these emails and the surrounding circumstances, I find the legal assistant and the paralegal are carrying out the Solicitor’s instructions and conveying information to, and obtaining information from, other City employees to assist the Solicitor in the real estate transaction. Therefore, I find these communications fall within the scope and protection of legal advice privilege.

**Analysis and findings: information for which s. 14 does not apply**

[102] As set out below, I find the City has withheld information and records under s. 14 that does not fall within the scope of legal advice privilege.

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<sup>102</sup> Solicitor’s affidavit at para. 35 discussing pp. 830-832 of the records.

<sup>103</sup> Solicitor’s affidavit at para. 36 discussing pp. 910-911 of the records.

<sup>104</sup> *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC) at pp. 892-893

<sup>105</sup> Order F23-53, 2023 BCIPC 61 at para. 20. Order F20-01, 2020 BCIPC 1 (CanLII) at paras. 21, 30-32.



[103] Memos and reports: the City applied s. 14 to the information that I found could not be withheld under s. 13(1) in certain memos and reports, such as the City's logo, generic titles and headings, the date of the document, the names of some senders and recipients and information in the footer of the documents such as the City's mailing address.<sup>106</sup> It is not apparent and neither the City nor the Solicitor sufficiently explain how this information reveals privileged information between the Solicitor and their client.

[104] Emails that do not include the Solicitor: the City withheld emails between City employees and emails from City employees to council members.<sup>107</sup> I found a small amount of this information could be withheld under s. 13(1).<sup>108</sup> For the rest of the information in these emails, these communications do not include the Solicitor and the Solicitor does not discuss or address these communications. I also find the information withheld in these communications does not reveal any legal advice given by the Solicitor to the City and instead discusses matters that are part of the public record.<sup>109</sup> Therefore, it is unclear how these records qualify as confidential communications between a lawyer and a client or would reveal that kind of information.

[105] Email involving a real estate agent: the City withheld an email between a City employee and the Bank's real estate agent.<sup>110</sup> The City withheld a small amount of information in this email. This communication is not between a lawyer and a client and it is not apparent how this information reveals any privileged communications between the Solicitor and the City. The City does not sufficiently explain or provide any evidence from the Solicitor about it.

[106] Anonymous handwritten notes: the City withheld two handwritten notes by an unidentified individual that contains instructions and information.<sup>111</sup> The Solicitor and the City do not discuss or address this information; therefore, it is unclear who wrote the notes or how the withheld information reveals any privileged communications between a lawyer and a client.

[107] Email with attachment: the City withheld an email that the Solicitor describes as "from City staff to me which attaches a copy of a Closed Council Report...that I prepared for City Council making recommendations, seeking legal instructions and containing my legal advice."<sup>112</sup> I found some of the information in the email subject line and the attachment field and most of the information in the

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<sup>106</sup> Information located on pp. 31-32, 100-101, 123 (same as pp. 166, 746, 747, 748, 756), 124-128, 131-132, 150-156, 802, 803-809 of the records.

<sup>107</sup> Information located on pp. 3, 4-8 of the records.

<sup>108</sup> Information located on p. 4 of the records.

<sup>109</sup> Information part of the public record located on pp. 1634-1635 of the records.

<sup>110</sup> Information located on p. 275 of the records.

<sup>111</sup> Information located on p. 983 of the records.

<sup>112</sup> Solicitor's affidavit at para. 23 discussing pp. 347-350 of the records (email on p. 347 and report located on pp. 348-350). The City did not withhold p. 350 under s. 14.

report could be withheld under s. 13(1). The remaining information consists of the generic headings and titles, the City's logo, the date, and the sender and recipient information in the report, as well as the identity of the email participants and most of the information in the last email. It is not apparent, and neither the City nor the Solicitor sufficiently explain, how this remaining information reveals privileged communications between the Solicitor and their client.

[108] To conclude, for the reasons given, I find some of the information withheld by the City under s. 14 does not meet the test for legal advice privilege because one or more of the criteria needed for legal advice privilege to apply has not been satisfied. It is also not apparent, and the City does not sufficiently explain, how the disclosure of this information would reveal confidential solicitor-client communications that entail the seeking or giving of legal advice.

### ***Unreasonable invasion of third-party personal privacy – s. 22***

[109] Section 22(1) of FIPPA requires a public body to refuse to disclose personal information the disclosure of which would unreasonably invade a third-party's personal privacy.<sup>113</sup> Numerous OIPC orders have considered the application of s. 22(1) and I will apply the same approach in this inquiry.

#### **Personal information**

[110] Section 22 only applies to personal information; therefore, the first step in the s. 22 analysis is to determine if the information at issue is personal information.

[111] "Personal information" is defined in Schedule 1 of FIPPA as "recorded information about an identifiable individual other than contact information." 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.

[112] "Contact information" is defined in Schedule 1 of FIPPA as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."

[113] The City submits the information that it has withheld under s. 22(1) is the personal information of several individuals, including property owners and a City employee.

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<sup>113</sup> A "third party" is defined in Schedule 1 of FIPPA as any person, group of persons or organization other than the person who made the access request or a public body.

[114] From my review of the s. 22(1) information, I am satisfied that the following information is the personal information of third parties:

- Information about a named City employee's whereabouts on a specific day.<sup>114</sup>
- A comment made by an individual, whose identity was disclosed in the records, about a visit to the Property.<sup>115</sup>
- A named individual's observation about a matter that involves the applicant and the Property.<sup>116</sup>
- The names of four individuals in a table with the title "Payable Contract Holdback" which I will refer to as the Holdback Table.<sup>117</sup>

[115] I find the above-noted information qualifies as personal information because it is not contact information and it identifies an individual by name or is attributed to an individual who is identifiable in the relevant records.

[116] However, for the reasons discussed below, I find the rest of the information withheld under s. 22(1) is not personal information or the City has already disclosed this information to the applicant; therefore, the City is not authorized to withhold this information under s. 22(1).

[117] The City withheld the phone numbers of three named individuals which I find qualifies as contact information under FIPPA.<sup>118</sup> Whether information will qualify as contact information under s. 22 depends on the context in which the information appears in the records.<sup>119</sup> One of the phone numbers belongs to the Bank's lawyer, the other to a City employee and the third number is being used by an employee from the Land Title and Survey Authority of BC. I can see from the context in which this information appears in the records that these individuals were using these phone numbers in their professional capacity and were communicating or contacted for work-related purposes. Therefore, I conclude this information qualifies as contact information, which means it is not personal information under FIPPA.

[118] The City also withheld an address and some information related to that address in an email between City employees.<sup>120</sup> However, it is unclear whether

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<sup>114</sup> Located on p. 924 of the records.

<sup>115</sup> Located on pp. 1000 and 1008 of the records.

<sup>116</sup> Located on p. 1003 of the records.

<sup>117</sup> Located on pp. 1106, 1112 and 1126 of the records.

<sup>118</sup> Information withheld on pp. 725, 956 and 1018 of the records.

<sup>119</sup> Order F21-35, 2021 BCIPC 43 (CanLII) at paras. 158 and 164.

<sup>120</sup> Information withheld on pp. 1106, 1111, 1125 of the records.

this information is related to a residential address and the City provided no explanation or evidence that shows how disclosing this information would identify a particular individual for the purposes of s. 22. Therefore, without more, I am not satisfied the information withheld by the City in this email is personal information under FIPPA.

[119] I find the City also withheld information in the Holdback Table that is not about identifiable individuals since it is the name of several companies and at least one corporation.<sup>121</sup> Corporations and companies do not have personal privacy rights under s. 22 of FIPPA.<sup>122</sup> As previously noted, a public body has the initial burden of proving that the information at issue is personal information under s. 22. In this case, the City did not explain how this company or corporate information qualifies as personal information under s. 22.

[120] In some cases, the City withheld information under s. 22(1) that it then disclosed elsewhere in the records or previously disclosed to the applicant. This information includes an individual's cell phone number, an address, and the commission on a real estate transaction.<sup>123</sup> The applicant was already given access to all this information. The City did not explain this inconsistency in its severance of the records and it is unclear how disclosing all this information to the applicant a second time would be an unreasonable invasion of a third-party's personal privacy. Therefore, I conclude the City cannot withhold this information under s. 22(1).

#### **Section 22(4) – disclosure not an unreasonable invasion**

[121] 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 cannot be withheld under s. 22(1).

[122] None of the parties made any submissions about s. 22(4). I have considered the types of information and circumstances listed under s. 22(4) and find none apply.

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<sup>121</sup> Located on pp. 1106, 1112 and 1126 of the records.

<sup>122</sup> Order F17-39, 2017 BCIPC 43 at para. 75.

<sup>123</sup> Information located on pp. 876-878 of the records, which was previously withheld under s. 21(1), but later disclosed to the applicant. The cell phone number was withheld on pp. 916, 959, 1003, 1004, 1006, 1008, 1009, but disclosed on pp. 129, 923, 950, 999, 1000, 1001. The amount of commission was withheld on p. 940 but disclosed on p. 876. The address was withheld on pp. 1105, 1111, but disclosed on p. 1125 of the records.

**Section 22(3) – disclosure presumed to be an unreasonable invasion**

[123] 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 circumstances would be an unreasonable invasion of third-party personal privacy.

[124] None of the parties made any submissions about s. 22(3). 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 and conclusion**

[125] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue considering all relevant circumstances. Section 22(2) requires a public body to consider the circumstances listed under ss. 22(2)(a) to (i) and any other relevant circumstances to determine whether disclosing the personal information at issue would be an unreasonable invasion of a third party's personal privacy.

[126] None of the parties made any submissions about s. 22(2). The City submits the information withheld under s. 22(1) should not be disclosed to the applicant because it would be an unreasonable invasion of a third party's personal privacy. However, it did not identify what relevant circumstances it considered in making that determination. On the other hand, the applicant did not identify what relevant circumstances favour disclosing the personal information at issue.

[127] I have considered the various s. 22(2) factors and I find none apply here. I do, however, find a relevant circumstance in this case is that some of the information at issue is not sensitive. Previous OIPC orders have considered the sensitivity of the personal information at issue and where the sensitivity of the information is high, such as medical or other intimate information, withholding the information should be favoured.<sup>124</sup> However, where the information is of a non-sensitive nature or that sensitivity is reduced by the circumstances, then this factor may weigh in favour of disclosure.<sup>125</sup>

[128] The City withheld a named employee's whereabouts on a specific day,<sup>126</sup> an individual's comment about a visit to the Property,<sup>127</sup> and innocuous information in the Holdback Table under headings such as "document number",

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<sup>124</sup> Order F16-51, 2016 BCIPC 58 at para. 87.

<sup>125</sup> Order F16-51, 2016 BCIPC 58 at paras. 87-91 and 93.

<sup>126</sup> Located on p. 924 of the records.

<sup>127</sup> Located on pp. 1000 and 1008 of the records.

“business area”, “document date”, “posting date” and “business area.”<sup>128</sup> There is nothing about this information or in the materials before me that indicates this information is particularly sensitive, intimate or personally revealing considering some of it is factual or publicly observable. As a result, I find disclosing this information would not be an unreasonable invasion of a third party’s personal privacy and the City is not required to withhold it under s. 22(1).

[129] However, I find it would be an unreasonable invasion to disclose the rest of the personal information withheld under s. 22(1). This information consists of a named individual’s observation about a somewhat sensitive matter that involves the applicant and the Property<sup>129</sup> and the names of four individuals in the Holdback Table.<sup>130</sup> I considered whether there were any factors that weigh in favour of disclosing this information to the applicant and could find none, nor did the applicant identify any relevant circumstances. Therefore, I find the City is required to withhold that information under s. 22(1).

## CONCLUSION

[130] For the reasons previously given, I make the following order under s. 58:

1. The City is not authorized to refuse access to the information that it withheld on page 716 of the records under numbered items 1 and 3-6. This record is responsive to the applicant’s access request and the City must give the applicant an unredacted copy of this information.
2. The City is not authorized to refuse access to the information that it withheld under s. 12(3)(b).
3. Except for the information discussed under item 4 below, I confirm the City is authorized or required to refuse access to the information that it withheld under ss. 13(1), 14 and 22(1).
4. The City is not required under s. 22(1), nor is it authorized under ss. 12(3)(b), 13(1) or 14, to refuse access to the information that I have highlighted in a copy of the records that will be provided to the City with this order.
5. I require the City to give the applicant a copy of the records with the highlighted information unredacted. The City must concurrently provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order, along with a copy of the unredacted records that the City will provide to the applicant.

<sup>128</sup> Information located on pp. 1106, 1112 and 1126 of the records.

<sup>129</sup> Located on p. 1003 of the records.

<sup>130</sup> Located on pp. 1106, 1112 and 1126 of the records.

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[131] Under s. 59 of FIPPA, the City is required to give the applicant access to the information that it is not authorized or required to withhold by December 13, 2023.

October 31, 2023

**ORIGINAL SIGNED BY**

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Lisa Siew, Adjudicator

OIPC File Nos.: F20-83715 and F20-83869