Order F23-96

CITY OF VANCOUVER

Carol Pakkala
Adjudicator

November 10, 2023

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Summary: An applicant requested access to records relating to a development project held by the City of Vancouver (City). The City withheld some information in the responsive records, citing multiple exceptions to disclosure under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found the City was authorized to refuse to disclose all the information it withheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 12(3)(b), 13(1), 14, 16(1)(b), and 17(1) and *Vancouver Charter,* SBC 1953, c 55, s. 165.2.

INTRODUCTION

[1] This inquiry is about the City of Vancouver's (City) response to an applicant's access request for information relating to the Seńáḵw real estate development project (Project). Specifically, the applicant requested access to all records of public feedback and emails (including attachments) about the Project.

[2] In response to the access request, the City provided 2,803 pages of records. The City withheld some information from those records under ss. 12(3)(b) (local public body confidences), 13 (advice or recommendations), 14 (solicitor-client privilege), 15 (harm to law enforcement), 16(1)(b) (intergovernmental confidences), 17 (harm to financial or economic interests), 21(1) (harm to business interests), and 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision to withhold information under ss. 12(3)(b), 13, 14, 15, 16(1)(b), 17, and 22. The applicant did not challenge the City's decision to withhold information under s. 21(1) and later consented to the

removal of the s. 15 issue from this inquiry. Mediation did not resolve the remaining issues and they proceeded to this inquiry.

[4] The applicant and the City each provided written submissions in the inquiry. The City requested and was given permission from the OIPC to submit parts of its evidence and submissions *in camera*, meaning for the OIPC to see, but not the applicant.[1]

Preliminary Matters

Section 22 no longer in dispute

[5] The City withheld some information in the records under s. 22, which provides that a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.[2] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.[3] I reviewed the information withheld under s. 22 and determined that it was, for the most part, third-party personal information.[4]

[6] Based on the applicant's submission, it appeared to me that he would not be interested in this type of information. I wrote to the applicant regarding my review of the s. 22 information. In response, the applicant consented to removing s. 22(1) as an issue, so I will not consider it any further.

Records no longer in dispute

[7] In its initial submissions, the City identified a severing error. The City says it should have withheld seven pages of the records under s. 21(1), not s. 13(1). Section 21(1) was not listed as an issue in this inquiry because the applicant did not dispute the City's application of s. 21(1) to the other responsive records. The City therefore requested to remove those pages from the scope of this inquiry. The applicant consented to the City's request, so I will not consider those pages any further.

Late raising of s. 25, public interest disclosure

[8] In his response submissions, the applicant appears to be arguing that s. 25 applies to the information in dispute. Section 25 of FIPPA states that,

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[1] Section 56(4)(b), FIPPA.
[2] FIPPA defines a "third party" as any person, group of persons or organization other than the person who made the request or a public body (Schedule 1 of FIPPA).
[3] Schedule 1 of FIPPA.
[4] There was a small amount of information about third parties that may or may not be considered "contact information" and therefore not "personal information" for the purposes of s. 22.

despite any other provision of FIPPA, a public body must disclose information that is clearly in the public interest. The applicant's request for review does not mention s. 25. There is no indication that s. 25 arose as an issue during mediation and it is not listed as an issue in the Notice of Inquiry or Fact Report.

[9] Past OIPC orders have consistently said that parties may only add new issues into an inquiry if permitted to do so by the OIPC.[5] The OIPC's Notice of Inquiry and its *Instructions for Written Inquiries*[6] clearly explain the process for adding new issues to an inquiry. The applicant did not seek prior approval to add s. 25. I am not persuaded by the record before me that it would be fair to add this new issue or that there is any exceptional circumstance to warrant adding s. 25. Therefore, I decline to add, or consider, s. 25.

Additional submissions - BC Supreme Court decision

[10] In its reply submission, the City asked that I consider a decision of the British Columbia Supreme Court handed down after the close of submissions in this inquiry: *Kits Point Residents Association* v. *Vancouver (City)*[7] (KRPA decision). The KRPA decision is about the City's *in camera* resolution to authorize and execute the proposed services agreement for the Project.

[11] The City's position is that the KPRA decision should be considered in this inquiry because the court's reasons provide context and are of relevance to the issues in the present inquiry, including findings on matters that are at issue.

[12] I gave the applicant the opportunity to provide submissions on the City's request that I consider the KPRA decision. The applicant takes the position that the KRPA decision is not relevant because it involved a complaint that provisions of the *Vancouver Charter*[8] (Vancouver Charter) had been contravened. The applicant says his complaint is related to whether sections of FIPPA were fairly applied.

[13] While the applicant is correct about the purpose of this inquiry, his point that the court considered the interpretation of the Vancouver Charter highlights a relevant portion of the KRPA decision to this inquiry. The s. 12(3)(b) issue in this inquiry requires an interpretation of the Vancouver Charter in giving the City the statutory authority to hold an *in camera* meeting. For this reason, I will consider the KRPA decision in this inquiry on this matter of statutory interpretation. Further, the court's interpretation of the meaning of "harm" to the City's interests

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[5] For example, see Order F12-07, 2012 BCIPC 10 at para 6; Order F10-37, 2010 BCIPC 55 at para 10; Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras 6-11; and Decision F08-02, 2008 CanLII 1647 (BC IPC).
[6] Available online: https://www.oipc.bc.ca/guidance-documents/1744.
[7] 2023 BCSC 1706 [KRPA decision].
[8] *Vancouver Charter*, SBC 1953, c. 55.

within the specific context of this Project is relevant to both the ss. 12(3)(b) and 17(1) issues before me in this inquiry.

Issues

[14] The issues to be decided in this inquiry are whether the City is authorized to refuse to disclose the information in dispute under ss. 12(3)(b), 13(1), 14, 16(1)(b), and 17(1) of FIPPA.

[15] Section 57(1) of FIPPA places the burden on the City to prove that the applicant has no right of access to the information withheld under all five sections.

DISCUSSION

Background

[16] The Seȟáḵw project (Project) is intended to develop Sḵwx̱wú7mesh Úxwumixw (Squamish Nation) unceded lands near the Burrard Bridge directly across the water from downtown Vancouver. These lands are adjacent to the surrounding Vanier Park situated on the unceded territories of the Squamish Nation, xʷməθkʷəy̓əm (Musqueam), and səlilwətaʔɬ (Tsleil-Waututh) Nations.

[17] The Project is primarily a residential development with an estimated 6,000 rental suites, along with office and commercial space, and community amenities. The Squamish Nation is developing its lands through the Seȟáḵw Partnership (Partnership). During the relevant time period covered by the applicant's access request, the Partnership consisted of the Squamish Nation's Nch'ḵay Development Corporation and a private real estate development company, Westbank Projects Corp.[9]

[18] The City's involvement in the Project is in respect of municipal infrastructure and services such as utilities (water, sewer), policing, fire and rescue, civic amenities and others.[10] The Squamish Nation entered into a services agreement with the City to provide such services for the Project (Services Agreement). The Services Agreement was released to the public in June of 2022.[11]

[19] The applicant's access request is for the City's records related to the Project for the period of December 12, 2019 to June 20, 2020. This period is

[9] Affidavit of the City's Director, Business Planning and Project Support (Planning Director) at para 14.
[10] *Ibid* at para 16.
[11] *Ibid* at para 31. The Services Agreement is available online at https://vancouver.ca/files/cov/senakw-services-agreement.pdf.

when the City's planning and groundwork for negotiation of the Services Agreement took place.[12]

Information in dispute

[20] In response to the applicant's Request, the City provided 2,803 pages of responsive records consisting of emails and documents including presentations, topic matrices, spreadsheets, internal briefing memos, and analyses.[13] Information was withheld from 950 pages of these records (some pages are duplicates). I will discuss the specific information in dispute as they relate to each exception and describe them as such. For example, I will refer to the redactions made under s. 14 as the s. 14 information.

Local public body confidences, s. 12(3)(b)

[21] Section 12(3)(b) is a discretionary exception that allows a public body to refuse to disclose information that would reveal

> (b) 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.

[22] The purpose of s. 12(3)(b) is to protect a local public body's ability to engage in full and frank exploration of issues, despite how controversial they might be, in the absence of the public.[14]

[23] Past orders have held that three conditions must be met in order for a public body to withhold information under s. 12(3)(b). The public body must establish that:

1. 1. it has the statutory (legal) authority to meet in the absence of the public;

2. 2. the meeting was actually held in the absence of the public; and

3. 3. the information would, if disclosed, reveal the substance of deliberations of that meeting.[15]

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[12] *Ibid* at para 26.
[13] City's initial submissions at para 27.
[14] Order F11-04, 2011 BCIPC 4 at para 29 and Order 04-04, 2004 CanLII 34258 (BC IPC) at para 72.
[15] Order 02-47, 2002 Can LII 42482 (BC IPC) at para 10 citing Order 02-22, [2002] B.C.I.P.C.D. No. 22, articulating the test from Order 326-1999, [1999] B.C.I.P.C.D. No. 39. Order F13-10, 2013 BCIPC 11 at para 8 relying on, for example, Order 00-14, [2000] B.C.I.P.C.D. No. 17. See also Order 02-19, [2002] B.C.I.P.C.D. No. 19 at para 70.

[24] Past orders have also considered the meaning of the phrase "substance of deliberations". These orders have held that the phrase covers discussions conducted with a view to making a decision or following a course of action.[16] Further, it covers what is actually said or decided at a meeting, not the material that stimulated the discussion,[17] unless one can reasonably conclude from that material what was thought, said or decided.[18]

The s. 12(3)(b) information

[25] The City applied s. 12(3)(b) to the minutes of a meeting of the Vancouver Park Board held on June 22, 2020, and to the preliminary planning principles for Vanier Park discussed at that meeting.[19] These principles are confidential, the City says, because they touch on sensitive matters that invoke colonial history. Vanier Park is adjacent to the Project within the unceded Squamish Nation, Musqueam, and Tsleil-Waututh territories.[20]

Parties' submissions, s. 12(3)(b)

[26] To support its position that s. 12(3)(b) applies to the information in dispute, the City provided affidavit evidence from its Manager of Planning, Policy and Environment, Vancouver Board of Parks and Recreation (Manager). I am limited in what I can say about the information, the City's submissions, and the Manager's evidence on s. 12(3)(b), because much of it was submitted to the OIPC *in camera.* However, I will discuss the aspects submitted in open evidence in my analysis below.

[27] The applicant does not specifically address s. 12(3)(b) but does express concern with the transparency of the City's decision making.

Analysis, s. 12(3)(b)

[28] I have reviewed the s. 12(3)(b) information and the Manager's affidavit evidence, portions of which were submitted to the OIPC *in camera*. Based on this review and for the reasons that follow, I am satisfied that the City properly applied s. 12(3)(b) to the information in dispute.

[29] As noted above, three conditions must be met for a local public body to withhold information under s. 12(3)(b). I will consider each of these conditions in turn below.

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[16] Order 00-11 2000, CanLII 10554 (BC IPC) at s. 3.3.
[17] Order F11-04, 2011 BCIPC 4 at paras 29 and 35.
[18] Order F12-11, 2012 BCIPC 15 at para. 14.
[19] City's initial submissions at paras 85 to 88.
[20] City's initial submissions at para 90.

Was the Park Board authorized to meet in the absence of the public?

[30] The first part of the s. 12(3)(b) test to meet is the statutory authority for the meeting. The City says that s. 165.2(1)(k) of the Vancouver Charter authorized the Park Board to meet in the absence of the public. Section 165.2(1)(k) of the Vancouver Charter, which applies to the Park Board,[21] provides that a meeting may be closed to the public if the subject matter being considered relates to one or more of the following:

> negotiations and related discussions respecting the proposed provision of an activity, work or facility that are at their **preliminary** stages and that, in the view of the Council, could reasonably be expected to **harm** the **interests of the city** if they were held in public; … [emphasis mine]

[31] The term "preliminary" means something coming before an event.[22] Here the event is the planning related to Vanier Park necessitated by the Project. Vanier Park is located directly next to the Project site on unceded territories and will therefore be impacted by a development of this magnitude. I accept that careful preliminary planning was required. I find the "preliminary" element of s. 165.2(1)(k) is met.

[32] The "interests of the city" in the context of this Project encompass a variety of considerations including the reputation of the City, its commitment to the principles of reconciliation, fiscal issues, and the consideration to be given to a wide variety of stakeholders.[23] The "interests of the city" also requires recognition of the historical and legal context of the Project. I find these interests of the City are at stake so this element of s. 165.2(1)(k) is met.

[33] The "harm" that could occur in this context is that which could occur if negotiations and related discussions were held in public.[24] The Manager says that public discussion of the planning for Vanier Park would harm the City's interests "in promoting reconciliation and in maintaining good inter-governmental relations with the local First Nations".[25] I accept this evidence and find that public discussions regarding preliminary planning for Vanier Park could reasonably be

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[21] Section 165.7(d) of the Vancouver Charter provides that s. 165.2 applies to meetings of the Park Board, subject to regulations. The Park Board regulations, at para 4.9, allow for *in camera* meetings with 48-hours' notice stating the day, hour, and place of the meeting and the agenda items to be discussed. Notice of the June 22, 2020 *in camera* meeting was given at the Park Board's June 8, 2020 regular meeting (Manager's affidavit at para 16).

[22] KRPA decision at para 173. The court held that the July 2021 *in camera* meeting to approve moving forward with the draft of the Services Agreement for the Project was preliminary within the meaning of s. 165.2(1)(k). Here the *in camera* meeting for City planning related to the Project was even earlier in the timeline of the Project than the one before the court.

[23] KRPA decision at para 182.

[24] KRPA decision at para 185.

[25] Manager's affidavit at para 18.

expected to harm the interests of the City. In particular, public discussion could undermine the City's relationship with other stakeholders and its commitment to reconciliation due to the overlapping jurisdictions in Vanier Park. I find the City's use of *in camera* procedures was justified because the glare of publicity would undermine that highly sensitive planning.[26]

[34] I find the City had the statutory authority under s. 165.2(1)(k) of the Vancouver Charter to hold the meeting at issue in the absence of the public.

[35] I note that the Park Board is required to provide notice stating the day, hour, and place of the meeting and the agenda items to be discussed at an *in camera* meeting to all commissioners at least 48 hours before the time of the meeting.[27] The Manager deposes that notice of the June 22, 2020 *in camera* meeting was given at the Park Board's June 8, 2020 regular meeting, so I am satisfied that this procedural requirement was also met.[28]

Was the meeting held in the absence of the public?

[36] The second part of the s. 12(3)(b) test is that the meeting was actually held in the absence of the public. I am satisfied that the meeting was, in fact held in the absence of the public (*in camera*). The Manager says he attended this *in camera* meeting and the minutes of the meeting show that the meeting was held *in camera*.[29]

Would disclosure of the information in dispute reveal the substance of deliberations at the meeting?

[37] The third part of the s. 12(3)(b) test is that the information would, if disclosed, reveal the substance of deliberations of that meeting. My review of the s. 12(3)(b) information indicates a discussion took place with a view to making planning decisions about Vanier Park and following a particular course of action.[30] Further, it includes material that stimulated this discussion from which one can reasonably conclude what was thought, said or decided.

[38] Based upon my review of the s. 12(3)(b) information, I am satisfied that its disclosure would reveal the substance of deliberations of the meeting held in the absence of the public. Specifically, I find the s. 12(3)(b) information provides detailed background information and interpretation to guide the discussions between staff and Park Board members during the meeting.[31] Disclosing this

[26] For a similar finding, see KRPA decision.
[27] *Vancouver Board of Parks and Recreation Procedure By-Law* at para 4.9.
[28] Manager's affidavit at para 16.
[29] Manager's affidavit at para 10 and the minutes of the meeting attached as Exhibit "A" to his affidavit.
[30] Order 00-11, 2000, CanLII 10554 (BC IPC) at s. 3.3.
[31] Order 03-22, 2003 CanLII 49200 (BC IPC) at para 15.

information would allow for accurate inferences with respect to the substance of the *in camera* deliberations.

Conclusion, s. 12(3)(b)

[39] I find the City has met its burden of proof on s. 12(3)(b). For the reasons above, I find that the Park Board had the statutory authority to hold a meeting in the absence of the public, that it in fact held that meeting, and that disclosure of the s. 12(3)(b) information would reveal the substance of the deliberations at that meeting. For these reasons, I find the City is authorized to refuse to disclose the s. 12(3)(b) information.

Advice or recommendations, s.13(1)

[40] Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. However, s. 13(1) does not apply to certain types of records and information listed in s. 13(2), and s. 13(3) says it does not apply to information in a record that has been in existence for more than 10 years.

[41] The purpose of section 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 deliberate process of government decision and policy making were subject to excessive scrutiny.[32]

[42] Past OIPC orders and court decisions have established the following principles for the interpretation of s. 13(1) and I adopt these principles in making my decision:

- To "reveal" advice or recommendations means that s. 13 does not apply to information that has already been disclosed.[33]
- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.[34]
- "Recommendations" include material relating to a suggested course of action that will ultimately be accepted or rejected by the decision maker.[35]
- "Advice" is broader than "recommendations"[36] and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of

[32] *John Doe* v. *Ontario (Finance)* 2014 SCC 36 at paras 45-51.
[33] See for examples: Order F23-51 2023 BCIPC 59 at para 96; Order F20-32, 2020 BCIPC 38 at para 36; Order F13-24, 2013 BCIPC 31 at para 19; Order F12-15, 2012 BCIPC 21 at para 19.
[34] See for example Order F19-28, 2018 BCIPC 30 at para 24.
[35] *John Doe v Ontario (Finance),* 2014 SCC 36 at para 23.
[36] *Ibid* at para 24.

fact.[37] Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.[38]

- Advice" also includes factual information "compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body."[39] This compilation of factual information and weighing the significance of matters of fact is an integral component of an expert's advice and informs the decision-making process.

[43] The first step in the s. 13 analysis is to determine whether the information withheld would reveal advice or recommendations developed by or for a public body or minister. If it would, then I must decide whether ss. 13(2) or 13(3) apply.

The s. 13(1) information

[44] The information the City is refusing to disclose under s. 13 are excerpts from emails and other types of documents. These documents include power point presentation slides, topic matrices, spreadsheets, internal briefing memos, and analyses. The excerpts are on 746 of the 2,803 pages of responsive records (some are duplicates). The excerpts pertain to the discussion and negotiation of the Services Agreement which is now public record.[40]

Parties' submissions, s. 13(1)

[45] The City submits that the section 13(1) information clearly reveals advice or recommendations that City staff developed in the context of determining the City's approach to negotiating the Services Agreement. It says the advice or recommendations were refined during an iterative process that involved determining services, amenities, and City resource or staffing support requirements for the Project. The City provides affidavit evidence supporting its position.

[46] The applicant did not specifically comment on whether the information in dispute is advice or recommendations because he cannot see the information. The applicant says that the City was overly broad in its redactions, particularly in its application of ss. 13 and 17. The applicant rejects the City's submissions that many of the records, if disclosed, would reveal internal discussions/debates that led to the negotiation of the Services Agreement and that pertain to relationship building. The applicant says this argument does not hold water since the

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[37] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para 113.
[38] *Ibid* at para 103.
[39] *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94.
[40] Available online at https://vancouver.ca/files/cov/senakw-services-agreement.pdf.

Services Agreement has now been made public and ground has broken on the Project.

Analysis, s. 13(1)

[47] I have reviewed the information withheld under s.13 from the emails and documents, and I find that information is as follows:

- Senior City staff's analyses and opinions on various issues pertaining to the City's confidential negotiations with the Partnership;[41]
- Senior City staff's discussions about options under consideration for the City's negotiating stance, including proposed courses of action;[42]
- Senior City staff's analyses and opinion about various approaches to the valuation of services and amenities included in the Services Agreement;[43]
- Senior City staff's (including Park Board staff who are City employees) strategic recommendations for City planning related to Project infrastructure;[44]
- Confidential discussions among City staff regarding advice or recommendations on a proposed course of action; and
- Portions of discussions that would allow someone to infer the advice or recommendation from the overall context.

[48] It is apparent to me that the City staff are using their professional expertise in project planning and land development to provide analysis and opinions about the matters that the City is deciding.

[49] I find that all of the information withheld is either actual advice or recommendations, or information that would allow one to accurately infer advice or recommendations.

[50] In reaching my conclusion under s. 13(1), I also considered whether the withheld information has already been "revealed" for the purposes of s. 13(1) because the Services Agreement has since been made public. The s. 13 information here is, or would reveal, advice or recommendations about how the City should negotiate the Services Agreement. This information is all about the process of reaching the Services Agreement which is the end result or product of that process. I find that the publication of the Services Agreement did not reveal the advice or recommendations developed by or for the City to assist it in reaching that agreement.

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[41] Planning Director's affidavit at paras 36 and 38.
[42] Planning Director's affidavit at para 39.
[43] Planning Director's affidavit at para 41.
[44] Manager's affidavit at para 25.

[51] For the reasons above, I am satisfied that disclosing the information in dispute under s. 13(1) would reveal advice or recommendations developed by or for the City.

Exceptions, ss. 13(2) or 13(3)

[52] The next step is to determine whether any of the provisions in ss. 13(2) or (3) apply to the information I find would reveal advice or recommendations. The City says the withheld records do not fall under any of the categories of information listed in s. 13(2). The applicant did not specifically address whether any of the provisions in s. 13(2) apply.

[53] After reviewing the information in dispute, I am satisfied that none of the provisions in s. 13(2) apply. Section 13(3) says s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. After reviewing the information in dispute, I am satisfied that it is not 10 or more years old, so s. 13(3) does not apply.

Conclusion, s. 13(1)

[54] I find the City has met its burden of proof on s. 13(1). For the reasons above, I find that the City is authorized to refuse to disclose the s. 13 information.

Solicitor-client privilege, s.14

[55] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.[45]

[56] The purpose of s. 14 is to protect confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.[46]

[57] In order for information to be protected by legal advice privilege it must be:

- a communication between solicitor and client (or their agent);
- that entails the seeking or providing of legal advice; and
- that is intended by the solicitor and client to be confidential.[47]

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[45] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para 26.
[46] *College* at para 31.
[47] *Solosky v. The Queen*, [1980] 1 SCR 821 at p. 837.

[58] Not every communication between a solicitor and their client is privileged. If the conditions above are satisfied however, then privilege applies.[48]

[59] The courts have established certain principles for deciding if privilege applies:

- Lawyers, their staff and other firm members working together on a file may share privileged information amongst themselves so long as those discussions remain confidential relative to the rest of the world.[49]
- Privilege extends beyond the actual requesting or giving of legal advice to the "continuum of communications" between a lawyer and client, which includes the necessary exchange of information for the purpose of providing legal advice.[50]
- Privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For instance, legal advice privilege applies to internal client communications that relate to the legal advice received and discussion of its implications.[51]
- Lawyers, as officers of the court, have a professional duty to ensure that privilege is properly claimed.[52]
- Some deference is owed to a lawyer who claims privilege because a lawyer's conduct is subject to the standards set by the Law Society.[53]

I adopt these same principles in making my decision.

Evidentiary basis, s.14

[60] 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/Summary of Records - Section 14* (Section 14 Index) which identifies page numbers, dates, parties involved, type and brief description of each record. The City also provided affidavits from two lawyers in the City's in-house legal department. The lawyers each say they are practicing members of the Law Society of BC and have provided legal services and advice to the City's Council, senior management, and staff on various legal issues involving the City.

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[48] *Ibid,* at p. 829.
[49] *Shuttleworth v. Eberts et. al.,* 2011 ONSC 6106 at paras 67 and 70-71.
[50] *Huang v Silvercorp Metals Inc*., 2017 BCSC 795 at para 83; *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para 42 [*Camp*].
[51] *Bilfinger Berger (Canada) Inc*. v *Greater Vancouver Water District*, 2013 BCSC 1893 at para 24.
[52] *Nelson and District Credit Union* v *Fiserv Solutions of Canada, Inc.,* 2017 BCSC 1139 at para 54.
[53] *British Columbia (Minister of Finance)* v. *British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para 86.

[61] Section 44(1) gives me, as the commissioner's delegate, the power to order production of records in order to review them during the inquiry. However, due to the importance of solicitor-client privilege to the proper functioning of the legal system, I would only order production of records being withheld under s. 14 when absolutely necessary to adjudicate the issues.

[62] After reviewing the parties' submissions, I determined that the City had not provided a sufficient evidentiary basis for its claim of privilege over some of the information in dispute.[54] Given the importance of solicitor-client privilege, I provided the City with an opportunity to submit additional evidence and submissions. In response, the City provided me with further affidavit evidence to support its claim of privilege.

[63] I find that I now have sufficient evidence to decide if s. 14 applies. I have the Section 14 Index as well as sworn affidavit evidence from two of the City's in-house lawyers. I am satisfied that both lawyers have reviewed the records at issue. Further, as practicing lawyers and officers of the court, they have a professional duty to ensure that privilege is properly claimed.

[64] On the basis of the evidence provided, I conclude it is not necessary to exercise my discretion under s. 44 to order production of the records.

Parties' submissions, s. 14

[65] The City provided affidavit evidence from its in-house lawyers that:

- The records consist of emails and documents including administrative reports and planning documents;
- The portions of the records redacted under s. 14 contain, or reference legal advice given about the Project;
- The Section 14 Index accurately describes the emails containing s. 14 redactions, namely that all involved city staff only (including lawyers);
- There was an established solicitor client relationship between the City and its lawyers, one of whom was actively engaged at that time in providing legal advice about the Project;
- All emails that included City lawyers were intended to be confidential; and
- The City lawyers were acting for the City as in house counsel, not in a business or managerial capacity.

[66] The applicant made no submissions on s. 14.

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[54] The City's original affidavit evidence from its lawyer distinguished the information withheld on p. 1466 of the records from his general statement about legal advice.

Analysis, s.14

[67] For the reasons that follow, I find solicitor-client privilege applies to the s. 14 information.

[68] My review of the records, including the context in which the information was withheld, supports the City's position. I accept the affidavit evidence provided by the City's in-house lawyers. I find that their evidence establishes that the information withheld under s. 14 is confidential communications between solicitor and client related to the seeking, formulating, or giving of legal advice, or it is information that would reveal such communications.

[69] Based on my review of the Section 14 Index, the affidavit evidence, and the portions of the records I am able to see, I find that the information withheld under s. 14 consists of:

- a summary of legal advice and a full legal opinion within documents;
- direct communications between the City staff and the City's lawyers about legal advice; and
- communications between senior City staff/staff working group for the Project in which they communicate about legal advice the City sought and/or received.

Conclusion, s. 14

[70] In summary, I find that disclosing the information the City withheld under s. 14 would reveal confidential communications between the City and its lawyers about the seeking and giving of legal advice. I conclude the City is authorized to refuse to disclose the information it withheld under s. 14.

Intergovernmental confidences, s. 16(1)(b)

[71] The City applied s. 16(1)(b) to some of the same information it withheld under s. 13(1). Given my findings about s. 13(1), I will only consider the application of s. 16(1)(b) to the information that the City withheld under that section alone.

[72] Section 16(1)(b) allows a public body to refuse to disclose information to an applicant if the disclosure could reasonably be expected to

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

[73] Paragraph (a)(iii) lists "an Indigenous governing entity". Before the amendments discussed below, paragraph (a)(iii) listed "an aboriginal government".

Recent FIPPA amendments to s. 16(1)

[74] Section 16(1)(a)(iii) and the related definition in Schedule 1 of FIPPA were amended effective November 25, 2021.[55] Before the amendment, and at the time the City made its decision to withhold the information in dispute, s. 16(1)(a)(iii) said "an aboriginal government." Schedule 1 of FIPPA defined "aboriginal government" as "an aboriginal organization exercising governmental functions."

[75] Since the amendments, s. 16(1)(a)(iii) now says "Indigenous governing entity," which is defined in Schedule 1 as follows:

> "Indigenous governing entity" means an Indigenous entity that exercises governmental functions, and includes but is not limited to an Indigenous governing body as defined in the *Declaration on the Rights of Indigenous Peoples Act*;[56]

[76] As detailed below, I have applied the version of s. 16(1)(a)(iii) that was in effect at the time the City responded to the applicant's access request. However, my analysis applies equally to the amended provisions.

The s. 16(1)(b) information

[77] The s. 16(1) information is interwoven with the s. 13(1) information[57]. Given my findings on s. 13(1), I need only consider here the information withheld under s. 16(1)(b) alone. For clarity, this information consists of excerpts from emails and documents as well as entire documents.

Parties' submissions, s. 16(1)(b)

[78] The City says that s. 16(1)(b) applies to the information in dispute because it could reasonably be expected to reveal information received in confidence either from the Squamish Nation directly or from the Partnership as an agent of the Squamish Nation.

[79] The applicant does not comment directly on the s. 16(1)(b) information except to say the City's submission that the Partnership would not wish the records to be disclosed appears to be based on an assumption.

Analysis, s. 16(1)(b)

[80] Section 16(1)(b) applies to the aboriginal governments/Indigenous governing entities or their agencies. Section 16(1)(b) has two parts. The first part

[55] By the *Freedom of Information and Protection of Privacy Amendment Act*, SBC 2021 c 39 s. 8(a).
[56] *Ibid* s. 47(a).
[57] Planning Director's affidavit at para 43.

is to determine whether the information was received from one of the bodies listed in s. 16(1)(a) or any of their agencies. The second part is to determine whether the information was "received in confidence."

Did the City receive the information from an aboriginal government or its agent?

[81] The City submits that disclosure of the 16(1)(b) information could reasonably be expected to reveal information about the Project that it received from the Squamish Nation (or the Partnership as an agent of the Squamish Nation), which it says is an aboriginal government under s. 16(1)(a)(iii).

[82] As mentioned above, before it was amended, Schedule 1 of FIPPA defined "aboriginal government" as an aboriginal organization exercising governmental functions. Previous orders have found that an "aboriginal government" includes, at the very least, a "band"[58] under the federal *Indian Act.*[59] The Squamish Nation is a band under the *Indian Act*.[60] I find that the Squamish Nation is an aboriginal government for the purpose of s. 16(1)(a)(iii). I further find, based on the withheld s.16(1)(b) information, that the Partnership is an agent of the Squamish Nation for the purposes of the Project. I am satisfied that the Partnership was an agent of the Squamish Nation within the meaning of s. 16(1)(a)(iii).

Did the City receive the information "in confidence"?

[83] Past OIPC orders have said there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information.[61] In Order No. 331-1999, former Commissioner Loukidelis provided a non-exhaustive list of factors that may be considered to determine if the information was "received in confidence," including the nature of the information, explicit statements of confidentiality, evidence of an agreement or understanding of confidentiality and objective evidence of an expectation of or concern for confidentiality.[62] I have considered these factors in my analysis.

[84] The City submits that the information was received in confidence from the Squamish Nation (or from the Partnership as an agent of the Squamish Nation). It provided affidavit evidence from its Planning Director, who says he understood the information shared by the Partnership about the Project was to be held in strict confidence. He based his understanding both from the discussions he

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[58] Order 01-13, 2001 CanLII 21567 (BCIPC) at para 14; Order F20-48, 2020 BCIPC 57 at para 190; Order F21-45, 2021 BCIPC 53 at para 74.
[59] *Indian Act*, RSC 1985 c.1-5.
[60] Office's initial submissions, para 31.
[61] Order No. 331-1999, 1999 CanLII 4253 (BC IPC) at s. 3.5; Order F19-38, 2019 BCIPC 43 (CanLII) at para 116.
[62] Order No. 331-1999, 1999 CanLII 4253 (BC IPC) at s. 3.5.

personally had with the Partnership and from the verbal requests from the Partnership to other City staff.[63] He also says the City holding the s. 16(1)(b) information in confidence is consistent with the City's past practice with municipal services agreements and proposed development projects.[64] The City also provided affidavit evidence from the Manager, who says the City was receiving all information about the Project in confidence from the Squamish Nation and goes further to describe the City having an undertaking to keep this information in confidence.[65]

[85] I reviewed the s. 16(1)(b) information in detail and conclude from the nature of that information that it is confidential in nature. I also accept the evidence of both the City's Planning Director and the Manager.

[86] On the basis of the City's evidence and my own review of the s. 16(1)(b) information, I find it was received in confidence from the Squamish Nation and from the Partnership as an agent of the Squamish Nation.

Conclusion, s. 16(1)(b)

[87] I find the City has met its burden of proof on s. 16(1)(b). For the reasons above, I find that the City is authorized to refuse to disclose the s. 16(1)(b) information.

Disclosure harmful to financial or economic interests, s. 17(1)

[88] Section 17(1) permits a public body to withhold information that, if disclosed, could reasonably be expected to harm the financial or economic interests of the public body. The relevant provisions of s. 17(1) provide as follows:

> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body, … including the following information:
>
> …
>
> (e) information about negotiations carried on by or for a public body …
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body...

[63] Planning Director's affidavit at paras 49-50.
[64] *Ibid* at para 50.
[65] Manager's affidavit at para 18.

[89] Subsections (a) to (f) of s. 17(1) are examples of the types of information that, if disclosed, could reasonably be expected to cause harm under s. 17(1). However, information that does not fit under subsections (a) to (f) may still fall under the general provision of s. 17(1) as information that, if disclosed, could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy.[66]

[90] Section 17(1) uses the language "could reasonably be expected to harm". Previous orders and court decisions have established that public bodies must prove that disclosure will result in a risk of harm that goes "well beyond the merely possible or speculative".[67] The Supreme Court of Canada describes this standard as "a middle ground between that which is probable and that which is merely possible".[68] A public body must provide evidence to demonstrate that disclosure will result in a risk of harm that is "well beyond" or "considerably above" a mere possibility of harm in order to meet the standard.[69] The evidence it provides must demonstrate "a clear and direct connection between the disclosure of specific information and the harm" that it alleges.[70]

The s. 17(1) information

[91] The City withheld information in emails and other documents under s. 17(1). There was some overlap between the City's application of ss. 13(1) and 17(1) to the records. Given my findings about s. 13(1), I will only consider the application of s. 17(1) to the information the City withheld under that section alone.

[92] Based on my review, I find this information consists of financial projections and costs, pro forma financial analysis of the Project, and the community amenity contributions (CAC) analysis for the Project.

City's submissions, s. 17(1)

[93] The City submits the s.17(1) information reveals negotiating analysis, strategies, options, positions, criteria, objectives, or other similar information, as well as financial information from a pro forma. It says this information reveals key aspects of the City's negotiating position. The City says it expects this information would be used to undermine its negotiating position or would otherwise harm future negotiations that have an economic and financial impact

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[66] Order F14-31, 2014 BCIPC 34 (CanLII), para. 41.
[67] *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, para. 206.
[68] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 54 (CanLII), 2014 SCC, para 54.
[69] Order F17-01, 2017 BCIPC 1 (CanLII), para. 21.
[70] Order 02-50, 2002 BCIPC 42486 (CanLII), para. 137.

on the City. These future negotiations relate to CACs and municipal amenities and services, including such negotiations with Indigenous governments.[71]

[94] The City provides affidavit evidence on the s. 17(1) information from its Planning Director and from its Director of Real Estate Services (Real Estate Director) who explain the financial information.

[95] The Planning Director and the Real Estate Director depose that:

- the pro forma analysis information was prepared confidentially (and is marked as such) by City staff for internal purposes only to prepare for the negotiation of the Services Agreement;[72]
- the pro forma was generated in confidence by the City for internal discussion purposes;[73]
- the information in the pro forma is important for accurately estimating and negotiating CACs;[74]
- CACs are voluntary contributions toward a public benefit which are negotiated by the City;[75]
- CACs are a "vital tool" for the City to be able to continue providing appropriate amenities and services to its citizens;[76]
- disclosure of the pro forma and financial information for this Project would significantly weaken the City's negotiating position in CAC negotiations for rental/strata projects; and[77]
- disclosure would very likely result in others using this information to gain an advantage against the City or would otherwise harm the City's ability to negotiate terms as favourable as it might otherwise be able to negotiate in the future.[78]

Applicant's submissions, s. 17(1)

[96] The applicant says the City was overly broad in its redactions, particularly in its application of ss. 13 and 17. The applicant further says information on how the City analyzes and estimates the value of rental units and other elements of the community amenity contribution (CAC) process should be transparent, so the public understands the process and to ensure taxpayers are getting value for money.

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[71] City's initial submissions at paras 177-177.
[72] Director, RES's affidavit at para 10.
[73] *Ibid* at para 12.
[74] I*bid* at para 11.
[75] *Ibid* at para 14.
[76] *Ibid* at para 15.
[77] *Ibid* at para 20.
[78] Planning Director's affidavit at para 56.

Analysis, s. 17(1)

[97] Past orders have said that ss. 17(1)(e) and (f) apply to information about cost projections, land appraisals or financial information to be used in, or relating to negotiations, as well as negotiating techniques, strategies, criteria, positions or objectives.[79] In my view, the withheld information in this case is similar, in that it consists of financial projections and costs which the City used to negotiate the CACs, as well as back-and-forth internal discussions on aspects of the pro forma and the City's negotiations for the Services Agreement.

[98] I find that disclosure of the back-and-forth internal discussion would reveal the City's strategies for negotiation of the Services Agreement. I further accept that disclosure of the pro forma information at large would affect the City's negotiating position in future CAC negotiations because future proponents can glean and extract information from it and use it in future dealings with the City to undermine the City's negotiating position for CACs. I am satisfied that disclosing the information would allow future developers to negotiate lower CACs, which could reasonably be expected to harm the City's financial or economic interests. In arriving at this conclusion, I place considerable weight on the affidavit evidence of the Real Estate Director and the Planning Director.

[99] I acknowledge the applicant's concern for public transparency about the CAC process but find the City's interests in preserving its negotiating position for future projects outweighs that concern. Disclosure of the information would reveal strategies or considerations that would be relevant in future negotiations.

[100] For the reasons above, I find that s. 17(1)(e) and (f) apply to different parts of the withheld information.

Conclusion, s. 17(1)

[101] I find the City has met its burden of proof on s. 17(1). For reasons given above, I find that ss. 17(1)(e) and 17(1)(f) and, more generally, s. 17(1), apply to the withheld information.

[79] See, for example: Order F10-34, 2010 BCIPC 50 (CanLII) and Order F17-10, 2017 BCIPC 11 (CanLII).

CONCLUSION

[102] For the reasons given above, I confirm the City's decision to withhold information under ss. 12(3)(b), 13(1), 14, 16(1)(b), and 17(1).

November 10, 2023

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

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