Order F25-02

CITY OF COURTENAY

Allison J. Shamas
Adjudicator

January 10, 2025

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Summary: An applicant asked the City of Courtenay (City) for access to records related to a residential development and the surrounding area. The City provided the records but withheld some information under several provisions of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found that ss. 13(1) (advice and recommendations) and 22(1) (unreasonable invasion of personal privacy) applied to some of the withheld information and ordered the City to disclose the balance of the information. The adjudicator also found that the City had not properly exercised its discretion under s. 13(1) and ordered the City to reconsider its decision to withhold the information to which s. 13(1) applied, and in doing so to exercise its discretion upon proper considerations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 13(1), 13(2)(a), 13(2)(f), 22(1), 22(4)(e), and 22(2)(b).

INTRODUCTION

[1] An individual (applicant) asked the City of Courtenay (City) for access to reports, studies, assessments, and the development checklist related to a residential development and the surrounding area (the access request).

[2] The City provided records but withheld some information under ss. 13(1) (advice and recommendations), 15(1)(l) (harm to the security of a property or system), 21 (harm to third-party business interests), and 22 (unreasonable invasion of 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. 13 and 22, but not its decisions under ss. 15(1)(l) or 21.[1]

[4] Mediation did not resolve the issues in dispute and the matter proceeded to inquiry.

PRELIMINARY ISSUE

[5] In their inquiry submission, the applicant sought to add s. 25(1) (disclosure in the public interest) to the list of issues in dispute. Specifically, the applicant submitted that if any of the information in dispute was captured by s. 25(1), if should be disclosed. The City did not respond to this argument.

[6] Section 25(1) is not listed in the fact report or the notice of inquiry. It is, therefore, a new issue. The notice of inquiry that the OIPC sent to the parties expressly states, "parties may not add new exceptions or issues without the OIPC's prior consent." The OIPC's Written Instructions for Inquiries contains a similar warning.[2]

[7] The applicant did not request the OIPC's consent to add s. 25(1) as an issue prior to submitting their inquiry submission.

[8] Previous OIPC orders have consistently held that new issues raised in a party's inquiry submission without the OIPC's prior authorization will not be considered.[3] There are good reasons for this practice. Most issues that come to the OIPC can be resolved or refined through the OIPC's investigation and mediation processes, without the need for a formal inquiry. When a new issue is added at the inquiry stage, both the parties and the OIPC are denied the benefit of these early resolution procedures. In addition, considering a new issue raised during the inquiry often delays the resolution of that inquiry by requiring additional rounds of submissions.

[9] The applicant does not explain why they did not request consent to add s. 25(1) prior to the inquiry or identify any exceptional circumstances which would warrant a departure from the OIPC's general practice in this case. In the circumstances, I decline to add s. 25(1) as an issue to this inquiry.

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[1] As noted in the fact report, at mediation the applicant confirmed that they were not seeking access to the information the City withheld under ss. 15(1)(l) or 21.
[2] https://www.oipc.bc.ca/documents/guidance-documents/1658 at 3.
[3] For orders where adjudicators came to similar conclusions regarding s. 25, see for example Order F16-30, 2016 BCIPC 33 (CanLII) at paras 12-14; Order F16-34, 2016 BCIPC 38 (CanLII) at paras 8-10; Order F18-07, 2018 BCIPC 9 (CanLII) at para 7; Order F19-47, 2019 BCIPC 53 (CanLII) at paras 7-10; and Order F24-86, 2024 BCIPC 98 (CanLII) at paras 6-9.

ISSUES

[10] The issues I must decide in this inquiry are:

1. Is the City authorized to refuse to disclose the information in dispute under s. 13(1)?
2. Is the City required to refuse to disclose the information in dispute under s. 22(1)?

[11] 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 s. 13(1). Section 57(2) places the burden on the applicant to prove that disclosure of any personal information would not be an unreasonable invasion of a third party's personal privacy under s. 22(1). However, the City has the initial burden to prove the information at issue under s. 22(1) is "personal information" for the purposes of FIPPA.[4]

BACKGROUND

[12] In this access request, the applicant seeks access to records related to a residential development and the surrounding area.

[13] The developer of the residential development submitted a completed "Environmental Development Permit – Application and Guideline Compliance Checklist" (the Checklist) to the City on August 30, 2016.[5] The Checklist is a City document that sets out a list of requirements to complete a development application. In support of its application, the Developer also submitted a "Riparian Areas Regulation Report" (RAR Report) dated April 7, 2016, which is referred to in the Checklist.[6]

[14] The City approved the project, and it was constructed. The applicant states the City has since approved two other development projects on adjacent land, and that one has been constructed and the other is underway.

[15] In 2020 and 2022 the City obtained ten reports about tree health in and around the developments from individuals who describe themselves as "ISA Certified Arborists" (Arborist Reports).[7]

[16] The applicant made the access request on January 18, 2023. The applicant states that the trees in and around the development are dying and falling over, and that they made the access request out of concern for public

[4] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.
[5] Records pages 1-3.
[6] Records pages 66-213.
[7] Records pages 7-65.

safety, property, and the health of the natural area surrounding the developments.

RECORDS

[17] There are 213 pages of responsive records. They are:

- the RAR Report dated April 1, 2016, which includes a report titled "Tree Inventory/Hazard, Tree & Windthrow Assessment" dated April 7, 2016 as Schedule No. 2,[8]
- the Checklist dated August 30, 2016,[9]
- a letter from two City officials to the developer about the development application (the Letter) dated March 9, 2017,[10] and
- the 10 Arborist Reports dated July 4, 2020, January/February 2022, May 5, 2022, June 5, 10, 16, and 21, 2022, July 20, 2022, and October 5, 2022, and December 21, 24, 2022.[11]

With the exception of two signatures in the Letter, the City disclosed the Checklist and the Letter in their entirety. While the City also disclosed the majority of the RAR and Arborist Reports, it withheld information from 56 pages of the reports.

SECTION 13(1) – ADVICE AND RECOMMENDATIONS

[18] Section 13 allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body. The purpose of s. 13 is to prevent the harm that would occur if a public body's deliberative process was exposed to public scrutiny.[12]

[19] The test under s. 13 is well-established, and I will apply it below.

Section 13(1) – would disclosure reveal advice or recommendations

[20] The first step in the s. 13 analysis is to determine whether disclosing the information at issue would reveal advice or recommendations developed by or for a public body.

[21] "Recommendations" involve "a suggested course of action that will ultimately be accepted or rejected by the person being advised."[13]

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[8] The RAR Report is 84 pages long and found at pages 66 – 149 of the records.
[9] The Checklist is 3 pages long and found at pages 1-3 of the records.
[10] The Letter is 3 pages long and found at pages 4-7 of the records.
[11] The Arborist Reports total 123 pages and are found at pages 7-65 and 150-213 of the records.
[12] *Insurance Corporation of British Columbia v Automotive Retailers Association*, 2013 BCSC 2025 [*ICBC*] at para 52.
[13] *John Doe v Ontario (Finance),* 2014 SCC 36 [*John Doe*] at para 24.

[22] The term "advice" has a broader meaning than the term "recommendations,"[14] and includes:

- a communication as to which courses of action are preferred or desirable,[15]
- an opinion that involves exercising judgment and skill to weigh the significance of matters of fact on which a public body must make a decision for future action,[16] and
- factual information that is integral to advice or recommendations because it was "compiled and selected by an expert, using [their] expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body, or … the expert's advice can be inferred from the work product".[17]

[23] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences to be drawn about advice or recommendations.[18]

[24] The City states that most of the information it withheld under s. 13(1) consists of tree risk assessments conducted by arborists. It describes the arborists as professionals who possess expertise about tree health, potential for tree failure, and associated risks, and states that these reports were intended to provide advice or recommendations to the City on the care and maintenance of specific trees.

[25] The applicant submits that the redacted information is based on factual findings and recommendations to manage a sensitive area, rather than for policy development or internal City deliberations. Therefore, according to the applicant s. 13(1) does not apply.[19]

Findings and Analysis

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[14] *John Doe* ibid at para 23.
[15] Order 01-15, 2001 CanLII 21569 at para 22.
[16] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para 113.
[17] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner*), 2013 BCSC 2322 (CanLII) [*PHSA*] at para 94. See also *PHSA* para 95 and *ICBC* supra note 9 at para 52 cited therein.
[18] See for example *John Doe supra* note 10 at para 24; Order 02-38, 2002 CanLII 42472 (BCIPC) at para 135; Order F10-15, 2010 BCIPC 24 (CanLII) at para 19; and Order F21-15, 2021 BCIPC 19 (CanLII) at para 35.
[19] Applicant's response submission at 1.

[26] The City relied on s. 13(1) to refuse access to excerpts from five pages of the RAR Report,[20] and 32 pages of the Arborist Reports.[21]

Information in the RAR Reports

[27] For the reasons below, I find that s. 13(1) does not apply to the information the City withheld from RAR Report because the RAR Report was not created by or for the City.

[28] First, on the face of the RAR Report, it is clear that the report was created by a consultant for the developer. The RAR Report expressly states that it was created by a consultant "for the sole use and distribution of" the developer.[22] It is also clear from the substance of the report, that the developer hired the consultant to prepare the RAR Report.[23]

[29] From the Checklist, I can see that the developer submitted the RAR Report to the City as part of its development application for the project,[24] to fulfill specific requirements established by the City.[25] This circumstance does not assist the City. In my view, information provided to a municipality by a developer as part of a development application is not advice or recommendations developed *by* or *for* that municipality, but rather information that the municipality must critically evaluate in deciding whether or not to grant the development application.

[30] Finally, there is no suggestion from the City, or in the records, of any relationship between the consultant and the City. It is difficult to see how the RAR Report could contain advice and recommendations created by or for the City in the absence of any such relationship, and the City does not explain.

[31] I find that the RAR Report does not contain advice or recommendations developed by or for the City. Therefore, I find that s. 13(1) does not apply to the information the City withheld from the RAR Report.

Information in the Arborist Reports

[32] For the reasons below, I am satisfied that s. 13(1) applies to all the information the City withheld from the Arborist Reports.

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[20] Records pages 99, 100, 101, 106, and 129.
[21] Records pages 7, 8, 9, 10, 11, 12, 16, 26, 28, 29, 30, 36, 37, 39, 40, 41, 43, 44, 46, 56, 59, 60, 61, 62, 64, 65, 150, 151, 180, 181, 183, and 184.
[22] Records page 67. For additional information that confirms that the RAR Report was prepared by a consultant for the developer see also 66-69,84, 86, and 107.
[23] See for example records page
[24] See comments on page 1 of the Checklist (page 1 of the records).
[25] *Ibid.*

[33] The information the City withheld from the Arborists Reports is the authors':

A. observations and description of problems with specific trees and areas, opinions about the timelines, likelihood, and potential consequences of those problems, and potential mitigation measures and other suggestions as to how to proceed in light of those consequences,[26]
B. images that pinpoint the location of problem trees,[27] and
C. explanations about how to interpret an image (the actual image was disclosed).[28]

[34] Further, the City states that it requested the Arborist Reports to obtain advice and recommendations about tree health in and around the development. I find that the contents of the reports support this statement about the purpose for the reports.

[35] For the reasons set out below, I accept that the information described above would reveal advice and recommendations developed for the City.

[36] In my view, the information described in paragraph A falls squarely within the definition of advice and recommendations set out above.[29] While the observations and descriptions of problems are factual in nature, it is clear that this information was compiled by expert arborists and included in the reports for the purpose of identifying and analyzing the issues to which the opinions and suggestions relate. The arborists' opinions about the timelines, likelihood, and potential consequences of problems are clear examples of the arborists exercising judgment and skill to weigh the significance of matters of fact and are therefore advice. Finally, the proposed mitigation measures and other suggestions as to how to proceed in light of the potential consequences are clearly offered by the arborists as suggested courses of action that the City could accept or reject, so I am satisfied that they are recommendations.

[37] In addition, I find that disclosing the images that pinpoint the location of problem trees, and explanations about how to interpret an image described in paragraphs B and C would, when combined with the information that has already been disclosed to the applicant about those problem trees and that image, reveal the arborists' advice.

Summary – Advice or Recommendations

[26] This information is found throughout the Arborist Reports (pages 7-65 and 150-213 of the records).
[27] Records page 7, 8 and 9. While the City withheld the image, it disclosed the description of what the image captured.
[28] Records page 44.
[29] See paragraphs 21 and 22 above.

[38] In summary, I find that disclosing the information from the RAR Report would not reveal advice or recommendations developed by or for the City. As a result, the City is not authorized to refuse access to it under s. 13(1).[30] However, disclosing the information the City withheld from the Arborists Reports would reveal advice and recommendations developed by or for the City, so s. 13(1) applies to that information. [31]

Section 13(2) – exceptions

[39] The next step is to decide whether the information in the Arborists Reports that I found would reveal the advice or recommendations under s. 13(1) falls into any of the categories in s. 13(2). If s. 13(2) applies, that information cannot be withheld under s. 13(1).

[40] The City submits that the exception in s. 13(2)(f) for an environmental impact statement or similar information does not apply to the information at issue. The applicant disputes the City's position about s. 13(2)(f) and also questions whether the exception in s. 13(2)(a) for factual material applies to some of the information.

Factual material – s. 13(2)(a)

[41] Section 13(2)(a) provides that a public body must not refuse to disclose "any factual material" under s. 13(1).

[42] The term "factual material" is not defined in FIPPA. However, the courts have interpreted "factual material" to mean "source materials" or "background facts in isolation" that are not necessary to the advice provided.[32] Thus, where facts are an integral component of advice and recommendations, they are not "factual material" within the meaning of s. 13(2)(a).

[43] The only information at issue that is factual is the arborists' observations and descriptions of problems. That information is found in the same charts and paragraphs as the advice and recommendations to which they relate. I find these facts are integral to that advice and recommendations because they identify the very observations and problems to which that advice and recommendations relate. For these reasons, I find that the factual observations and descriptions of problems are not the kind of distinct source material or isolated background facts that courts have found to be "factual material." Accordingly, I find that this information is not excluded under s. 13(2)(a).

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[30] The information to which s. 13(2) does not apply is found on pages 99, 100, 101, 106, and 129 of the records.
[31] The information to which s. 13(1) applies is found on pages 7, 8, 9, 10, 11, 12, 16, 26, 28, 29, 30, 36, 37, 39, 40, 41, 43, 44, 46, 56, 59, 60, 61, 62, 64, 65, 150, 151, 180, 181, 183, and 184 of the records.
[32] *PHSA*, *supra* note 14 at para 94.

Environmental impact statement or similar information – s 13(2)(f)

[44] Section 13(2)(f) provides that a public body must not refuse to disclose an environmental impact statement or similar information under s. 13(1).

[45] The crux of the City's submission is that the Arborist Reports do not fit the definition of an environmental impact statement because they are intended to provide advice or recommendations to the City on the care and maintenance of specific trees, they are not legislatively required, and they do not concern a subject matter that is expected to have significant environmental consequences.

[46] Citing the City's own documents including various City by-laws, the City's checklist for development applications, and its Terms of Reference for Environmental Impact Assessments,[33] the applicant submits that the definitions set out in these documents demonstrate that reports from arborists are the kinds of documents that fall within the City's definition of an environmental impact statement. In this regard, the applicant highlights the City's Terms of Reference for Environmental Impact Assessments document which provides that "prior to any development work on lands that contain an Environmental Development Permit (EDPA), including site preparation, an Environmental Impact Assessment (EIA) shall be prepared by a Registered Professional (R.P.) Biologist and with input from other professionals of specific expertise where required. I understand the applicant to argue that arborists are examples of the other professionals of specific expertise who would provide input into an Environmental Impact Assessment as contemplated in the City's own Terms of Reference for Environmental Impact Assessments document.

[47] The term "environmental impact statement" is not defined in FIPPA. However, past OIPC orders provide guidance on the interpretation of s. 13(2)(f).

[48] In Order 215-1999, former Commissioner Flaherty found that s. 13(2)(f) did not apply to draft copy of a discussion paper because it did not contain "a technical assessment or similar information on the impact on the environment of specific projects or activities, such as buildings, highways, mining, or timber harvesting."[34]

[49] In Order F16-30 the adjudicator endorsed the following definition of an environmental impact statement:

> 1. A document required of federal agencies by the National Environmental Policy Act for major projects or legislative proposals significantly affecting the environment. A tool for decision making, it describes the positive and

[33] In support of his position, the applicant included copies of various City by-laws, the City's Terms of Reference for Environmental Impact Assessments.
[34] Order 215-1998, 1998 CanLII 956 (BC IPC) at 3.

> negative effects of the undertaking and cites alternative actions. 2. A documented assessment of the environmental consequences and recommended mitigation actions of any proposal expected to have significant environmental consequences, that is prepared or procured by the proponent in accordance with guidelines established by a panel. 3. An environmental impact assessment report required to be prepared under [a provincial environmental protection statute]. 4. A detailed written statement of environmental effects as required by law.[35]

[50] In Order F20-31, the adjudicator considered the definitions and approaches concerning s. 13(2)(f) set out above as well as the definitions of the term "environmental impact assessment" in BC's *Environmental Management Act*[36] and *Environmental Impact Assessment Regulation*,[37] and offered the following definition of an "environmental impact statement" under s. 13(2)(f):

> A written analysis or assessment, required by law or policy, about the anticipated effects on the environment of a project or activity and/or environmental harm mitigation strategies for the project or activity. Generally, the statement will be prepared by a professional qualified to opine on the environmental impact of the project or activity. Whether information is "similar information" under s. 13(2)(f) will depend on the extent to which the disputed information shares the main characteristics of an environmental impact statement.[38]

[51] I endorse and adopt the reasoning and definitions above. In Order F20-31 the adjudicator wrote that "whether information is "similar information" under s. 13(2)(f) will depend on the extent to which the disputed information shares the main characteristics of an environmental impact statement." In my view, there are two main characteristics that run through all the above, that are relevant to the facts before me. Those are, to fall within s. 13(2)(f) the document at issue must be required by law or policy and must relate to assessing the environmental impact of a project, activity, or undertaking.

[52] The City states that the Arborist Reports were not required by law or policy, and that it obtained the reports to get advice and recommendations to the City on the care and maintenance of specific trees, not in relation to a project, activity, or undertaking. While the applicant disagrees with the City's position, the applicant does not specifically dispute either of these assertions except to say that the reports concern factual findings and recommendations to manage a sensitive area.

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[35] 2016 BCIPC 33 (CanLII) at para 36. The definition came from the *Dictionary of Environmental Law and Science*, edited by William A. Tilleman, Environmental Law Centre, 2005.
[36] SBC 2003, c. 53.
[37] BC Reg. 330/81.
[38] 2020 BCIPC 37 (CanLII) at para 30.

[53] Having considered the information in the records as well as the City documents submitted by the applicant, there is no information that would suggest that the Arborist Reports were required by law or policy.

[54] In addition, each Arborist Report begins with a statement of the purpose of the report under the heading "Assignment." These purpose statements relate to investigating and providing advice and recommendations about individual trees or groups of trees. They do not refer to assessing the environmental impact of any specific project, activity or undertaking.

[55] In light of the above, I find that the Arborist Reports were not required by law or policy, and that their purpose was not to assess the environmental impact of a project, activity, or undertaking. Instead, I accept the City's assertion that it requested the Arborist Reports in order to obtain advice and recommendations about the health of specific trees in and around the developments. I find that the Arborist Reports are not environmental impact statements or similar information because they do not satisfy two of the main characteristics required to fall under s. 13(2)(f).

[56] Turning to the applicant's argument, and in particular the language of the City's Terms of Reference for Environmental Impact Assessments, I accept that in different circumstances reports from arborists could form part of an environmental impact assessment. Indeed, while not relevant given my finding that s. 13(1) did not apply to the RAR Report, it is entirely possible that the "Tree Inventory/Hazard, Tree & Windthrow Assessment" which forms Schedule 2 to the RAR Report is one such example.

[57] The difficulty for the applicant, is that there is no evidence that the *Arborist Reports* were required by law or City policy, or that they relate to assessing the environmental impact of a project, activity, or undertaking. In this regard, I note that the Arborist Reports were not part of the RAR Report or any environmental impact assessment. Rather, as discussed above, I found that they were standalone reports the City requested to obtain advice and recommendations about tree health in an area under its jurisdiction independent of any project, activity, or undertaking. It is for these reasons that I do not accept the applicant's argument.

[58] Having examined the other categories in s. 13(2), I find that no other categories apply to the information in dispute.

Section 13(3) – in existence for 10 or more years

[59] The third step is to consider whether the information in the Arborists Reports that I found would reveal the advice or recommendations under s. 13(1) is "information in a record that has been in existence for 10 or more years" under

s. 13(3). Information in a record that has been in existence for 10 or more years cannot be withheld under s. 13(1).

[60] The Arborist Reports are dated between July of 2020 and December of 2022. They have not been in existence for 10 or more years, so I find that the exemption in s. 13(3) does not apply.

Conclusion – s. 13(1)

[61] In conclusion, I find that s. 13(1) authorizes the City to refuse to disclose the information withheld from the Arborist Reports, but not to the information the City withheld from the RAR Report.

Exercise of discretion under s. 13

[62] Section 13 is a discretionary exception to access under FIPPA. In past orders, the OIPC has made it clear that when considering discretionary exceptions to disclosure, a public body must "exercise that discretion in deciding whether to refuse access to information, and upon proper considerations,"[39] and must "establish that [it has] considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception."[40]

[63] If the head of the public body has failed to exercise their discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where the decision was made in bad faith or for an improper purpose, the decision took into account irrelevant considerations, or the decision failed to take into account relevant considerations.[41]

[64] According to the applicant, the trees in and around the development are dying and falling over causing property damage and safety risks. The applicant identified several specific incidents where, they say, falling trees and branches posed such risks. The applicant states that they made the access request out of concern for public safety, property, and the health of the natural area surrounding the developments. Emphasizing that s. 13(1) is a discretionary provision, the applicant submits that in the circumstances, the City should have exercised its

[39] Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 144 and the cases citing it. For recent examples see Order F24-73, 2024 BCIPC 83 (CanLII) at para 187 and Order F24-88, 2024 BCIPC 100 (CanLII) at para 97.
[40] Order No 325-1999, October 12, 1999, [1999] BCIPCD No 38 at page 4 and the cases citing it. For recent examples see Order F24-73, 2024 BCIPC 83 (CanLII) at para 187 and Order F24-88, 2024 BCIPC 100 (CanLII) at para 97.
[41] Order F23-51, 2023 BCIPC 59 at para 142, citing *John Doe v Ontario (Finance)*, 2014 SCC 36 at para 52 and Order 02-38, 2002 CanLII 42472 (BC IPC) at para 147.

discretion to disclose information about tree health in and around the developments.

[65] The City did not respond to these submissions or provide any information that would suggest that it exercised its discretion in deciding whether or not to withhold information under s. 13(1).

[66] The onus is on the City to establish that it exercised its discretion under s. 13(1), and that it did so upon proper considerations – that is, that it considered, in all the circumstances, whether information should be released even though it was technically covered by s. 13(1).

[67] The City does not identify what factors, if any, it considered in exercising its discretion to deny access under s. 13(1) or offer any evidence that it considered all relevant considerations and did not consider any irrelevant considerations.

[68] As noted above, the Commissioner may return the matter to a public body for reconsideration where there is no evidence that the public body took into account relevant considerations in exercising its discretion under s. 13(1). In the absence of any such evidence, I find it is appropriate to order the City to reconsider its decision to refuse to disclose the information it withheld from the Arborist Reports under s. 13(1) and, in doing so, to consider the circumstances identified by the applicant in their submissions and the factors identified in the OIPC's past orders concerning the exercise of discretion under s. 13(1).

SECTION 22 – UNREASONABLE INVASION OF THIRD-PARTY PERSONAL PRIVACY

[69] Section 22(1) of FIPPA requires a public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

Personal information

[70] As s. 22(1) only applies to personal information, the first step in the s. 22(1) analysis is to determine whether the information in dispute is personal information within the meaning of FIPPA.

[71] Personal information is defined in 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 an individual, either alone or when combined with other available sources of information."[42]

[42] Order F19-13, 2019 BCIPC 15 at para 16, citing Order F18-11, 2018 BCIPC 14 at para 32.

[72] "Contact information" is defined in 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."[43]

[73] The parties did not address the question of whether the information the City withheld under s. 22(1) was personal information.

[74] Having reviewed the information the City withheld under s. 22(1), I find that it is:

- signatures, email addresses, addresses, and phone numbers,[44]
- images of people, their houses, residential properties, and land uses,[45] and
- a description of a specific action an individual took toward a tree.[46]

[75] I find that all the withheld information is recorded information about identifiable individuals. The signatures, email addresses, addresses, and phone numbers are found alongside the names of the affected individuals – two City employees who wrote the Letter, one arborist who prepared an Arborist Report, and the developer and consultants who created the RAR Report. As the City disclosed those names, I find that this information can readily be associated with the identifiable individuals.

[76] I also find that the images and description are recorded information about identifiable City residents. The images clearly depict specific people, their houses, properties, and land uses, many of which have unique and identifiable features. The description of the action an individual took toward a tree is unique and specific. Moreover, this information was redacted from larger images and descriptions in the Arborist and RAR Reports, all of which relate to the area surrounding the development. Given the clarity and specificity of the images and descriptions, it is my view that anyone familiar with the neighbourhood and area captured by the reports could easily associate the images and descriptions with identifiable individuals.

[77] However, I find that the email addresses, addresses, and phone numbers of the developer and consultant, which are found in a form at the start of the RAR Report, are contact information. It is apparent that this information about the developer and consultant is provided for the purpose of enabling these individuals to be contacted at their places of business regarding any questions about the RAR Report. The City does not suggest otherwise.

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[43] Schedule 1.
[44] Records pages 6, 62, 67, 68, 69, 149,
[45] The images are found throughout the RAR and Arborist Reports.
[46] Records page 43.

[78] Similarly, I find the arborist's email address, which is found in at the end of a report prepared by that arborist, is contact information. It is clear from the content of the report, and the certifications under the signature that the arborist prepared the report in a business capacity, and I can see no other reason for including the email address at the end of the report other than to allow the arborist to be contacted about the report. Again, the City does not suggest otherwise.

[79] In summary, I find that the only personal information at issue is the signatures of the City employees and the arborist, and the images and descriptions that relate to City residents. The balance of the withheld information is contact information.

Section 22(4) – circumstances where disclosure is not an unreasonable invasion of a third party's personal privacy

[80] The second step in the s. 22 analysis is to consider whether s. 22(4) applies to any of the information that I have found is personal information. Section 22(4) lists circumstances where disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. If information falls into one of the circumstances enumerated in s. 22(4), the public body is not required to withhold it under s. 22(1).

The parties did not address s. 22(4). Having considered the circumstances described in s. 22(4), I find that it is appropriate to consider the application of s. 22(4)(e) to the personal information of the City employees.

Third party's position, functions, or remuneration – s. 22(4)(e)

[81] Section 22(4)(e) provides that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions, or remuneration as an officer, employee, or member of a public body.

[82] It is well-established that s. 22(4)(e) applies to "objective, factual statements about what the third party did or said in the normal course of discharging [their] job duties."[47] When assessing whether s. 22(4)(e) applies, the key question is, considered in its full context, what does the information reveal about the individual?[48] Thus, past OIPC orders have also found that s. 22(4)(e)

[47] Order F09-15, 2009 BCIPC 58553 (CanLII) at para 15; Order F14-41, 2014 BCIPC 44 (CanLII) at para 24; and Order F24-10, 24 BCIPC 14 at para 45.
[48] See for example Order F23-28, 2023 BCIPC 32 at para 42; Order F21-08, 2021 BCIPC 12 (CanLII) at paras. 126-129; Order F10-21, 2010 BCIPC 32 (CanLII) at para 24; Order F08-04, 2008 CanLII 13322 (BC IPC) at para 27; Order 00-53, 2000 CanLII 14418 (BC IPC) at 7; and Order 01-53, 2001 CanLII 21607 (BC IPC) at para 40.

applies to a public body employee's signature provided in the normal course of performing their job duties.[49]

[83] I find that s. 22(4)(e) applies to the signatures of the two City employees at the bottom of the Letter. The subject line of the Letter is "Review Letter for Environmental Development Permit." It was drafted by two employees in the City's planning department,[50] and sets out what additional information is required before the City can continue processing the development application associated with the Checklist. Given the context, I find that the two City employees wrote and signed the Letter in the ordinary course of their job duties. Therefore, consistent with past orders, I find that s. 22(4)(e) applies to the signatures of the two City employees. However, s. 22(4)(e) does not apply to the arborist's signature because it is clear the arborist was not an officer, employee, or member of a public body.

Section 22(3) – disclosure presumed to be an unreasonable invasion of third-party personal privacy

[84] Section 22(3) lists circumstances where disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. The third step is to consider whether the presumptions listed in s. 22(3) apply to any of the personal information that is not excluded under s. 22(4).

[85] The parties did not address s. 22(3). Having considered the presumptions listed in s. 22(3), I find that they do not apply to the personal information that remains in dispute.

Section 22(2) – all relevant circumstance

[86] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information that is not excluded under s. 22(4) in light of all relevant circumstances, including those listed in s. 22(2).

[87] The parties' arguments under s. 22 relate to public safety and environmental protection. I will consider these arguments under s. 22(2)(b) (disclosure likely to promote public health and safety or protection of the environment). I also find that it is appropriate to consider whether the arborist's signature relates to their professional capacity.

Section 22(2)(b) – promotion of public health, safety, or protection of environment

[49] Order F22-62, 2022 BCIPC 70 at paras 26-28; and Order F24-66, 2024 BCIPC 76 (CanLII) at para 73.
[50] The employees' titles are listed under their names on page 7 of the records.

[88] Section 22(2)(b) asks whether disclosing the personal information at issue is likely to promote public health and safety or to promote the protection of the environment. If so, this will factor will weigh in favour of disclosure.

[89] The City submits that disclosing the information in the Arborist Reports would pose a risk to public safety because it could enable individuals to exploit identified weaknesses in trees, potentially increasing the risk of deliberate damage or felling, which could lead to injury or property damage.

[90] Conversely, the applicant submits that disclosing the information in the reports would promote public safety and the protection of the environment by equipping residents with the information required for them to understand and identify specific risk factors in trees so they could inform the City of problems in a timely manner, and thus prevent injury and property damage and support the health of the natural environment.

[91] The only information that remains in dispute under s. 22 is the arborist's signature, the images of City residents, their houses, properties, and land uses, and the description of a specific action an individual took toward a tree. I do not accept that s. 22(2)(b) is relevant to this information. First, I can see no connection between the signature and public safety or the protection of the environment. Second, the images and description the City withheld are partial images and a few words that capture personal information about identifiable City residents in reports that are not about these individuals, but instead about tree health in the area in which these individuals happen to live. The information consists of snippets of personal information that has very little relevance to the substance of the reports. It is my view that disclosing this information would neither reveal which trees have been identified as risks, as the City fears, nor provide any information that residents could use to understand and identify risk factors in specific trees, as the applicant hopes. For these reasons, I find that disclosing the personal information that remains at issue is not likely to promote public health and safety or promote the protection of the environment. Therefore, I find that s. 22(2)(b) is not a factor the weighs in favour of disclosure.

Professional capacity

[92] In past orders, the OIPC has held that where information relates to an individual's actions in a professional capacity as opposed to a personal or private capacity, this circumstance weighs in favour of disclosure.[51]

[93] The arborist's signature is found in an Arborist Report prepared by that arborist. It is clear from the content of the report, and the certifications under the

[51] Order F13-01, 2013 BCIPC 1 at para 61; Order F18-42, 2018 BCIPC 45 at para 22; Order F23-05, 2023 BCIPC 6 (CanLII) at para 58; and Order F24-48, 2024 BCIPC 56 (CanLII) at para 138.

signature that the arborist signed the report in a professional capacity. Consistent with previous OIPC decisions, I find that this factor weighs in favour of disclosure.

[94] Having considered the remaining factors listed in s. 22(2) as well as those listed in past OIPC orders, I find that no others apply.

Conclusion – s. 22(1)

[95] The City withheld signatures, email addresses, addresses, phone numbers, partial images and descriptions under s. 22(1).

[96] I found that most of that information was personal information, but that the email addresses, addresses, and phone numbers of the developer, consultant and an arborist were not personal information because they were contact information.

[97] I also found that the City was not required to withhold the signatures of the City employees because the signatures related to those employees' functions under s. 22(4)(e), and, therefore, it was not an unreasonable invasion of those City employees' personal privacy to disclose their signatures.

[98] The only information that remained at issue was an arborist's signature in an Arborist Report prepared by that arborist, and the images and description that related to City residents the RAR and Arborist Reports.

[99] I considered the presumptions in s. 22(3) and the circumstances listed in s. 22(2) and found that none applied to the information that remained in dispute. As set out above, while I considered s. 22(2)(b) because of the parties' submissions, I found that it did not favour disclosure of any of the information that remained in dispute.

[100] Considering other circumstances, I determined that the fact that the arborist's signature related to their actions in a professional capacity was a factor that favoured disclosure of the arborist's signature. Furthermore, because the arborist's name was already revealed throughout the report containing their signature, disclosing the signature reveals only the arborist's signature, not the identity of the arborist. Therefore, I find that it would not be an unreasonable invasion of the arborist's personal privacy to disclose their signature.

[101] I come to the opposite conclusion about the images and description that relate to City residents. No presumptions or factors applied to this information, which consists of bits of personal information about City residents that have little to no relevance to the issues under discussion in the reports. Ultimately, the onus is on the applicant to prove that disclosure of this personal information would not be an unreasonable invasion of a third party's personal privacy under s. 22(1), and I find he has not done so. Therefore, I conclude that it would be an

unreasonable invasion of the personal privacy of the City residents to disclose their personal information.

[102] For the reasons above, I find that the only information the City is required to withhold under s. 22(1) is the images of City residents and their homes, properties, and land uses, and the description of the action an individual took toward a tree.[52]

CONCLUSION

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

1. The City is required to withhold the images and descriptions it withheld from the RAR Report and the Arborist Reports under s. 22(1).

2. Under s. 58(2)(b), the head of the City is required to reconsider its decision to refuse access to the information it withheld under s. 13(1) from pages 7-12, 16, 26, 28-30, 36-41, 43, 44, 46, 55, 56, 59-62, 64, 65, 150, 152, 180, 181, 183, and 184 of the records. The City must deliver this reconsideration decision, along with the reasons and factors it considered for that decision, and any additional information the head decides to disclose, to the applicant.

3. The City is required to give the applicant access to the balance of the information it withheld under ss. 13(1) and 22(1). I have highlighted that information in green on pages 6, 62, 67, 68, 69 99-103, 106, 129, and 149 of the copy of the records which are provided to the City with this order.

4. The City must provide to the OIPC Registrar of Inquiries a copy of the City's cover letter and the accompanying information sent to the applicant in compliance with items 2 and 3 above.

Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by February 21, 2025.

January 10, 2025

ORIGINAL SIGNED BY

Allison J. Shamas, Adjudicator

OIPC File No.: F24-92940

[52] This information is found in the records at pages 6, 62, 99-103, 106, 129, 149, 150, 152, 180, 181, 183, and 184