Order F21-41

CITY OF VANCOUVER

Celia Francis
Adjudicator

September 7, 2021

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Summary: An applicant requested records from the City of Vancouver (City) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) related to three "rezoning enquiries" covering the period from April 2016 to January 2019. The City disclosed records, severing information under ss. 13(1) (advice or recommendations), 15(1)(l) (harm to security of property or system), 17(1) (harm to economic interests of public body) and 22(1) (unreasonable invasion of third-party privacy). The applicant disputed that severing and also complained that the City interpreted his request too narrowly and did not conduct an adequate search for the responsive records. The adjudicator found that ss. 13(1) and 22(1) applied to some information. The adjudicator also found that s. 13(1) did not apply to other information and ordered the City to disclose it. It was not necessary to consider s. 13(1) for some information or to consider ss. 17(1) and 15(1)(l) at all. Finally, the adjudicator found that the City complied with its duty under s. 6(1) to interpret the request and conduct an adequate search.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 13(1), 13(2)(a), 13(2)(k), 22(1), 22(2)(a), 22(2)(c), 22(4)(e).

INTRODUCTION

[1] This order concerns records related to an applicant's communications with the City of Vancouver (City) about rezoning matters. In late January 2019, the applicant submitted a request to the City under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for records related to enquiries he had made regarding the rezoning of three properties. The City and the applicant agreed on revised wording in February 2019.[1]

[1] I describe this process more fully below in the s. 6(1) discussion.

[2] In early May 2019, the City responded to the request by disclosing 216 pages of responsive records. It severed some of the information under ss. 13(1) (advice or recommendations), 15(1)(l) (harm to security of property or system), 17(1) (harm to economic interests of public body) and 22(1) (unreasonable invasion of third-party privacy).

[3] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the severing.[2] The applicant also complained that the City had not conducted an adequate search for the responsive records.[3] During mediation, the City disclosed additional records in phases, for a total of 306 pages.

[4] Mediation by the OIPC did not resolve the issues and they proceeded separately to inquiry. As the parties are the same and the issues related, I have dealt with both the complaint and the request for review in this order.

Preliminary matters

[5] The City said in its initial submission that it was no longer relying on s. 15(1)(l).[4] This exception is, therefore, no longer at issue.

Unrelated properties

[6] The City applied ss. 13(1) and 17(1) to information about rezoning enquiries that do not relate to the applicant's properties (pages 75, 208 and 212-216).[5] The applicant said he is not interested in any information withheld under s. 17(1) that pertains to unrelated properties "or advice that is specific only to those unrelated properties."[6] I need not, therefore, consider if ss. 13(1) and 17(1) apply to the information in those pages.

ISSUES

[7] The issues I am to decide are these:

1. Whether the City:

    a. is required to refuse to disclose the information at issue under s. 22(1) of FIPPA; and

[2] OIPC File F19-79839.
[3] OIPC File F19-79840.
[4] City's initial submission, para. 1.
[5] Affidavit of City's Planning, Urban Design and Sustainability Department (PDS) Planner, para. 21.
[6] Applicant's response submission in F19-79839, para. 43.

b. is authorized to refuse to disclose the information at issue under s. 13(1) of FIPPA;

2. With respect to s. 6(1) of FIPPA, whether the City:

a. conducted an adequate search for responsive records; and

b. interpreted the applicant's request too narrowly.

[8] Under s. 57(1) of FIPPA, the City has the burden of proving that the applicant has no right of access to the records under s. 13(1) of FIPPA. Under s. 57(2), the applicant has the burden of proof respecting s. 22(1).

[9] Section 57 is silent with regard to who has the burden of proof in s. 6(1) inquiries. However, previous OIPC orders have found that a public body bears the burden of establishing that it has complied with its duties under s. 6(1).[7]

DISCUSSION

Background

[10] The applicant engaged in three interactions with City planning staff: two pre-enquiry processes and a formal application for preliminary advice on a proposed rezoning.[8]

[11] The first pre-enquiry process took place from April 24-28, 2016. The applicant exchanged emails with a named senior rezoning planner regarding an informal eligibility review of certain properties for the City's Affordable Housing Choices Interim Rezoning Policy.

[12] The second pre-enquiry process took place between February and March 2018. The applicant's architects corresponded with City planning staff regarding a "pre-enquiry submission" to confirm eligibility for the Moderate Income Rental Housing Pilot Program.

[13] The third interaction involved a process called a "rezoning enquiry" which the applicant's architects conducted on the applicant's behalf over the period from May 2018 to January 2019.

[7] See, for example, Order F20-13, 2020 BCIPC 15 (CanLII).
[8] The information in this background section is drawn from the City's initial submission, paras. 15-17, and the affidavits of the City's Access to Information and Privacy (ATIP) Director, paras. 9-17, and its Manager, Administrative Services, PDS, paras. 7-9 and 22.

What is a rezoning enquiry?

[14] Prior to submitting a formal application for rezoning, the City recommends that a proponent participate in a pre-application process referred to as a "rezoning enquiry". This is a formal application from a proponent proposing to rezone a site for preliminary advice from staff in the City's Planning, Urban Design and Sustainability Department (PDS).

[15] A rezoning enquiry is a confidential, optional and voluntary process which occurs before the submission of a formal rezoning application. It is a fee-based service, that is, the proponent is required to pay for City staff's review and for preliminary advice. A dedicated rezoning planner is assigned to be the City liaison for the proponent. Other City staff are also involved in providing review and comments. The City assists the proponent in determining the feasibility of a proposed project or in preparing for an eventual formal rezoning application. The City provides feedback and suggestions and the proposed project may change through the process.

[16] The applicant proposed to rezone and develop the sites at 222, 230 and 240 East 17th Avenue in Vancouver. The purpose of his rezoning enquiry was to obtain advice on his proposed project before submitting a formal rezoning application.[9] It appears from the submissions and records that this formal application process never began.

Information in dispute

[17] The 306 pages of responsive records, most of which the City disclosed, consist of emails, letters, meeting notes, photographs and drawings about the proposed rezoning and development of the three properties. There is considerable duplication of information in the records. The information in dispute is the information the City withheld under ss. 13(1) and 22(1).

Advice or recommendations – s. 13(1)

[18] The courts have said that the purpose of exempting advice or recommendations is "to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice",[10] recognizing that some degree of deliberative secrecy fosters the decision-making process.[11] They have interpreted the term "advice" to include an expression of opinion on policy-related matters[12] and expert opinion on matters of fact on which a public

[9] City's initial submission, paras. 20-26.
[10] *John Doe v. Ontario (Finance)*, 2014 SCC 36 [*John Doe*], at paras. 34, 43, 46, 47.
[11] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*], para. 105.
[12] *John Doe*, para. 46.

body must make a decision for future action.[13] They have also found that advice includes policy options prepared in the course of the decision-making process.[14] Previous orders have found that a public body is authorized to refuse access to information, not only when it directly reveals advice or recommendations, but also when it would enable an individual to draw accurate inferences about advice or recommendations.[15]

[19] Order F21-16[16] sets out the process for determining if s. 13(1) applies:

> The s. 13 analysis involves two steps. First, I must determine if disclosure of the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then I must determine whether the information falls into any of the categories listed in ss. [*sic*] 13(2) or 13(3). If it does, the public body cannot refuse to disclose it.
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> Section 13(2) lists categories of information that public bodies cannot withhold under s. 13(1). For example, s. 13(2)(a) says that public bodies cannot withhold factual material under s. 13(1). Section 13(3) says that public bodies cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.[17]

[20] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in the court decisions and orders cited above.

Parties' submissions on s. 13(1)

[21] The City said that the information it withheld under s. 13(1) is advice or recommendations in staff meeting notes and internal emails among City staff. The City described this information as follows:

- contents of materials to be discussed at internal meetings;
- potential or proposed courses of action;
- draft communications circulated for comment, containing questions and suggested changes, i.e., "possible wording, contents, messaging";
- matters to include in communications with the applicant and direction to be given to the applicant; and

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[13] *College of Physicians*, para. 113.
[14] *John Doe*, para. 35.
[15] See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), at para. 12. See also Order F16-32, 2016 BCIPC 35 (CanLII). Order F15-52, 2015 BCIPC 55 (CanLII), also discusses the scope and purpose of s. 13(1).
[16] Order F21-16, 2021 BCIPC 21 (CanLII).
[17] Order F21-16 at paras. 14 and 15.

- options and possible responses regarding the proposed project that were ultimately "not chosen or acted upon".[18]

[22] The applicant argued that the City had applied s. 13(1) inappropriately. He also noted that several OIPC orders have found that s. 13(1) does not apply automatically to a record, just because it is a draft. Moreover, in his view, the withheld information is not advice or recommendations but rather is directions, statements, instructions, factual background or information about decisions already made. He also pointed out that the City had disclosed some emails containing drafts but withheld others.[19]

Analysis and findings

[23] With one exception, I agree with the City's characterization of the withheld information. I discuss the individual categories of information below.

[24] **Issues and Recommendations – pages 7, 21 and 281 (duplicates at pages 77 and 207):** The withheld information on these pages comprises a development planner's successive drafts of issues concerning the applicant's rezoning enquiry. It also consists of recommendations on what to say to the applicant and conditions for how the proposed development might proceed. It is clear from the context that the development planner prepared the issues and recommendations for consideration by the responsible rezoning planner and for his use in preparing for meetings in which City staff would review and consider the applicant's rezoning enquiry.

[25] I am satisfied that the development planner prepared her expert analysis and opinion on these matters, using her skill and judgement, and that she compiled them for use in the City's deliberations on the applicant's rezoning enquiry. In my view, disclosure of this information would reveal advice and recommendations prepared by or for a public body.

[26] **Internal Comments – pages 9-10 (duplicates at pages 79, 84 and 88):** The withheld information on these pages consists of a heritage planner's views on the potential heritage aspects of 222 East 17th Avenue, as well as her recommendations on what to tell the applicant about how the proposed development might proceed. The heritage planner prepared these comments, on behalf of the Heritage Group (part of PDS), in an email to the responsible rezoning planner for his consideration and use in preparing for a meeting of City planning staff.

[27] I am satisfied that the heritage planner was exercising her skill and judgement in preparing her expert analysis and opinion on the potential heritage

[18] City's initial submission, paras. 40-46; Affidavit of PDS planner, paras. 39-40 and 42.
[19] Applicant's response submission, paras. 14-17.

merits of the property, for the City's use in its deliberations on the applicant's rezoning enquiry. In my view, disclosure of this information would reveal advice and recommendations prepared by or for a public body.

[28] **"Direction" from assistant director of planning – page 82 (duplicate at page 77):** The withheld information on these pages is preceded by the (disclosed) introductory remark that the assistant director of planning "has provided some direction for us around the proposed recommendations …" respecting 222 East 17th Avenue. Three bulleted points follow, which the City withheld under s. 13(1).[20]

[29] Past orders have said that s. 13(1) does not apply to instructions or directions in which the recipients had no choice or latitude in taking the direction.[21] It is clear from the records that the City planning staff had no choice but to follow the assistant director's direction. The withheld information on these pages does not, therefore, qualify as advice or recommendations.

[30] **Discussion points (pages 105-106, 111, 113-114):** The withheld discussion points on these pages are in successive drafts of the rezoning planner's recommended responses to several issues the applicant raised in response to a letter from the City about the rezoning enquiry. Disclosed information in these pages indicates that the rezoning planner paraphrased the issues and drafted the recommendations for discussion at an internal meeting of City staff.

[31] In my view, the withheld information reflects the rezoning planner's exercise of skill and judgement, both in his expert interpretation and analysis of the issues and his considered recommendations on how to respond to those issues. I am satisfied that this information was integral to the City's deliberations on the applicant's rezoning enquiry. In my view, its disclosure would reveal advice and recommendations developed by or for a public body.

[32] **Draft letter (pages 116-117 – duplicate at pages 275-276):** The withheld draft letter contains the rezoning planner's proposed wording for a response to the issues mentioned just above. It appears to flow from the internal staff meeting on the discussion points.

[33] I acknowledge the applicant's point that past orders have said that s. 13(1) does not apply to drafts, simply because they are drafts.[22] I am satisfied, however, that the purpose of the draft in this case was, as a whole, to provide

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[20] The City did not apply any other exceptions to this information.
[21] See Order F21-16, 2021 BCIPC 21 (CanLII); Order F19-27, 2019 BCIPC 29 (CanLII); Order F15-33, 2015 BCIPC 36 (CanLII); Order F14-44, 2014 BCIPC 47 (CanLII); Order F15-52, 2015 BCIPC 55 (CanLII).
[22] See Order 00-27, 2000 CanLII 14392 (BC IPC).

advice and recommendations on how to respond to the applicant's issues.[23] Moreover, disclosure of this draft would enable a reader to discern the differences from the final letter and thus advice on its contents.[24] In my view, disclosure of the draft would reveal advice and recommendations developed by or for a public body.

Does s. 13(2) apply?

[34] The City asserted, without explanation, that s. 13(2) does not apply.[25] The applicant argued that s. 13(2)(a) applies generally and that s. 13(2)(k) and (n) apply to certain pages. These provisions read as follows:

> 13(2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material
>
> …
>
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a pubic body,
>
> …
>
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

[35] I do not need to consider the applicant's argument that s. 13(2)(n) applies to the withheld information on pages 77 and 82, as I decide below that s. 13(1) does not apply to this information. I consider the remaining withheld information below.

[36] **Factual material:** The applicant said he was entitled to any factual material, such as factual statements or background data.[26] The City replied that the withheld information does not contain any "factual material" and that any facts are intermingled with the advice and recommendations.[27]

[37] The Supreme Court of Canada has noted that there is a distinction between advice and factual "objective information."[28] In addition, the BC Supreme Court said this about the type of factual information to which s. 13(1) applies:

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[23] See Order F19-28, 2019 BCIPC 30 (CanLII).
[24] See Order F18-41, 2018 BCIPC 44 (CanLII).
[25] City's initial submission, para. 47.
[26] Applicant's response submission, para. 18.(A).
[27] City's reply submission, paras. 12-15.
[28] *John Doe,* at paras. 50-52, commenting with approval on findings in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC).

> ... if the factual information is 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 or if the expert's advice can be inferred from the work product it falls under s. 13(1) ... the compilation of factual information and weighing the significance of matters of fact is an integral component of the expert's advice and informs the decision-making process. Based on the principles articulated in *Physicians*, the documents created as part of a public body's deliberative process are subject to protection.[29]

[38] The withheld information consists of advice, recommendations, expert opinion and analysis, compiled and formulated as part of the City's deliberative process regarding the rezoning enquiries. What little factual information there is in the records is integral to the deliberative process. It is, moreover, intertwined with the advice or recommendations, such that it could not, in my view, reasonably be separated from it and disclosed.[30] I find, therefore, that s. 13(2)(a) does not apply here.

[39] **Report of a task force:** The applicant argued that s. 13(2)(k) applies to the withheld information on pages 9-10 (duplicates at pages 79, 84 and 88). In the applicant's view, the City established the Heritage Group to review and consider specialized heritage matters. He said the heritage planner reported her recommendations after investigation, analysis and evaluation of the heritage value and character of this property.[31]

[40] The City denied that the Heritage Group is a "task force" or similar body. It also argued that the information in question is not a "report".[32]

[41] Past orders have said that the term "report" means "a formal statement or account of the results of the collation and consideration of information".[33] The information in question does not, in my view, rise to the formal status of a report. Rather, the heritage planner provided her comments and recommendations for internal use by staff in their consideration of the rezoning enquiry. Nor, in my view, was the Heritage Group established as a task force or similar body, for the purposes of s. 13(2)(k). It is part of PDS and was carrying out its normal, routine duties. I find that s. 13(2)(k) does not apply here.

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[29] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)* [*PHSA*], 2013 BCSC 2322, at para. 94.
[30] See *Insurance Corp. of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 [*ICBC*], paras. 52-53.
[31] Applicant's response submission, para. 18.(B).
[32] City's reply submission, paras. 16-19.
[33] See Order F17-33, 2017 BCIPC 35 (CanLII), and Order F20-37, 2020 BCIPC 43 (CanLII).

Conclusion on s. 13(1)

[42] I found above that the withheld information on pages 77 and 82 is not advice or recommendations. I find, therefore that s. 13(1) does not apply to it. It was not necessary to consider s. 13(2)(n) respecting these pages.

[43] I also found that the remaining withheld information is advice or recommendations and that ss. 13(2)(a) and (k) do not apply to it. I find, therefore, that s. 13(1) applies to the remaining information in dispute.

[44] None of the withheld information is older than 10 years. Section 13(3) does not, therefore, apply to it.

Exercise of Discretion

[45] Section 13 is discretionary. This means that the head of a public body must properly exercise its "discretion in deciding whether to refuse access to information, and upon proper considerations."[34] If the head of the public body has failed to exercise 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."[35]

[46] The City said it had considered a number of specified factors in exercising its discretion[36] and had withheld only those portions of the records containing advice or recommendations. It added that it recently disclosed information it had earlier withheld under s. 13(1).[37] The applicant disputed that the City properly exercised its discretion, arguing it had not done a line-by-line severing of the records, as it should.[38]

[47] The City did not identify the information to which it had originally applied s. 13(1) and which it later disclosed. However, I can see that the City conducted a line-by-line review of the records and that it disclosed some information that it could technically have withheld under s. 13(1). There is no evidence that it considered improper or irrelevant factors or that it acted in bad faith in deciding to withhold information. I am satisfied that the City exercised its discretion properly in this case.

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[34] Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144.
[35] *John Doe*, at para. 52; see also Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 147.
[36] These included the purpose of the legislation, the nature and sensitivity of the records, the purpose of the exception and the applicant's interest in the records.
[37] City's initial submission, paras. 48-52.
[38] Applicant's response submission, para. 17.

Unreasonable invasion of third-party personal privacy – s. 22(1)

[48] The City relied on s. 22 to withhold minor amounts of information on pages 20-21, 37-38 and 291.[39]

Application of s. 22(1)

[49] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03, where the adjudicator said this:

> Numerous orders have considered the approach to s. 22 of FIPPA, which states 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." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[40]

Is it personal information?

[50] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information.

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

[52] Past orders have said "[w]hether information will be considered 'contact information' will depend on the context in which the information is sought or disclosed".[41]

[53] The City did not expressly address this issue. However it did say that it considers the information to be the private information about City staff.[42] The applicant suggested that the information in question is "contact information" or is otherwise not personal information.[43]

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[39] City's initial submission, para. 81.
[40] Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.
[41] See, for example, Order F08-03, 2008 CanLII 13321 (BC IPC), at para. 82.
[42] City's initial submission, para. 81.
[43] Applicant's response submission, paras. 42.(A) and (B).

[54] The information in question consists of references to named City staff's recreational activities. It is not contact information but rather information about the staff's private lives. I find that it is personal information.

Does s. 22(4) apply?

[55] Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. The City argued, without elaboration, that s. 22(4) does not apply.[44] The applicant suggested that, if the information relates to an employee's professional opinions or falls under s. 22(4)(e), s. 22(1) does not apply.[45]

[56] There is no basis for finding that s. 22(4) applies here. The personal information at issue does not, for example, relate to any third party's position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)).

Presumed unreasonable invasion of third-party privacy – s. 22(3)

[57] Section 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. Neither party addressed this provision. The personal information in question does not, in my view, fall squarely into any of the s. 22(3) categories.

Relevant Circumstances – s. 22(2)

[58] Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing personal information would be an unreasonable invasion of a third party's personal privacy. The City did not address s. 22(2). The applicant made arguments related to ss. 22(2)(a) and (c) which read as follows:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …

[44] City's initial submission, para. 83.
[45] Applicant's response submission, paras. 42.(C) and (D).

> (c) the personal information is relevant to a fair determination of the applicant's rights,
> …

[59] **Public scrutiny – s. 22(2)(a):** The applicant said "it is important to foster the accountability of public bodies and weighs [*sic*] in favour of disclosure."[46]

[60] There is no indication that disclosing information about the recreational activities of the City's staff would assist in subjecting the City's activities to public scrutiny. I find that s. 22(2)(a) does not apply to this information.

[61] **Applicant's rights – s. 22(2)(c):** Past orders have set out a four-part test to determine whether s. 22(2)(c) applies:

> 1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
>
> 2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
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> 3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
>
> 4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[47]

[62] The applicant argued that s. 22(2)(c) applies, "[i]nsofar as the personal information relates to a third party, or other personal information that relates to meetings, meetup and gatherings of one or more staff to contact, discuss, or meetup that has anything to do with the processing of the applicants' enquiry …"[48]

[63] The information in question has nothing to do with any of these activities. Moreover, it is clear from disclosed information in the records that rezoning applications are "highly discretionary", rather than related to a legal right of the applicant.[49] I find that s. 22(2)(c) does not apply here.

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[46] Applicant's response submission, para. 42.(F).
[47] See, for example, Order 01-07, 2001 CanLII 21561 (BC IPC) and Order F18-48, 2018 BCIPC 51 (CanLII).
[48] Applicant's response submission, para. 42(E).
[49] See page 122 of the records, for example.

[64] **Nature of information:** The applicant argued, and I agree, that the information is not particularly sensitive. It is, nevertheless, about the City staff's private lives, a factor which favours non-disclosure of the information.

Conclusion on s. 22(1)

[65] I found above that the information in dispute is personal information and that ss. 22(3) and (4) do not apply. I also found that ss. 22(2)(a) and (c) do not apply and that the private nature of the information favours its withholding. No other factors in s. 22(2) are relevant here, in my view.

[66] While the information in question is innocuous, the applicant has not explained why he should have access to the personal information of the City's staff which is about their recreational activities. He has not met his burden of proof. I find that disclosing the staff's personal information would be an unreasonable invasion of their personal privacy and s. 22(1) applies.

Duty to assist – s. 6(1)

[67] The applicant complained that the City did not conduct an adequate search for responsive records. He also complained that the City interpreted his request too narrowly. These complaints both relate to the issue of whether the City complied with its duty under s. 6(1) of FIPPA which reads as follows:

> **Duty to assist applicants**
>
> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[68] Past orders have said the following regarding these aspects of s. 6(1):

- requests should be interpreted in a manner that a fair and rational person would consider appropriate in the circumstances and public bodies should avoid overly literal or narrow interpretations of requests[50]; and
- although FIPPA does not impose a standard of perfection, a public body's search for records must be thorough and comprehensive; it should explore all reasonable avenues, describe its searches and indicate how much time its staff spent looking for records.[51]

[50] Order F20-05, 2020 BCIPC 5 (CanLII), at para, 32, with reference to Investigation Report F08-01, 2008 CanLII 1648 at para. 18.
[51] See, for example, Order 02-18 2002 CanLII 42443 (BCIPC) at para 7, and Order 00-32, 2000 CanLII 14397 (BC IPC), at page 9.

[69] I will begin by setting out the chronology of the request and complaints. I will then consider the interpretation and search issues collectively, as they are intertwined. As will become clear, an unfortunate series of misunderstandings and errors clouded and complicated both matters for many months, resulting in frustration and delay for the applicant.

Chronology of request

[70] **Original request –** The applicant submitted the following request on January 28, 2019:

> All documents in the custody or control of the City of Vancouver pertaining to rezoning enquiries for 222 East 17th Avenue, 230 East 17th Avenue and 240 East 17th Avenue, Vancouver from April 24, 2016 to present including but not limited to: letters, memos, reports, emails, text messages, handwritten or electronic notes, electronic documents, drawings and pictures, including but not limited to the following persons: [16 named individuals]

[71] A series of email exchanges ensued in which the City attempted to gain the applicant's agreement to narrow or clarify the request. The City suggested the applicant remove the phrases "including but not limited to" and that he specify the records he wanted and the individuals to whom he referred.[52]

[72] **Clarification email –** In a February 12, 2019 email, the applicant said the request was clear. He also declined to specify the individuals, as he did not know the names of all those who might have been involved, for example, those in the engineering department.

[73] However, the applicant said, he wanted access to information on "three distinct rezoning enquiries" made for the three specified properties, during the period April 24, 2016 to January 28, 2019, as follows:

> 1. Rezoning enquiry made via email by [the applicant] to the rezoning department of the City of Vancouver during the period of April 24 to 28, 2016; ([named City employee] was the principal COV respondent cc: [another named City employee]); [part 1]
>
> 2. Rezoning enquiry made via submission of Pre-Enquiry Application for the Moderate Income Rental Housing Pilot Program during the period of January to March 2018; [part 2] and
>
> 3. Rezoning enquiry made via submission of a formal Rezoning Enquiry (fee paid service) submitted on May 25, 2018 and ongoing to date. [part 3]

[52] Affidavit of City's ATIP Director, para. 8.

[74] The applicant said he had made the first rezoning enquiry (i.e., part 1) and his architects, whom he named, had made the second and third (i.e., parts 2 and 3).[53] The applicant added he did not want all of the City's documents but was limiting his request to records

> … generated/created by the City as a result of and pertaining to the applicants [*sic*] rezoning enquiries made during the stated time period. As per our FOI request, this is to include **all the types** of records that were generated/created which can include but is [*sic*] not limited to letters, memos, reports, emails, text messages, handwritten or electronic notes, electronic documents, drawings and pictures. [bolding in applicant's email]

[75] **Final version of request –** The City and the applicant exchanged further emails on the scope of the request and, on February 21, 2019, they settled on the following wording:

> All records in the custody or under the control of the City of Vancouver pertaining to the rezoning enquiries made by the applicants for 222 East 17th Avenue, 230 East 17th Avenue, and 240 East 17th Avenue, including but not limited to letters, memos, reports, emails, text messages, handwritten or electronic notes, electronic documents, drawings and pictures, on both City of Vancouver and personal email/devices from April 24, 2016 to January 28, 2019.

[76] The City's Access to Information and Privacy (ATIP) staff sent the February 21, 2019 wording of the request (final version) to PDS, the relevant department, and asked it to gather the responsive records. PDS staff collected what it referred to as "complete" copies of records in the PDS electronic case file on the rezoning enquiry for the three properties, as well as copies of the responsible rezoning planners' email records and paper records.[54] The City disclosed severed copies of these records (216 pages) on May 8, 2019.

[77] **Initial complaint to City –** After receiving the records, the applicant complained to the City on May 10, 2019 that several items were missing or not included:

- photographs, PowerPoint slides and other attachments mentioned in the emails;
- emails or other records from the City's Engineering department, when it was clear that that department had provided "detailed input and advice" on the proposed project; and

[53] The applicant referred to himself and his architects collectively as the "applicants" or "complainants". For simplicity, I refer to him here as the applicant.
[54] Affidavit of City's Manager, Administrative Services, PDS, paras. 13-16.

- emails from several named "senior level civil servants" who had been involved in the file.

[78] The applicant also referred to his February 12, 2019 clarification email in which he had set out three "distinct enquiries" he had made during the period of interest. He said the records he had received were responsive to part 3 but not parts 1 and 2. The applicant also asked that the City explain where it had searched for records.

[79] **City's response to initial complaint –** In response to the applicant's May 10, 2019 complaint, the City raised the applicant's concerns with PDS.[55] The City disclosed eight pages of photographs with its May 28, 2019 email, which said this:

> We have completed our due diligence search for records and Planning, Urban Design and Sustainability Staff confirm that no further records have been found.
>
> We are attaching copies of the photographs you requested in your letter of May 10, 2019.

[80] **Complaint to OIPC –** The applicant complained to the OIPC on May 29, 2019 that the City had not conducted an adequate search for the responsive records.[56] First, he noted that the City had not produced records pertaining to parts 1 and 2 of his request. He provided the OIPC with two examples of correspondence which supported his view that the City should have produced more records: an April 25, 2016 email from him to the City (related to part 1); and a March 19, 2018 letter from the City to his architects (related to part 2).

[81] The applicant added that the City had not provided details of its search, as requested. He also said that, except for the photographs, the City had not provided any other supposedly missing records, such as emails from the named senior City employees, and had not responded to his other concerns.[57]

[82] The City later disclosed more records, first in August 2020 and then in November 2020.

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[55] Affidavit of City's Manager, Administrative Services, PDS, para. 17.

[56] The applicant also complained about the City's extension of its time limit to respond to his request (OIPC File F19-79356). The OIPC investigated and dismissed this complaint.

[57] The applicant also complained that his architects had earlier received 244 pages of records whereas he had received 216 pages. He claimed that the City had withheld 28 pages. The City explained that it had removed the 28 pages as the information in them was not responsive or duplicated other information. Affidavit of City's ATIP director, para. 38.c. I have not considered this issue, as it was not listed in the notice or investigator's fact report for this inquiry.

City's submission on interpretation and search

[83] The City's initial submission framed the interpretation issue as whether it had interpreted the request "reasonably". However, the notice for this inquiry stated that this issue was whether the City had interpreted the request "too narrowly" and this is what I will consider.

[84] The City said it considered the applicant's request too broad to do an accurate search, as it could, in the City's view, require searching all City employees' files.[58] It said its normal practice in such cases is to attempt to narrow the request, both to reduce workload on staff and provide an applicant with a more meaningful response. Thus, the City said, it attempted to gain the applicant's agreement to narrow his original request, during the course of which the applicant provided "particulars" which, the City said, he did not include in the original request. On February 21, 2019 the parties agreed on the wording of the final version of the request.[59]

[85] The City said that its ATIP staff did not initially realize the term "rezoning enquiry" refers to "a formal application for preliminary advice from staff for development projects proposing to rezone a site". The City said that the applicant's request "incorrectly" referred to "rezoning enquiries" regarding the three properties, whereas only part 3 of the February 12, 2019 clarification email actually referred to a "rezoning enquiry". It said that parts 1 and 2 of the applicant's clarification email referred to "pre-enquiry processes", separate processes that occur prior to a "rezoning enquiry".[60] The City said a "misunderstanding" occurred at this point, as ATIP staff did not realize the applicant's "mistake in terminology" or the distinction among the three processes.[61]

[86] The City said, in keeping with its usual practice, the ATIP office provided only the February 21, 2019 final version of the request to PDS. The City said it had no reason to provide PDS with its "extensive communications" with the applicant. PDS retrieved records which the City disclosed in severed form on May 8, 2019.[62]

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[58] Affidavit of City's ATIP Director, para. 8.
[59] Affidavit of City's ATIP Director, paras. 41-42.
[60] The City said that part 1 of the February 12, 2019 clarification referred to "an informal eligibility review done by email with respect to the Affordable Housing Choice Interim Rezoning Policy" and that part 2 referred to a "pre-enquiry submission to confirm eligibility for a pilot program called a Moderate Income Rental Housing Pilot Program"; City's initial submission, para. 16.
[61] City's initial submission, para. 14
[62] City's initial submission, paras. 20-25.

[87] Upon receiving the applicant's May 10, 2019 complaint that photographs, PowerPoint slides, attachments and other records were missing, the City's ATIP office raised his concerns with PDS. PDS told ATIP staff the following:[63]

- **Attachments:** The photographs had not been filed properly, due to an "oversight".[64] The PowerPoint slides were at pages 163-168 of the records. An attachment at pages 113-114 had been "redacted" (withheld).

- **Engineering Department:** The responsive records contained "the complete information" PDS had obtained from the Engineering Department (pages 26, 174, 175) and PDS had provided all of the relevant information and records.[65]

- **Senior staff:** The named senior level staff were only copied on the emails as their positions require that they be informed and that they act in a "supervisory and decisional role". They are not expected to generate emails or other records in the rezoning case file.[66]

- **Parts 1 and 2 of the February 12, 2019 clarification email:** Records related to parts 1 and 2 related to processes that preceded the rezoning enquiry and were not part of it.[67] The parts 1 and 2 records had not been included as they were not responsive to the February 21, 2019 final version of the request.

[88] The City said that the ATIP staff then "reconsidered whether the Applicant intended parts 1 and 2 records to be included" in the February 21, 2019 final version of the request and asked PDS to look for pre-submission and pre-enquiry records. The City said that, in preparing this request, ATIP staff made a typographical error in the address and referred to 545 East Cordova instead of the three properties of interest to the applicant.[68] The City said that PDS staff had no reason to question the address 545 East Cordova and that they found no responsive records. The City said that this typographical error only came to light during preparation for this inquiry.[69]

[89] In response to the applicant's complaint to the OIPC, the City said that it later located the records to which the applicant had referred in his OIPC complaint: the April 24-28, 2016 email string; and the March 19, 2018 letter. The

[63] The following bulleted points come from the Affidavit of the City's ATIP Director, para. 31.
[64] The City disclosed the photographs (which PDS had retrieved) with its email of May 28, 2019 to the applicant.
[65] Affidavit of City's Manager, Administrative Services, PDS, paras. 27-28.
[66] Affidavit of City's Manager, Administrative Services, PDS, para. 26.
[67] The City said this was the first ATIP learned of the distinction in processes.
[68] City's initial submission para. 33.
[69] Affidavit of City's ATIP Director, para. 31.v., and City's Manager, Administrative Services, PDS, para. 19.

City said these items had not been included with the first response as they were not responsive to part 3 of the request.[70] The City provided the applicant with the April 2016 email string on August 27, 2020. It said it also intended to provide the March 2018 letter but it made a mistake and provided an October 25, 2018 letter instead.[71]

[90] The City added that, in preparing for this inquiry, ATIP staff asked PDS to search for any further records related to parts 1 and 2 of the February 12, 2019 clarification. It said PDS located some records[72] which it included with its submission to this inquiry. The City said most of these records relate to the March 2018 pre-enquiry submission and some are correspondence from the Engineering Department.[73]

[91] The City argued that its initial interpretation of the request was "reasonable" and that its initial searches were all reasonable. The City said that that it was not irrational or unfair for it to have "deferred" to the applicant's preferred wording and terminology, "as someone seemingly informed on the subject matter of his request", in the February 21, 2019 final version of the request which, the City noted more than once, referred only to "rezoning enquiries".[74]

[92] The City said that its ATIP staff are not subject matter experts and that they were not under a duty, nor were they in a position, to assist the applicant with the "technical terminology" of his request. The City said the ATIP staff made good faith efforts to help the applicant narrow his request. The City said that the mistake in terminology the applicant used in the February 21, 2019 final version of the request was the applicant's error.[75] The ATIP staff sent the final version to PDS staff, who, the City said, reasonably interpreted the request as referring only to "rezoning enquiries" (i.e., part 3) and searched accordingly. In the City's view, it met its duty to assist the applicant with the first disclosure and the "pre-enquiry records" (i.e., parts 1 and 2) were not in the scope of the applicant's request.

[93] The City added that, once it realized there was a "misunderstanding" on the applicant's part regarding the scope of the request, it conducted further searches, although in its view, it was under no obligation to do so. The City argued that, initially, it more than fulfilled its duty to conduct an adequate search. It said that it was under no duty to conduct further searches, particularly for records that it considered outside the scope of the request. However, it said, it did so "in good faith" to assist the applicant. The City said its staff had

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[70] Affidavit of City's ATIP Director, paras. 38.b. and c.
[71] City's initial submission, para. 38.
[72] Affidavit of City's Manager, Administrative Services, PDS, para. 20.
[73] City's initial submission, para. 40.
[74] City's initial submission, paras. 54-56.
[75] City's initial submission, para. 55.

spent 30-40 hours searching for records.[76]

[94] The City again noted that it searched for and provided "pre-enquiry" records despite the fact they were not responsive to the "subject request". The City acknowledged that, due to the typographical error, it found pre-enquiry records only later, while preparing for this inquiry, but denied that it had any responsibility to search for them. It said that the fact that it found further out of scope (pre-enquiry) records "during due diligence searches" does not mean its initial searches were unreasonable or inadequate. The City also noted that the records it found later should not have been kept as they were mostly duplicates or of no "business value".[77]

[95] The City argued that it had endeavoured to respond to the applicant in good faith, beyond its obligation under s. 6. In its view, if his informational needs were not met initially, this was not due to a lack of reasonable effort on its part but rather due to the applicant's "misunderstanding of the terminology".[78]

Applicant's response

[96] The applicant argued that his clarification email of February 12, 2019 gave complete details of the three types of records he was interested in. In his view, it was clear how he was using the term "rezoning enquiries". If there was an issue, he argued, the ATIP staff could have requested that he amend or split up his request. He added that the City's ATIP staff should have sent the clarification email to PDS.[79]

[97] The applicant also renewed his concern about records he thought the City ought to have disclosed, including engineering records, emails from City heritage planners, rezoning planners and senior City employees, agendas and PowerPoint slides. In his view, the City ought to search for records in its backup files.[80] He added that the City's ATIP staff's early emails were unhelpful, discouraging and adversarial in tone.[81]

City's reply

[98] The City argued that the applicant's supposed clarification, which it regards as "external" to the request, did not expand his request or somehow become part of his request. It also disagreed that the ATIP staff should have sent the clarification to PDS.[82]

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[76] City's initial submission, para. 60.
[77] City's initial submission, paras. 61-62
[78] City's initial submission, para. 63.
[79] City's initial submission, para 22-24.
[80] City's initial submission, paras. 39-58.
[81] City's initial submission, paras. 68-73.
[82] City's reply, paras. 5-7, 22.

[99] The City reiterated that the February 21, 2019 final request was about "rezoning enquiries" and this is what guided PDS's initial search. The City said that, if it had appreciated the "inconsistency" between the request and the clarification, it would have asked the applicant to submit a new request.[83]

[100] The City added that there is no evidence of a need to search back-ups. In any case, it said, data back-ups are for disaster recovery and only go back 30 days.[84]

Discussion and findings

[101] I agree with the City that the applicant's request was, at first blush, broadly worded. The City was, therefore, reasonable in attempting to clarify or narrow the request. However, in my view, contrary to the position the City took in this inquiry, the applicant's email of February 12, 2019 clarified, but did not expand, his request. The clarification was not "external" to the request but, rather, an integral part of it.

[102] Nevertheless, I accept the City's evidence that its ATIP staff did not initially appreciate the distinction among the three types of enquiries. I also acknowledge that the applicant agreed to the final wording of the request, evidently unaware that he and the ATIP staff were at cross purposes regarding the scope of the request.

[103] In this light, it is unfortunate that the ATIP staff did not include the clarification email with the final wording of the request. This could well have prevented the request from going off the rails so early in the process. In any case, given the wording of the February 21, 2019 final request, I think it was reasonable that PDS retrieved only part 3 records.

[104] In my view, despite the position it took in its initial submission, the City realized early on, from the applicant's May 10, 2019 complaint, that it had misunderstood the scope of the request. It then, rightly, undertook further searches for part 1 and 2 records. Unfortunately, the City missed another opportunity to salvage the request at this point when the typographical error occurred. This curious and unexplained error further compounded matters and resulted in a futile search for the part 1 and 2 records.

[105] I reject the City's after the fact argument that the applicant was mistaken in his terminology and that his clarification was "external" to the request. Rather, in my view, it was clear from the start that the applicant was aware of the differences in the three types of enquiries, knew precisely what records he

[83] City's reply, paras. 29, 36-37.
[84] City's reply, paras. 18 and Affidavit of City's ATIP Director, para. 31.ii. I agree with the City on this point.

wanted and described them accurately in his clarification email. After the second search, the result of "no responsive records" for parts 1 and 2 should, therefore, have triggered questions in the City's mind as to why no such records had turned up. Despite this, the City does not appear to have pursued this aspect of the complaint until much later, for reasons it did not explain.

[106] The City's blunt and uninformative May 28, 2019 email also did not help matters. Apart from disclosing the photographs, the email failed to deal with the applicant's other concerns about possibly missing records, even though PDS had provided helpful and detailed explanations, which I accept. The City did not explain this omission either.

[107] The City devoted considerable energy in its submissions to denying that the clarification was part of the request and to deflecting blame on to the applicant for his supposed mistake in terminology. Both attitudes were unhelpful and, to say the least, disingenuous. Why did the City not simply admit it had initially misunderstood the scope of the request? Alternatively, why did it not ask the applicant to make a new or amended request for the part 1 and 2 records? Why did it not realize until this inquiry that it had made a typographical error? Why did it erroneously disclose the wrong letter in August 2020? The City did not answer any of these questions.

[108] In conclusion, for reasons given above, I find that the City initially interpreted the request too narrowly. It follows that I consider that its search was at first inadequate. However, in light of the further disclosures, and despite the curious and inexplicable errors and omissions, I am satisfied that, eventually, the City properly interpreted the request as encompassing all three parts. I am also satisfied that, eventually, the City conducted an adequate search for the responsive records.

[109] I acknowledge that the applicant still believes there are other records. However, I agree with the City that the records it disclosed latterly were transitory, duplicative, of dubious relevance or of no business consequence, as were the examples the applicant cited in his submission. I see no likelihood that there are further responsive records of any significance and decline to order another search.

CONCLUSION

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

1. Subject to item 2 below, I confirm that the City is authorized by s. 13(1) and required by s. 22(1) to withhold information.

2. I require the City to disclose the information it withheld under s. 13(1) on pages 77 and 82.
3. I confirm that the City performed its duty under s. 6(1).
4. The City must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described in item 2 above.

[111] Under s. 59(1), the City is required to comply with this order by October 21, 2021.

September 7, 2021

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F19-79839
F19-79840