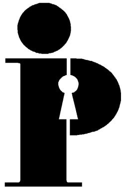

ORDER MO-2337

Appeal MA06-274

City of Toronto

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

In March of 2006, while four firefighters were at a shopping plaza, their unattended fire truck was stolen. The fire truck was later found in a ditch on a highway, having suffered significant physical damage. Staff at the Toronto Fire Service (the TFS) began an investigation into the incident and it was ultimately determined that the actions of the four firefighters were contrary to procedures set out in the Toronto Fire Services' Operating Guidelines.

Following a meeting with the Toronto Professional Fire Fighters' Association (the Association), who represented the four firefighters, and staff at the TFS, an agreement was reached regarding the appropriate disciplinary action for each firefighter. Minutes of Settlement were executed that set out the terms of that agreement. Subsequently, questions surrounding the actions of, and discipline received, by the firefighters, as well as the damage incurred by the vehicle, were the subject of reports to elected representatives of the City of Toronto (the City). The circumstances relating to the theft of the fire truck also attracted the attention of the public and the media.

NATURE OF THE APPEAL:

The City received a request from a member of the media under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> [All] records which will allow me to determine the circumstances under which a fire truck was stolen from a plaza at Alness Street and Steeles Avenue West on March 20, 2006, the results of an internal investigation, and the details of the disciplinary action taken as a result.
>
> …[R]ecords which will allow me to determine what the crew's status was at the time, whether the stop at Alness and Steeles was part of dispatched service, the means by which the truck was reported stolen, internal communications on how the theft occurred, as well as records which include details of the internal investigation and disciplinary action.

A large number of records were identified by the City as being responsive to the request. It issued a decision letter to the requester denying access to all of the records, except the Minutes of Settlement, in their entirety on the basis that they were excluded from the *Act* under sections 52(3)2 and 3 (labour relations and employment records). Access to the Minutes of Settlement was denied in its entirety on the basis of section 14(1) (unjustified invasion of privacy).

The requester (now the appellant) appealed the decision of the City to this office. During mediation, the appellant raised the application of section 16 (public interest override) and as a result I made section 16 an issue in this appeal. No further mediation was possible and this matter was moved to the adjudication stage of the appeal process.

I began this inquiry by issuing a Notice of Inquiry to the City and the four firefighters (the affected parties), inviting them to submit representations on the issues set out in the notice. I received representations from the City and the Association on behalf of the affected parties. Any

reference in this order to the affected parties includes actions and communications on their behalf by the Association and its counsel unless otherwise stated.

I then issued a Notice of Inquiry to the appellant, and invited him to submit representations on the issues set out in the notice. The non-confidential portions of the City's representations and the complete representations of the affected parties were shared with the appellant. I received representations from the appellant. The appellant's representations were shared in their entirety with the City and the four affected parties and they were invited to submit representations in reply. I received reply representations.

I then decided to invite the City to make representations on the application of any exemptions that it may wish to rely on to deny access to the records should I not accept their position that the records are excluded from the *Act* under section 52(3). The City submitted supplementary representations in which it claimed, in the alternative, that the exemptions in sections 6 (draft by-law/closed meeting), 7 (advice or recommendations), 11 (economic and other interests), 12 (solicitor and client privilege) and 14(1) (unjustified invasion of personal privacy) applied to the responsive records. Following review of the supplementary representations of the City, I instructed an Adjudication Review Officer from this office to contact the City to seek clarification regarding the City's claim to section 11. The City confirmed that the reference to section 11 of the *Act* in the representations was an error. Accordingly, section 11 is not an issue in this appeal.

Subsequently, a Supplementary Notice of Inquiry was issued to the appellant inviting supplementary representations and a copy of the non-confidential portions of the City's supplementary representations was shared. I received supplementary representations from the appellant, which I shared with the City and the City was then invited to submit supplementary representations in reply. I received the City's supplementary reply representations.

RECORDS:

The records at issue consist of the Minutes of Settlement, printouts of "unit history", emails, written statements of the affected parties, correspondence, interview notes, drafts and the final report to the Community Services Committee (the CSC), a draft and final report to City Council, corporate communication strategy documents, a strategic communications plan, and a briefing note. I have revised the index of records that was provided by the City previously to reflect their claim to additional discretionary exemptions in the alternative to the claim that sections 52(3)2 and 3 apply to all of the records.

Unless otherwise stated in this order, any reference I make to a record shall be applied equally to its duplicate, and I will not refer to the duplicate records in the main body of this order. Also, the numbering system used in the record index indicates the page number assigned to the records provided to this office prior to mediation. Each individual page does not represent a record and in some cases there is more than one record on a given page. For example, a series of emails that were exchanged may appear on one page in some circumstances. In those cases, each individual email represents a record. Where this order makes reference to a page number, it shall be considered as a reference to all of the records that appear on that page unless otherwise stated.

The revised index of records follows:

Page numbers	Description	Exemptions Claimed
1	Unit History	52(3)2 and 3
2	GPS Snapshot	52(3)2 and 3
3-11	Emails	52(3)2 and 3
12-13	GPS Snapshots	52(3)2 and 3
14-21	Emails	52(3)2 and 3
22	Printout of unit history	52(3)2 and 3
23-29	Emails	52(3)2 and 3
30-36	Emails	52(3)2 and 3, 7
37-44	Emails	52(3)2 and 3, 12
45-48	Written statements from affected parties	52(3)2 and 3, 14(1)
49-57	Minutes of Settlement	14(1)
58-61	Correspondence	52(3)2 and 3, 14(1)
62-106	Interview Notes	52(3)2 and 3, 14(1)
107-118	Emails	52(3)2 and 3, 14(1)
119	"	52(3)2 and 3
120	"	52(3)2 and 3, 12
121-122	"	52(3)2 and 3
123-126	"	52(3)2 and 3
127	"	52(3)2 and 3
128-129	Strategic Communications Plan	52(3)2 and 3, 7
130	"	52(3)2 and 3
131	"	52(3)2 and 3, 12
132-135	Draft Report to CSC	52(3)2 and 3, 6
136-137	Emails	52(3)2 and 3
138-141	Draft Report to CSC	52(3)2 and 3, 6
142-150	Emails	52(3)2 and 3
151-154	Draft Report to CSC	52(3)2 and 3, 6
155-157	Emails	52(3)2 and 3
158-161	Draft Report to CSC	52(3)2 and 3, 6
162	Emails	52(3)2 and 3
163-166	Draft Report to CSC	52(3)2 and 3, 6
167	Emails	52(3)2 and 3
168-171	Draft Report to CSC	52(3)2 and 3, 6
172-173	Emails	52(3)2 and 3
174-177	Draft Report to CSC	52(3)2 and 3, 6
178-182	Emails	52(3)2 and 3
183-186	Draft Report to CSC	52(3)2 and 3, 6
187-194	Emails	52(3)2 and 3
195-198	Draft Report to CSC	52(3)2 and 3, 6

Page numbers	Description	Exemptions Claimed
199-200	Emails	52(3)2 and 3
201-204	Draft Report to CSC	52(3)2 and 3, 6
205-206	Emails	52(3)2 and 3
207-210	Draft Report to CSC	52(3)2 and 3, 6
211-212	Emails	52(3)2 and 3
213-216	Draft Report to CSC	52(3)2 and 3, 6
217-221	Emails	52(3)2 and 3
222-225	Draft Report to CSC	52(3)2 and 3, 6
226-229	Emails	52(3)2 and 3
230-235	Draft Report to CSC	52(3)2 and 3, 6
236	Emails	52(3)2 and 3
237-242	Draft Report to CSC	52(3)2 and 3, 6
243-246	Emails	52(3)2 and 3
247-248	“	52(3)2 and 3, 12
249-250	“	52(3)2 and 3
251	“	52(3)2 and 3, 12
252	“	52(3)2 and 3
253-254	Corporate Communications Strategy	52(3)2 and 3, 7
255	Email	52(3)2 and 3
256-261	Report to CSC dated April 21	52(3)2 and 3, 6
262-264	Emails	52(3)2 and 3
265	Email	52(3)2 and (3)
266-267	Duplicate of 128-129	52(3)2 and 3, 7
268-269	Emails	52(3)2 and 3
270	Email	52(3)2 and 3
271-272	Duplicate of 128-129	52(3)2 and 3, 7
273-278	Duplicate of 256-261	52(3)2 and 3, 6
279-280	Briefing Note	52(3)3 and 3
281-283	Emails	52(3)2 and 3
284-298	Email with attached CSC Decision Document	52(3)2 and 3
299	Email	52(3)2 and 3
300-305	Duplicate of 256-261	52(3)2 and 3, 6
306	Email	52(3)2 and 3
307-312	Duplicate of 256-261	52(3)2 and 3, 6
313-324	Draft Report to City Council	52(3)2 and 3
325-326	Emails	52(3)2 and 3
327-338	Draft Report to City Council	52(3)2 and 3

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The City claims that paragraphs 2 and 3 of section 52(3) exclude pages 1-48 and 58-338 from the *Act*. It states that pages 49-57, which are the four Minutes of Settlement, fall within the exception to section 52(3), which is found in section 52(4). As a result, the City claims that the *Act* applies to these records.

Section 52(3) states, in part:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*. The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

Section 52(3)2: negotiations

For section 52(3)2 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and

3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[Orders M-861, PO-1648]

Section 52(3)3: matters in which the institution has an interest

For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Section 52(4): exceptions to section 52(3)

If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

Representations

As noted above, the City's claim that the records are excluded from the *Act* applies to all responsive records other than the Minutes of Settlement. It submits that requirements 1, 2 and 3 for the application of section 53(2)2 have been met. It states:

> **Requirements 1 and 2:**
>
> The City submits that the records at issue were collected or prepared during the disciplinary investigation of the stolen fire truck incident and/or created,

> collected, maintained and used specifically by the City in relation to anticipated negotiations and actual negotiations arising from the results of this investigation. The records specifically document the City's decision making processes with respect to the incident and include statements from the crew members and other information which formed the basis of the City's position in the negotiations.
>
> The City further submits that these negotiations were in relation to the City's employment and discipline of the four crew members under the collective agreement including the determination of any grievance rights. The negotiations were thus related to both labour relations and the employment of persons by the City.
>
> Therefore, requirements 1 and 2 have been met.
>
> The City submits that these negotiations took place during the meeting held by senior fire services officers with the crew members, their union representatives and HR staff as indicated in the background of these representations.
>
> Therefore, requirement 3 has been met.

The City also submits that the three requirements for the application of section 52(3)3 have been met in respect of all of the records. It states:

> In order to fall within the scope of paragraph 3 of section 52(3), the City must establish that:
>
> 1. the records were collected, prepared, maintained or used by the City or on its behalf; and
>
> 2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
>
> 3. these meetings, consultations, discussion or communications are about labour relations or employment-related matters in which the institution has an interest.
>
> **Requirements 1 and 2:**
>
> As previously stated the City collected, prepared, maintained or used the records at issue during the disciplinary investigation of the incident and subsequent negotiations with the crew members and their union on employee discipline.
>
> The City submits that this collection, preparation, maintenance and usage was in relation to meetings, consultations, discussions or communications about City employees, more specifically about the employees' duties and responsibilities,

> their actions leading to the fire truck being stolen and the subsequent negotiations on suitable discipline as a result of these actions.
>
> Therefore, requirements 1 and 2 have been met.
>
> **Requirement 3:**
>
> Clearly issues relating to employees' failure to comply with their employment responsibilities…are all employment related matters.
>
> The City submits, therefore, that in the present appeal, the meetings, consultations, discussions or communications are about "labour relations" or "employment related matters." Previous orders of the IPC have held that an interest is more than a mere curiosity or concern. The City submits that its interest in the employment related matters has the capacity to affect its legal rights or obligations including those pursuant to the collective agreement.
>
> The requirement of part 3 has thus been met and section 52(3)3 applies in the circumstances of this appeal.
>
> The City has considered the provisions of section 52(4) and submits that none exist in this appeal with respect to the records to which sections 52(3)2 and 3 of the *Act* apply. It is therefore, the City's view that these records fall outside the scope of the *Act*.

The affected parties also argue that these records are excluded from the *Act* under section 52(3) and they appear to agree with the position taken by the City that the Minutes of Settlement fall within the exception to section 52(3) in section 52(4).

The affected parties submit:

> As noted above, the affected parties are employees of the City and governed by the collective agreement between the association and the City which includes articles concerning the City's right to discipline employees for just cause and a grievance procedure for the resolution of disputes arising from the collective agreement; therefore, records concerning matters arising from the relationship between the City and its employees, as represented by the Association clearly concern "labour relations" within the meaning of the Act.

The affected parties state that the requirements for the application of section 52(3)2 have been met because the records were collected, prepared, maintained and used by the City in its investigation into the theft of the fire truck and subsequent negotiations which took place between the City and the Association concerning the disciplinary action to be taken. They argue that the negotiations resulted in the signing of the Minutes of Settlement, without which there would have "undoubtedly" been a grievance and arbitration proceeding.

The affected parties also state that section 52(3)3 applies as the records were collected, prepared, maintained or used by the City in relation to meetings, consultations, discussions and communications with the Association concerning the disciplinary action to be taken by the City against the four affected parties.

The affected parties state:

> In the instant case, since Minutes of Settlement were concluded, communications between the Association and the City concerning the discipline of the Affected Parties took place before a grievance was filed under the collective agreement; however, in the respectful submission of the Affected Parties, the labour relations or employment related test applies equally to the expeditious resolution of matters arising from the terms and provisions of the collective agreement by the Association and the City without recourse to the grievance and arbitration provisions of the collective agreement. To find otherwise and to hold that a grievance must be filed for the exemption to apply would be to frustrate the ability of the parties to collective agreements to conclude minutes without recourse to grievance and arbitration, would undermine the labour relations between the parties and fly in the face of the purpose of the exemption.

The appellant argues that section 52(3) of the *Act* does not apply to the records because there is no evidence that "proceedings" were contemplated or that they ever occurred. With respect to the affected parties' argument that a finding that section 52(3) does not apply to "resolutions of matters arising from the terms … of a collective agreement" would undermine labour relations and be contrary to the purpose of the section, the appellant submits:

> [T]he application of the section has to be considered based on the facts of this case and the adjudicator should not be drawn into a hypothetical discussion of whether a grievance may or may not have been contemplated and whether or not a request for access could in the future frustrate the ability of parties to negotiate a resolution. In fact, were the adjudicator to find in favour of the affected parties argument in paragraph 20, it could negate section 52(3) in almost every case. Order M-1014 points out that "[S]ection 52(3) is record specific and fact specific". Again, I submit that a decision should be made based on the facts of this case.

The appellant agrees that the exception in section 52(4) applies to the Minutes of Settlement and that this record is not excluded under section 52(3).

In reply, both the City and the affected parties dispute that there is a need for there to have been proceedings (actual or contemplated) in order for sections 52(3)2 and 3 to apply. The City cites Orders PO-1648 and M-978 in support of their position. The affected parties argue that Order M-1014 cited by the appellant actually supports their position in this appeal.

Findings and Analysis

For the purposes of the analysis that follows, the records which the City and affected parties claim are excluded can be divided into four general categories:

- The first category of records includes pages 1, 2, 12, 13 and 22 which constitute the "Unit history" and the GPS snapshots tracing the movements of the fire truck on the day of the theft.

- The second category of records includes emails, reports and draft reports to City Council and the Community Services Committee (the CSC), internal communications regarding the damage and necessary repairs to the fire truck, the negotiations with the insurance company and information relating to proposals to avoid the theft of fire trucks in the future. Included in this category of records are pages numbered 28-29, 37-44, 119-120, 130-251, 255–261, 269-270, and 273-338.

- The third category of records includes the City's communications plans and strategies, and records relating to queries from members of the public. This category includes pages numbered 27, 29-32, 107–118, 123–129, 252–254, 262–268 and 271-272.

- The last category of records includes emails, written statements, and notes recording interviews with the affected parties containing information regarding the actions of the fire fighters, the discipline and the implementation of the discipline. Included in this category of records are pages numbered 3-11, 14-21, 23-26, 45-48, 58-106 and 121-122.

Having carefully reviewed all of the records and the representations of the parties, I find that only the records that are included in the fourth category of records referred to above are excluded from the *Act* pursuant to paragraphs 52(3)2 and 3. However, the requirements for the application of section 52(3)2 and 3 have not been met in respect of the records that fall within the other three categories and therefore, they are subject to the *Act*.

In arriving at my decision, I have found that all of the records, other than those that I have included in the fourth category, are not in essence about labour relations or employment related matters and there is not a sufficient connection between these records and the labour relations matter at issue in this appeal to meet the requirements for the application of section 52(3). However, with respect to the fourth category of records, there is a sufficient connection to satisfy the requirement for the application of section 52(3)2 and 3.

My findings and analysis of the records turns on the language of section 52(3)2 and 3 which requires that the excluded records be "in relation to" labour relations or employment related matters. This requirement has been considered by other adjudicators in previous orders of this office.

In Order M-927, Senior Adjudicator John Higgins considered the application of section 52(3) to records created for the purposes of an investigation into a motor vehicle accident and found that section 52(3) did not apply to those records. In that appeal, following the investigation, the records were copied and placed in another file that related to allegations of misconduct on the part of the police officer involved in the original motor vehicle investigation. In that order, Senior Adjudicator Higgins examined the records at issue and made a finding that they "were not, in essence, related to employment or labour relations." He stated:

> In my view, in assessing the possible application of section 52(3) in this case, it is important to note that the request was essentially directed at the contents of the police investigation file concerning the accident, and any related entries in officers' notebooks. It was not a request for information relating to the allegations against the investigating officers.
>
> It is difficult to imagine any category of records which would be more integral to the basic mandate of a police force than the files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and related entries in officers' notebooks. Moreover, although some of them are prepared by employees of the Police, such records are not, in essence, related to employment or labour relations. Rather, they record the activities and conclusions of the investigating officers and, at times, others who conduct forensic analyses, etc. Generally speaking, such records are subject to the *Act*.
>
> …
>
> Applying section 52(3) to the information at issue in this appeal would have the effect of permanently removing certain information maintained by the Police with respect to their basic mandate (i.e. protection of the peace and investigation of possible criminal behaviour which comes to their attention) from the scope of the *Act*, while most information of this nature would remain subject to the *Act*. As noted above, this information is not, in essence, related to employment or labour relations, and in my view, broadly speaking, it is to these latter categories of information that section 52(3) is intended to apply.

In Order P-1223, former Assistant Commissioner Tom Mitchinson made the following statements with respect to the interpretation of the words "in relation to" that appear in section 52(3):

> ... in my view, the case law does provide a clear indication that in order to be "in relation to" something, the activity or object in question must do more than merely "affect" that thing; there must be a substantial connection between the activity and the thing to which it is supposed to be "in relation".

Order P-1223 was referred to by Senior Adjudicator Higgins in Order MO-2024-I. In that order, the appellant sought access to the "total amount paid" to a law firm "with respect to" a former

employee. The City of Toronto denied access on the basis that the records were excluded by section 52(3)1 and 3 of the *Act*. Senior Adjudicator Higgins stated:

> The consequence of a finding that section 52(3)1 applies is a serious one – the total exclusion of the record from the scope of the access and privacy provisions of the *Act*. In this case, as the appellant points out, the record relates to the expenditure of public funds to defend a legal action. This type of information has a strong connection to government accountability, which the Supreme Court of Canada refers to as an "overarching" purpose of access legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 (S.C.C.)). In my view, this purpose, which relates to the right of public access to government-held records identified in sections 1 and 4 of the *Act*, must be kept in mind in assessing the proper meaning of "in relation to" in this case.
>
> Another relevant factor to consider in assessing the meaning of "in relation to" is the stated intent and goal of the *Labour Relations and Employment Statute Law Amendment Act*, which added section 52(3) to the *Act*. The long title of this Bill identified this goal as to "restore balance and stability to labour relations and to promote economic prosperity".
>
> As noted above, the term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In my view, meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings. For example, the preparation of the record would have to be more than *an incidental result of the proceedings*, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.

> I therefore find that requirement 2 is not met, and section 52(3)1 does not apply. (emphasis added)

Justice Swinton, writing for the Court in *Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289 (Div. Ct.), dealt with a request for an application for judicial review brought by the Ministry of Order PO-1905. Order PO-1905 found that records contained in a litigation file that related to an action brought against the Ministry for vicarious liability arising from the actions of its employees were not excluded pursuant to section 65(6) of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent to section 52(3)). Justice Swinton upheld the provisions of the order relating to section 65(6) but for the provisions in the order that referred to the "time sensitive approach", and stated:

> Subclause 1 of s. 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution". The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations per se — that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the Ministry is sued by a third party in relation to actions taken by government employees.
>
> Moreover, the words of subclause 3 of s. 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.
>
> The scope of s. 65(6) is made clearer when one looks at the relationship between it and s. 65(7), as well as the legislative history of the provision. Subsection 65(6) is subject to s. 65(7), which states:
>
> > (7) This Act applies to the following records:
> >
> > > 1. An agreement between an institution and a trade union.
> > >
> > > 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

> The fact that the Act applies to the documents in subclauses 1 through 3 of s. 65(7) suggests that the type of records excluded from the Act by s. 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

After reviewing the legislative history of section 65(5), Justice Swinton examined the consequences of a finding that the records at issue were excluded in the context of the appeal. She stated:

> The interpretation suggested by the Ministry in this case would seriously curtail access to government records and thus undermine the public's right to information about government. If the interpretation were accepted, it would potentially apply whenever the government is alleged to be vicariously liable because of the actions of its employees. Since government institutions necessarily act through their employees, this would potentially exclude a large number of records and undermine the public accountability purpose of the *Act* (Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner), [2005] O.J. No. 4047 (C.A.) at para. 28).

She also stated:

> However, [previous orders of this office do] not stand for the proposition that all records *pertaining* to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document. (emphasis added)

I adopt the approach taken by Justice Swinton and that of the orders cited above in my analysis of the records at issue in this appeal. I now turn to a record by record analysis.

Pages 1, 2, 12, 13 and 22

As noted above, these records consist of the "unit history" and snapshots of the GPS tracking system that reveal the location of the fire truck on the day that the theft occurred. These records are collected and maintained by the City and the fire services on a routine basis and they are in the nature of routine operational records similar to the motor vehicle accident report referred to

by Senior Adjudicator John Higgins in Order M-927. Applying the approach taken in previous orders and that of Justice Swinton noted above, I find that there is not a sufficient connection between these records and labour relations or employment-related matters to satisfy the requirements of section 52(3)2 and 3 and therefore, I find that the exclusion does not apply to these records.

Pages 28-29, 37-44, 119-120, 130-251, 255-261, 269-270 and 273-338

As a consequence of the theft of the fire truck, it was damaged and it was necessary to arrange for the repair of the vehicle, to negotiate a fair cost recovery for the repairs with the insurance company and to consider how the TFS might avoid thefts in the future. The records in this category include internal email communications regarding the damage and dealings with the insurance company. Other records in this category are draft reports and final reports to City Council and the CSC reporting on the theft, the financial consequences of the theft and the TFS proposal to avoid the recurrence of similar incidents in the future. Consistent with my findings in relation to the first category of records and for substantially similar reasons, I find that although some requirements for the application of section 52(3)2 and 3 have been met in connection with these records, I also find that there is not a sufficient connection between these records and the labour relations or employment matters to satisfy the requirement of section 52(3) that the records be "in relation to" those matters.

In my opinion, the records that include information regarding the damage to the fire truck and the negotiations with the insurance company are similar to the records that were considered by Justice Swinton in *Ministry of Correctional Services*, *supra*. Although these records were created as a result of the theft and may *pertain* to the employees' conduct, they are not in essence about labour relations or employment related matters.

Along with information relating to the financial consequences of the theft, the draft reports and final reports to City Council and the CSC include a general description of the incident for which disciplinary action was taken. However, they do not include any particulars of the nature of the disciplinary action agreed to. These records do not reveal any information regarding the negotiations with the Association, details of the investigation conducted by the TFS into the incident or details of the Minutes of Settlement that were executed following the incident. In my view, although these records were prepared as a consequence of the theft of the fire truck and the media attention that arose following that incident and they generally report what actions were taken by the TFS as a result of the incident, they are not sufficiently connected to the labour relations or employment related matter to satisfy the requirements in section 52(3)2 and 3.

Pages numbered 27, 29-32, 107-118, 123–129, 252-254, 262-268 and 271-272

These records are in essence about communication with the media and members of the public and more generally about the management of the media. For the same reasons that I have found that the records referred to above do not meet the requirement for the application of section 52(3), I also find that these records are not in essence about or sufficiently connected to labour relations or employment related matters. Therefore, I find that they are not "in relation to"

employment or labour relations matters and do no satisfy the requirements for the application of either paragraph 2 or 3 of section 52(3).

Pages numbered 3-11, 14-21, 23-26, 45-48, 58-106 and 121-122

Having carefully reviewed the records in this category, I find that they satisfy the requirements for the application of section 52(3)3. These records relate directly to the TFC investigation into the actions of the four employees whose conduct was under scrutiny. For example, these records contain discussions regarding the need to explore disciplinary action against the employees and statements given by the employees during the TFC investigation. It is clear from a review of these records that this investigation resulted in disciplinary action being taken against the individuals, albeit through a negotiated settlement which negated the need for invoking the grievance process. I find that the records were collected, prepared, maintained or used by the City in relation to meetings, consultations, discussion or communications and therefore, the requirements of parts 1 and 2 for the application of section 52(3)3 have been met. In addition, the meetings, consultations, discussion or communications are about labour relations or employment related matters in which the institution has an interest and therefore part 3 of the test for the application of section 52(3)3 has been met.

I also find that the requirements for the application of section 52(3)2 have been met because the records were collected, prepared, maintained or used by the City in relation to negotiations relating to labour relations and these negotiations took place between the City and the bargaining agent on behalf of its employees. Therefore, all three requirements for the application of section 52(3)2 have been satisfied.

In arriving at my conclusion, I agree with the position of the affected parties and the City that section 52(3)2 and 3 does apply in the circumstances of this appeal, despite the fact that no proceedings were ever commenced. Contrary to what is suggested by the appellant, there is no requirement in section 52(3)2 and/or 3 that actual proceedings be commenced and the orders referred to by the appellant do not support the appellant's position in this regard.

In coming to this conclusion, I am mindful of the direction provided by Madame Justice Swinton on the application of section 52(3) quoted above. These records relate to disciplinary actions taken against employees of the TFS and are therefore excluded from the *Act*.

Accordingly, I find that both sections 52(3)2 and 3 apply and the records in this fourth category are excluded from the *Act*.

Email Records

There are some exceptions to my findings. Some of the page references in the index of records include pages on which two or more emails appear. As each email constitutes a separate record for the purposes of the *Act,* the application of section 52(3) must be considered in relation to each individual email. Pages numbered 15, 18, 19, 20 and 21 include emails for which section 52(3) applies as they fall within the category of records discussed above. However, other emails on those same pages are more appropriately categorized in the third group of records referred to

above. Consistent with my findings above in relation to this third group of records, I find that these portions of the pages are not excluded from the *Act* pursuant to Section 52(3)2 and 3. I will identify the excluded portions in the order provisions below.

Section 52(4): exception to the exemption

I now turn to consider the Minutes of Settlement (pages 49-57), which all parties appear to agree, fall within the exception to the exemption in section 52(4). Having carefully reviewed the Minutes of Settlement and the representations of the parties, I agree that the Minutes of Settlement fall within paragraph 3 of section 53(4) as they represent agreements between the institution and the employees, resulting from negotiations about employment related matters.

Summary and Conclusion

Therefore, I find that section 52(3) applies to the following pages: 3-11, 14, 15(in part), 16-17, 18-21 (in part), 23-26, 45-48, 58-106, and 121-122 and that they are excluded from the *Act*.

There are a number of records that I have found are not excluded from the *Act* under section 52(3) but for which no exemptions in the alternative were claimed. Given that no exemptions were claimed in the alternative, and no mandatory exemptions apply to these records, the following pages should be disclosed to the appellant: 1, 2, 12, 13, 15 (in part), 18- 21(in part), 22, 27-29, 119, 127, 130, 136-137, 142-150, 155-157, 162, 167, 172-173, 178-182, 187-194, 199-200, 205-206, 211-212, 217-221, 226-229, 236, 243-246, 249-250, 252, 255, 262-265, 268-270, 279-299, 306, and 313-338.

I now turn to consider the application of the exemptions claimed in respect of the remaining records.

PERSONAL INFORMATION

The City claims that section 14(1) applies to the written statements (pages 45-48), Minutes of Settlement (pages 49-57), correspondence (pages 58-61) and interview notes (pages 62-106). The City also made an alternative claim to section 14(1) in respect of pages 107-118 which consist of email correspondence between City staff and members of the public who wrote to express their views regarding the theft of the fire truck and the City's management of the issue. Although the City did not claim section 14(1) in respect of pages 123-126, these pages include email correspondence from other members of the public and due to the nature of the information in those records, I will be considering the possible application of the personal privacy exemption to those records. However, as I have found that section 52(3) applies to the written statements (pages 45-48), correspondence (pages 58-61) and interview notes (pages 62-106), they are no longer at issue in this appeal.

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> …
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The meaning of "about" the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The meaning of "identifiable"

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations

Minutes of Settlement

The City states that the Minutes of Settlement contain the personal information of the affected parties; namely their names, along with information about their negligence and conduct in contravention of rules and regulations, and the disciplinary actions taken against them.

The affected parties appear to be arguing that all of the records at issue, including the Minutes of Settlement, contain personal information. They submit:

> Orders of the Commissioner have consistently held that information about individuals named in various types of employment contracts and/settlements, which includes an individual's name, address, terms, date of termination and terms of settlement concern individuals in their personal capacity and thus qualify as personal information. Orders MO-1184, MO-1332, MO-1405, MO-1749, P-1348 and MO-1941.

Although the appellant disagrees with the City's position, he states that if there is any personal information in any of the records, it can be severed. In supplementary representations, the appellant also argues that the information in the records relates to the individuals in a "professional, official or business capacity" because they were compiled as part of the normal operations of the TFS.

In reply, the City argues that information about an employee that relates to an investigation into his or her conduct is the employee's personal information and it refers to a number of orders from this office including Order PO-2477. In their reply representations, the affected parties state that it is not possible to sever the personal information from the records as suggested by the appellant.

Emails from and to Members of the Public

The City submits that these records contain the personal information of individuals other than the appellant such as their names, email addresses and their views and/or complaints regarding the management of the fire services and this particular incident and that this information falls within paragraphs (b), (d), (f) and/or (h) of the definition of personal information found in section 2(1).

The appellant's supplementary representations do not appear to specifically address the information contained in these records. However, as noted above, the appellant states in his supplementary representations that any information that would make an individual identifiable in the records can be severed.

Findings and Analysis

Minutes of Settlement

Previous orders of this office have consistently held that information about individuals named in employment contracts or settlement and/or severance agreements, including name, address, terms, date of termination and terms of settlement, concern these individuals in their personal capacity, and therefore qualifies as their personal information (Orders M-173, P-1348, MO-1184, MO-1332, MO-1405, MO-1622, MO-1749, MO-1970 and PO-2519). I adopt the same approach in the circumstances of this appeal. The Minutes of Settlement executed by the four fire fighters include their names and information relating to the disciplinary action taken by the City against

them. As such, I find that these records contain their personal information as it is defined in section 2(1) of the *Act*.

However, contrary to what is suggested by the affected parties, having carefully reviewed the Minutes of Settlement, I also find that if the names of the individuals are severed from these records, the individual affected parties are not identifiable from the remaining information. In these circumstances, the remaining information would not qualify as personal information as it would not be reasonable to expect that the individuals may be identified if the remaining information is disclosed. As the appellant has clearly indicated that the personal information in the records can be severed, I will order that the names be severed pursuant to section 4(2) of the *Act* which states:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Therefore, applying section 4(2) to the Minutes of Settlement, I will order that the names of the fire fighters be severed from the records and the remaining information in the records be disclosed.

I acknowledge that there will be a limited number of individuals who are already aware of the identities of the affected parties; for example, other co-workers and supervisors. However, this does not affect my decision with regard to the ability to sever their names from the Minutes of Settlement. Such individuals will have been aware of the affected parties' identity independent of the disclosures made pursuant to this appeal. They will also be aware that the affected parties were subject to discipline as a result of the theft of the unattended fire truck. For the vast number of individuals who are unaware of the identity of the affected parties, the removal of their names from the Minutes of Settlement will not identify them and will provide relevant information about the manner in which the TFS handled a high profile incident.

Further, in my view, the disclosure of the severed Minutes of Settlement is supported by the application of the public interest override found at section 16 of the *Act*. That section reads as follows:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

The theft of the fire truck received a significant amount of publicity and, as a result, achieved a high profile in the community. The fact that the records reflect a significant amount of time and energy expended by the TPS on dealing with the media issues raised by the incident, attests to this high level of public interest. This included public interest in the manner in which the TPS dealt with the cause of the incident, including the actions of the four employees. In my view, there is a compelling public interest in shedding light on the manner in which the incident was

handled by the TPS. Only through providing the public with details of the disciplinary actions taken against the employees, and the penalties assessed against them, can the public determine the appropriateness of the TPS's response. In this instance, greater transparency in terms of the actions taken by the TPS is necessary to hold that institution accountable to the public.

As noted above, there are a limited number of individuals who are aware of the identity of the affected parties. Disclosure of the severed Minutes of Settlement may allow these individuals to draw accurate conclusions as to the exact penalty agreed to by each employee. However, to the extent that such a disclosure would constitute an unjustified invasion of personal privacy under section 14, I am satisfied that such a disclosure is justified by section 16. Any invasion of privacy would be extremely limited; e.g. restricted to the small group of individuals who are aware of the identity of the affected parties. I am satisfied that the public interest in the disclosure of the severed Minutes of Settlement discussed above outweighs the limited invasion of the personal privacy of the affected parties.

Emails from and to Members of the Public

Having carefully reviewed these records, I find that they contain the personal information of members of the public, not notified of this proceeding, who wrote to the City to register their complaints about the City's management of the stolen fire truck incident. The emails were written by these members of the public in their personal capacity. They include the names of the individuals, their email addresses and their personal opinions or views. This is the personal information of these individuals as defined in paragraphs (d), (e) and (h) of the definition of personal privacy found in section 2(1).

I will order that the City sever references to the names and contact details of these individuals from the records as suggested by the appellant. If the severance of this information is made to the emails, in my opinion it will not be possible to identify these individuals and, therefore, the remaining information will not constitute personal information as defined in section 2(1). Accordingly, pursuant to section 4(2) of the *Act,* I will order that the names and contact details be severed from these emails in my order provisions.

Given that no exemptions, other than the personal privacy exemption in section 14(1), were claimed for the Minutes of Settlement and the emails referred to above, and given that section 14(1) only applies to personal information, I will order that these records be disclosed to the appellant. I will deal with the specific severances to be made in my order provisions.

Other Records

The affected parties appear to argue that all of the records at issue in this appeal contain their personal information. I have carefully reviewed all of the records other than those that I have found to be excluded under section 52(3) and I find that, other than the Minutes of Settlement, and the emails from members of the public (pages 107-118 and 123-126), the records do not contain personal information as that term is defined in the *Act*. It is not therefore necessary for me to consider the application of the personal privacy exemption to any records.

DRAFT BY-LAW/CLOSED MEETING

I now turn to consider the City's alternative argument that portions of the in-camera report to the CSC are exempt pursuant to section 6(1)(b). The report and its various drafts appear at pages 132-135, 138-141, 151-154, 158-161, 163-166, 168-171, 174-177, 183-186, 195-198, 201-204, 207-210, 213-216, 222-225, 230-235, 237-242, 256-261, 273-278, 300-305 and 307-312. The portions of the draft reports and final reports that the City claims are exempt are the portions that include information relating to "the substance of the deliberations concerning the discipline of the firefighters."

Section 6(1) states, in part:

> A head may refuse to disclose a record,
>
> > (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

Under part 3 of the test:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

Representations

The City submits that all three parts of the test for the application of section 6(1)(b) have been met in this appeal and the exception in section 6(2) does not apply. With respect to part one, it states that the CSC met in camera to discuss the confidential report dated April 21, 2006 (pages 256-261) by the Fire Chief and General Manager. The City Council met in camera to discuss the report dated May 19, 2006 (pages 325-338) also from the Fire Chief and General Manager.

The City submits that part two has been satisfied because the meetings were held in camera in accordance with section 239(2)(d) of the *Municipal Act*. Section 239(2)(d) states:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> (d) labour relations or employee negotiations;

With respect to part three of the test, the City states:

> In Order M-184, former Assistant Commissioner Irwin Glasberg stated that: "in my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view toward making a decision…"
>
> The City submits that in the present case, the disclosure of the confidential portions of the Report would reveal in detail the discussions and considerations by both the Community Services Committee and City Council with respect to the incident of the stolen fire pumper, specifically the negotiations on the terms of the discipline of the firefighters with the view to deciding on any additional steps staff were required to undertake.
>
> The City submits therefore, the disclosure of the report would reveal the substance of the deliberations of the Community Services Committee and City Council in its in-camera meetings and thus, the third part of the test has been met.

Regarding the application of the exception to section 6(1) found in 6(2)(b), the City states:

> The City further submits that the confidential portions of the Report, i.e., the substance of the deliberations concerning the discipline of the firefighters have never been considered in a meeting open to the public. The confidential information contained in the Report has consistently been treated in confidence and has never been disclosed to the general public.
>
> It is therefore the City's view that section 6(2)(b) does not apply to the confidential portions of the Report and they have been properly withheld under section 6(1)(b) of the *Act*.

The City makes the following comments with respect to pages 313-324 and 327-338:

> Following the in-camera meeting on May 8th 2006 of the Community Services Committee, a non-confidential staff report was prepared but not discussed in any public meetings. This report dated May 23rd is the "Supplementary Public Version of In-camera Staff Report…" and is available on the City's website. Records 313 to 324 and Records 327 to 338 appear to be earlier drafts of this report. For convenience, a copy of the May 23 report is attached.
>
> Pursuant to section 6(2), the City is not relying on section 6(1)(b) with respect to this report or to its earlier drafts, as they were intended to be public documents.

The appellant disputes that the records reveal the "substance of deliberations" and that part three of the test has been met.

Findings and Analysis

I have already ordered that pages 313-324 and 327-338 should be disclosed to the appellant in full as I have found that the *Act* applies to these records and the City is not claiming any exemptions in the alternative with respect to these records. I now turn to consider the application of the three part test in section 6(1)(b) to the portions of the records that the City claims are exempt. Having carefully reviewed theses records, I find that there is insufficient evidence to support a finding that section 6(1)(b) applies to these records in whole or in part. My reasons follow.

Part 1 – meeting or council, board, commission or other body, or a committee of one of them

I am satisfied that there was a meeting of City Council and of the CSC where the draft reports and the final reports identified by the City were considered. Therefore, I find that part 1 of the test has been satisfied.

Part 2 – statute authorizes the holding of the meeting in the absence of the public

As noted above, the City relies on section 239(2)(d) of the *Municipal Act* and states that the meeting were held in camera pursuant to this provision. Section 239(2)(d) states:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> (d) labour relations or employee negotiations;

While I accept that section 239(2)(d) of the *Municipal Act* supports the holding of an in camera meeting where the subject matter of the meeting being considered is labour relations or employee negotiations, the City cannot claim the application of section 239(2)(d) unless it can establish that the subject matter of the meeting included the substance of the labour relations or employee negotiations. The City cannot rely on section 239(2)(d) to claim that a meeting was held in

camera if it had no intention of discussing the substance of the labour relations or employee negotiations at that meeting. In this appeal, the in camera reports include only a general description of the labour relations matter and a reference to confidentiality. The purpose of section 239(2)(d) is to protect the in camera discussions. If those present at the "in camera meeting" have no intention of discussing or reviewing the substance of the issues, they cannot properly rely on the application of section 239(2)(d) to hold a meeting in camera.

I find that part two of the test for the application of section 6(1)(b) has not been met in this appeal.

Part 3 – disclosure of the record would reveal the actual substance of the deliberations of the meeting

Under part 3 of the test it must be shown that disclosure of the record would reveal the actual substance of the deliberations of the meeting. As noted above, "deliberations" refer to discussions conducted with a view towards making a decision and "substance" generally means more than just the subject of the meeting.

Previous orders of this office have also established that it is not sufficient that the record itself was the subject of deliberations at the meeting in question [see Order M-98, M-208], where the record does not reveal the actual substance of the deliberations or discussions that took place leading up to the decisions that were made.

Former Assistant Commissioner Tom Mitchinson addressed the application of part 3 of the test in section 6(1)(b) to the minutes of a closed meeting held by a school board in Order MO-1344. He stated:

> To satisfy the third requirement of the test, the Board must establish that disclosure of the record would reveal the actual substance of the deliberations of this *in camera* meeting. As I found in Order M-98, the third requirement would not be satisfied if the disclosure would merely reveal the subject of the deliberations and not their substance (see also Order M-703). "Deliberations" in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision (Orders M-184, M-196 and M-385).

In Order M-1169, the former Assistant Commissioner Mitchinson considered the application of section 6(1)(b) to handwritten notes and minutes of an in camera meeting where fully executed Minutes of Settlement relating to a complaint against the Chief of Police under the *Ontario Human Rights Code* were reviewed. The former Assistant Commissioner stated:

> In my view, these two records deal with the subject of the human rights complaint and the outcome of the mediation exercise, but not the substance of any deliberations about this matter. The terms of settlement were simply reported to the Board at the January 20 meeting. The Board did not, and it would appear did not have authority to, discuss these terms with a view to approving or making a decision about them. Therefore, I find that the third requirement has not been

> established for these two records, and that they do not qualify for exemption under section 6(1)(b).

I adopt the same approach in this appeal. From my review of the records at issue, I find that at the time of the meeting with the CSC and Council, all decisions had been made regarding the discipline of the affected parties and were reflected in fully executed Minutes of Settlement. Therefore, contrary to what is suggested by the City, no further decisions or deliberations by the CSC or City Council were required, nor was it possible to implement any additional disciplinary actions.

While I accept that disclosure of these records might reveal the *subject* of discussions, I do not find that disclosure of these records would either reveal the *substance* of deliberations on the information contained in the record, nor would it reveal any discussions that took place leading up to any decisions that might have been taken.

Accordingly, I find that none of these records meet part 3 of the test and, therefore, they do not qualify for exemption under section 6(1)(b). Further, having found that all of the draft reports and the final report should be released to the appellants as they do not satisfy the test for the application of section 6(1)(b), it is not necessary to consider the application of the exception in section 6(2)(b) of the *Act*. Accordingly, I will order the disclosure of these records in my order provisions below.

ADVICE TO GOVERNMENT

The City submits, in the alternative, that section 7(1) of the *Act* applies to pages 30-36, 128-129, 253-254 and 271-272. I found above that these records are not excluded from the *Act* and, therefore, I now turn to consider the City's claim that section 7 applies. Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario*

(Ministry of Transportation) v. Ontario (Information and Privacy Commissioner), [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Examples of the types of information that have been found not to qualify as advice or recommendations include:

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. Sections 7(2) and (3) state, in part:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:
>
> > (a) factual material;

…

> (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if the record is more than twenty years old.

Representations

The City refers to Order 94, which discussed the purpose of section 7, and argues that the records should not be disclosed because to do so will inhibit the City's decision-making processes. In particular, the City states that section 7 applies because the records contain a suggested course of action that was ultimately accepted or rejected by the recipient of the advice or recommendation. It argues that records 30-36 are emails that contain advice from various staff that was ultimately accepted. It also argues that records 128-129 (and their duplicates 271-272), and 253-254 are drafts of communications plans which also set out a recommended course of action or tactics and this advice was accepted.

The appellant states:

> In this case, I point out that submissions by the lawyer for the affected parties … indicated that the Minutes of Settlement were concluded without any proceedings taking place. Therefore, there was neither advice or recommendations considered as part of a deliberative process, but rather factual information or records created as part of the normal administration of the fire service and illustrating a process which led to a conclusion.

In reply, the City states that it is not necessary for actual proceedings to take place and that it is sufficient that the advice was given, considered and ultimately accepted.

Findings and Analysis

Former Assistant Commissioner Tom Mitchinson reviewed the meaning of "advice" for the purpose of section 13(1) (the provincial equivalent to section 7(1) of the *Act*) in Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564. In that order, a provincial ministry took the position that "advice" should be broadly defined to include "information, notifications, cautions, or views where these relate to a government decision-making process". Assistant Commissioner Mitchinson did not agree, and stated:

> [The institution's position] flies in the face of a long line of jurisprudence from this office defining the term "advice and recommendations" that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.

> A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

Previous orders of this office have held that a record cannot be exempt under section 7(1) solely on the basis that it is in draft form. For example, in Order PO-1690, Adjudicator Holly Big Canoe stated:

> A draft document is not, simply by its nature, advice or recommendations [Order P-434]. In order to qualify for exemption under [section 7], the record must recommend a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision-making. Although I am satisfied that the final version of this report is intended to be used during the deliberative process, it simply does not contain advice or recommendations, nor does it reveal advice or recommendations by inference. Accordingly, I find that section [7(1)] does not apply.

I adopt the approach taken in these previous orders to my analysis of the records at issue here. As noted above, for information to qualify as "advice or recommendations," the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised. Alternatively, the information in the record must *reveal* or *allow one to infer* that suggested course of action.

Pages 30-36 include a series of emails exchanged between human resources staff and the chief of the TFS. Having reviewed the records carefully, I find that the majority of the information contained in these records does not qualify as advice or recommendations, as it consists of factual or background information. Nor would its disclosure permit one to accurately infer advice or recommendations. Therefore, it does not qualify for exemption under section 7(1). However, portions of the emails that appear on pages 30 and 31 include recommendations made by staff in the communications department to the chief of the TFS. I find that these pages contain one or more recommendations as the information in those specific portions reveals a suggested course of action that will ultimately be accepted or rejected by the chief of the TFS, who is the individual being advised. For these reasons, I find that section 7(1) applies only to these portions of the emails on pages 30 and 31 of the records.

The records appearing at pages 128-129, their duplicates at pages 271-272, and records 253-254 consist of communications plans. These communications plans contain similarly titled sections: Background, Key Issues, Target Audience, Key Messages, Tactics and Spokespersons. The record at pages 128-129 and its duplicate also contains a section entitled Vehicle Damage.

Having reviewed these records, I am satisfied that the sections entitled Background, Key Issues, Target Audience, Key Messages, Vehicle Damage and Spokespersons do not contain a specific suggested course of action for a decision maker to either follow or not and do not reveal information from which it is possible to infer a suggested course of action. These sections contain factual and background information and therefore do not constitute advice or recommendations. Therefore, I find that these sections of the records do not qualify for exemption under section 7(1) of the *Act*.

I have reviewed the sections entitled Tactics and have concluded that they potentially contain advice or recommendations. They set out a proposed course of action for TFS staff to consider should they be questioned by the media. Presumably, TFS staff would have the option of adopting these proposed tactics or opting for another approach. As such, I am satisfied that the sections of the communications strategies entitled Tactics constitutes advice or recommendations and qualify for exemption under section 7(1) of the *Act*.

In summary, I find that only portions of pages 30 and 31 the sections of pages 128, 254 and 272 entitled Tactics qualify for exemption pursuant to section 7(1) of the *Act*. I will highlight those portions of the pages in the duplicate copy of the records that will accompany this order.

SOLICITOR-CLIENT PRIVILEGE

The City claims the application of section 12, in the alternative, to pages 37-44, 120, 131, 247-248 and 251. As none of these pages are excluded under section 52(3), I now turn to consider the application of this exemption. Section 12 states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches. Before I can find that section 12 exempts the records, the City must establish that one or the other (or both) branches apply. The City submits that branch 2 applies. Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice." Branch 2 also applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

Representations

The City submits that branch 2 applies because the records were prepared by or for counsel employed or retained by the City for use in giving legal advice or in contemplation or for use in litigation and therefore, the City submits that these records are subject to both the statutory solicitor-client communication privilege and litigation privilege found in branch 2.

The City states that the records contain specific advice provided by legal staff on particular issues or relate directly to the seeking, formulating or giving of the advice. It states that pages

37-44 include confidential emails between the City solicitor and staff asking for legal advice. It also states that records 120, 131, 247-248 and 251 are emails between TFS staff and legal staff with respect to the draft report to the CSC including whether it should go in camera and whether the discipline could be reported in public.

The City submits:

> These records either contain the specific advice provided by legal staff on the particular issues or relate directly to the seeking, formulating or giving of the advice.
>
> The City submits therefore that solicitor-client communication privilege applies to the records at issue and therefore, section 12 has been appropriately relied upon to deny access.

The appellant argues that section 12 does not apply as no proceedings ever occurred and there is no indication in the records that litigation was considered. In reply, the City states that litigation is not a precondition for the application of section 12.

Findings and Analysis

Having carefully reviewed the records at issue, I find that the records at pages 37-43, 120, 131 and 251 contain communications between legal counsel at the City and various clients within the City. I am satisfied, having reviewed the content of these pages that they are either direct confidential communications between a client and solicitor, and were prepared by or for institution counsel for the purpose of obtaining or giving professional legal advice. Therefore, section 12 applies to these records and they are exempt.

However, I arrive at a different conclusion with respect to the emails at pages 44, 247 and 248. Although the City claims that section 12 applies to these records, I do not believe that the individuals involved in these email communications are legal counsel. I find that there is insufficient evidence to support a finding that these emails were prepared by or for counsel "for use in giving legal advice." I also find that there is insufficient evidence to support a finding that these records were prepared by or for counsel "in contemplation of or for use in litigation." Therefore, I find that neither part of branch 2 of section 12 applies to these records.

In summary, having carefully reviewed the records, I find that the following records are exempt under branch 2 of section 12 namely, 37-43, 120, 131 and 251. Pages 44, 247 and 248 do not qualify for exemption under section 12 and as no other exemptions were claimed for these records, they should be disclosed to the appellant.

EXERCISE OF DISCRETION

The sections 6, 7 and 12 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so and/or whether it

erred in exercising its discretion by acting in bad faith, or by taking into account irrelevant considerations, or by failing to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Representations

The City submits that it considered all relevant factors in arriving at its decision to apply the discretionary exemptions including the purposes of the *Act* and the relevant exemptions, whether disclosure would increase public confidence in the operation of the City, whether the requester has a sympathetic need to receive the information, whether the requester is seeking his own personal information, and the nature of the information and the extent to which it is significant and/or sensitive to the City.

The City notes that substantive information relating to this matter has already been disclosed to the public and reported on by the media and the City does not believe that any further disclosure will advance the public's right to know how local government operates.

The appellant submits that the City's exercise of discretion should not be upheld because the information should be available to the public and disclosure will increase public confidence in the operation of the institution.

Findings and Analysis

In the circumstances of this appeal, I find that with respect to the few records and small portions of records that I have found to be exempt, the City has exercised its discretion to withhold this information in an appropriate manner having regard to the nature of the information withheld and the circumstances of this appeal.

PUBLIC INTEREST OVERRIDE

As noted above, during mediation the appellant raised the application of the public interest override in section 16 to the responsive records. As a result, I made section 16 an issue in this appeal. Before I turn to consider the application of section 16, it is important to reiterate that I have found, above, that only the following records are exempt under the *Act*: portions of pages 30, 31, 128, 254 and 272 (advice and recommendations) and all of pages 37-43, 120, 131 and 251 (solicitor client privilege). I have also ordered the severance of identifying information from the Minutes of Settlement and emails sent to the TFS by members of the public. The remaining records are either not subject to the *Act*, or have been disclosed.

I have also already determined that, should the disclosure of the Minutes of Settlement, with the names of the affected parties severed, constitute an unjustified disclosure of the personal information of the affected parties, section 16 authorizes their disclosure.

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)*, the Ontario Court of Appeal held that the exemption in section 19 of the provincial *Act*, which is equivalent to section 12 of the *Act,* is to be "read in" as an exemption that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*.

There are two requirements for the application of section 16. There must be a compelling public interest in disclosure and the interest must clearly outweigh the purpose of the exemption. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. Any public interest in non-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. A compelling public interest has been found not to exist where, for example a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

Representations

The City submits that any public interest that existed at the time of the theft of the fire truck was satisfied by the City's disclosure of information advising of its disciplinary investigation and the finding that the employees had acted inappropriately and had been disciplined which was reported on by the media at that time. It argues that there is no current public interest in the information in the records, compelling or otherwise. It also argues, in the alternative, that if there were a compelling public interest in the records, that interest would not outweigh the privacy interests of the affected parties.

The affected parties also argue that there is no compelling public interest in the records at issue that outweighs the purpose of the section 14 exemption. They argue that the records at issue are essentially private in nature and are not analogous to those cases where the Commissioner has found that a compelling public interest does exist such as those relating to the criminal justice system or public safety issues relating to the operation of nuclear facilities. They also argue that there is a compelling public interest in non-disclosure:

> It is the position of the affected parties that the records relating to and prepared in the course of negotiations and communications between the City and the Association, as the bargaining agent for the Affected Parties facing disciplinary penalties, were prepared on the condition of the parties' strict mutual confidentiality. This confidentiality between the City and the Association not only preserves privacy interests of the Affected Parties given the information in question, but it also facilities the expeditious resolution of disputes arising out of the collective bargaining relations, which the Affected Parties submit is a

> compelling public interest in non-disclosure of the Minutes of Settlement in this case.

The appellant argues:

> I submit that this is a matter of compelling public interest demonstrated by the fact that the issue was dealt with by a committee of Toronto City Council, as well as Toronto City Council itself, in addition to the fact that the circumstances were such that the Toronto Fire Service was compelled to amend Standard Operating Guidelines in order to prevent a similar incident from occurring.

The City disputes that all issues dealt with by CSC or City Council are of a compelling public interest and even if that interest did exist in these records, it does not outweigh the privacy interests of the affected parties. They deny that the amendment to the Standard Operating Guidelines of the TFS that followed the incident is evidence of a compelling public interest.

In reply, the affected parties argue that the compelling public interest in this appeal favours the non-disclosure of the records to preserve the collective bargaining relationship, which includes the expeditious resolution of disputes arising from that relationship.

The issue was addressed by the City and the appellant in their supplementary representations in which they repeated much of the argument made in previous representations.

Findings and Analysis

In the circumstances of this appeal, I find that section 16 does not apply to override the application of sections 7 and 12 to the limited amount of information that I have ordered withheld. Although I accept the appellant's position that there is a public interest in a number of the issues identified by the appellant, I am not persuaded that a compelling public interest exists in the information withheld as a result of my findings above. I believe that the information that I have ordered disclosed in this order will satisfy any public interest in disclosure that may exist.

Further, I do not believe that there is a compelling public interest in the disclosure of the names of the affected parties that have been ordered severed from the Minutes of Settlement. I am sympathetic to the argument put forward by the appellant that the incident of the stolen fire truck and how it was handled by the TFS generated significant public interest. Similarly, given the high profile of this incident, I agree that there is a public interest in the disclosure of information relating to the discipline process to the extent that the public can assess whether the incident was properly handled by the institution. I note that for some public servants, for example police officers, the necessity for, and extent of, discipline can be determined through a very public process. However, I am satisfied that sufficient public scrutiny can be brought to bear on the discipline process in this case through the disclosure of the Minutes of Settlement with names severed.

Accordingly, I find that section 16 does not apply to override the City's claim to sections 7, 12 and 14 in respect of the information that I have ordered disclosed.

ORDER:

1. I uphold the City's determination that the following pages are excluded from the scope of the *Act* under section 52(3) in their entirety and I order that they should not be disclosed: 3-11, 14, 16-17, 23-26, 45-48, 58-106, and 121-122.

2. I uphold the City's determination that the following pages are excluded from the scope of the *Act* under section 52(3) with respect to portions only and find that other portions of these pages are not excluded: 15, 18, 19, 20 and 21. I order that these pages be disclosed with the excluded portions severed. For the sake of clarity, I have highlighted the portions of these records which are excluded in the duplicate copy that are enclosed with this order.

3. I do not uphold the City's determination that the remaining records are excluded from the scope of the *Act* under section 52(3) and except for those records or portions of records that I have found to be exempt below, they should be disclosed to the appellant.

4. I order that the personal information be severed from the following pages: 49-57, 107-118, and 123-126 and the remaining information in these pages should be disclosed. For the sake of clarity, I have highlighted the information that should not be disclosed on the duplicate copy of the records enclosed with this order.

5. I find that portions of pages 30, 31, 128, 254 and 272 are exempt pursuant to section 7 of the *Act*. For the sake of clarity, I have highlighted the portions of the pages that should not be disclosed on the duplicate copy of the records enclosed with this order.

6. I find that pages 37-43, 120, 131, and 251 qualify for exemption under section 12 of the *Act* and I order that they should not be disclosed to the appellant.

7. I order the City to disclose to the appellant the portions of records and records that I have not found to be excluded or exempt by **September 24, 2008** but not earlier than **September 19, 2008**.

8. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the information disclosed to the appellant pursuant to these provisions, upon request.

Original signed by: August 19, 2008
Brian Beamish
Assistant Commissioner