Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2610

Appeal MA10-3-2

City of Toronto

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NATURE OF THE APPEAL:

The appellant made a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> … copies of all correspondence, e-mail communication, notes and memoranda arising out of, connected with or related to a proposed development at [specified address]. Without any way limiting the generality of the foregoing, would you please also ensure that you provide us with copies of any correspondence, e-mail communication, notes or memoranda involving any one or more of:
>
> 1. [named individual] of the City of Toronto;
> 2. [named individual], Manager of Planning of the City of Toronto;
> 3. [named Councillor] for the City of Toronto, including any members of his office or staff;
> 4. [named individual] assistant to Councillor [named above];
> 5. [named individual] of the Heritage Preservation Services of the City of Toronto.

After locating the responsive records, the city granted partial access to the records from its Planning and Heritage Services. Certain pages of the records were disclosed in whole or in part, while the remainder were withheld in their entirety, pursuant to the discretionary exemptions in sections 7 (advice or recommendation) and 12 (solicitor-client privilege), as well as the mandatory exemption in section 14(1) (personal privacy) of the *Act*.

As part of its decision, the city also advised that records created and maintained by city councillors are not covered by the *Act*. The city went on to indicate that councillors' records or correspondence sent to program areas are considered to be records in the custody and control of the city and thus accessible under the *Act*.

The city concluded that the fee for processing the request totalled $59.40.

During mediation, the appellant clarified that he is not taking issue with the severances applied to the following pages of the record: 1 – 3, 12, 16, 22, 123, 125, 129, 131, 132, 134, 135, 139, 140 and 164. Accordingly, these pages are no longer at issue.

The city subsequently issued a supplementary decision, disclosing the following pages in their entirety: 6, 30, 144 and 161. Accordingly, these pages are no longer at issue. The city also provided access to some additional information on pages 7, 8, 28, 29, 31, 32, 74, 75, 142, 143, 145, 146, 165; however, the appellant continues to take issue with the remainder of the severances applied to these pages.

The appellant clarified that he believes an insufficient search was conducted and that additional records responsive to his request should exist, both in electronic and paper form. Accordingly, the reasonableness of the City's search is an issue in the appeal. The appellant confirmed with

the mediator that he does not take issue with the City's decision regarding the records created or maintained by city councillors, nor the fee charged by the city for processing the request.

As mediation did not completely resolve the appeal, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During my inquiry into the appeal, I sought and received representations from the city and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

RECORDS:

The following pages, consisting of email correspondence, remain at issue: 4, 5, 7 – 8 (in part), 9, 28 (in part), 29 (in part), 31 (in part), 32 (in part), 74 (in part), 75 (in part), 78 (in part), 89 (in part), 90 (in part), 111 (in part), 142 (in part), 143 (in part), 145 (in part), 146 (in part), 165 – 170 (in part).

DISCUSSION:

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist [Order MO-2246].

The city submits that initially it may have limited the scope of the request, but has subsequently expanded the scope of its search, explaining that:

> The City acknowledges in hindsight that it may have inadvertently limited the scope of the request by having searches done by only those individuals specifically identified in the request. However, when the requester broadened the scope of his second request, the City located some additional 2000 pages of records as a result of further searches. The City believes that these additional searches would constitute a "reasonable" search for all records responsive both to the current and the second request.

In support of its search, the city provided affidavits from the individuals identified in the request, except for one individual who is no longer employed by the city. Each individual identified in the request, with the exception of the councillor and his assistant, affirmed that:

- They were contacted by the Corporate Access and Privacy Office (CAP office) via email and forwarded a copy of the request.
- They conducted a search through their files and emails relating to the property identified in the request.
- They sent any records located to the CAP office with a covering memorandum.

The city also submits that it has conducted two additional searches in response to a further, more expansive request from the appellant, which is the subject of Appeal MA10-207, currently at mediation. The city states that it has located an additional 1991 records after these two searches.

The appellant's representations do not focus on the city's searches. He instead focuses on the city's failure to search for councillor's records which are in the custody and control of the city. The appellant submits that the city document "A Councillor's Guide to Access and Privacy Legislation" clearly identifies records relating to a city councillor's official responsibilities as a member of council or some aspect of council's mandate is subject to the *Act*.

Based on the representations of the parties and the affidavits provided by the city, I find that the city's search for records relating to the two named city employees to be reasonable. I accept that these employees were fully aware of the request and that the searches that were conducted in both their files and their emails were thorough. Accordingly, I find this portion of the city's search to be reasonable.

In regard to the city's search for records relating to the appellant's broadened request, which is the subject of appeal file MA10-207, I make no comment. I have not seen the responsive records relating to this appeal and the appellant has not made representations to me on the adequacy of the search for these records. This may be addressed in a further order arising from that appeal.

Lastly, I find that the city's search for the councillor and the councillor assistant's records to be inadequate. I agree with the appellant's representations that the city's search for the records in its custody and control relating to these individuals was not reasonable. The appellant's request is for records related to a named address. I find that the councillor or his assistant's records relating to this named address would relate to the councillor's official responsibilities as a

member of council or some aspect of council's mandate such that these records would be subject to the *Act*. The city's decision that councillors' records are not covered by the *Act* without further explanation of the search conducted for councillor's records within its custody and control, leads me to conclude that the search for records of this nature was never conducted and thus not reasonable. Accordingly, I will order that the city conduct a search for records of the named councillor and his assistant that may exist within the city's custody and control. In particular, the city's search should include correspondence, emails and letters sent to or from city staff to the councillor and his assistant about the specified address.

ADVICE AND RECOMMENDATIONS

The city submits that section 7(1) applies to the information severed from pages 28, 29, 31, 32, 74, 75, 78, 142, 143, 145, 146, 165, 166, 168 and 169 of the record at issue. 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.)].

Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [see Order PO-2681].

"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 Order PO-1993, upheld on judicial review in *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)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)].

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)*, (cited above); 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)*, (cited above)].

The city submits that pages 28, 29, 31, 32, 74, 75, 78, 142, 143, 145 and 146 are a series of emails in which a member of staff is seeking and receiving advice from other employees on the proposed contents of an email to be sent to the architects. The city submits that almost all of the recommendations of staff were accepted and provided in evidence of this fact the email that was ultimately sent.

The city submits that the advice given on pages 165, 166, 168 and 169 was ultimately accepted by all staff members involved.

Finally, the city notes that matters relating to the specified address are unresolved and thus any advice given in the records at issue is highly sensitive to the city:

> … given the controversy concerning applications for the demolition and development of [specified address] … matters remain unresolved with the designation of [specified address] to be heard at the Conservation Board in September.
>
> The City submits that in such circumstances, the disclosure of the advice identified above could reasonably inhibit the ability of City staff in providing their opinion, advice and recommendations on all the relevant issues, including those yet to be decided as staff prepare for the Conservation Board hearing. Staff would be reluctant in providing frank and meaningful advice on what is a high

> profile matter, if such advice were to be made known to the appellant and the general public.

The appellant submits that the city's submissions do not suggest that a course of action would be disclosed through the release of the pages at issue. The appellant states:

> It is clear on the face of the examples given by the City that the records in question do not disclose a course of action but merely provide guidance from one employee to another on how to phrase correspondence. This does not qualify the record for the above-noted [exemption] and would inappropriately broaden the scope of this [exemption].

The appellant also argues that the sensitivity of the advice cannot be used as a reason to justify the exemption claim.

Based on my review of the records and the parties' representations, I find that the withheld information on pages 165, 166, 168 and 169 qualifies for exemption under section 7(1) of the *Act*. The information withheld on these pages contains a suggested course of action from one city staff member to other city staff regarding the situation at the specified address. I further accept that this course of action was ultimately accepted or rejected by the persons being advised. I accept that disclosure of this information would reveal the actual advice given; therefore, I find the information on these pages of record exempt from disclosure under section 7(1).

However, the remaining pages claimed to be exempt do not contain advice or recommendations for the purposes of section 7(1). As stated above, in order for information to qualify as "advice or recommendations," it must suggest a course of action that will ultimately be accepted or rejected by the person being advised. The series of emails for which this exemption has been claimed stems from a draft email sent from one employee to other employees. The first employee's email request for editing suggestions does not indicate to me that this employee would either ultimately accept or reject the courses of action or editing suggestions made. In fact, the employee's comment in his email suggests that his colleagues are free to make any changes to the draft email. Accordingly, I find that there is no advice or recommendation being given in the context of the emails exchanges.

Moreover, I find that the subject matter of the draft email does not include a suggested course of action that will ultimately be accepted or rejected by the person being advised. In Order MO-2337, Adjudicator Frank Devries in finding that certain draft records were not exempt under section 7(1), stated:

> 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.

I too adopt this approach and apply it to the series of emails at issue in this appeal. The draft email that is the subject of the responding emails does not contain a suggested course of action; nor would its disclosure permit an individual to infer a suggested course of action. The draft email relates to the subject property and a decision of the city planning services. Accordingly, I find that section 7(1) does not apply to those pages of the record claimed exempt under this section.

In conclusion, I uphold the city's decision to withhold those portions of pages 165, 166, 168 and 169 to which it has applied section 7(1), subject to my finding on its exercise of discretion below. I do not uphold the city's claim of section 7(1) for the portions of pages 28, 29, 31, 32, 74, 75, 78, 142, 143, 145 and 146, and as the city did not claim another exemption for these pages, I will order them to be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

The city submits that section 12 applies to exempt the information on pages 4, 5, 7, 8 and 9 of the records at issue. 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 as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The city submits that section 12 applies as the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice …" The city further submits that these records are subject to statutory solicitor-client communication privilege.

Branch 2: statutory privileges

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. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

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."

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

The privilege applies to "a continuum of communications" between a solicitor and client:

> ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The city submits that the pages claimed exempt consist of a series of emails between a city solicitor and city staff during the course of the solicitor providing legal advice relating to the proposed development at the specified address. The city submits that the emails were intended to be "confidential" communications and as evidence of this, each email bears the statement "[t]his email and any attachments may be privileged and/or confidential …"

Based on my review of pages 4, 5, 7, 8 and 9, and the city's representations, I find that these pages of the record contain direct communications of a confidential nature between a city solicitor and city staff. These pages consist of a series of emails between the city solicitor and staff with both the solicitor and staff requesting updates on the status of various events, followed by the city solicitor providing legal advice and opinions on the matters described therein. These pages represent part of the continuum of communications between the city solicitor and staff, as

well as confidential communications between a solicitor and client that contain legal advice. I find that these pages and portions of the records are exempt under the Branch 1 aspect of section 12 as solicitor-client communication privilege applies to them.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1). The city submits that the records contain information which meets the criteria for personal information described in paragraphs (d), (e) and (h) of the definition in section 2(1), which states:

> "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 where 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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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 and 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 and MO-2344].

The city identifies two email addresses for two city employees as personal information on pages 166 and 167 of the record. Further, the city submits that pages 89, 90, 111, 170 contain employees' information that is of a personal, rather than professional nature. The city also claims that pages 111 and 170 contain the employees' personal views. Accordingly, the city submits that the information at issue contains personal information within the meaning of that term as defined in paragraphs (d), (e) and (h) of section 2(1). Finally, the city notes that the records do not contain the personal information of the appellant.

Based on my review of the information which the city claims is personal information, I find that the information on pages 111 and 170 is of a business and professional nature and not personal. The information which the city claims to be personal relates to that individual in his or her business and professional capacity. The disclosure of this information would not reveal anything of a personal nature about these individuals. Instead, disclosure would only reveal information about that individual's business views and opinions. As I have found that this information is not personal information within the meaning of that term as defined in section 2(1) of the *Act*, the personal privacy exemption in section 14(1) does not apply, and this information should be disclosed.

I accept the city's submission that the information on pages 89 and 90 and the private email addresses of the two employees on pages 166 and 167 is recorded information about identifiable individuals within the meaning of paragraphs (d) and (h) of the definition of personal information within section 2(1). The information on pages 89 and 90 is information about an individual whose disclosure would reveal personal information about him. The email addresses of the two employees are their private email addresses. I will now consider whether this information is exempt under the personal privacy exemption in section 14(1).

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. In the circumstances, it appears that the only exception that could apply is paragraph (f).

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). If paragraph (a) or (b) of section 14(4) applies, disclosure is not an unjustified invasion of personal

privacy and the information is not exempt under section 14. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99].

Having reviewed the records, I am satisfied that 14(4) does not apply in the circumstances of this appeal. Further, I find that none of the presumptions in section 14(3) apply in the circumstances of this appeal. Accordingly, I will consider the possible application of the factors listed in section 14(2).

The city submits that the factors favouring non-disclosure in sections 14(2)(f) and (h) should be considered. These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

The only information I have found to be personal information and thus capable of being exempted under section 14(1) are the two personal email addresses and other information whose disclosure would reveal personal information about a city employee. In my view, none of the factors favouring disclosure or non-disclosure apply in the circumstances.

However, under section 14, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy." In the present appeal, the personal information relates to individuals other than the appellant. As a result, I find that disclosure would constitute an unjustified invasion of these individuals' personal privacy and, as such, I uphold the city's exemption claim for this personal information under section 14(1).

EXERCISE OF DISCRETION

I have found pages 4, 5, 7, 8, 9, 165, 166, 168 and 169 to be exempt under sections 7 and 12, which 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, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails 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)].

In exercising its discretion to withhold records under section 12, the city submits that it considered the following:

- The purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited and specific. The city has provided access to many of the records (some 1151 additional pages of records have been disclosed in response to the second request).
- The wording of the exemptions and the interests they seek to protect. The city has carefully considered the application of sections 7 and 12 and the interests they seek to protect, namely to permit advice to be freely given by staff and for City solicitors to be able to provide the necessary and confidential legal assistance to their clients.
- Compelling or sympathetic reason: the appellant has not provided any compelling or sympathetic reason for access to the information at issue.
- Whether the appellant is seeking his or her own personal information. The appellant is not seeking his own personal information.
- Whether the requester is an individual or an organization. The requester is a member of a law firm who is acting on behalf of the property owner.
- Whether the disclosure will increase public confidence in the operations of the institution. There is no indication that the disclosure of the records at issue, for which the section 7 and 12 exemptions have been applied, would increase public confidence in the City's operations.

Based on the city's representations and upon my careful review of the information claimed exempt under sections 7 and 12, I find that the city considered only relevant factors in making its decision to withhold the information. It has done so in good faith and for a proper purpose. Accordingly, I uphold the city's exercise of discretion.

PUBLIC INTEREST OVERRIDE

The appellant claims the application of the public interest override in section 16. As section 16 does not include those records exempt under section 12, I will only consider the public interest override for those records I have found exempt under sections 7 and 14.

Section 16 states:

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

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773 and M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

The appellant submits that there is a compelling public interest in the disclosure of the record. He states:

> It is of fundamental importance to all members of the public that the City operates in as transparent a manner as possible. Furthermore, the fact that local community groups have been intimately involved in the proposed development project provides clear evidence that this matter rouses strong interest and attention amongst the greater public.
>
> In the present case, the City is attempting to prevent an owner from re-developing its property in a manner it sees fit. The Appellant submits that the public has a strong interest in ensuring that parties in the position of the Appellant are provided with access to important records which could aid them in advancing their case. The information currently being withheld would also create strong interest and attention amongst the greater public, including the local community groups mentioned above. It is clear that the proposed re-designation of [specified address] would have widespread effects among the community. It should therefore be a process that is as transparent as possible.

The information which I have found exempt under section 7(1) relates to the advice of a city staff member to other staff members about the specified property. The information withheld under section 14(1) relates to the private email addresses of two employees and the personal information of another employee. In the circumstances of the appeal, I find that the appellant has not established a compelling public interest in the disclosure of this particular information. The appellant is a law firm representing the owner of the property. The appellant's interest in the records is a private one relating to the city's heritage designation of the specified address and the city's actions to prevent the owner from developing it. The fact that community groups have expressed an interest in the development of this property does not expand the scope of the appellant's private interest in the records into a public one. Accordingly, I find that section 16 does not apply to override the exemptions in sections 7 and 14.

ORDER:

1. I order the city to disclose the following information to the appellant by providing him with a copy of this information by **May 2, 2011**. To be clear, I have enclosed a highlighted copy of the records with this order with the information to be disclosed highlighted.

   Pages 28, 29, 31, 32, 74, 75, 78, 111, 142, 143, 145, 146 and 170

2. I uphold the city's decision to withhold the following information in the records from disclosure:

   - All of pages 4 and 5
   - Parts of pages 7, 8, 9, 89, 90, 165, 166, 167, 168 and 169

3. I order the city to conduct a search for the records relating to the named councillor and his assistant that are in the custody and control of the city and to provide the appellant with the result if its search treating the date of this order as the date of the request. In particular, the city is to search for records (email and correspondence) sent to or from city staff by the councillor or his assistant relating to the specified address.

4. In order to verify compliance with Order provision 1, I reserve the right to require the city to provide me with a copy of the records provided to the appellant.

Original signed by: March 31, 2011
Stephanie Haly
Adjudicator