

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## **ORDER MO-2847**

Appeals MA10-278, MA10-308 and MA10-450

City of Ottawa

February 20, 2013

**Summary:** The appellant made a request to the City of Ottawa for records relating to a third party review of a restoration project involving the Carp River. The city granted access to some records and denied access to others, claiming the application of the mandatory exemptions in sections 9 (relations with other governments), 14(1) (personal privacy) and 10(1) (third party information) and the discretionary exemptions in sections 7 (advice and recommendations) and 12 (solicitor-client privilege). The city also claimed that some information was excluded from the *Act* by virtue of section 52(3)3 (employment related matters). The requester appealed the city's decision to deny access to some of the records. In addition, two third parties who have an interest in some of the records appealed the city's decision to grant access to certain records either in whole or in part. The issues raised by the third party appellants include the responsiveness of the records, the raising of a discretionary exemption and the application of the mandatory exemptions in sections 9 and 10. This order disposes of all of the issues raised in the three appeals. The adjudicator upholds the city's decision, in part, and orders the city to disclose a number of records, either in whole or in part, to the appellant.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 (definition of personal information), 7, 9, 10, 12, 14(1) and 52(3)3.

**Orders Considered:** Orders P-880, P-1137.

## **OVERVIEW:**

[1] The subject matter of this access request is a third party review of the Carp River Restoration project. The Carp River is a slow moving, sediment filled river that runs through an area west of Ottawa. Restoration and development in the area triggered various processes under the *Environmental Assessment Act* and the *Planning Act*. Consequently, a hydrologic and hydraulic analysis of the Carp River Flood Plain was conducted on behalf of the City of Ottawa (the city). In 2007, city staff discovered that the hydrologic and hydraulic models used in that analysis contained errors. As a result, a consulting company was retained to review the previous analysis.

[2] The third party review process has been completed. However, related processes under the *Planning Act* are still underway, including a staff report to the city's Planning Committee and City Council that will include discussion of a required zoning by-law and official plan amendments. The third party who conducted the review continues to be the "model keeper" and reviewer of model runs associated with future development applications in the vicinity of the Carp River.

[3] This order arises from a decision made by the city in response to a request made by the requester under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

All records, including correspondence, e-mails, meeting notes and reports related to the third party review of the Carp river restoration and related projects, from and including the time of awarding of the consultant contract until and including June 2009.

[4] The requester subsequently narrowed the scope of the request, the city located responsive records and provided notice to a number of parties (the affected parties) whose interests may be affected by the disclosure of records. The city subsequently issued decisions to some of the affected parties, advising them that it would be granting the requester partial access.

[5] The city then issued an interim and a final decision letter to the requester, granting him access, in part, to some of the records and denying access, in whole to others. The city claimed the application of the discretionary exemptions in sections 7(1), 11(c), 11(d), 11(e), 11(f) and 12, as well as the mandatory exemptions in sections 9(1)(b), 10(1)(a), 10(1)(b), 10(1)(c) and 14(1). In addition, the city claimed that some records were excluded from the scope of the *Act* by virtue of sections 52(3) and 53(1).

[6] The requester (now the appellant) and two affected parties (third party A and B) appealed the city's decision to this office. Consequently, this office opened appeals MA10-278 (third party B), MA10-308 (third party A) and MA10-450 (the appellant). This order will dispose of the issues raised in all three appeals.

[7] During the mediation of the appeals, the city provided the mediator and the appellant with an index of records. The appellant confirmed which records or portions of records he was seeking access to. As a result, some of the records are no longer at issue, as set out below.

***Appeal MA10-278***

[8] During the mediation of this appeal, the appellant advised that he is no longer seeking the personal information withheld by the city under section 14(1) with respect to records 346, 353, part of 354, 356 and 358.

[9] In addition, during the inquiry of this appeal, third party B advised the adjudicator that it had reviewed the records and agreed to the disclosure of further information. As a result, third party B no longer objects to the disclosure of records 355, 369, 370 and 371. As the city has not claimed any other exemptions with respect to these records and no other mandatory exemptions apply to them, they are no longer at issue in this appeal and may be disclosed to the appellant, in full. However, with respect to the remaining records, third party B advised the mediator that it objected to further disclosure, relying on the mandatory exemptions in sections 10(1) and/or 14(1).

[10] The city then issued a supplementary decision letter granting access, in part to an additional 29 pages of records, but advised the appellant that these records were being withheld, as they are the subject of this appeal.

[11] The appeal subsequently moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from the city, the appellant and the third party appellants. Representations were shared in accordance with this office's *Practice Direction 7*. The appeal was then transferred to me for final disposition.

[12] In its representations, the city advised that it is no longer claiming the application of the discretionary exemption in section 12 to records 372-374. However, in its representations, third party B is claiming that section 12 exempts 372-374, as well as another record from disclosure. Consequently, whether third party B can raise a discretionary exemption is also at issue in this appeal. Third party B also claims that one of the records is not responsive to the request, which I will consider, below.

***Appeal MA10-308***

[13] During the mediation of the appeal, having reviewed the index of records, the appellant advised the mediator that he was no longer seeking access to a number of records, and to certain portions of records withheld under section 14(1).

[14] Also during mediation, third party A wrote to the city, agreeing to consent to the disclosure of further records, but conditional on certain agreements and undertakings being given by the city to it. The city advised third party A that it could not provide the agreements and undertakings sought by it as pre-conditions to its consent.

[15] The appeal subsequently moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from the city, the appellant and the third party appellants. Representations were shared in accordance with this office's *Practice Direction 7*. The appeal was then transferred to me for final disposition.

[16] Third party A has raised the application of the mandatory exemptions in sections 9(1), 10(1) and 14(1), in addition to the discretionary exemption in section 7(1). Consequently, whether third party A can raise a discretionary exemption is also at issue in this appeal.

### ***Appeal MA10-450***

[17] During the mediation of the appeal, having reviewed the index of records, the appellant advised the mediator that he was no longer seeking access to a number of records, and to certain portions of records withheld under section 14(1).

[18] The city advised the mediator that a portion of page 1009 was withheld as being non-responsive. The appellant subsequently advised the mediator that he is seeking access to that portion of the record. Therefore, whether the withheld portion of this record is responsive has been added as an issue in this appeal.

[19] The appeal subsequently moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from the city, the appellant and the third party appellants. Representations were shared in accordance with this office's *Practice Direction 7*. The appeal was then transferred to me for final disposition.

[20] In its representations, the city advised that it was no longer relying on the exemptions in sections 9 and 11 of the *Act*. Consequently, I will order the city to disclose records 215, 398, 416, 469, 470, 589, 876-877 and 1021 to the appellant, as no other exemptions are being claimed for them and no mandatory exemptions apply.

[21] For the reasons that follow I uphold the city's decision in part, as well as the city's exercise of discretion. I do not allow the third party appellants to raise discretionary exemptions. I order the city to disclose a number of records, either in whole or in part, to the appellant.

## **RECORDS:**

[22] The records consist of e-mails, letters, memoranda, charts, summary recommendations, minutes of meetings, invoices and other reports.

## **ISSUES:**

- A. Can a third party appellant claim a discretionary exemption?
- B. Are the records responsive to the request?
- C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the mandatory exemption at section 14(1) apply to the information at issue?
- E. Does the mandatory exemption at section 9 apply to the records?
- F. Does the mandatory exemption at section 10(1) apply to the records?
- G. Does the discretionary exemption at section 7(1) apply to the records?
- H. Does the discretionary exemption at section 12 apply to the records?
- I. Did the institution exercise its discretion under sections 7 and 12? If so, should this office uphold the exercise of discretion?
- J. Does section 52(3) apply so as to exclude records from the *Act*?

## **DISCUSSION:**

### **A. Can a third party appellant claim a discretionary exemption?**

#### ***Appeal MA10-278***

[23] Third party B has claimed the application of the discretionary exemption in section 12 to records 347 and 372-374. The city has not made a section 12 claim with respect to these records.

***Appeal MA10-308***

[24] Third party A has claimed the application of the discretionary exemption in section 7(1) to a number of records. The city has claimed the application of section 7(1) to some of the records as well. However, the following are records for which third party A has claimed section 7(1) and the city has not claimed that exemption:

- Records 8, 375-381, 384-394, 396-397, 437-441, 448-455, 457-462, 509-513, 516-532, 534-535, 537-541, 558-563, 566, 569-572, 577-588, 590-592, 597-600, 602-607, 614-621, 639-643, 646, 648, 650, 652-658, 660-661, 663-671, 674-691, 694-697, 700-701, 704-726, 739, 749, 761, 775-776, 780, 782-783, 856, 858, 905-906, 974 and 1012.

[25] The issue of the raising of a discretionary exemption by a non-institutional party has been considered in a number of previous orders. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments concerning the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*):

The [provincial] *Act* includes a number of discretionary exemptions within sections 13 to 22 [of *FIPPA*, the equivalent of sections 6 to 16 of the *Act*] which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.

The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) [the equivalent of section 14(1) of the *Act*] and 17(1) [the equivalent of section 10(1) of the *Act*] of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.

Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[26] I adopt the findings of former Adjudicator Fineberg in Order P-1137 and find in the circumstances of this appeal that third parties A and B cannot raise discretionary exemptions not claimed by the city. In making this finding, I also note that the head of an institution under the *Act* must exercise its discretion when applying discretionary exemptions. This important exercise of discretion is not available to parties other than an institution.

[27] Further, both third parties' interests have been considered in this appeal in the context of the application of the mandatory exemptions and will be considered in the ultimate disposition in this order.

[28] Accordingly, I find that it is not necessary for me to consider the application of the discretionary exemption in section 12 sought to be applied by third party B in appeal MA10-278. As the city has not claimed any other exemptions with respect to records 372-374 and no mandatory exemptions apply, I will order the city to disclose them, in full to the appellant. I will further consider whether record 347 contains personal information, below.

[29] Similarly, I find that it is not necessary to consider the application of the discretionary exemption in section 7(1) sought to be applied by third party A in appeal MA10-308. As the city has not claimed any other exemptions with respect to the records previously listed, I will order the city to disclose them, in full to the appellant, with certain portions in some records withheld, which are no longer at issue.<sup>1</sup>

## **B. Are the records responsive to the request?**

### ***Appeal MA10-278***

[30] Third party B submits that record 346 is not responsive to the request, stating:

When determining whether a record is relevant, one must look not just as the context of the record, but at the information it provides. Just because a record forms part of a larger document or record that may contain important information, does not necessarily render the record responsive

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<sup>1</sup> Portions for which the city claimed the mandatory exemption in section 14(1), which the appellant has advised he is no longer seeking access to.

or produceable. In other words, "the fact that some irrelevant information is located next to some relevant information does not make irrelevant information relevant."<sup>2</sup> It is our contention that nothing in this record provides relevant information with respect to meeting notes, reports, correspondence etc., related to the third party review of the Carp River Restoration and related projects.

[31] The city made no representations with respect to whether this record is non-responsive to the request, and the appellant states that he cannot comment on the issue, as he has not seen the record.

[32] In Order P-880, former Adjudicator Anita Fineberg considered the issue of relevancy of records and responsiveness:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

[33] I have reviewed record 346 and disagree with third party B's characterization of this record as being non-responsive to the request. The appellant's original request clearly sought access to all records, including correspondence, e-mails, meeting notes and reports related to the third party review of the Carp River restoration and related projects, from and including the time of awarding of the consultant contract until and including June 2009. The record, which is an email from third party B to the city during the third party review, has been identified by the city as being responsive to the request. Third party B has failed to adduce specific or persuasive evidence as to how this record is not responsive to the request. Consequently, I find that record 346 is responsive to the request.

### ***MA10-450***

[34] The city submits that a portion of record 1009 is non-responsive to the appellant's request, as it refers to zoning amendments for two specific properties, rather than the third party review process that is the subject matter of the request.

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<sup>2</sup> Order P-880.



The appellant states that he cannot comment on the issue, as he does not have the record.

[35] I have reviewed the record and I agree with the city that one paragraph of the record is non-responsive to the request. Accordingly, this portion of the record will not be disclosed to the appellant. The city has claimed the application of section 14(1) to other portions of the record, which I will consider, below.

**C. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?**

[36] The city has claimed the application of the mandatory exemption in section 14(1) to portions of the records, as have third parties A and B. 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) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (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,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

- (g) the views or opinions of another individual about the individual, and
- (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;

[37] Section 2(2.1) also relates to the definition of personal information, and states:

(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.

[38] 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.<sup>3</sup>

[39] 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.<sup>4</sup>

### ***Appeal MA10-278***

[40] As previously stated, during the mediation of this appeal, the appellant advised that he is no longer seeking the personal information withheld by the city under section 14(1) with respect to records 346, 353, part of 354,<sup>5</sup> 356 and 358. Consequently, these portions are no longer at issue and will not be referred to again, as they will not be disclosed to the appellant.

[41] Third party B submits that record 347 contains comments which express the personal opinions or views of an individual.

[42] In addition, although third party B did not make further representations on whether the records contain personal information, it provided this office with copies of the records at issue, with those portions which it believes should not be disclosed, indicated.

[43] I have reviewed the records and find that the remaining information in the records does not contain the personal information of identifiable individuals. The

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<sup>3</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>5</sup> The name of the author of an email.

information that third party B claims is remaining at issue in records 346, 347, 353, 356, 357 and 358 does not constitute personal information, as it consists of information associated with individuals in a professional, official or business capacity, including documentation in relation to a city councillor's motion to conduct an audit of the Carp River process. I find that there is no information remaining at issue in these records which would meet the definition of personal information in section 2(1) of the *Act*.

[44] Further, the remaining information at issue in record 354 consists only of the name of a municipality, which does not disclose the identity of an individual; nor would it allow a reader to deduce the identity of an individual.

[45] For these reasons, I find that these records do not contain personal information and are, therefore, not subject to the personal privacy exemption in section 14(1) of the *Act*. I will order the city to disclose records either, in full or in part,<sup>6</sup> as set out in the order provisions.

### ***Appeal MA10-308***

[46] In its representations, third party A has claimed that several of the records contain personal information. The appellant has advised that he is not seeking the personal information contained in a number of these records. Therefore, the personal information the appellant no longer seeks is no longer at issue, and need not be disclosed.

[47] I have reviewed all of the records for which third party A has claimed the application of the mandatory exemption in section 14(1), and find that they either do not contain personal information, or the personal information contained therein is no longer at issue, subject to one exception, below. The city has claimed the application of other exemptions to four of the records, which I will consider later in this order. However, with respect to the remaining records for which the city and third party A have not claimed any other exemptions, I will order the city to disclose them either in whole or in part<sup>7</sup> to the appellant.

[48] Conversely, I find that there is personal information at pages 408 and 409, which remains at issue. In particular, these pages contain the employment history of a number of identifiable individuals, falling with paragraph (b) of the definition of personal information in section 2(1) of the *Act*. The city has also identified these pages as containing personal information.

[49] I will consider whether the personal information identified in pages 408 and 409 is exempt under section 14(1) of the *Act*, below.

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<sup>6</sup> Severing the portions that are no longer at issue, as the appellant is no longer pursuing access to them.

<sup>7</sup> *Ibid.*

**MA10-450**

[50] As previously stated, the appellant advised the mediator after reviewing the index of records that he is no longer seeking access to much of the personal information contained in the records. Consequently, these portions of records for which the city claimed the exemption at section 14(1) are no longer at issue, and will not be disclosed to the appellant. Further, in his representations the appellant submits that he has "no interest" in the disclosure of personal information that would cause harm or distress to a member of the general public. In addition, the appellant states that personal information such as names and addresses can be excluded.

[51] The city submits that record 1306 contains personal information about an individual who sent correspondence to the city in a personal capacity. The city also claims that records 419-420 contain personal information, as they consist of detailed work histories and educational experiences of third party A. In addition, the city submits that records 1224-1224 contain personal information, as they consist of management recommendations or evaluations, character references or personnel evaluations of city staff.

[52] Conversely, the city submits in its representations that it is no longer relying on the exemption in section 14(1) with respect to records 492, 608, 649, 662 and 702-703 because the individuals identified in these records were acting in a professional and not personal capacity.

[53] As a result, based on the city's representations and the index of records, the only records remaining at issue with respect to the city's claim that the exemption at section 14(1) applies, which have not been dealt with in either of the third party appeals are records 419-420, 564, 1127-1128, 1224-1225 and 1306.

[54] I will now determine whether the above records contain personal information.

[55] I am satisfied that there is personal information at pages 419 and 420, consisting of the employment history of a number of identifiable individuals, falling within paragraph (b) of the definition of personal information in section 2(1) of the *Act*.

[56] I am also satisfied that a portion of record 564 contains personal information of an individual, namely their medical history, which falls within paragraph (b) of the definition of personal information in section 2(1) of the *Act*, and that the second portion which was withheld is the name of an individual, appearing with other information about the individual, which falls within the ambit of paragraph (h) of the definition of personal information.

[57] With respect to records 1127-1128, I find that they contain the personal email address and name of an identifiable individual, with other personal information about

them, thereby falling within the definition of personal information in paragraphs (d) and (h) of the definition of personal information in section 2(1) of the *Act*. Similarly, record 1306 contains the name of an individual in their personal capacity, combined with other personal information about them, falling within the definition of personal information in paragraph (h) of the definition of personal information in the *Act*. Based on the appellant's representations, I find that the personal information in the portions of records 564,<sup>8</sup> 1127-1128 and 1306 is not the type of information he is seeking and, consequently, will not be ordered disclosed.

[58] Lastly, I find that records 1224 and 1225 do not contain personal information. The records simply consist of compliments paid to individuals in their professional capacity by other individuals in their professional capacity. Consequently, these records cannot be exempt under section 14(1). As no other exemptions have been claimed by the city, I will order it to disclose these records to the appellant.

[59] I will also determine whether the personal information identified in records 419-420 and 564 is exempt from disclosure under section 14(1) of the *Act*, below.

**D. Does the mandatory exemption at section 14(1) apply to the information at issue?**

***Appeals MA10-308 and MA10-450***

[60] Pages 408-409, 419-420 and 564 contain the personal information of identifiable individuals. 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.

[61] If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. I find that none of the exceptions in section 14(1) (a) to (e) apply in the circumstances of this appeal.

[62] 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). As previously stated, the personal information at issue consists of the employment history of a number of identifiable individuals. In the circumstances, it appears that the only exception that could apply is paragraph (d).

[63] Previous orders have determined that information contained in resumes<sup>9</sup> and work histories<sup>10</sup> falls within the scope of section 14(3)(d). Accordingly, I find that the

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<sup>8</sup> The medical information.

<sup>9</sup> Orders M-7, M-319 and M-1084.

<sup>10</sup> Orders M-1084 and MO-1257.

presumption at section 14(3)(d) is applicable in this appeal, as the personal information contained in records 408-409 and 419-420 consists of work histories.

[64] 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.<sup>11</sup> In the circumstances of this appeal, I find that section 14(4) is not applicable, nor does there exist a public interest in the disclosure of this personal information. Consequently, I find that the personal information in pages 408-409 and 419-420 is exempt from disclosure under section 14(1) of the *Act*.

[65] Turning to the personal information in record 564, which consists of an individual's name in conjunction with other personal information about that individual, I find that none of the presumptions in section 14(3) apply to the personal information. I also find that none of the factors in section 14(2) apply to the personal information; nor does section 14(4). In addition, I find that there is not a public interest in the disclosure of this personal information. Accordingly, as none of the factors either favouring disclosure or non-disclosure apply, I uphold the mandatory exemption and find that the personal information in record 564 is exempt under section 14(1) of the *Act*.

#### **E. Does the mandatory exemption at section 9 apply to the records?**

##### ***Appeal MA10-308***

[66] Third party A is claiming the application of the mandatory exemption in section 9(1)(b) to records 94, 209, 211-212, 382-383, 613, 614-621, 639-643, 954-955 and 974. The city has not claimed the application of section 9 to these records, and, as previously stated, has advised in its representations that it is no longer relying on section 9 for any of the information at issue.

[67] Section 9(1)(b) states:

A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

the Government of Ontario or the government of a province  
or territory in Canada;

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<sup>11</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[68] The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure."<sup>12</sup>

[69] For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.<sup>13</sup>

[70] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.<sup>14</sup>

[71] For a record to qualify for this exemption, the institution must establish that:

- disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section; and
- the information was received by the institution in confidence.<sup>15</sup>

[72] The focus of this exemption is to protect the interests of the supplier, and not the recipient. Therefore, the supplier's requirement of confidentiality is the one that must be met. Some orders refer to a mutual intention of confidentiality.<sup>16</sup> Generally, if the supplier indicates that it has no concerns about disclosure or vice versa, this can be a significant consideration in determining whether the information was received in confidence.<sup>17</sup>

[73] Whether the information would have been exempt from disclosure under the provincial *Act*, had it remained in the hands of the provincial institution from which it was received, may weigh in favour of a finding that it was "received in confidence" by the municipal institution.<sup>18</sup>

[74] In its representations, third party A submits that the records for which it claims section 9(1)(b) contain material that was received in confidence from an Ontario government ministry. Third party A did not provide any representations on the issue of

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<sup>12</sup> Order M-912.

<sup>13</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

<sup>14</sup> Order P-1552.

<sup>15</sup> Orders MO-1581, MO-1896 and MO-2314.

<sup>16</sup> Order MO-1896.

<sup>17</sup> Orders M-844 and MO-2032-F.

<sup>18</sup> Order MO-1581.

what "reasonable expectation of harm" could reasonably be expected to result should the record be disclosed.

[75] I have reviewed the records and find that they do not meet the criteria for exemption under section 9(1)(b). First, some of the records do not originate from the Government of Ontario but, in fact, originate from third party A. Second, although some of the records were sent to the city by a Government of Ontario ministry, there is no evidence to suggest, either in the representations, or on the face of the records themselves that they were provided to the city in confidence.

[76] Third, as previously stated, for this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Third party A has not provided sufficiently detailed and convincing evidence to establish a reasonable expectation of harm. I find in fact that it has not provided *any* evidence to that effect. For these reasons, I find that these records are not exempt under section 9(1)(b) of the Act and I will order the city to disclose them to the appellant, either in whole or in part,<sup>19</sup> with the exception of record 613 for which a further exemption has been claimed by the city.

#### **F. Does the mandatory exemption at section 10 apply to the records?**

##### ***Appeal MA10-278***

[77] Third party B is claiming that the mandatory exemption in section 10(1) applies to exempt records 349-352, 356-358 and 359-368 from disclosure. Based on its representations, third party B is relying on sections 10(1)(a) and (b), which state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

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<sup>19</sup> Severing out the personal information which the appellant no longer seeks.



[78] The city submits in its representations that it defers to third party B's representations on this exemption.

[79] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.<sup>20</sup> Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.<sup>21</sup>

[80] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

***Part 1: type of information***

[81] Third party B submits that the records contain commercial and labour relations information, which has been discussed in prior orders:

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.<sup>22</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>23</sup>

*Labour relations information* has been found to include:

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<sup>20</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

<sup>21</sup> Orders PO-1805, PO-2018, PO-2184, MO-1706.

<sup>22</sup> Order PO-2010.

<sup>23</sup> Order P-1621.

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute;<sup>24</sup>

[82] With respect to the type of information contained in the records, third party B submits that:

- records 349 to 352 reveal information about its customers, which constitutes "commercial information," and that they also contain "labour relations information," as they reveal its approach in dealing with employees and sub-contractors;
- records 356-358 contain "commercial information," as they reveal information about its commercial progress, which relates to the buying, selling or exchange of merchandise and services in connection with potential monetary value, and that they also contain "labour relations information," as they reveal its approach in dealing with employees and sub-contractors; and
- records 359-368 contain "commercial information," as they reveal information about its commercial progress, which relates to the buying, selling or exchange of merchandise and services in connection with potential monetary value.

[83] Having reviewed the records, I find that records 349 to 352, which are letters written to the city by third party B, contain "commercial information" as they include information that relates solely to the buying, selling or exchange of merchandise, meeting the requirement of part 1 of the section 10(1) test.

[84] Records 356-358 consist of email communications between the city and third party B. During the mediation of the appeal, third party B agreed to the disclosure of much of the content of these records. I find that the remaining information does not contain "commercial" or "labour relations information," but either simply sets out the identity of senders and recipients of the email, in their business capacity, or corrects certain action items contained in separate meeting notes, neither of which qualifies as either commercial or labour relations information. Consequently, part 1 of the section 10(1) test has not been met with respect to these records, and I will order the city to disclose them to the appellant, with the exception of two portions of records 356 and 358, which the appellant has advised are no longer at issue.

[85] Records 359-368 are draft and final minutes of a meeting between representatives of the city, the Ministry of the Environment (MOE), and third party B. I

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<sup>24</sup> Order P-1540.

find that portions of the records which third party objects to being disclosed contain "commercial" information, as they relate solely to the buying, selling or exchange of merchandise. In particular, these portions are contained on pages 359, 362-364 and 368. However, I am not satisfied that the remaining portions contain "commercial" information. Some of this remaining information simply identifies individuals in their business capacity, while other information sets out next steps to be taken by the MOE and the city with respect to certain approvals. Consequently, part 1 of the section 10(1) test has not been met with respect to portions of these records, and I will order the city to disclose them to the appellant.

***Part 2: supplied in confidence***

[86] Third party B submits that the emails and letters for which it is claiming the application of section 10(1) were supplied to the city by it and that there was a reasonable expectation that the information would be kept confidential. It also submits that had it intended for wider dissemination, the records would not have contained sensitive and potentially damaging information. With respect to the minutes of the meeting and follow up emails, third party B submits that the information at issue was supplied by it to the city, and that the meeting was not open to the public for the "precise" reason that there was an exchange of confidential information.

[87] The appellant submits that there should be no expectation of confidentiality given the public nature of the planning process and the public infrastructure projects that this process recommended.

***Part 3: harms***

[88] With respect to part 3 of the section 10(1) test, even if I were to find that the information remaining at issue was "supplied in confidence" by third party B to the city, I am not satisfied that its disclosure would result in the harm contemplated by this exemption. In its representations, third party B states:

The disclosure of the records would significantly prejudice the competitive position of [it] should the public become aware of the commercial information and labour information contained in the records.

. . .

Furthermore, should the record be disclosed, these types of meetings will no longer be held between parties and the Institution, which will result in the information no longer being supplied, contrary to the public interest.

[89] The city submits that it defers to third party B's representations as to why the records ought not to be disclosed. The city adds that development in the Carp River

area and associated appeals under the *Planning Act* are likely, and that third party B has had its developments in the area delayed at a financial cost to their company.

[90] To meet this part of the test, the institution and/or the third party must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.<sup>25</sup> The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.<sup>26</sup>

[91] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 10(1).<sup>27</sup>

[92] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.<sup>28</sup>

[93] In these circumstances, I am not satisfied that third party B has provided sufficiently detailed and convincing evidence of the harm that will occur should the records be disclosed. Third party B has not provided *any* evidence to establish how disclosure of the records could cause a reasonable expectation of harm to it. Essentially, third party B’s representations amount to a reiteration of the wording of the section in the *Act*. For these reasons, I find that part 3 of the section 10(1) test has not been met. Consequently, I will order the city to disclose records 349-352, 357 and 359-368, in whole to the appellant and records 356 and 358, in part.

### ***Appeal MA10-308***

[94] In its representations, third party A submits that it is relying on the exemption in sections 10(1)(a), (b) and (c) to exempt the following records from disclosure:

- Records 411-412, 413-415, 416-417, 418-422, 423-436, 463-464, 496-497, 514, 542-543, 544-554, 573, 574-576, 592-596, 609-610, 611-612, 622, 623-632, 636-638, 644-645, 698-700, 701, 702-703 and 704-726.

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<sup>25</sup> *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

<sup>26</sup> Order PO-2020.

<sup>27</sup> [Order PO-2435].

<sup>28</sup> *Ibid.*

[95] Section 10(1)(a) and (b) are previously set out. Section 10(1)(c) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

Result in undue loss or gain to any person, group, committee or financial institution or agency.

[96] Third party A's representations on the application of the exemption in section 10(1) state:

. . . [C]ontains cost data, methodologies and processes the disclosure of which will significantly prejudice the consultant and result in undue competitive advantage to competitors.

Contains confidential information concerning proprietary software.

Contains confidential password user name for access to private consultant server.

Contains confidential and proprietary cost data.

[97] The city submits that it has upheld third party A's objections to disclosure, in part and it agrees that disclosure of certain detailed invoices, proposals and project descriptions may reveal third party A's business processes and strategies, thereby enabling competing engineering firms to gain a competitive advantage.

[98] The appellant states:

On the assumption that this section is being applied to records related to the work, reports, recommendations, etc., of the consulting engineering firm retained by the City, I submit that it cannot meet all of the three-part test. Specifically, the nature of engineering work done for this type of public project is not proprietary because its methodologies must meet specific guidelines promulgated by public agencies. Further, it is my understanding that the results of this type of engineering work are typically shared with and used by the local engineering consulting community and other public agencies in the design and implementation of related infrastructure. By its very nature, this type of information must be accessible to the public, other engineering firms and other public agencies if it is to be of any use.

Given the nature of this type of engineering work, release of such information cannot result in harm or loss of "trade secrets" to the consulting firm because there are no "trade secrets" to lose. Further, I have no interest in those portions of records that reveal charge-out rates or cost data related to the engineering consulting firm retained by the City.

Finally, I submit that there should have been no expectation of confidentiality given the public nature of the planning process (the Class EA process) and the public infrastructure projects that this process recommended.

*Records 411-412, 423-436, 542-543, 544-554, 573-576, 609-612, 636-638, 644-646 and 698-700*

[99] These records are invoices submitted to the city by third party A. As indicated in his representations, the appellant is not seeking portions of records that reveal "charge-out rates or cost data." Staff of this office contacted the appellant, who clarified that he is not seeking any invoice information. Consequently, these records are no longer at issue and need not be disclosed.

*Records 624-631*

[100] These records consist of receipts relating to various expenses incurred by third party A. The appellant has advised staff of this office that he is not seeking that type of information. Consequently, these records are also no longer at issue and should not be disclosed.

*Records 413-414 and 415-417*

[101] These records consist of notes of meetings between representatives of the city and third party A.

*Records 418-422 and 592-596*

[102] These records consist of proposals submitted by third party A to the city. Portions of these records contain the type of cost information that the appellant advised he is not seeking and are, therefore, no longer at issue and need not be disclosed.

*Records 463-464, 496-497, 514-516, 622-623, 632, 701, 702-703 and 704-726*

[103] These records consist of emails between third party A and the city or other third parties. Portions of these records contain the type of cost information that the appellant advised he is not seeking and are, therefore, no longer at issue and will not

be disclosed. In addition, part of page 496 contains a computer log in and password. The appellant has advised that he is not seeking certain types of personal information. Consequently, the log in and password are no longer at issue and will not be disclosed.

[104] Turning to the remaining information at issue, even if I were to find that parts one and two of the test were met, that is, that these records contained commercial or financial information that was supplied in confidence by third party A to the city, I find that part three of the section 10(1) test has not been met. In particular, I find that third party A has not provided sufficiently detailed and convincing evidence of harm that could be reasonably be expected to occur by the disclosure of the records, nor is it evident that such harm would result from an examination of the records themselves. Third party A's representations consist of a reiteration of section 10, and fail to detail specifically how the disclosure of the records could cause harm.

[105] Consequently, I will order the city to disclose some of the records, in whole and others in part, subject to my review of the city's section 10 claim in appeal MA10-450.

### ***Appeal MA10-450***

[106] The city has claimed the application of the mandatory exemption in section 10(1) with respect to several records either in whole or in part. The city submits that it defers to third parties A and B as to why the records should not be disclosed. However, the city also states that disclosure of certain detailed invoices, proposals and project descriptions may reveal third party A and other affected parties' business processes and strategies, enabling competing engineering firms to gain a competitive advantage. The city's section 10(1) claim relates to the following records:

- 480, 515, 557, 565, 567-568, 601, 613, 647, 651, 659, 672, 673, 692, 693, 733-735, 742-748, 750-756, 757-760, 786, 795, 801, 823-824, 826-827, 830-831, 842, 844, 846-847, 860, 862, 1019, 1025, 1172, 1173-1180, 1181, 1182, 1183-1186, 1187, 1188, 1189-1190, 1191, 1192, 1193-1198, 1199-1200, 1202, 1203-1205, 1206, 1207, 1221-1223, 1237-1240, 1244, 1247-1248, 1251-1255, 1259-1273, 1313-1316, 1317, 1318-1319, 1321-1324, 1325, 1326 and 1327-1329.

[107] The appellant's representations are the same as those quoted in appeal MA10-308.

*Records 557, 567-568, 601, 613, 647, 672, 692-693, 733-735, 742-748, part of 759, 786, 795, 801, 823, 824, 826, 827, 830, 831, 842, 844, 846, 847, 860, 862, 1019, 1025, 1221-1223, 1247-1248 and 1327.*

[108] The portions of these records which the city withheld contain the type of cost information that the appellant advised he is not seeking and are, therefore, no longer at issue and will not be disclosed.

[109] Turning to the remaining information at issue, as was the case with the third party appeals, even if I were to find that parts one and two of the test were met, that is, that these records contained commercial or financial information that was supplied in confidence by third parties to the city, I find that part three of the section 10(1) test has not been met. In particular, I find that the city has not provided sufficiently detailed and convincing evidence of harm that could be reasonably be expected to occur by the disclosure of the records. The city's representations consist of a reiteration of section 10, and fail to detail specifically how the disclosure of the records could cause harm. I further find that the records themselves do not support a finding that the harms contemplated by section 10(1) will result from their disclosure.

[110] Consequently, I will order the city to disclose some of the records, in whole and others in part, where no further exemptions have been claimed.

## **G. Does the discretionary exemption at section 7(1) apply to the records?**

### ***Appeal MA10-450***

[111] 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.

[112] 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.<sup>29</sup>

[113] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information.<sup>30</sup>

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<sup>29</sup> 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.).

<sup>30</sup> Order PO-2681.



[114] "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.<sup>31</sup>

[115] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.<sup>32</sup>

[116] 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.<sup>33</sup>

[117] The city is claiming the application of the exemption in section 7 to the following records:

- 395, 468, 475, 651, 727-730, 731-732, 765, 772, 874-875, 900, 956, 976, 980, 987, 1172, 1181-1188, 1191, 1192, 1199-1200, 1217-1220, 1226-1236, 1241-1246, 1249-1250, 1282, 1297, 1307-1311, 1313-1316 and 1325.<sup>34</sup>

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<sup>31</sup> 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.

<sup>32</sup> 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).

<sup>33</sup> 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).

<sup>34</sup> The city advises in its representations that it no longer relies on section 9 to withhold record 93. As no other exemptions have been claimed, I will order the city to disclose this record to the appellant.

[118] The city submits that the exempted portions contain both advice and recommendations because they contain internal staff/consultant/lawyer suggested courses of action that were considered at different points in time throughout the third party review process. These courses of action, the city submits, were confidential and consist of preferred options, not merely a set of facts or a list of options for discussion.

[119] If disclosed, the city argues, the information would allow the appellant to draw an accurate inference of the staff advice and recommendations given. In addition, the city submits that the disclosure of the exempted information could reasonably be expected to inhibit the free flow of advice and recommendations to and within the city. The city states:

. . . [I]n order for the City to receive the best advice, consultants and staff need to operate under the assumption that they are free to make confidential recommendations on how the City ought to respond to controversial issues. External parties that are not privy to these recommendations do not have access to this detailed advice itself but will in most instances become indirectly aware of the decisions that have taken place through other records and publicly available information including Reports to Committee/Council and the Third Party Review itself.

. . . [T]he City submits that its ability to retain engineering firms will be impeded if it is unable to provide an environment whereby frank professional advice may be provided. This issue continues to be relevant in the facts of this specific appeal as the City will continue to require that there be a "model keeper."

[120] The city has categorized the type of advice and recommendations given based on their respective topic or purpose as follows:

- Strategic advice and recommendations from members of working groups, relating to how staff ought to address specific issues at Committee/Council;<sup>35</sup>
- Email correspondence containing advice or recommendations on how to respond to specific requests or present a position to individuals/groups, including the Mayor, Councillors, the City's Auditor General, Committee/Council, members of the public and the Public Advisory Committee;<sup>36</sup>

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<sup>35</sup> Portions of records 395, 468 and 1183-1185.

<sup>36</sup> Records 765, 976, 987, 1172, 1186-1188, 1192, 1226-1229, 1307-1308, 1311 and 1313-1316.

- Briefing notes/emails prepared in advance of meetings with senior management which reveal specific advice/recommendations;<sup>37</sup>
- Staff/consultant advice on internal management issues, including contract/employment issues and specific budgetary advice/recommendations. This includes advice from staff on how the city can continue to have specialized engineering work completed; and<sup>38</sup>
- Correspondence between the city, third party A and other various sub-contractors in which advice/recommendations is given to address technical challenges that relate to the conduct of the third party review.<sup>39</sup>

[121] Lastly, the city submits that none of the exceptions in section 7(2) apply to the records at issue, as they do not meet the criteria set out in that section.

[122] The appellant submits that the third party review involves the analysis and design of millions of dollars of public infrastructure on the basis of established planning processes and standard engineering practice, not the production of widgets for which there may be proprietary concerns. The appellant states:

If some of the advice has been given by engineering consultants, in my understanding that, as professional engineers their first duty is to the general public (or third party), not the client (or first party), even if that client is a public corporation like the City . . . In this case, I question how such engineering advice, directed to the analysis and design of public infrastructure and paid for by public dollars, can be considered confidential and/or exempt.

. . . I am aware that a Project Advisory Committee was struck, comprised of agency, City, consultant and academic representatives, and that this Committee met six times during the preparation of the Third Party Review. The notes prepared for these meetings were not appended to the public documentation compiled to support the CRRP Class EA studies but, in my understanding of the standard practice, they should have been.

[123] I have reviewed all of the records for which the city is claiming the application of the exemption in section 7. I have found that some of the records, either in whole or in part, contain advice and recommendations which were to be communicated to city council, committee and other groups, which in turn could be accepted or rejected. I also find that the disclosure of other records would reveal the substance of the advice and recommendations provided by the third parties to the city. These records either in

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<sup>37</sup> Records 874-875, 1199, 1241 and 1245-1246.

<sup>38</sup> Records 772, 980, 1217-1220, 1230-1231, 1234-1236, 1242-1243, 1282, 1297, 1309-1310 and 1325,

<sup>39</sup> Records 651, 727-732, 1181-1182, 1200, 1232-1233, 1244 and 1249-1250.

whole or in part are therefore, exempt from disclosure, subject to my review of the city's exercise of discretion.

[124] However, portions of some of records and others in their entirety do not contain advice or recommendations, nor would they permit one to accurately infer the advice given. Instead these records contain either views, cautions, notifications, opinions, factual information, evaluative information, status reports, action plans, issues management discussions or questions. Consequently, I will order these records either in whole or in part to be disclosed to the appellant as set out in the order provisions.

#### **H. Does the discretionary exemption at section 12 apply to the records?**

##### ***Appeal MA10-450***

[125] 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.

[126] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[127] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.<sup>40</sup> The city is claiming that the following records are exempt under section 12, as they contain information that is subject to solicitor-client privilege:

- 737-738, 740-741, 757-760, 1274-1297, 1299-1300, 1303-1311, 1326 in whole and 1334 in part.<sup>41</sup>

[128] 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.<sup>42</sup>

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<sup>40</sup> Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

<sup>41</sup> The city advised in its representations that it was no longer relying on the exemption in section 12 with respect to records 372-374, 479, 495, 533, 536 and 651. Accordingly, I will order the city to disclose the information at issue in these records to the appellant.

<sup>42</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[129] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.<sup>43</sup>

[130] 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.<sup>44</sup>

[131] 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.<sup>45</sup>

[132] The city submits that it has withheld records that relate directly to the confidential solicitation and provision of legal advice, including research and memoranda that formed the basis of any advice. The exempted portions, the city argues, form a continuum of communications of a confidential nature involving solicitor-client advice that were made for the purpose of providing a response to specific legal issues that affect the city as a client. The city states that all exchanges were related to seeking and formulating legal advice and were implicitly confidential as adverse parties were not included in the communication. The city then goes on to describe what the specific legal advice was, which I will not set out in this order, as it would reveal the contents of the record.

[133] The city states:

In respect of the memorandum and questions/answers received/sent to staff/consultants, the city relies on precedent that solicitor-client privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.<sup>46</sup> . . . [T]he city further submits that waiver of privilege has not occurred as the records have not been disclosed to an outside party, communicated to an opposing party, or communicated in open court.

[134] Lastly, the city argues that although records 1285-1287 and 1303-1304 constitute solicitor-client advice, they are also not responsive to the request, as they relate to the Village of Carp Water and Wastewater Infrastructure Upgrade/Expansion Project. This project, the city states, consisted of an upgrade to existing municipal

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<sup>43</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>44</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

<sup>45</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

<sup>46</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

well/sanitary services and was not related to the third party review process that is the subject matter of the access request in this appeal.

[135] The appellant states that he has no comments with respect to this exemption.

[136] On my review of these records, which consist of email exchanges, memoranda, letters and meeting minutes, and taking into consideration the city's representations, I am satisfied that these records contain legal opinions, draft legal opinions, input or review by counsel, and are confidential communications to or from counsel directly related to seeking or providing legal advice. Accordingly, I find that these records qualify for exemption under the solicitor-client communication privilege aspect of Branch 1 found in section 12 of the *Act*, subject to my review of the city's exercise of discretion.

**I. Did the institution exercise its discretion under sections 7 and 12? If so, should this office uphold the exercise of discretion?**

[137] The section 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, the Commissioner may determine whether the institution failed to do so.

[138] 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.

[139] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>47</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>48</sup>

[140] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>49</sup>

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their

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<sup>47</sup> Order MO-1573.

<sup>48</sup> Section 43(2).

<sup>49</sup> Orders P-344, MO-1573.

own personal information, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected;

- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[141] The city submits that it applied all exemptions in accordance with the purposes of the Act and for no improper/irrelevant purposes and considered all relevant circumstances. The city also states that it disclosed as much of responsive records as could reasonably be severed without disclosing material which was exempt.

[142] The city argues that, with respect to the exemption in section 7, it focused on withholding information that supports the purpose of ensuring that staff/consultants are able to have a frank exchange of ideas and internally strategize on how to respond to various issues. Similarly, the city states that its approach in applying section 12 is in accordance with the protection of solicitor-client privilege at common law in that a client may confide in their lawyer on a legal matter without reservation.

[143] Lastly, the city submits that it has made numerous records available to the appellant and that there are other access points to obtain information throughout the third party review process, such as:

- reports to Committee/Council including minutes where issues have been debated;

- consultation obligations under the *Environmental Assessment Act* and *Planning Act*;
- information publicly available on the city's website;
- part II orders under the *Environmental Assessment Act* that have allowed individuals to challenge aspects of the Carp River Restoration Plan;
- legal proceedings under the *Planning Act*, including appeals to the Ontario Municipal Board;
- the 2007 city's Auditor General report on the audit of the Carp River Watershed Study and related projects; and
- facts and opinions that were reported in the local media.

[144] The appellant advises in his representation that he has no comment on the city's exercise of discretion.

[145] In the circumstances and based on the city's representations, I am satisfied that it properly exercised its discretion in applying the exemptions in sections 7 and 12 to the records I did not order disclosed, and that it did not err in doing so by taking into account irrelevant considerations or failing to take into account relevant considerations. Accordingly, I uphold the city's exercise of discretion.

**J. Does section 52(3) exclude the records from the *Act*?**

[146] The city is claiming the application of the exception in section 52(3)3 to a portion of record 456. Section 52(3)3 states:

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:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[147] 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*.



[148] For the collection, preparation, maintenance or use of a record to be “in relation to” the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is “some connection” between them.<sup>50</sup>

[149] The term “employment of a person” refers to the relationship between an employer and an employee. The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.<sup>51</sup>

[150] The city has claimed the application of the exception in section 52(3) to exempt a single sentence in record 456 on the basis that the record was prepared, maintained and used by the city for the purpose of resolving issues that pertained to the relationship between the city and its employees. The city submits that the specific issues raised in the record relate to meetings, consultations, discussion and communications about employment related matters in which the city has an interest.

[151] The appellant submits that he has no interest in any records directly relating to labour relations and employment records and that he is only interested in records related to the substance of the CRRP, whether or not they may be from or about this particular staff member.

[152] I have reviewed the record and I am not satisfied that it was prepared, maintained and used by the city for the purpose of resolving issues that pertained to the relationship between the city and its employees. However, based on the appellant's representations and his request, I find that the sentence that has been withheld does not relate to the substance of the third party review and is, accordingly, not responsive to his request. Therefore, it is not necessary for me to make a finding regarding the application of section 52(3). As the sentence is not responsive to the request, it need not be disclosed to the appellant.

[153] In conclusion, I uphold the city's decision, in part and its exercise of discretion. I order the city to disclose records as set out below.

## **ORDER:**

1. I order the city to disclose the following records in their entirety to the appellant:

- 8, 93-94, 211, 215, 347-352, 355, 357, 359-394, 396-407, 410, 413-417, 422-423, 426-427, 437-441, 445-448, 450-455, 458-465, 467, 469-476, 478, 481-491, 496-507, 509-514, 516-520, 522-523, 527, 530-531, 542-

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<sup>50</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

<sup>51</sup> Order PO-2157.

543, 545, 555, 558-563, 566, 570, 572, 577-595, 597-600, 602-607, 614-621, 634-635, 639-643, 648, 650, 655-661, 663-671, 673, 675, 677-678, 680-684, 687-689, 691, 694-697, 701, 704-713, 715-722, 724, 726, 739, 749-756, 761-762, 764-771, 773-777, 779-781, 783, 784-785, 787-789, 791-793, 795 (back side), 798, 804-821, 838-840, 849-851, 853, 855-858, 864, 867-870, 878-899, 901-908, 911, 913-919, 923-927, 929-937, 939, 943-948, 951, 954-955, 960-962, 965-975, 977-979, 981-983, 985-986, 988-989, 993-994, 998-999, 1001-1008, 1010-1016, 1020-1023, 1026-1027, 1034-1051, 1056-1057, 1059-1062, 1064-1066, 1070, 1075-1090, 1094-1112, 1114-1120, 1125-1126, 1129-1131, 1133-1160, 1164, 1166, 1168-1171, 1173-1180, 1189-1190, 1192-1198, 1201, 1203-1205, 1207, 1224-1226, 1237-1241, 1244, 1250-1255, 1259-1273, 1298, 1312, 1317, 1319, 1321-1324, 1328-1329 and 1335-1345.

2. I order the city to disclose the following records, in part, to the appellant. I have included copies of these records with this order. The highlighted portions are **not** to be disclosed. The records are:

- 209, 212, 346, 353-354, 356, 358, 395, 408-409, 419-421, 442-444, 449, 456-457, 466, 468, 477, 479-480, 492-495, 508, 515, 521, 524-526, 528-529, 532-541, 564, 567-569, 571, 608, 613, 622-623, 632-633, 647, 649, 651-654, 662, 674, 676, 679, 685-686, 690, 692-693, 702-703, 714, 723, 725, 727, 763, 772, 778, 782, 796-797, 836, 852, 854, 865-866, 871-875, 900, 909-910, 912, 920-922, 928, 938, 940-942, 949-950, 951(a)-953, 956-959, 963-964, 976, 980, 984, 987, 990-992, 995-997, 1000, 1009, 1017, 1032-1033, 1052-1055, 1058, 1063, 1067-1069, 1071-1073, 1091-1092, 1113, 1121-1124, 1127-1128, 1132, 1161-1163, 1165, 1167, 1172, 1183, 1186-1189, 1199-1200, 1202, 1206, 1227-1236, 1242, 1245-1246, 1318, 1325 and 1330-1333.

3. I order the city to disclose the above records, by **March 27, 2013** but not before **March 22, 2013**. In order to verify compliance with order provisions 1 and 2, I reserve the right to require that the city provide me with a copy of the records sent to the appellant.

Original signed by: \_\_\_\_\_  
Cathy Hamilton  
Adjudicator

February 20, 2013 \_\_\_\_\_