Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2848

Appeals MA12-350 and MA12-377

City of Toronto

February 21, 2013

Summary: Two media requesters sought access to the mayor's City Hall parking pass log sheets. The city denied access claiming the application of the mandatory personal privacy exemption in section 14(1) and the discretionary exemptions in section 8(1) (law enforcement) and 13 (threat to safety or health). The exemptions were found not to apply to the record and it was ordered disclosed to the appellants.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 8(1)(e), (i) and (l), 13.

Orders and Investigation Reports Considered: Orders M-333, MO-2521, MO-2567, PO-1939, PO-2225.

OVERVIEW:

[1] The City of Toronto (the city) received a request from two media requesters under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to the mayor's city hall parking pass log sheets.

[2] The city denied access to the responsive record pursuant to section 13 (threat to safety or health) of the *Act*.

[3] The requesters, now the appellants, appealed the city's decision.

[4] As mediation did not resolve this appeal, the file was transferred to adjudication where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in these appeals, to the city and the mayor, seeking their representations. I received representations from the city and the mayor's legal counsel.[1] These representations were shared with the appellants in accordance with *Practice Direction 7* and section 7 of the IPC *Code of Procedure*, along with a Notice of Inquiry. The appellants provided representations, which were provided to the city and the mayor. Both these parties provided reply representations.

[5] In its initial representations, the city claimed the application of the mandatory personal privacy exemption in section 14(1), as well as the application of the discretionary law enforcement exemptions found at sections 8(1)(e), (i), and (l). The application of these exemptions were added to this appeal, along with the additional issue concerning the late raising of the discretionary law enforcement exemptions by the city.

[6] In this order, I order the city to disclose the record to the appellants.

RECORD:

[7] The record consists of the mayor's parking pass log sheets, dated from December 1, 2010 to June 22, 2012, detailing his city hall parking garage entry and exit times and dates.

ISSUES:

A. Does the discretionary exemption at section 13 apply to the record?

B. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C. Can the city raise the discretionary law enforcement exemption in section 8(1) late?

D. Do the discretionary law enforcement exemptions at sections 8(1)(e), (i) and (l) apply to the record?

[1] In this order, I will refer to representations received from the mayor's legal counsel as representations received from the mayor.

DISCUSSION:

A. Does the discretionary exemption at section 13 apply to the record?

[8] Section 13 states:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[9] 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 evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[2]

[10] An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption.[3]

[11] The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[4]

[12] The city provided both confidential and non-confidential representations on this issue. In its non-confidential representations, it submits that anyone who has a general intent of harming the mayor may target him either at his workplace or personal residence. The city states that although the general population has a means to locate the mayor's residence and may seek him out there outside of work hours, there is a sub-group of the population (such as people with mental health issues, under influence of substances or homeless citizens) that has potential to pose a high risk to his security and well-being. The city states that:

> Some of these individual's may pose a general risk to the security of the mayoral office holder, regardless of the specific identity of the mayor, while others may be a specific risk to [him]. These individuals may act impulsively in an unpredictable manner. They likely do not know where the holder of the Office of [the] Mayor of the city lives generally (or where [he] resides specifically), or they have no means of reaching His Worship after work hours, hence, for these and other reasons, it is much easier and accessible for these individuals to stalk and/or target [the mayor] at City Hall.

---

[2] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).
[3] Order PO-2003.
[4] Order PO-1817-R.

[13] The city submits that the parking pass log demonstrates a pattern of behaviour and if disclosed, would make it much easier for a third party to make (not necessarily positive) contact with the mayor. As the appellants are members of the media, it is likely that the parking pass log will be made public.

[14] It is the city's position that there are particular concerns about the mayor being physically confronted or attacked by members of the public in unsecured locations. According to the city, this expectation of harm is based on very real and specific incidents. The city points out that in July 2011 and again in August 2011, the mayor received death threats. In both instances there were criminal charges laid, and with respect to one individual, conditions were put on his release including: that he not come within 200 metres of City Hall and that he abstain from communicating directly, or indirectly, with the mayor.

[15] The city states that the mayor has been the subject of many additional threats, particularly at City Hall. Some of these threats have resulted in arrests. These incidents involving threats include matters such as trespassing, causing a disturbance, and death threats. Some of the individuals had been previously banned from entering the workspace provided to the Office of the Mayor, yet they continued to do so. These threats arise not only due to the mayor's position as the holder of the Office of the Mayor - but threats have arisen from sources which relate to personal aspects of his life. The city states that:

> In July, it was tweeted that a new vehicle was parked in the spot designated for the Office of the Mayor under City Hall. The tweet identified the make and model of the new vehicle: "[Mayor's name] City Hall parking space has been occupied by a [vehicle colour, make and model], instead of his [vehicle colour, make and model]".
>
> The fact that members of the public are gaining access to the private parking garage and taking particular note of the vehicle parked in the space reserved for the Office of the Mayor raises security concerns…

[16] The mayor provided both confidential and non-confidential representations on this issue. In his non-confidential representations, he states that publication[5] of the information in the record by the appellants could reasonably threaten his safety or health as the record reveals key information that may help others target and harm him. The mayor states that this consequence may not, as a matter of probability, be likely, nevertheless, it is eminently reasonable to conclude that, if made public, the record could reasonably be expected to seriously threaten his health and safety.

---

[5] The mayor, relying on Order P-1499, submits that given that the appellants are members of the media, disclosure of the record must be viewed as disclosure to the public generally.

[17] The appellants are both media requesters. With respect to section 13, the first appellant states that, as an elected official, the mayor is often in public settings where he interacts with Torontonians. At City Hall, he is at a minimum accessible during City Council and Executive Committee meetings. He has made no secret of where he lives, having conducted interviews on his front lawn.

[18] This appellant also states that if someone wanted to do harm to the mayor, they need not rely on any pattern that may or may not emerge from the release of his City Hall parking garage record. Its position is that in the absence of a more fulsome explanation as to why or how the release of this record could threaten the mayor - such as, if someone has threatened him in the parking garage before - then the record should be disclosed.

[19] The second appellant relies on Order MO-2567. In that order, the records at issue consisted of the Toronto City Councilors' parking pass master inventory database spreadsheets printouts. These printouts contained the names of each card holder, as well as the time, date and location where the card holders parked and the dollar value of the time spent. This information included information about the city's former mayor and his driver.

[20] The second appellant states that if the record does not reveal a pattern of behaviour on behalf of the mayor which would make it easier for a third party who wishes him harm to be able to locate him at any given time, then I should rely on the findings of Assistant Commissioner Brian Beamish in Order MO-2567, where he stated:

> A careful examination of the records suggests that this level of concern is not warranted. The actual information in the records does not reveal any patterns nor does it amount to a "personal calendar". Finding or harassing a Councilor at City Hall or at a public event is a more likely possibility than could reasonably be expected to flow from the use of the information in the records at issue in this appeal. Councilors are always free to pay for their parking spots when on a family outing in order to keep its location confidential, if they have such concerns.

[21] The second appellant also relies on Order M-333. The records in that order were credit card statements with related sales slips of the Director of Education of the Toronto School Board. The second appellant quotes the finding in that order of Inquiry Officer Anita Fineberg that:

> It is not so much the disclosure of a possible pattern of behaviour that may endanger or threaten, as it is the pattern itself that presents the possibility of harm. In my opinion, there is nothing in the records which would provide a sufficient degree of predictability to increase or enhance the possibility of harm which may be inherent in the individual's choice to

> frequent certain restaurants in the course of carrying out his employment duties or otherwise.

[22] The second appellant concludes by stating that the record will reveal nothing more than the mayor's entry and exit in and out of public view to a parking lot, which can be readily observed by anyone wishing the mayor harm. Therefore, according to this appellant, disclosure of the record would not increase or enhance the likelihood of harm.

[23] In reply, the city states that disclosure of the record will reduce the effectiveness of the security procedures implemented at the City Hall parking facilities to prevent such harm befalling an individual.

[24] The city states that the documented threats to the mayor's life and health appear to occur at home or at City Hall. The city submits that the risk to the mayor's health or safety remains a realistic possibility. It states that:

> Members of the public, who wish to encounter [the mayor], with the intent to cause him harm, may find the relative seclusion and isolation provided by in the City Hall parking garage, rather than at a public meeting of City Council or Executive Committee, preferable for their purposes.

[25] In support, the city provided a copy of a news report dealing with an abduction of an individual from a parking facility in the general vicinity of the City Hall parking facility. The city states that parking facilities contain particular factors which are inherently conducive to particular criminal activities, such as potential hiding spaces. The city also states that disclosure may increase the utility of the specific parking facility as a location to undertake specific acts which have been threatened against the mayor.

[26] In reply, the mayor relies on the confidential affidavit he supplied with his initial representations and states that this information and his pattern of activity themselves present the concern for his safety.

Analysis/Findings

[27] The issue to be decided is whether the city and the mayor have demonstrated that disclosure of the information at issue "could reasonably be expected to" give rise to the specified result, i.e. endangerment of the mayor.

[28] In carefully reviewing the record, I find that it does not reveal any patterns nor does it amount to a "personal calendar".[6] The record does not reveal information as to

[6] Order MO-2567.

what vehicle the mayor is driving, where he parks in the garage, what exits or entrances he uses when entering or exiting this garage nor where in this garage he parks his car. In other words, the record does not identify where the mayor can be located at a specific time.

[29] On my review, the record shows apparently random entry and exit dates and times for the mayor entering and exiting the City Hall garage. I do not agree with the mayor that the record reveals key information that may help others target and harm him. Although there have been threats against the mayor previously, none of these threats are related to the entry or exit of the mayor from the City Hall parking garage. According to the city's own website, this garage is a parking garage to which the public has access to park their vehicles.[7]

[30] I find that there is nothing in the record which would provide a sufficient degree of predictability to increase or enhance the possibility of harm which may be inherent in the mayor's choice to park his vehicle in this garage.[8] I find that disclosure of the record could not reasonably be expected to seriously threaten the safety or health of the mayor.

[31] It has been acknowledged by this office that individuals working in public positions will occasionally have to deal with "difficult" individuals. In a postscript to Order PO-1939, Adjudicator Laurel Cropley states the following with regard to section 20 of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*, the equivalent of section 13 of the *Act*):

> In these cases, individuals are often angry and frustrated, are perhaps inclined to using injudicious language, to raise their voices and even to use apparently aggressive body language and gestures. In my view, simply exhibiting inappropriate behaviour in his or her dealings with staff in these offices is not sufficient to engage section 20… claim. Rather… there must be clear and direct evidence that the behaviour in question is tied to the records at issue in a particular case such that a reasonable expectation of harm is established should the records be disclosed.

[32] I agree with Adjudicator Cropley's comments. In the circumstances of the present appeal, I do not accept that there is clear and direct evidence establishing a reasonable expectation of harm should information in the record be disclosed.

[33] I find that disclosure of the information at issue in the record could not reasonably be expected to seriously threaten the safety or health of the mayor. Therefore, I find that the record is not exempt under section 13.

---

[7] See http://www.toronto.ca/311/knowledgebase/74/101000045574.html
[8] Order M-333.

[34] I will now consider whether the record contains personal information.

B. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[35] 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;

[36] 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].

[37] 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.

[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.[9]

[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.[10]

[40] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[11]

[41] The city submits that the record contains personal information as it will identify the physical location of the mayor at a specific time, which has been previously determined to be personal information of an individual. The city also submits that although the information relates to the mayor's use of a parking facility which is provided to him due to his status as the holder of the Office of the Mayor of the City of Toronto, the information in the record is not information about his activities as mayor and is, therefore, not employment related information. The city states that while the record may give an overall picture of the mayor's comings and goings at City Hall, it

---

[9] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[10] Orders P-1409, R-980015, PO-2225 and MO-2344.
[11] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

provides no specific information about his duties, functions or hours of work. Rather, the city submits that the record reveals information about the mayor's activities which may or may not be work-related but related to his personal activities.

[42] The mayor submits that the various times he enters and exits from the City Hall parking garage offers no insight into his performance as an elected office-holder and, ultimately, would reveal something of a personal nature about him. He states that at best, the record may allow one to only assume that his entries and exits from the City Hall parking garage reflect his attendance at City Hall. However, he states that this proposition assumes that he works only at City Hall and overlooks the fact that the record does not disclose anything specific about his duties, activities, attendance at Council meetings, or his hours of actual work.

[43] The mayor states that he also may park in the garage when conducting personal business and that it is impossible to differentiate from a review of the record which of his entries or exits from City Hall relate to his activities as opposed to his personal activities.

[44] The mayor also argues that even if this information were to make a more direct connection between his use of the City Hall parking garage and his actual work as mayor, the record would be highly analogous to information relating to the number of hours worked by an employee during a particular period, or information that would reveal the number of overtime hours worked by the mayor, or information revealing the times during which he attended his workplace.

[45] The first appellant states that even if the mayor did on occasion decide to park at City Hall to "conduct some personal business", the parking garage is still directly attached to his place of work and presumably its primary function would be in relation to his employment.

[46] The second appellant states that the mayor is entitled to the benefit of the parking pass because he is a member of Council. This appellant relies on Order MO-2567. In that order, Assistant Commissioner Beamish stated that:

> …it is critical to consider that it is the circumstances of the position they hold that entitles the members of council to parking passes. These parking passes are given to these individuals based solely on their standing as current or past members of council for the City of Toronto. Once elected, each councillor is listed on the City website, given a budget to keep their constituents informed on issues and often identified in the media. Similarly, they become entitled to parking passes. Without being members of council, they would not be entitled to the benefit of the passes. I am therefore of the view that the record at issue identifies publicly elected

figures whose identities are well known in the community and sets out the details of a benefit conferred on them as a result of their position.

This office has held in previous orders that information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual. As mentioned above, the parking passes are eligible to be used for both business and personal use by the pass holder…

Although I recognize the possible dual usage of the parking pass [for business and personal reasons], I am satisfied that the records at issue are not "about" the affected parties as individuals, but rather relate to their elected position. I note that there is no distinction on the face of the records between uses of the parking passes while members are on council business and uses on their own personal time. In other words, uses of the pass for professional or official purposes and uses that might be considered personal are indistinguishable. Further, neither the [Toronto Parking] Authority nor any of the affected parties have analyzed the records and provided me with such a breakdown…

… I cannot agree that the use of the complimentary parking pass was meant to [entitle] the pass-holders to some higher level of privacy protection...

…The use of a parking spot prevents another paying customer from using it and the lost revenue represents a cost to the Authority, and, in turn, the City. In addition, in the absence of a parking pass, councillors would be required to pay for the parking themselves and then submit an expense claim. As such, the parking pass represents a clear benefit to members of council.

The intended use of the parking passes is clearly for professional, official or business purposes regardless of the fact that it may also be used for personal parking. Any personal use appears to be incidental, and in any event, is not distinguishable on the face of the record…

I am satisfied that the disclosure of the record would not reveal anything of a personal nature - on its face, it is not possible to distinguish between professional and personal use. Also, as noted previously, neither city nor any of the affected parties have analyzed the information to provide this breakdown.

> Accordingly, I find that the records do not contain personal information. Because only personal information can be exempt under section 14(1), I find that it does not apply.

[47] In reply, the city states that the mayor's attendance at the City Hall parking garage does not establish his attendance at City Hall. It states that all the record can establish is that the mayor attended at the City Hall parking garage, possibly for the purpose of attending at City Hall or possibly to attend at another location, and the attendance at City Hall (or the other location) may have been for the purposes of engaging in the activities related to the official responsibilities of the Office of the Mayor, or may have been for the purposes of attending at a location (either at City Hall or at another location) to act in a personal or political capacity.

[48] In reply, the mayor states that unlike the situation in Order MO-2567, this case involves additional information in the media or public domain concerning the mayor's personal activities. This includes, among other things, the mayor's relationship with a specific high school football team, whose schedule is publically available. Should this publicly available information be matched with the entry and exit dates and times, the public could then discern additional information about the mayor and his activities, making the information in the record "personal information."

Analysis/Findings

[49] The record contains a listing of dates between December 1, 2010 to June 22, 2012 and entry and exit times for each listed date. Based on my review of the record and the parties' representations, I find that the record does not fit within one of the categories of personal information found in section 2(1). In particular, I do not agree with the mayor that the record contains his employment history within the meaning of paragraph (b) of the definition of personal information in section 2(1). The record does not reveal the number of hours or overtime hours worked by the mayor during a particular period, or even the specific times he attended his workplace. As stated by the city and the mayor, the mayor attends other locations in the city besides City Hall in the performance of his duties as mayor. Therefore, I find that the mayor's entry and exit from the City Hall garage does not reveal any information about the time he spends at a location other than the City Hall parking garage and, in particular, does not reveal his time spent undertaking official, business, or personal obligations at any location.

[50] The definition of "personal information" set out above includes a non-exhaustive list of categories of information that qualifies as personal information. Even if the information in the record does not fit within one of these categories, as I have found above, it can still qualify as personal information if it is about an identifiable individual. In Order PO-2225, the information at issue in the record was the names of non-corporate landlords owing money to the Ontario Rental Housing Tribunal. In that order, former Assistant Commissioner Tom Mitchinson set out the following two-step analysis

for determining whether information should be characterized as "personal" or "professional":

1. In what context do the names of the individuals [the information at issue in the record] appear? Is it in a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

2. Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[51] The mayor's parking pass information in the record sets out only the dates and times the pass was used to enter and exit the City Hall parking garage. City Hall is one of, if not the central, work locations for the mayor. The parking pass was issued to him in connection with his work as a mayor. I find that the information at issue in the record appears in a business or official government context, and not in a context that is inherently personal.

[52] As indicated above, the mayor states that, unlike the situation in Order MO-2567, this case involves additional information in the media or public domain concerning the mayor's personal activities (specifically, the football team schedule) which could be combined with the information at issue to discern additional information about the mayor's activities. Even if the mayor's activities with this team could be considered personal duties as opposed to official duties with the team, the possibility that information about the mayor's entries and exits to the parking garage could be used, in conjunction with other available information, to arrive at inferences about the mayor's personal activities, is too uncertain for me to conclude that the information at issue is therefore "personal".

[53] I find that disclosure of the record would not reveal anything of a personal nature about the mayor, such as details about how and where he spends his personal time. I find there is nothing in the circumstances of this appeal that leads to the information at issue crossing over into the personal information realm.[12] Therefore, I find that the information in the record does not otherwise qualify as personal information.

[54] I have considered the similarities between this appeal and the situation in Order MO-2521, and find them distinguishable.[13] In that appeal, the record revealed the affected person's entry and exit points to the 407 ETR (Express Toll Route). Both the

[12] Orders MO-2342, PO-2225 and PO-3142.
[13] Order MO-2521, upheld on judicial review in in *Vaughan v. Information and Privacy Commissioner*, 2011 ONSC 7082.

city's representations and the record revealed that the intended use of this toll route by the affected person was for both for business and personal trips. In addition, the entry and exit points on the toll route listed in the record were not located at the affected person's place of business, as is the case in this appeal, but were located on the 407 ETR. In Order MO-2521, I determined that the record contained personal information.

[55] In this appeal, the record is the mayor's parking pass log and contains the dates and times the mayor's parking pass was used to enter and exit from the City Hall parking garage, which is one of his places of employment. The parking pass was provided to the mayor by the city in his official capacity as a member of Council. The parking pass relates to the mayor's elected position. The intended use of the parking pass is for the mayor to park at one of his places of employment. This pass is intended for professional, official or business purposes regardless of the fact that it may also have been used for personal parking.[14]

[56] It is not possible upon reviewing the record to distinguish between the mayor's personal and professional, business or official use of the pass. Given the circumstances, any personal use appears to be incidental, and in any event, is not distinguishable on the face of the record.

[57] Based upon my review of the parties' representations and the record, and relying on the findings of Assistant Commissioner Beamish in Order MO-2567, I find that the record does not contain personal information about the mayor. I find that the record contains information associated with the mayor in a professional, official or business capacity and does not reveal something of a personal nature about him.[15] Because only personal information can be exempt under the mandatory personal privacy exemption in section 14(1), I find that this exemption does not apply.

C. Can the city raise the discretionary law enforcement exemption in section 8(1) late?

[58] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may

[14] Order MO-2567.
[15] Orders P-1409, R-980015, PO-2225 and MO-2344.

> decide not to consider a new discretionary exemption claim made after the 35-day period.

[59] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[16]

[60] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[17] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[18]

[61] The parties were asked to consider the following:

1. Whether the appellants have been prejudiced in any way by the late raising of a discretionary exemption or exemptions. If so, how? If not, why not?

2. Whether the institution would be prejudiced in any way by not allowing it to apply an additional discretionary exemption or exemptions in the circumstances of this appeal. If so, how? If not, why not?

3. By allowing the institution to claim an additional discretionary exemption or exemptions, would the integrity of the appeals process been compromised in any way? If so, how? If not, why not?

[62] The appellants have had an opportunity to provide representations on the late raising of this discretionary exemption. The appellants did not provide representations on whether the city should be allowed to raise the section 8(1) exemption late, but did provide representations on the exemption itself. I have not been provided with evidence that the appellants were prejudiced by the late raising of this discretionary exemption nor that the integrity of the appeals process has been compromised by the late raising

---

[16] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[17] Order PO-1832.
[18] Orders PO-2113 and PO-2331.

of this exemption. Accordingly, I will allow the city to raise the discretionary section 8(1) exemption late.

D. Do the discretionary law enforcement exemptions at sections 8(1)(e), (i) and (l) apply to the record?

[63] Section 8(1) states in part:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[64] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

[65] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[19] Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing"

[19] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[20]

[66] In the case of section 8(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[21]

[67] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.[22]

Representations

[68] Concerning the application of the section 8(1) exemption, the city relies on its representations made in support of the section 13 exemption. It also submits that as the mayor has been the victim of death threats, disclosure of the record will reduce the effectiveness of the security procedures implemented to prevent such harm befalling the mayor at City Hall and its parking facilities.

[69] The mayor relies on his submissions made in support of the application of the section 13 exemption.

[70] The first appellant did not provide specific representations on this exemption.

[71] The second appellant states that the city and the mayor only addressed section 8(1)(e) in their representations. This appellant submits that by the rules of statutory interpretation, section 8(1)(e) only applies to law enforcement officers or other individuals who hold a similar position or perform similar duties. It states that if the section were meant to include any individual there would have been no need for the legislature to have included "law enforcement officer" in the section, as that class would have been included by reference to "any individual". Since the mayor has not made any argument that the Office of the Mayor is similar in any way to a "law enforcement officer", this appellant submits that section 8(1)(e) has no application in this case. In the alternative, this appellant relies on its representations it made concerning the application of section 13.

---

[20] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[21] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).
[22] Order PO-2040; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[72] In reply, the city states that disclosure of the record will increase the utility of the specific parking facility as a location to undertake specific acts which have been threatened against the mayor and, therefore, both sections 8(1)(i) and (i) apply.

[73] Concerning section 8(1)(e), the city relies on the Ontario Court of Appeal decision in *Big Canoe v. Ontario*,[23] and states that this section applies to situations where "disclosure could be expected to endanger the life or physical safety of a person". Otherwise, the city states that there would not be an exemption to prevent disclosure of information that could reasonably be expected to endanger the life or physical safety of an individual who is not a law enforcement officer, where this endangerment could not be established as a serious threat to the individual's health or safety

[74] The city relies on the submissions it made in support of the application of section 13. It also submits that it is not necessary that the use of the information in the record is the most likely method for harm to befall the mayor, only that a reasonable basis exists for the belief that some form of endangerment will result from disclosure.

[75] The mayor provided the same reply representations for both the application of sections 13 and 8(1).

Analysis/Findings re: section 8(1)(e)

[76] Section 8(1)(e) prevents disclosure of a record that could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. The second appellant has argued that this exemption would only apply to law enforcement officers or other individuals who hold a similar position or perform similar duties. However I find, in the context of section 8(1)(e), "other person" includes persons who may be endangered in the context of law enforcement, as defined above.

[77] Concerning the application of the law enforcement exemption in section 8(1), it appears that the city and the mayor are relying on paragraph (b) of the definition of law enforcement in section 2(1) of the *Act*, where law enforcement means investigations that could lead to proceedings in a court where a penalty or sanction could be imposed in those proceedings. These parties submit that, in respect of section 8(1)(e), disclosure could reasonably be expected to endanger the safety of the mayor in the context of law enforcement as the mayor has been the subject of threats which have resulted in law enforcement investigations and could be the subject of further such threats as a result of disclosure of the record.

[78] A person's subjective fear, while relevant, may not be sufficient to establish the application of the section 8(1)(e) exemption.[24] Therefore, the mayor's subjective fear is

[23] (1999) 46 OR 395.
[24] Order PO-2003.

not sufficient to establish the application of this exemption. Based on the evidence before me, I find that objectively the city and the mayor have not provided evidence to establish a reasonable basis for believing that endangerment will result from disclosure of the record.

[79] Although the city submits that disclosure of the record will reduce the effectiveness of the security procedures implemented to prevent harm befalling the mayor at the City Hall garage, it has not provided specific information as to how disclosure of the times the mayor entered and exited the City Hall parking garage in the past will affect these security procedures.

[80] From a review of the parties' representations, the evidence before me is that the mayor drives his own vehicle; this vehicle is parked in an area in a public parking garage that is visible to the public and that his vehicle's make and model is also public information. Disclosure of the record, therefore, will not reveal the make and model of vehicle the mayor is driving or that he is parking his vehicle in a garage where it can be seen by the public. I determined from my review of the record that it does not disclose a pattern such that disclosure would allow anyone to predict when the mayor is entering or exiting the garage or even what entrance or exit the mayor utilizes for the City Hall garage.

[81] I find that the city has not provided evidence to establish a reasonable basis for believing that endangerment will result from disclosure of the record under section 8(1)(e). I cannot see how revealing this information could reasonably be expected to result in endangerment to the mayor. In other words, I find the position of the city and the mayor to be exaggerated with respect to this information. Accordingly, I find that section 8(1)(e) does not apply to the record.

Analysis/Findings re: section 8(1)(i)

[82] Although this provision is found in a section of the *Act* dealing specifically with law enforcement matters, its application is not restricted to law enforcement situations but can be extended to any building, vehicle or system which reasonably requires protection.[25]

[83] The city and the mayor's representations focus on the safety of the mayor. The city states that disclosure of the record will increase the utility of the City Hall parking garage as a location to undertake specific acts which have been threatened against the mayor. However, it does not indicate how the information in the record, which I have found does not reveal a pattern of entry and exit times by the mayor from the garage, could reasonably be expected to endanger the security of the City Hall parking garage.

[25] Orders P-900, PO-2461.

Nor do their representations contain information about the security of a vehicle carrying items, or of a system or procedure established for the protection of items.

[84] I cannot ascertain from a review of the record how disclosure could reasonably be expected to endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required. Therefore, I find that I do not have sufficient evidence to find that section 8(1)(i) applies to the record.

Analysis/Findings re: section 8(1)(l)

[85] The city states that disclosure of the record will increase the utility of the City Hall parking garage as a location to undertake specific acts which have been threatened against the mayor. However, it does not indicate how the information in the record, which I have found does not reveal a pattern of entry and exit times by the mayor from the garage, could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[86] I cannot ascertain from a review of the record how disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Therefore, I find that I do not have sufficient evidence to find that section 8(1)(l) applies to the record.

ORDER:

I order the city to disclose the record to the appellants by **March 28, 2013** but not before **March 22, 2013**.

Original Signed By: February 21, 2013
Diane Smith
Adjudicator