Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2986

Appeal MA12-118

The Corporation of the City of London

December 11, 2013

Summary: An individual submitted a request under the *Act* for plans and drawings related to the renovation of a certain building. Some of the records identified as responsive were disclosed to the appellant. However, based on the submissions provided by the affected party property owner, access to many others was denied under section 10(1) (third party information) and section 8(1)(i) (endanger security of a building). After the decision was appealed to this office by the requester, the city withdrew its claim of section 10(1), but maintained the position that section 8(1)(i) applies to the records, with the support of the property owner. The appellant challenged both the exemption claims and the adequacy of the city's search for responsive records. In this order, the adjudicator finds the city's search to be reasonable. She finds that section 10(1) does not apply, but partially upholds the city's decision with respect to the application of section 8(1)(i) and orders the non-exempt records disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(i), 10(1) and 17.

Orders and Investigation Reports Considered: Orders 188, MO-1719, MO-2074, MO-2181, MO-2353, MO-2735, P-1537 and PO-2461.

OVERVIEW:

[1] This order addresses the issues raised by a request submitted by an individual under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the City of London (the city) for access to:

1. All plans submitted in respect of the building application … at [a specified address] in 2009/2010/2011 by the owner or its agents.
2. In respect of the same application:
    a. All correspondence (letters, faxes emails) between the city and the owner or its agents, engineers and architects.
    b. All inspection notes, reports, orders issued in the city.
    c. All other documents in the city's possession relating to the said application.

[2] The city notified an organization whose interests could be affected by the release of the requested records (the affected party). After receiving the affected party's response, the city issued an access decision to the requester, denying access to "a series of 10 construction plans" related to the identified location, pursuant to section 10(1) (third party information) and section 8(1)(i) (endanger security of a building) of the *Act*.

[3] In separate correspondence, the city disclosed permit applications and letters identified as responsive to the request, in their entirety. After the requester inquired about the existence of additional records, and an additional search was conducted, the city advised that the Building Control Division had identified additional responsive building plans. The city notified the affected party again with respect to disclosure of the additional responsive records. However, the city did not issue a supplementary decision for the newly identified records, instead asserting a denial of access to them under the same exemptions cited in its original decision.

[4] The requester (now the appellant) appealed the city's decision to this office, which appointed a mediator to explore resolution of the issues. During mediation, the city indicated that the records that had been disclosed were responsive to part two of the request. The appellant suggested that there may be further records responsive to that part of the request. The city maintained that there are no additional responsive records.

[5] The mediator contacted the affected party, who consented to the disclosure of 21 plans, and the city issued an access decision accordingly.

[6] On August 14, 2012, the city provided the appellant with an index of records, indicating the number and title of each of the plans at issue, and whether or not the record was disclosed. As the appellant wished to pursue access to the remaining

records, the mediator prepared a mediator's report for the appeal to proceed to adjudication. After receiving the mediator's report, the appellant again raised concerns with the adequacy of the city's search for responsive records. In response, the city conducted another search in the Building Control Division and disclosed another 83 records to the appellant, in their entirety, in a supplementary decision, dated October 4, 2012.

[7] In particular, the appellant questioned the city's search for emails. The city's answer to that was that Building Control Division staff followed an established practice of printing relevant emails for the file and no further searches would need to be conducted. The appellant maintains that the search was not adequate to locate all responsive records.

[8] As this appeal could not be fully resolved through mediation, it was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry. I started my inquiry by sending a Notice of Inquiry to the city and the affected party, seeking representations. I received representations from the city and the affected party, which I then shared with the appellant to seek her representations on the issues. After receiving the appellant's representations, I decided to send them to the city in order to provide an opportunity to submit representations in reply respecting the application of section 8(1)(i) and the adequacy of the city's search of its email systems. I did not seek reply representations from the affected party. Once the city's reply representations were received, I shared these with the appellant for sur-reply, inviting her to respond, which she did.

[9] In this order, I find that the city's search for responsive records was reasonable and I uphold it. I find that section 10(1) does not apply to the records. However, I find that section 8(1)(i) applies to some of the records and that the city's exercise of discretion in withholding those records was based on proper considerations. I order the remaining non-exempt records disclosed to the appellant.

RECORDS:

[10] There are approximately 157 pages of records at issue, consisting of drawings, plans, tables, calculations and other information associated with the approvals process. On the CD-ROM provided, the Construction Plans folder has six subfolders, which are titled: Other (10 pages), Arch (23 pages), Fire Stopping System (73 pages), Mech (40 pages), Struct (10 pages), and Other (1 page).

ISSUES:

A. Did the city conduct a reasonable search for records responsive to the request?
B. Does the mandatory exemption at section 10(1) apply to the records?

C. Could disclosure of the records reasonably be expected to endanger the security of a building?
D. Should the city's exercise of discretion be upheld?

DISCUSSION:

A. Did the city conduct a reasonable search for records responsive to the request?

[11] The appellant takes the position that the city has not conducted a reasonable search for email records responsive to her request because the city's email system was not searched broadly enough. In particular, the appellant challenges the city's indication that Building Control Division staff print relevant emails and put them in the file and that no further searches need to be conducted because all emails would already be part of the property files. The appellant maintains that a search under these limitations was not adequate to locate all responsive records.

[12] Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17. If I am satisfied by the evidence before me that the search carried out was reasonable in the circumstances, this ends the matter. However, if I am not satisfied, I may order the city to carry out further searches.

[13] The *Act* does not require the city to prove with absolute certainty that further records do not exist, but the city must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[1] To be responsive, a record must be "reasonably related" to the request.[2] Similarly, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.

Representations

[14] The city indicates that building permit records include "records received, generated and maintained in relation to each building permit such as drawings, applications, inspection records, notices and correspondence." According to the city, correspondence includes letter, faxes and emails. The city submits that all building permit records and drawings are scanned into the electronic document management system, Opentext Livelink, and then filed by the permit number.[3] The city refers to the

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[1] Order P-624 and PO-2559.
[2] Order PO-2554.
[3] The city's electronic document management system, Opentext Livelink, is referred to simply as "EDMS" in the remainder of this order.

Building Division's practice to scan such records to the EDMS on an ongoing basis and, in any event, within two weeks of the closure of a building permit file.

[15] As an attachment to its representations,[4] the city provided a list of nine files related to the building permit. The city submits that the appellant's interest in reviewing "all records relating to the construction/alteration of the building" at the identified address from August 31, 2009 to the present was understood. Accordingly, the city included in the search all records identified in the first three appendices (A to C) attached to its representations, "even though the actual request only specifically related to 'the building application dated August 31, 2009 at [the specified address]'."

[16] The city provided a brief affidavit (Appendix D) from the Coordinator of Development and Compliance Services describing the searches conducted during the mediation stage of this appeal, as follows:

> Our electronic files were searched by myself, physical files were requested to be searched by other Building Control Divisional staff. The Amanda, Livelink and Shared Drives were searched. These systems include any emails, notes, checklists and faxes that were determined by staff to be saved as part of the file, and resulted in the material that was submitted to the Manager of Records and Information Services on September 25, 2012.

[17] The city maintains that a "separate electronic search of its email system" was not required because all pertinent records relating to the three different recent building permit applications for the specified address are contained in the EDMS file.

[18] In response to the city's representations on this issue, the appellant notes that only two emails were disclosed. She refers to a Field Review Reports Form that mentions an email sent requesting a review of "fire exits," which was not identified as responsive to her request or produced. The appellant submits that:

> In this day and age of electronic communications, it is not reasonable to believe that in all three files at the city's Building Department there are no other emails sent and received by the city relating to a renovation project that cost over $4 million dollars and took years to complete and involved architects, engineers and contractors.
>
> The city has conceded in its representations that it has not conducted a search of its email system. Such a search should be made.

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[4] Appendix A.

[19] In reply, the city submits that:

> As with every other request that asks for access to certain documents and "correspondence, including emails" the request is forwarded to the division manager responsible for the activity to conduct the search. Division employees are tasked with pulling the records from their filing systems. These file systems could be electronic based [EDMS] or paper based. It is the day to day responsibility of the division employees to populate these file systems with records of business value that document their activities and decision processes, including emails.

[20] The city refers to the process followed in filing building permit records described in its initial representations and submits that any emails that do not end up in the file system are "transitory records with no particular business value." The city adds that such transitory emails remain in the Microsoft Outlook Exchange system and are deleted after a period of time. The city emphasizes that Outlook is not a filing system used for maintaining records since any emails deemed to have business value are held elsewhere. According to the city, a general search of its entire email system would only be conducted after discussion with a requester due to the broad nature of such a search and because Outlook is not an "official records repository."

[21] In sur-reply, the appellant challenges the city's indication that she would have had to specify that a broader search of the city's email system was required or desired. She submits that:

> What the city is submitting is that unless the appellant requests the very specific location where their emails are stored, the appellant will not be successful in obtaining the emails. That places the onus on the appellant to speculate where the city keeps their emails and then to request each and every location be searched. That is contrary to the intent of the *Act.*

Analysis and findings

[22] As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided.[5] Moreover, in the circumstances of this appeal, I note that the *Act* does not require an institution to prove with absolute certainty that further records do not exist.[6]

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[5] Orders P-624, PO-2388 and MO-2076.
[6] Order PO-1954.

[23] A number of past orders have established the principle that a "reasonable" search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[7] The expectation created by the wording of section 17 of the *Act* is that the individual or individuals conducting the search must be familiar with the subject matter to which the records relate and have a detailed knowledge of the institution's information management systems. In passing, I note that there is no particular, or corresponding, requirement that the employees conducting the search be knowledgeable in the *Act* or even in access-to-information matters more generally.[8]

[24] Based on the evidence provided to me in this appeal, I am satisfied that the city properly construed the appellant's request as being for access to all records related to the renovation of the building at the address specified in the request.

[25] I am also satisfied that the terms of the request were appropriately directed to the Building Division, the city department that would most reasonably have records responsive to the request, in order for those staff members most knowledgeable with respect to the types of records and their specific locations, to conduct the actual searches.

[26] Respecting the appellant's concern that there ought to be more emails responsive to her request, I accept the city's evidence on the subject of email records. Specifically, I accept that the city has an established practice in which division employees are responsible for filing "records of business value that document their activities and decision processes, including emails" in EDMS. I note that after the appellant advised the mediator of her continuing concerns about the city's search for records responsive to part two of her request, the city conducted another search in the Building Control Division and disclosed another 83 records to the appellant, in their entirety, in a supplementary decision, dated October 4, 2012.

[27] Additionally, I am satisfied that there is a reasonable explanation for why additional email records were not identified and that it is found in the city's representations respecting "transitory" emails. I accept that there is a process by which employees of the city's various business units consider emails created as a result of the carrying out of one of the functions of the city to determine whether they qualify as, or represent, city business. This determination as to whether or not the record ought to be scanned to be included in a building permit file is made in a time period that is roughly contemporaneous with the record's creation.

[28] On this point, I note that the city's Records Retention By-law, which provides "for the retention of documents and for the destruction of certain documents" is available

[7] Orders M-909, MO-2433, PO-2469, PO-2592 and PO-2831-F.
[8] See Order PO-2592.

online.[9] Although the city did not define "transitory records" in its representations, the term is defined in section 1 of the By-law as:

> "Records, including e-mail, voice mail, text messages that have temporary usefulness and are not required to meet statutory obligations, set policy, establish guidelines or procedures, certify a transaction, become a receipt or provide evidence of a legal, financial, operational or other decisions of the municipality…"

[29] Section 10 of the By-law indicates that: "All electronic e-mails which have not been moved to the Livelink [EDMS]… and are older than 60 days will automatically be permanently destroyed." Section 11 states that: "Unless otherwise specified in the schedule, or unless required for legal purposes or as otherwise provided by law, transitory records may be destroyed at any time."

[30] The time period for the building permit records of interest, as identified in the request, was 2009/2010/2011, while the request itself was submitted in January 2012. In view of the city's evidence, including the publicly available records retention By-law, I am satisfied that the city has taken reasonable steps to identify all *available* information that would be responsive to the appellant's January 2012 access request.

[31] Specifically, I accept that city staff would retain and/or transfer (to the EDMS) email messages that are sent and received only if they relate to "city business," as defined in the By-law. All other messages would be treated as transitory and may be deleted *at any time*, according to section 11 of the records retention By-law. I am satisfied that the searches conducted by the city did include searches for emails that may have been responsive, but that the context in which such records are created, considered and retained, described above, account for why there may not be as many responsive emails as the appellant would have expected. Indeed, even though the appellant may be reluctant to accept the explanation provided about the number of emails identified as responsive, this does not, by itself, persuade me that a reasonable basis exists for me to conclude that additional responsive emails might exist elsewhere in the city's record holdings, including its Outlook system.

[32] In summary, based on the evidence before me, I am satisfied that the city made adequate and reasonable efforts to identify and locate any existing responsive records within its record-holdings. I accept that relevant city staff knowledgeable about the subject matter of the request conducted searches aware of the possible types of records that would be responsive to the appellant's request. Furthermore, I accept the evidence of the city that the additional email records the appellant seeks simply may not exist. Accordingly, I find that the city's search for responsive records was reasonable, and I uphold it.

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[9] www.london.ca/city-hall/by-laws/Documents/recordsA4640.pdf: By-law A.-4640-291, Consolidated September 20, 2010.

B. Does the mandatory exemption at section 10(1) apply to the records?

[33] In its initial access decision, the city relied on the mandatory exemption for third party information in section 10(1) of the *Act* to deny access to "a series of 10 construction plans" related to the address identified in the request.[10] This decision was issued following the city's receipt of submissions from the affected party, pursuant to a notification of that party under section 21(1)(a) of the *Act*.[11] It appears from later correspondence and the city's representations that it has retreated from this position on section 10(1). However, as the affected party continues to oppose disclosure partly on this basis, and since section 10(1) is a mandatory exemption, I must review its possible application to the records at issue.

[34] Section 10(1) states, in part:

> 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,
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> (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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> …

[35] Section 10(1) of the *Act* recognizes that in the course of carrying out public responsibilities, institutions sometimes receive information about the activities of private businesses. Section 10(1) is designed to protect the confidential "informational assets" of such businesses or other organizations.[12] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit

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[10] There does not appear to have been a claim that section 10(1) applied to any of the records identified as responsive to part two of the request for other types of records.

[11] Section 21(1)(a) provides third parties with an opportunity to make submissions to an institution with respect to the possible disclosure of information that may fit within section 10(1) of the *Act*.

[12] *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.).

disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[13]

[36] For section 10(1) to apply, the party or parties opposing disclosure of the record 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.

[37] For the reasons set out below, I find that section 10(1) of the *Act* does not apply.

Part 1: type of information

[38] The types of information listed in section 10(1) have been discussed in prior orders. Relevant in this appeal is the definition of technical information, which states:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[14]

[39] I adopt this definition in the circumstances of this appeal. I find that the building plans contain information that qualifies as technical information for the purposes of section 10(1) of the *Act*. Consequently, I find that the first part of the test in section 10(1) has been met.

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[13] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[14] Order PO-2010.

Part 2: supplied in confidence

Supplied

[40] In order for me to find that the second part of the test under section 10(1) has been met, I must be satisfied by the evidence that the affected party "supplied" the information at issue to the city in confidence, either implicitly or explicitly.

[41] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[15] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[16]

[42] Neither the appellant's nor the affected party's representations address the "supplied" requirement of section 10(1). However, the city concedes that the plans and drawings were supplied to the city's Building Division by the affected party in support of his application for three different building permits. I agree. Since the affected party submitted the plans and drawings directly to the city for the purpose of obtaining the relevant permits, I find that these records were "supplied" to the city for the purpose of part two of the test for exemption under section 10(1).

In Confidence

[43] In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that at the time the information was provided, the supplier of the information had a reasonable expectation of confidentiality, either implicit or explicit. This expectation must have an objective basis.[17]

[44] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;

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[15] Order MO-1706.
[16] Orders PO-2020 and PO-2043.
[17] Order PO-2020.

- not otherwise disclosed or available from sources to which the public has access; or
- prepared for a purpose that would not entail disclosure.[18]

[45] The city takes the position the records were not supplied in confidence because they were submitted along with a completed "Application for a Permit to Construct or Demolish" form and in the circumstances, none of the considerations relevant to assessing an expectation of confidentiality apply. Specifically, the city notes that none of the plans were stamped "confidential" or otherwise identified as such. The city also indicates that it had been the practice of the Building Division for many years to provide public access to the records involved in the building permit process, including architectural plans and building drawings. According to the city, the reason the plans and drawings were not disclosed in this case is that there had been a complaint to this office (the IPC) about the city's disclosure practices.[19] The city adopted a practice effective January 1, 2012 of notifying property owners prior to granting access to building plans to try to seek consent for disclosure. Not having received the affected party's consent in relation to certain plans, the city denied access "even though it was apparent that … [the] section 10(1) exemption did not apply…."

[46] Referring specifically to the withheld drawings and plans, the affected party submits that these records consist of floor plan and security systems information that ought to be held confidential because of the "tenancy agreements as well as commercial tenancy agreements … that [require that] we will provide a safe and secure space." The affected party argues that disclosure would contravene the reasonable expectations of the tenants as to the safety and security of the building. The rest of the affected party's representations respecting section 10(1) relate to the harm to the vulnerable population served by the facility with disclosure of the floor plans and drawings.

[47] The appellant points out that while building plans and drawings may not be disclosed, they can be "viewed by anyone attending at the City of London [offices]."

[48] As the city notes, the issue of the application of section 10(1) of the *Act* to building plans has been reviewed by this office. In Order MO-2735, the appellant was an architectural firm that filed building plans with the city on a property owner's behalf. The appellant in that case challenged the city's disclosure of the plans to a member of the public upon payment of a fee. Assistant Commissioner Beamish found that section 10(1) of the *Act* did not apply to the building plans, based on his conclusion that the

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[18] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct.).

[19] The city's new practice was adopted in response to the complaint, which was resolved by Order MO-2735, issued by Assistant Commissioner Brian Beamish on May 18, 2012.

plans had not been supplied in confidence.[20] In his analysis, the Assistant Commissioner relied on the interpretation of the confidentiality requirement by Inquiry Officer Holly Big Canoe in Order M-169, which the city repeats in its representations in this appeal. Assistant Commissioner Beamish stated:

> I find that the appellant's expectation of confidentiality was neither reasonable nor objective.
>
> While I appreciate that the building plans were submitted as part of the building permit application process, the expectation that the plans would be used for this purpose alone is not equivalent to a reasonable expectation of confidentiality. In addition, the city provided evidence that it is its practice to make building plans available to the public upon request, for a fee. Such a practice is contrary to a reasonable and objective expectation of confidentiality on the part of the appellant. Had the appellant or property owner made inquiries of the city, they would have been informed that building plans are routinely disclosed to third parties on request. Furthermore, as the plans were not submitted directly by the appellant, the city could not reasonably have known that the appellant expected that the plans would be kept confidential. Finally, the building plans were not stamped "Confidential" or otherwise noted as having been provided in confidence. Instead, the notation on the building plans only states that the "Copyright Act applies to use and production" of the plans. While the lack of a "Confidential" stamp or notation is not necessarily determinative, in my view, the circumstances of this appeal, the city's routine practices and the plans themselves lead me to conclude that they were not supplied with a reasonable expectation of confidentiality.

[49] There are certain aspects of this appeal that distinguish it from the circumstances of the appeal before the Assistant Commissioner in Order MO-2735. However, the essential features required for evaluating the reasonableness of the expectation of confidentiality *at the time the plans were submitted* are substantially similar. At the time the plans were submitted for the permit approvals in this matter, the city's practice of disclosing such plans to the public upon payment of a fee remained in place. The plans are not marked confidential. Based on the city's routine disclosure practices respecting this type of record at the time these plans were submitted, and the absence of any apparent indication that the plans themselves were to be held in

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[20] The city refers to the Assistant Commissioner's comment in Order MO-2735 that the general practice of seeking the property owner's permission prior to granting access "seems a prudent one." Notably, in the very next paragraph of Order MO-2735, Assistant Commissioner Beamish stated: "However, where the property owner does not consent to the disclosure of the building plans to a third party, the municipality could consider processing the request as a formal request under the *Act*. This would involve a determination of whether any of the exemptions in the *Act* apply to the requested building plans."

confidence, I find that any expectation of confidentiality on the part of the affected party was neither reasonable nor objective.

[50] Given my conclusion that the records were not supplied *in confidence,* I find that part two of the test under section 10(1) is not met. As all three parts of the test under section 10(1) must be met in order for the exemption to apply, it is not necessary for me to review part three of the test. I find that section 10(1) does not apply to the withheld plans or drawings.

C. Could disclosure of the records reasonably be expected to endanger the security of a building?

[51] The city and the affected party oppose disclosure of the plans and drawings at issue based on section 8(1)(i) of the *Act*, which is part of the law enforcement exemption, and which states:

> A head may refuse to disclose a record if the 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;

[52] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[21] Furthermore, although section 8(1)(i) 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.[22]

[53] The use of the words "could reasonably be expected to" in section 8(1)(i) require that there be "detailed and convincing" evidence to establish a "reasonable expectation of harm" with disclosure of the information. Evidence amounting to speculation of possible harm is not sufficient.[23]

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[21] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[22] Orders P-900 and PO-2461.
[23] 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.).

Representations

[54] The background provided by the affected party provides the context for the city's claim of section 8(1)(i) to deny access to the building plans and drawings. The affected party states that:

> The property in question is owned by a non-profit, charitable organization. It is a multiuse facility combining residential, educational and outreach services targeted to vulnerable youth aged 15 to 29 years. The facility is home to 30 young people and their families and is visited by up to 150 vulnerable young people each day. Many of the young people accessing services at the facility have experienced significant challenges including homelessness, addiction, victimization and mental health histories. For them, the building is a place of safety and security [where] they can find stability and create plans in partnership with trusted professionals…

[55] The affected party submits that disclosure of the security measures and floor plans outlined in the records remaining at issue would pose a risk of harm to the physical safety of residents, as well as their emotional security, particularly because many of the residents experience physical and emotional trauma prior to establishing themselves at the facility.

[56] The affected party refers to the appellant contacting him at the time the request under the *Act* was submitted and notes that she said the request was motivated by a need to "have a full understanding of the demolition and construction undertaken." The affected party takes the position that it cooperated with the appellant, as evidenced by its consent during mediation to "the release of all documents which fell within those parameters." The affected party notes that it also asked its contractors to release documents directly to the appellant that had been prepared by them specifically in relation to certain matters of interest to the appellant. The affected party points out that the records not yet disclosed to the appellant contain floor plan and security system information, both of which ensure a safe and secure space for vulnerable clients. According to the affected party, the release of these remaining records detailing security measures may place vulnerable youth at increased risk of renewed victimization, including "youth requiring a secure facility to ensure their own protection."

[57] In closing, the affected party submits that:

> The release of the remaining documents can reasonably be seen to undermine the safety and security of the building and its residents and [would] violate assumptions that our residential and commercial tenants have regarding safety and security. The damage would be irreparable to a population that needs a high level of safety and protection. …

[58] According to the city,

> When the property owner was contacted and asked for his representations concerning disclosure of certain building plans and drawings for the … building, he … expressed his concerns for the security and safety of the vulnerable high risk youth who are the target population for the residential areas within the building. ...
>
> The city's head agreed with the property owner that the protection of these high risk youth in the building where they reside is of utmost importance and therefore used his discretion in applying … section 8(1)(i) to only the drawings that provide detailed security features of the building.

[59] The appellant states that the test under section 8(1)(i) is "where there is reasonable expectation of harm to the building." According to the appellant, the section makes no mention of harm to occupants or even that it is a consideration and, therefore, the parties resisting disclosure have misapprehended the test for exemption and failed to meet the burden of proof under it. In particular, the appellant notes that no evidence has been provided to establish:

- that the building is one that usually meets the exemption; i.e. a sensitive military installation or nuclear power plant, as opposed to a residence (Order MO-2181);
- that the building has been targeted or is the type of building that has historically been targeted or harmed;
- what security measures are in place in the building with respect to access; or
- the owner's contractual commitment to tenants to keep the drawings confidential.

[60] According to the appellant, if the security of the building was really a concern, the number of persons using the facility would "surely be limited." Moreover, the appellant asserts that she is a lawyer of longstanding practice and there is "absolutely no evidence that she endangers the security of the building," unlike the circumstances of Order MO-2074. The appellant explains the reason for the request, as follows:

> Not only does the appellant require the drawings to obtain a complete understanding of the renovations but also, to determine if there was anything wrong with respect to the process undertaken by the City of London with respect to the renovations. The renovations undertaken at the owner's premises have adversely affected the neighbouring building

> such that, all residents of that building had to be evacuated by early December 2011 to preserve their life and safety.

[61] Finally, the appellant contends that not all of the withheld drawings can possibly deal with the purported "security measures" implemented for the building.

[62] In reply, the city acknowledges that:

> The appellant takes issue with our concern over the possibility of harm to the occupants of the building as opposed to the possibility of harm occurring to the building itself. … In Order MO-2074, one of the issues was the protection of one of the occupants of the building because there was a restraining order out against the appellant/requester in that instance. In Order MO-1719 Adjudicator Donald Hale found the appellant and the affected parties were embroiled in a land use dispute that [led] to an intractable situation between them. He stated that although the appellant's right of access to the records is legitimate …disclosure to the appellant may be equated with disclosure to the world. …

[63] In her sur-reply representations, the appellant asserts that if section 8(1)(i) "referred to the safety of the occupants, then the city's submissions may be relevant, but since it does not, the safety of the occupants is not a consideration."

Analysis and findings

[64] Order 188 articulated the principle that establishing one of the exemptions in section 8 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason.[24] This requirement that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the institution or affected party seeks to avoid by applying the exemption.[25] As I also stated above, the application of section 8(1)(i) is not limited to the law enforcement context and may be extended to any building, vehicle or system which *reasonably* requires protection.

[65] In this appeal, with regard for both the representations provided, as well as the content of the records themselves, I am satisfied that there is sufficiently detailed and convincing evidence to support a conclusion that disclosure of the records at issue, with some exceptions, could reasonably be expected to endanger the security of the building. For the following reasons, therefore, I find that the records enumerated below are exempt under section 8(1)(i).

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[24] See also Order PO-2099.
[25] Orders 188 and P-948.

[66] The city and affected party were not obligated to prove that the disclosure of the records will actually result in the alleged harm[26] or that the expectation of harm was dependent on the identity of the requester. I mention this latter point because the appellant referred to there being "absolutely no evidence that she endangers the security of the building." Past orders have reviewed the relevance of the identity of the requester/appellant in determining the application of section 8(1)(i) and the consensus seems to be that "it depends." The requester's identity has been found to be relevant in the determination where the affected party had obtained a restraining order against that individual (Order MO-2074), but not relevant in other appeals (MO-2353), notwithstanding what might be considered poor relations between the parties. These determinations also seem to have contemplated the motivation of the requester in seeking the information.[27]

[67] In this appeal, moreover, neither the city nor the affected party suggests that the appellant would use the records for an inappropriate or illegitimate purpose. Rather, the concern is based on the belief that disclosure of the records to the appellant is, in effect, disclosure to the world. This concern is consistent with the position taken in previous orders.[28] In Orders P-1537 and PO-2461, the sought-after records related to research facilities using animals and the provision of animal care, control and pound services, including inspections, respectively. In the latter decision, Senior Adjudicator John Higgins adopted the following reasoning of former Assistant Commissioner Tom Mitchinson in the former order:

> My decision is not based on the identity of the appellant, but rather on the principle that disclosure of the records must be viewed as disclosure to the public generally. If disclosed, the information in the records would be potentially available to all individuals and groups involved in the animal rights movement, including those who may elect to use acts of harassment and violence to promote their cause.

[68] The senior adjudicator agreed with this reasoning and held that even if the concerns identified by the parties opposing disclosure of the information did not relate to the appellant, it was appropriate to consider the consequences of disclosure of the records into the public domain in the *particular circumstances of each appeal.* Accordingly, even though the nature of the relationship between the parties in this

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[26] Order P-557.

[27] In Order MO-2353, for example, Adjudicator Steven Faughnan found that there was not a sufficient basis for: "believing that endangerment of the building could reasonably be expected to result from disclosure. In fact, there appears to be no dispute that the appellant's motivation for wishing to have copies of the building plans is to potentially assert some proprietary interest in them, and not to endanger the building that resulted from the plans. While I do not doubt that relations between the appellant and the affected party are not good, this does not mean that providing the appellant with a copy of the building plans represents a risk to the affected party's building."

[28] See Orders P-169, P-1537, MO-1719 and PO-2461.

appeal may not suggest concern, I accept that disclosure of the records is tantamount to disclosure to the world.

[69] In response to this idea that disclosure of these records to her would be disclosure to the world, the appellant argues that the building is not the type that has historically been targeted. Support for this particular argument may be found in Order MO-2181, where Assistant Commissioner Brian Beamish noted that: "residential structures, by their very nature, do not establish a reasonable basis for believing that the harms set out in section 8(1)(i) could reasonably be expected to result from the disclosure of their building plans." However, the case-by-case basis of these determinations is worth emphasizing. The nature of a building's use may indeed be relevant, if disclosure can be shown to be "reasonably and logically connected to a threat or compromise to the security of [the facility]."[29] This accords with the principle that the coverage provided by the exemption can be extended to *any* building, vehicle or system which reasonably requires protection.[30]

[70] In this context, I reject the appellant's assertion that the occupants of a building are an irrelevant consideration. Rather, I accept that the type of services provided at a facility, or the individuals who access those services, may have implications for the characterization of a building's use. In this situation, the building in question is a "multiuse facility combining residential, educational and outreach services targeted to vulnerable youth." These youth are described as coming from, or experiencing, various challenging circumstances, such as homelessness, addiction, victimization and mental health issues. Therefore, I accept the evidence before me that security, safety and stability are important considerations for the target population of this facility. I am also satisfied that a risk of harm to the emotional security of the building's residents that may be contemplated by disclosure of information about where they reside is a relevant consideration, as is the concern with ensuring their physical security by not disclosing the details of the building's inner floor plans and systems. Further, while disclosure of floor plans outlining where the bedrooms, closets and washrooms are located may not present a reasonable basis for resisting disclosure in some circumstances, I accept that disclosure of such information, given the vulnerable, at-risk population that inhabits the building in question here, is rationally connected with its endangerment. Accordingly, given the clientele, and the services offered within the building to the affected party's clients, I am satisfied by the evidence that this facility is one that reasonably requires protection. In my view, disclosure of many of the records could reasonably be expected to result in endangerment or serious compromise to the protection of the facility for the purpose of section 8(1)(i) and I find that it applies, with some exceptions.

[29] Order PO-2461.

[30] *Supra*, footnote 22.

[71] Generally, I accept the city's and affected party's descriptions of the records and the assertion that many of the drawings remaining at issue provide detailed information about the building's floor plans or systems. In particular, I find that the following records qualify for exemption under section 8(1)(i):

- All of the records contained in the first subfolder titled "Other" (10 pages): these are plans or drawings related to HVAC, power, water, etc., including detailed interior floor plans.
- Most of the records contained in the second subfolder titled "Arch" (23 pages): pages 1-13 and 16-23 include similar detailed interior floor plans.
- Most of the records contained in the fourth subfolder titled "Mech" (40 pages): pages 19-40 are diagrams and schematics, comparisons of old and new layouts, and detailed plumbing support information.
- Some of the records contained in the fifth subfolder titled "Struct" (10 pages): pages 1 and 8 of those drawings of roof framing or building framing detail aspects of the interior layout of the building.

[72] However, I am not satisfied that the rest of the withheld records are sufficiently connected with the protection of the building's interior or its systems in these circumstances, such that their disclosure could reasonably be expected to result in the endangerment section 8(1)(i) seeks to prevent. In particular, I find that the following records do *not* qualify for exemption under section 8(1)(i):

- Pages 14 and 15 of the second subfolder ("Arch), which are exterior views of the building.
- Pages 1-73 of the third subfolder ("Fire Stopping"): these records feature detailed information about the building's fire retardation requirements, including cut-outs (drawings) to demonstrate building features and/or instructions for filling cavities or voids with fire stopping materials, smoke and acoustic sealants and fire aid preventive measures. These records do not include floor plans or details of specific locations within the building.
- Pages 1-18 of the fourth subfolder ("Mech"), which consist of hydraulic calculations for the sprinkler systems and some product specification sheets.
- Pages 2-7, 9 and 10 of the fifth subfolder ("Struct"), which contain drawings of the building's framing for roof, floor and elevator that do not include floor plan layouts or other systems reasonably requiring protection.
- Page 1 (of 1) of the sixth subfolder ("Other"), which consists of a drawing detailing work to be carried out on the building's exterior surroundings, including sidewalk, roadway, hydro, water main and paving.

[73] In view of my findings above, I will be ordering the city to disclose the non-exempt records listed to the appellant.

D. Should the city's exercise of discretion be upheld?

[74] As I have upheld the city's decision to deny access, in part, under section 8(1)(i), I must now consider the city's exercise of discretion in doing so. Since section 8(1)(i) is discretionary, the city had the discretion to disclose the withheld records, even if they qualified for exemption. This is the essence of a discretionary exemption.

[75] On appeal, an adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. In doing so in this appeal, I may find that the city erred in exercising its discretion where, for example, I find that it did so in bad faith or for an improper purpose, took into account irrelevant considerations, or failed to take into account relevant considerations. In such a case, I may send the matter back to the city for an exercise of discretion based on proper considerations. However, section 43(2) of the *Act* states that I may not substitute my own discretion for that of the city.[31]

[76] The city submits that because the head agreed with the affected party that the protection of these high risk youth in the building where they reside is of utmost importance, he exercised his discretion in applying section 8(1)(i) to "only the drawings that provide detailed security features of the building." While the appellant does not specifically comment on the exercise of discretion, she does challenge the city's assertion that each and every record withheld contains details of the building's security measures, which by implication, suggests an overbroad claim to the exemption.

[77] In the circumstances of this appeal, I would emphasize that my review of the city's exercise of discretion relates only to those records for which I have upheld the claim of section 8(1)(i) of the *Act.* Given the disclosure of the non-exempt records provided for by this order, therefore, I am satisfied overall that the rationale cited by the city for its exercise of discretion to deny access under section 8(1)(i) demonstrates that relevant factors were considered. Accordingly, I uphold the city's exercise of discretion, and I find that the withheld records detailed on page 19 of this order, above, are exempt under section 8(1)(i) of the *Act.*

ORDER:

1. I uphold the city's search as reasonable.

2. I uphold the city's section 8(1)(i) exemption claim with respect to:

   i. All 10 pages in the first subfolder titled "Other";
   ii. Pages 1-13 and 16-23 of the second subfolder titled "Arch";

[31] See also Order MO-1573.

iii. Pages 19-40 of the fourth subfolder titled "Mech"; and
iv. Pages 1 and 8 of the fifth subfolder titled "Struct".

3. I order the city to disclose to the appellant all other non-exempt records to which section 8(1)(i) does not apply by **January 20, 2014, but not before January 15, 2014.**

4. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

Original signed by: December 11, 2013
Daphne Loukidelis
Adjudicator