Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3089

Appeal MA12-540

City of Toronto

August 28, 2014

Summary: The city received a request for access to any record arising out of a meeting involving managers at Toronto Water, Environmental Monitoring & Protection, and the mayor's office held during a specified time period. The city located a three-page record and, after notifying an affected party, granted access to portions of the record. Access to some parts of the record was denied on the basis of the exemptions in sections 8(1)(b), (c) and (i) (law enforcement), 10(1)(a) and (c) (third party information) and 13 (danger to safety or health). One part of the record was identified as not responsive to the request.

This order determines that the withheld portions of the record do not qualify for exemption under the *Act*. It also determines that the all of the record is responsive to the request, and orders the city to issue an access decision regarding the portion that was identified as non-responsive.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(b), (c) and (i), 10(1)(a), (b) and (c), 13 and 17.

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to Toronto Water, Environment Monitoring and Protection Unit records, including but not limited to e-

mails, notes, meeting minutes, calendar items, etc. related to a meeting or meetings between Toronto Water managers and the mayor's office for a specified time period.

[2] In response to the request, the city denied access in full to the responsive record on the basis of the exemptions in sections 8(1)(a) and (b) (law enforcement) of the *Act*.

[3] The appellant appealed the city's decision.

[4] During mediation, the city issued a supplementary decision to the appellant in which it stated that it intended to disclose portions of the three-page responsive record to the appellant. The decision also stated that the city was notifying an affected party whose interests might be affected by the request, pursuant to section 21 of the *Act*, and that a decision regarding access to the record would be made after receiving representations from the affected party. In addition, the decision confirmed that the city was no longer relying on the exemption in section 8(1)(a).

[5] The appellant confirmed that he wished to pursue full access to the record.

[6] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*.

[7] After the file was transferred to the inquiry stage, the city issued its revised access decision. In that decision, the city stated that it had received representations from the affected party. It also stated that access was being granted, in part, to the single responsive record, and that access to portions of the record was denied on the basis of the exemptions in section 8(1)(b), (c) and (i) (law enforcement), 10(1)(a) and (c) (third party information), and 13 (danger to safety or health). It also stated that access to a portion of the record was denied on the basis that it is not responsive to the request.

[8] In addition, the city noted that the affected party had 30 days to appeal the city's decision to provide partial access to the record.

[9] Following the 30 day period of time, and in the absence of an appeal of the city's decision by the affected party, the city granted access to portions of the record at issue.

[10] The appellant confirmed that he wished to continue with the appeal.

[11] As a result, the record at issue in this appeal is the withheld portions of the three-page record responsive to the request.

[12] I sent a Notice of Inquiry to the city and the affected party, initially, and received representations from both parties. After reviewing the representations, I decided it was not necessary to hear from the appellant before issuing this order.

[13] In this order, I find that the withheld portions of the record do not qualify for exemption under the *Act*. I also find that the whole record is responsive to the request, and order the city to issue an access decision regarding the portion that was identified as non-responsive.

RECORD:

[14] The record remaining at issue consists of the withheld portions of a three-page report from Toronto Water, Environmental Monitoring & Protection.[1]

[15] The withheld portions of this report all consist of a summary of comments made during a meeting involving various city representatives and the affected party. The only portions remaining at issue are the following:

- severance 1: three sentences severed from the last paragraph on page one;
- severance 2: two sentences severed from page two (the third and fourth sentences after the title "Additional comment 1");
- severance 3: three sentences severed from page two (the fifth, sixth and seventh sentences after the title "Additional comment 1");
- severance 4: two sentences severed from page two (the ninth and tenth sentences after the title "Additional comment 1");
- severance 5: two sentences severed from page two (the sixteenth and seventeenth sentences after the title "Additional comment 1");
- severance 6: three sentences severed from page two (the nineteenth, twentieth and twenty-first sentences after the title "Additional comment 1");
- severance 7: two sentences severed from page two (the twelfth and thirteenth sentences after the title "Additional comment 2");
- severance 8: one sentence severed from page two (the first sentence after the heading "Tasks");
- severance 9: one sentence severed from page two (the second sentence after the heading "Tasks");

[1] Although the document is identified as a three-page report, the last page is largely blank.

ISSUES:

A: Is the information in severance 3 responsive to the request?

B: Do the mandatory exemptions at sections 10(1)(a), (b) and/or (c) apply to the withheld portions of the record?

C: Do the discretionary law enforcement exemptions at sections 8(1)(b), 8(1)(c) and/or 8(1)(i) apply to the severances for which they are claimed?

D: Does the information in the records qualify for exemption under section 13 of the *Act*?

DISCUSSION:

Issue A: Is the information in severance 3 responsive to the request?

[16] As identified above, the city takes the position that certain information contained in the record is not responsive to the request.

[17] The request resulting in this appeal is for access to "Toronto Water, Environment Monitoring and Protection Unit records, including but not limited to e-mails, notes, meeting minutes, calendar items, etc. related to a meeting or meetings between Toronto Water managers and the mayor's office for [an identified period of time]." The record at issue in this appeal, which consists of a summary of the comments made during a meeting involving various city representatives and the affected party, is clearly responsive to the request.

[18] However, the city takes the position that a portion of the record (severance 3 identified above) is not responsive to the access request. The city reviews previous orders of this office which confirm that, to be considered responsive to a request, information must "reasonably relate" to the request.[2] It then states that it determined that the scope of the current request is for documents relating to the identified affected party.

[19] The city explains that the requester has made a series of requests, all of which relate to the affected party and, in light of this "pattern of conduct," the city interpreted the current request as being related to the same subject matter as the other requests. The city states that it took a "broad and liberal interpretation" to the scope of this request, and that "the only limitation on the scope of the request, was to interpret the

[2] The city refers to Order P-880 and PO-2661.

request as being limited to meetings which related to the same subject matter as were the subject of the requester's other requests."

[20] With respect to severance 3 of the record, the city states:

> The portion in question reflects a conversation between two attendees at the meeting in question about another outstanding matter. This other matter was entirely unrelated to the specific matter concerning the Affected Party. … The person responsible for the Report indicated the comments on this other unrelated matter. There was a question posed about whether there was a relationship between the particulars of the unrelated matter, and the matter concerning the affected party - the answer was that there was not a relationship.
>
> This exchange about a potential relationship between the two matters was not redacted from the Report. The person responsible for the Report recorded the comment that indicated the absence of any connection between the redacted matter and the matter concerning the affected party. The requester has this comment and so should be aware that the redacted portion deals with a matter that is not the same as the subject matter of the request as understood by the City. The only comment redacted as non-responsive is the portion that dealt exclusively with the particulars of a matter unrelated to the affected party.

[21] The city then states that the only way in which this portion of the record could be responsive to the request would be if the request were interpreted to have the "expanded scope' of being a request for records relating to any meeting on any subject, where managers of Toronto Water and representatives of the mayor's Office were present during the specified time period.

[22] I do not accept the city's position on this point. Previous orders have established that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Adjudicator Fineberg also made the following general statement regarding the approach an institution should take in interpreting a request, which was cited with approval by Commissioner Ann Cavoukian in Order PO-1730:

> ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request.

[23] I adopt these principles, and apply them to the circumstances of this appeal.

[24] The request in this appeal is for access to Toronto Water, Environment Monitoring and Protection Unit records, including notes and meeting minutes related to a meeting between Toronto Water managers and the mayor's office for the period of August 13, 2012 to August 15, 2012. The record itself, in full, clearly fits within the parameters of the request.

[25] The city argues that it interpreted the request with reference to other requests made by the requester, which relate specifically to the affected party and that, because of these other requests, severance 3 is not responsive to the request. In my view, this interpretation of the request is an overly narrow and restrictive one. I find that by interpreting the request in the way it did, the city unilaterally limited the scope of the request. In these circumstances, at the very least, the city ought to have contacted the requester to clarify what was being requested, as required by section 17(2) of the *Act*.

[26] As a result, I find that the scope of the appellant's request includes severance 3, and I will order the city to issue an access decision on it.

Issue B: Do the mandatory exemptions at sections 10(1)(a), (b) and/or (c) apply to the withheld portions of the record?

[27] The city takes the position that severance 5 qualifies for exemption under section 10(1)(a). The affected party takes the position that all of the severances qualify for exemption under sections 10(1)(a), (b) and (c). These sections read:

> 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, where 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;

[28] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[4]

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a) and/or (c) of section 10(1) will occur.

[30] I will now review severances 1, 2 and 4 through 9 and the representations of the parties to determine if the three-part test under section 10(1) has been established.

[31] In the circumstances, I will begin by reviewing the application of the third part of the three-part test.

Part 3: harms

[32] To meet this part of the test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a reasonable expectation of harm.[5] Evidence amounting to speculation of possible harm is not sufficient.[6]

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[3] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[5] In the recent decision of the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* (*Community Safety*), 2014 SCC 31, the Court discussed the standard of proof required to establish the risk of harm from disclosure under access to information legislation, and provided general guidance on the application of exemptions that are based on risk of harm. The Court concluded that there should be one consistent formulation of the standard, requiring that a party resisting disclosure provide evidence establishing a "reasonable expectation of probable harm". While proposing this single formulation, the Court also recognized that there was "no practical difference" between it, and the formulation applied by this office in previous decisions (para 53).
[6] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[33] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[7]

Section 10(1)(a) and (c)

[34] The city's representations on this part of the test for section 10(1)(a) as it relates to severance 5 read:

> [The information in severance 5] is specific technical information relating to chemicals present in wastewater testing. The information was [taken from] sample results taken by the City of the effluent from the Affected Party.
>
> … The sample results and strength of wastewater could aid in competitors in reverse engineering of product produced by the Affected Party.

[35] The city then states that the affected party is a leading manufacturer of particular types of products from highly protected company formulas, and that it would not expect the city to release the sample results of the wastewater leaving the site, to allow their competitors to reverse-engineer their products or cause harm to the company.

[36] The city also states that the affected party has not consented to the disclosure of the information. In addition, in its representations the city also refers to the possibility that information contained in effluent samples could constitute a "trade secret." It states:

> Depending on the particulars of the content, this information could constitute a trade secret. (For example, imagine the effect of disclosure of technical results of effluent testing on the secret recipe for Coca-Cola [from] facilities where it is prepared.)

[37] The affected party argues that all of the severances contain information which qualifies for exemption under sections 10(1)(a) and (c). It provides confidential representations in support of its position.[8] In addition to referring generally to the wording of the harms set out in section 10(1)(a) and (c), and asserting that these

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[7] Order PO-2020.

[8] Because it was not necessary for me to share the affected party's representations with the appellant, I did not address issues regarding the sharing of the affected party's representations, and will only refer generally to its submissions in this order.

harms will occur if the withheld portions of the records are disclosed, the affected party's remaining representations can generally be summarized as follows:

- the affected party is operating in a highly competitive marketplace;
- all of the withheld information relates to the affected party's operations;
- disclosure of certain information will reveal information about its operations and facilities, and could result in harm to the affected party;
- disclosure will interfere with certain identified negotiations;
- some of the withheld information is inaccurate and/or disputed, and disclosure would prejudice the affected party.

Analysis and findings

[38] On my review of the representations of the city and the affected party, I am not satisfied that the disclosure of the withheld information would result in the harms identified in sections 10(1)(a) and (c). Specifically, I have not been provided with sufficient evidence to satisfy me that the disclosure of the withheld portions of the record could reasonably be expected to prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations, nor that disclosure would result in undue loss or gain to any person.

[39] With respect to the information in severance 5, I have considered the city's representations on the test for section 10(1)(a) as it relates to severance 5, as well as the affected party's representations on this severance. I accept the city's position that this severance contains references to specific technical information taken from sample results from the effluent from the affected party. However, I do not accept the representations which argue that disclosure of this specific information could result in the reverse engineering of the affected party's product, and that the harms in section 10(1)(a) or (c) could reasonably be expected to result from disclosure.

[40] Although severance 5 does contain some specific technical information, by itself, this information is, nonetheless, very general in nature. It does not contain details about the various chemicals found in the effluent; rather, it refers to whether the effluent contains levels of general readings above or below certain levels. Without further detailed evidence that the disclosure of this information could result in the identified harms, I do not accept that the information in this severance qualifies for exemption under section 10(1)(a) or (c). In addition, I reject the city's position that the information in this severance could constitute a "trade secret." Even the city acknowledges that the disclosure of technical results of effluent testing from certain facilities depends on "the particulars of the content" of such testing. In the circumstances, given the information contained in severance 5, I find that this information does not constitute a trade secret, nor that disclosure could result in the identified harms.

[41] I have also considered the affected party's representations on possible harms under section 10(1)(a) and (c), which I have summarized above. In the circumstances, I find that the affected party has not satisfied me that the harms in sections 10(1)(a) or (c) are established because:

- the information contained in the withheld portions is general in nature, and disclosure will not result in the identified harms;
- a number of the references to certain terms contained in the record relate to information which has been disclosed in the released portions of the record, and I find that the further release of the withheld portions would not result in any further harms;
- references to certain information is information of a general nature, and the representations are also general. I am not satisfied that I have been provided with sufficient evidence to establish that disclosure of the general information contained in the withheld portions of the record would reveal the types of information referred to by the affected party;
- the affected party has also not satisfied me that the disclosure of the withheld information would result in the harms to certain identified contractual negotiations.

[42] In summary, I find that the harms in sections 10(1)(a) or (c) have not been established for severances 1, 2 and 4 through 9, and that these portions of the record do not qualify for exemption under those sections.

[43] The affected party also takes the position that the exemption in section 10(1)(b) applies, and provides confidential representations in support of its position.

[44] On my review of the representations of the affected party, and in light of the nature of the record at issue, I am not satisfied that the disclosure of the withheld portions of the record could reasonably be expected to result in similar information no longer being supplied to the city. To begin, much of the information in the withheld portions of the record refers only in a general way to information which might have been "supplied" by the affected party. As identified above, the record at issue consists of a summary of comments made during a meeting involving various city representatives and the affected party. Some of the severances reference information which may be said to be "supplied" by the affected party, but many of the severances only provide comments or observations of other individuals.

[45] With respect to the information which may be considered to have been "supplied" by the affected party, I find that I have not been provided with sufficient evidence to establish that section 10(1)(b) applies. Furthermore, as I also noted above, considerable information from the record has already been disclosed, and it is not clear to me how the disclosure of the remaining portions of the record would result in the harms in section 10(1)(b). The affected party's position, in my view, focusses more on

the harms which may result from disclosure of the information which is not at issue in this appeal.

[46] In summary, I find that severances 1, 2 and 4 through 9 do not qualify for exemption under section 10(1).

Issue C. Do the discretionary law enforcement exemptions at sections 8(1)(b), 8(1)(c) and/or 8(1)(i) apply to the severances for which they are claimed?

[47] The city takes the position that the discretionary exemptions at sections 8(1)(b), (c) and/or (i) apply to certain severances made to the record. These sections read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure

[48] 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)

[49] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law[9]
- a police investigation into a possible violation of the *Criminal Code*[10]
- a children's aid society investigation under the *Child and Family Services Act*[11]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*[12]

[50] The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.[13]
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.[14]

[51] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[15]

[52] The institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm".[16] Evidence amounting to speculation of possible harm is not sufficient.[17]

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[9] Orders M-16 and MO-1245.
[10] Orders M-202 and PO-2085.
[11] Order MO-1416.
[12] Order MO-1337-I.
[13] Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).
[14] Order P-1117.
[15] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[16] See footnote 5, above.
[17] 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.).

[53] 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* fulfillment of the requirements of the exemption.[18]

Representations and findings

[54] The city begins by submitting that the enforcement of municipal regulations and bylaws has been routinely determined to be "law enforcement" for the purposes of the *Act*. It then states:

> … Toronto Water was engaged in the enforcement of the City's regulations concerning water, for which a penalty could be imposed before a tribunal. For example, Chapter 850, of the City of Toronto Municipal Code which has regulations to prohibit contamination of waterworks, and establishes that violations of these prohibitions are offences for which penalties may be imposed. The City also has municipal regulations on the utilization of sewers, Chapter 681, that prohibits the "spilling" of chemicals into municipal sewers and imposes penalties for such actions. The City submits that the actions of the City, specifically Toronto Water, which are described in the Report, for which the exemptions are claimed are "law enforcement" as this term has been applied …

[55] As noted above, the term "law enforcement" has been found to apply to a municipality's investigation into a possible violation of a municipal by-law.[19] In the circumstances of this appeal, I accept the city's position that the enforcement of the municipal regulations and bylaws addressed in the record at issue is "law enforcement" for the purpose of section 8(1) of the *Act*.

[56] The city provides separate representations on the application of the three referenced exemptions in section 8(1), and I will review each in turn.

Section 8(1)(b) – interfere with an investigation

[57] The city takes the position that the fourth and fifth severances qualify for exemption under this section. It states:

> … In the current situation, … the City received a complaint of an apparent violation of the City's by-laws. … [I]n response to this complaint, … the City commenced an investigation to determine the relevant facts in relation to this complaint.

[18] Order PO-2040; *Ontario (Attorney General) v. Fineberg.*
[19] Orders M-16 and MO-1245.

> The complaint being a potential spill, which resulted in "foaming" of water in an area of the City which contains a City Park. The appropriate staff commenced activities to determine the source of the foam, in the park. The intention was to determine the cause of the "foaming" and to take the steps necessary to enforce the relevant municipal regulations …

[58] The city then provides confidential information about its activities in this matter in support of its position that disclosure of these two severances would "interfere with an investigation" for the purpose of section 8(1)(b). It also states:

> As the un-redacted portions of the Record notes - the Affected Party appears to have an opinion that the source of the complaint would not be from the actions of the Affected Party. …

[59] After providing further confidential representations, the city states:

> … disclosure of information [of the type contained in the fourth and fifth severances] … may compromise the investigation. For example, disclosure of this information would reveal the conclusions of the City in the current investigation to the public. This would allow another party to utilize the results and the conclusions drawn in furtherance of efforts to avoid detection reducing the efficacy of the City's investigations. Therefore the City believes that section 8(1)(b) was properly applied to these redacted portions.

[60] The city also provides additional confidential information in the footnotes to its representations in support of its position that section 8(1)(b) applies to the two severances.

Findings

[61] Previous orders have confirmed that, in order for section 8(1)(b) to apply, the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations.[20] The investigation in question must be ongoing or in existence.[21]

[62] I have carefully reviewed the city's representations, including the confidential representations on the application of section 8(1)(b). I have also reviewed the brief portions of the record which the city claims qualify under section 8(1)(b).

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[20] Order PO-2085.
[21] Order PO-2657.

[63] I accept the city's general arguments that disclosure of specific information about an investigation may allow other parties to interfere with or otherwise compromise an ongoing investigation. However, on my review of the particular information contained in the withheld portions of the record, I am not persuaded that this possible interference could reasonably be expected to result from disclosure of these portions of the record. The information in the withheld portions identifies certain findings or conclusions made. It is not particularly detailed, and its nature is not such that other parties could reasonably be expected to use this information to interfere with an investigation. I also note that the general information about this investigation is public, and that portions of the record have already been disclosed. I am not persuaded that the disclosure of the remaining portions of the records for which the section 8(1)(b) exemption is claimed (the fourth and fifth severances) could result in the harms under section 8(1)(b).

[64] As a result, I find that the exemption in section 8(1)(b) does not apply to the withheld portions of the record for which it is claimed.

Section 8(1)(c): investigative techniques and procedures

[65] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[22]

[66] The city takes the position that disclosure of the fifth, sixth, seventh, eighth, and ninth redacted portions could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement by the city.

[67] With respect to redactions six, eight and nine, the city states that these portions deal with a particular type of technique/procedure, and that this is a process is not generally known to the public. It also identifies that this procedure is investigative in nature, and describes it in some more detail. The city then describes how, in its view, disclosure of the technique is likely to hinder or compromise its effective utilization. It identifies that if this technique is revealed and made public, others may find ways to avoid detection or to "sabotage" the technique by illegally taking actions to frustrate the efficacy of the technique and its results. The city provides a possible scenario of how this sabotage could be achieved.

[68] Regarding redactions five and seven, the city states that these redactions deal with another particular investigative technique and procedure that is not generally known to the public. The city describes the technique and its use, and identifies how

[22] Orders P-170, P-1487, MO-2347-I and PO-2751.

disclosure of the technique could hinder or compromise its effective utilization, by allowing parties to foil its effectiveness.

[69] In the circumstances, I am not satisfied that section 8(1)(c) applies. Although I accept the city's position that there are references made in these severances to particular investigative techniques, I do not accept its position that the investigative techniques referenced in these redactions is not generally known. It appears to me that these referenced techniques are widely known. I also note that the city's representations refer specifically to these techniques in the portions of its representations which it was prepared to share.

[70] In the circumstances, I am not satisfied that the exemption in section 8(1)(c) applies to the severances for which it is claimed.

Section 8(1)(i): security of a building, vehicle, system or procedure

[71] 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.[23]

[72] The city states that, in this appeal, it is applying this provision to prevent disclosure that could endanger the security of the city's wastewater system. It states:

> The City's Sanitary Trunk sewer leads to a wastewater treatment plant. Disclosure of the redacted portions can cause danger to a system, designed to safeguard the public health through the City's sewage/wastewater collections system and City's sewage wastewater treatment plant buildings. In particular, disclosure of the location of the City trunk sewer could cause danger, if it was made known. This includes danger to the public through terrorism, or through individuals attempting to introduce contaminants to harm specific subsets of the public, for example introducing containments to damage the reputation of the Affected Party.
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> Disclosure of the location of Toronto Water infrastructure may risk the security of the City's water supply and wastewater treatment system. For example, the location and manner of access into manholes and trunk sewers as well as the type of sewer, and grade difference may provide persons intent on introducing damaging or toxic substances or objects [with] information necessary to access and put at risk the City's water and wastewater systems and the general public.

[23] Orders P-900 and PO-2461.

[73] The city then states that release of information regarding its trunk sewer location could put the city at risk from terrorism or damage. It identifies some information about its system, and states that the introduction of contaminants into the city's wastewater system could cause non-compliance with the Ministry of the Environment's regulations for the city's wastewater treatment plants, which may in turn affect the drinking water quality provided to the public.

[74] The city then identifies further possible harms that could result from disclosure of information about its underground sewer infrastructure. These include:

- disclosure may encourage individuals to access, and facilitate their access to, the city's underground sewer infrastructure for the purposes of exploring (an activity known as "urban spelunking"), which would pose significant risks to such individuals and emergency personnel who may be called to rescue them, and which may cause damage to the city's underground infrastructure;
- disclosure of information concerning the entrance to the sewer system may injure persons who wish to gain access to the system out of personal interest;
- "urban spelunking" or "urban exploration" presents various risks and inherent dangers, including physical danger;
- urban exploring which involves entry into sewers constitutes trespassing and breaking and entering and is prohibited under the city's Municipal Code;
- one of the biggest dangers faced by persons entering wastewater systems or sewers is "confined spaces," which involve many dangers and hazards, including atmospheric air hazards;
- sewer gases can be both toxic and explosive, are invisible and often odourless, and can create an oxygen deficient atmosphere;
- entry into sewers can result in illness from viral, bacterial or parasitic microorganisms, or from industrial or commercial sources;
- drowning is also a serious threat at wastewater facilities.

[75] The city also states that, with respect to the concern about terrorism related to information facilitating access to sewer systems, the U.S. National Counterterrorism Center (NCC) warns that photographs shot by urban explorers could pose a national security risk by aiding terrorists in their surveillance and planning.

[76] The city provides attachments to its representations in support of some of the information it provides on the dangers resulting from urban spelunking, and the terrorism concerns.

Findings

[77] 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]

[78] In this appeal, I have not been provided with sufficient evidence to satisfy me that there is a logical connection between the disclosure of the information in the record and the possible harms identified by the city. I make this finding primarily on my review of the withheld information in the record.

[79] To begin, I accept the city's position that its sewer system is a system which reasonably requires protection. I also accept that some of the concerns identified by the city, including the possibility of acts of terrorism, contamination of potable water, or illegal access to the system for various purposes, are the sorts of harms that section 8(1)(i) is designed to protect against. If the witheld portions of the record at issue included information which, if disclosed, could reasonably be expected to result in these actions taking place, I may well have found that section 8(1)(i) would apply to this type of information.

[80] However, notwithstanding the city's lengthy and detailed representations on the possible harms that may result from these actions, I am not satisified that the disclosure of the withheld portions of the records could reasonably be expected to reveal any information that would assist parties in undertaking the actions identified by the city.

[81] The city's representations do not refer to specific information in the record. I note that, in the redacted record provided to this office, the city only indicates one withheld portion of the record (severance 1), as qualifying for exemption under this section. That severance does refer to a sanitary trunk sewer, a specific elevation difference between two locations, and a general reference to an egress point (which has already been made public); however, this is the only information in this severance or, indeed, in any severances to the record, which provide any detail about the city's sewer system. The withheld records do not contain any other details about the layout of the sewer system, or particular ingress or egress points.

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

[82] In these circumstances, I am not satisfied that the withheld portions of the record are sufficiently connected with the protection of the sewer system such that their disclosure could reasonably be expected to result in the endangerment section 8(1)(i) seeks to prevent. The information contained in the record relating to the sewer system is simply too general, and not sufficiently detailed, to reasonably expect that its disclosure could result in the harms identified in section 8(1)(i).

[83] In summary, I find that the withheld portions of the record do not qualify for exemption under section 8(1) of the *Act*.

Issue D. Does the information in the records qualify for exemption under section 13 of the *Act*?

[84] The city takes the position that any information in the records relating to the particulars of the wastewater system is exempt under section 13 of the *Act*, which reads:

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

[85] For the section 13 exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result.[26] 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.[27]

[86] The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[28]

Representations

[87] With respect to the application of the section 13 exemption, the city states that this section applies to records which, if disclosed, could harm an individual. It also refers to previous decisions of this office which have concluded that the reference to an individual is not necessarily directed at an "identifiable" individual. The city then submits:

> As noted [in the representations for the application of section 8(1)(i), above], the City submits that providing public access to information which

[26] See footnote 5, above.
[27] *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.).
[28] Order PO-1817-R.

> facilitates access to the City's wastewater system exposes individuals who rely on the security of the City's wastewater to a potential risk of harm, for example, the harm resulting from unknown contamination of the City's water supply. This is because disclosure of the redacted portions will allow individuals who wish to access [the] wastewater system for the purposes of attacking the security of the system with an increased ease of entry, and therefore an increased risk of harm to their intended targets. Additionally, increased ease of unauthorized access to the City's water treatment facilities and system to the members of the public will provide an increased risk to the health and safety of the members of the public who access the system. This is because, as noted above, sewers and the remainder of the wastewater system is a location filled with numerous intrinsic potential dangers that must be guarded against by individuals who enter the system.
>
> The City submits that for these reasons - as noted above with respect to section 8(1)(i) - disclosure of the information relating to the particulars of the wastewater system would be properly withheld [under section 13].

[88] I have found above that the withheld portions of the record did not qualify for exemption under section 8(1)(i), primarily because the information contained in the withheld portions of the record relating to the sewer system is simply too general, and not sufficiently detailed, to reasonably expect that its disclosure could result in the harms identified in section 8(1)(i). For the same reasons, I find that the disclosure of the withheld portions of the records could not reasonably be expected to seriously threaten the safety or health of an individual. As a result, I find that they do not qualify for exemption under section 13.

Additional Matter

[89] As a final matter, I note that the affected party suggests that one of the statements attributed to a representative of the affected party contains that individual's opinion about a matter, and therefore contains his "personal information" and that the exemption in section 14 applies to this statement.

[90] 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. 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.

[91] The affected party's representative is clearly involved in the matters discussed in the record in a business or professional capacity, and attended the meeting in that capacity. The record does not, therefore, contain information "about" this individual. Furthermore, on my review of the withheld portions of the record, I am not satisfied that disclosure of the withheld portions would reveal something of a personal nature about this individual.

[92] As a result, because the record does not contain "personal information" as defined in section 2(1) of the *Act*, it cannot qualify for exemption under section 14(1), which only applies to personal information.

ORDER:

1. I order the city to issue an access decision on severance 3 of the record, treating the date of this order as the date of the request. For the sake of clarity, I have provided the city with a copy of page 2 of the record, highlighting in green the portion of the record that comprises severance 3.

2. I find that the remaining withheld portions of the record do not qualify for exemption under the *Act*, and order the city to provide the appellant with a copy of them by **October 3, 2014** but not before **September 29, 2014**.

Original signed by: August 28, 2014
Frank DeVries
Adjudicator