Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3194

Appeal MA14-35

City of Toronto

May 8, 2015

Summary: The requester sought access under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) to email records from six named city employees containing the keywords of a named address and the requester's name. The city denied access to certain pages or portions of pages of the records, citing the mandatory personal privacy exemption in section 14(1) and the discretionary solicitor-client exemption in section 12. The city also withheld certain other pages of the records, as it claimed that they were not subject to *MFIPPA* by reason of section 173 of the *City of Toronto Act*, 2006 (*COTA*).

In this order, the adjudicator upholds the city's decision as to the information it withheld under sections 12 and 14(1). She does not uphold its decision that certain pages of the records are subject to *COTA* and not subject to *MFIPPA*. She also upholds the city's search for responsive records and its preparation fee of $71.00.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 12, 14(1), 17(1), 38(a), 45(1)(b), 53(1); *City of Toronto Act, 2006*, section 173.

Orders and Investigation Reports Considered: Order MO-2629-R.

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following:

> All my personal records, from January 1, 2007 to August 26, 2013 inclusive. From, but not limited to, the Building and the Municipal Licensing Standards (MLS) divisions of the City of North York, Toronto and Etobicoke. Including, but not limited to, electronic, printed and written.

[2] The requester further clarified his request as follows:

> … copy of all e-mails containing the key words "[name of requester]," "[two specific addresses]" for the time period of September 1, 2007 to September 4, 2013 from the following City staff:
>
> [20 named individuals]

[3] The city issued an interim decision regarding access and a fee estimate as follows:

- Access is granted in full to the sample of records provided by staff of Toronto Building with respect to [named individual]'s e-mails.
- Access is granted in part to the sample of records provided by staff of Municipal Licensing & Standards with respect to [named individual]'s e-mails. Access is denied to pages 43 to 47 under section 12 of the *Act*.
- Access is granted in part to the records provided by staff of Parks, Forestry & Recreation with respect to [named individual]'s e-mails. Access is denied to pages 106 to 111 and 114 to 127 under section 173 of the *City of Toronto Act* (*COTA*).
- Access is granted in full to the records provided by [named councilor]'s office.
- Access is granted in full to the sample of records provided by [named councilor]'s office including [named individual]'s e-mails. Please note that [named councilor]'s office did not include e-mails to or from yourself.
- Access is granted in full to the sample of records provided by staff of the Deputy City Manager's Office with respect to [named individual]'s e-mails.

- Access is denied in full to records provided by staff of the Ombudsman's Office under section 173 of the *City of Toronto Act*.

  Section 12 has been relied upon to sever portions of records that are subject to solicitor-client privilege.

  Section 173 of the *City of Toronto Act, 2006* has been relied upon to deny access under MFIPPA to page number 51-54 of the records, which are related to matters which came before the Ombudsman's Office during the performance of her duties.

  …

  A copy of the sample records is enclosed. As a courtesy, we are providing these free of charge.

[4] The city advised the requester that the estimated fee for processing his request was $78,360.00, which included a fee estimate of $77,760.00 for locating and restoring 18 months of backup tapes for 20 city staff.

[5] The requester then narrowed his request for access to the following, which was confirmed with him in the city's final access decision of December 16, 2013, as follows:

> … a copy of all email records from [six named city employees] containing the keywords [named address] and [requester's name]. You also indicated that you only required records that did not require restoration with a timeframe from May 2011 to October 17, 2013.

[6] The city then issued a final access decision and fee, which stated:

> Access is granted in part to the responsive records provided by staff of Toronto Building and Municipal Licensing & Standards. Access is denied to the remaining parts of these records under section 12 and 14 of the *Act* as well as section 173 of the *City of Toronto Act, 2006*…
>
> Please be advised that pages 1-207 were previously released to you as sample records. Within those pages access was granted in full to a sample of records provided by staff of Toronto Building with respect to [named individual]'s e-mails.
>
> Furthermore, staff of Toronto Building advised that despite a thorough search, they were unable to locate any e-mail records from [named individual] between the timeframe requested. Access therefore, cannot be granted as the records do not exist.

> ...
> Cost of photocopying $0.20 per page - 1513 pages
> (less 20% duplicates) $242.00
> Cost of severing $30.00 per hour – 71 pages
> at 2 minutes per page $ 71.00
> Total: $313.00
>
> In addition to the 1513 pages mentioned above, staff of Municipal Licensing & Standards also provided 472 pages from the Groupwise deleted e-mail folder of [named individual]. Please advise [named individual] before January 16, 2014 if you wish to obtain these records as well.

[7] The requester did not respond to the city by the specified date regarding the 472 pages from the Groupwise deleted e-mail folder for a named individual. Accordingly, these records will not be addressed in this appeal.

[8] The requester (now the appellant) appealed the decision of the city to deny access to the withheld portions of the records and the fee charged.

[9] During mediation, the appellant explained that he believed the fee charged by the city was excessive, as in his view, the information he had requested qualified as his personal information. The appellant did not believe that the city should be able to charge him the $71.00 fee for preparation time.

[10] The appellant informed the mediator that he did not believe the city conducted a reasonable search for responsive records related to a named individual.

[11] The appellant also informed the mediator that he wanted to pursue access to all of the information that had been withheld in relation to his narrowed request.

[12] As mediation did not resolve the appeal, this file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[13] In this order, I uphold the city's decision with respect to the information it withheld under sections 12 and 14(1). I do not uphold its decision that certain pages of the records are subject to *COTA* and not subject to *MFIPPA*. I also uphold the city's search for responsive records and its preparation fee of $71.00.

RECORDS:

[14] The records remaining at issue are the withheld portions of email records relating to six named individuals, the appellant and a named address.

ISSUES:

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

B. Does the discretionary exemption at section 12, read in conjunction with section 38(a), apply to pages 405-413, 415-422, 458-472, 477-490, 492, 496-534, 546-551, 555-558, 563-570, 572-630, 1096-1097, 1135-1136, 1194, 1508, 1528-1529, 1817-1818, 1835, 1840-1844 of the records?

C. Did the institution exercise its discretion under section 38(a), in conjunction with section 12? If so, should this office uphold the exercise of discretion?

D. Does the mandatory personal privacy exemption at section 14(1) apply to the insurance policy number?

E. Are pages 378-384, 457, and 473-476 of the records not accessible under *MFIPPA* by virtue of section 53(1) of *MFIPPA* as a result of the confidentiality provision in section 173(1) of the *City of Toronto Act*?

F. Should the $71.00 fee for preparation time be upheld?

G. Did the institution conduct a reasonable search for records?

DISCUSSION:

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

[15] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

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

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their

[1] Order 11.

> dwelling and the contact information for the individual relates to that dwelling.

[18] 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.[2]

[19] 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.[3]

[20] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[21] The city states that the records consist of emails about the appellant's neighbor's property and contain the name, telephone numbers and email address of the owners of the property in question, and likely contain that same information relating to the appellant. The city states:

> In the current situation, the responsive records, email and other correspondence from the City's Building and Municipal Licensing & Standards ("MLS") Divisions, would, at most, identify the names, phone numbers, and email address of the property owner. This information generally would be contained either in the header or email closing of the records. The actual content of the records is property related, i.e., they are records "about" the named property.

[22] The appellant did not address this issue in his representations.

Analysis/Findings

[23] The city has applied the mandatory personal privacy exemption in section 14(1) to portions of 71 pages of records and has severed a cell phone number and the insurance policy number for a property from these pages. Because the appellant already has this cell phone number, it is no longer at issue.

[24] Concerning the insurance policy number, this is an insurance policy number for a home belonging to a neighbour of the appellant. I find that the insurance policy number

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

qualifies as the personal information of the neighbour in accordance with paragraph (c) of the definition of personal information in section 2(1).

[25] The records for which the city has claimed section 14(1) do not contain the personal information of the appellant. Therefore, the discretionary personal privacy exemption in section 38(b) cannot apply. I will consider whether the mandatory personal privacy exemption in section 14(1) applies to the insurance policy number below.

[26] The city also submits that the records for which it has claimed the discretionary solicitor-client privilege exemption in section 12 contain the personal information of the appellant and therefore, section 38(a) applies to exempt them from disclosure. It describes these records as emails sent to or by specified city staff concerning the appellant, who is involved in various disputes involving the city, or emails which contain a specific municipal address which has been in issue with respect to some of these disputes.

[27] Based on my review of the records for which the city has claimed section 12, in conjunction with section 38(a), I agree with the city that these records contain the personal information of the appellant, namely the personal opinions or views of the appellant that do not relate to another individual, in accordance with paragraph (e) of the definition of personal information in section 2(1).

B. Does the discretionary exemption at section 12, read in conjunction with section 38(a), apply to pages 405-413, 415-422, 458-472, 477-490, 492, 496-534, 546-551, 555-558, 563-570, 572-630, 1096-1097, 1135-1136, 1194, 1508, 1528-1529, 1817-1818, 1835, 1840-1844 of the records?

[28] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[29] Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information.

[30] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[5]

[31] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[32] In this case, the institution relies on section 38(a) in conjunction with section 12. Section 12 states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[33] The city provided very detailed representations on the application of section 12 to these records, which are 180 pages of emails. They include substantively "duplicative" emails and entries in "email chains" incorporating previous emails. I have considered these representations and I am listing the main points in this order.

[34] The city states that there are emails that contain the name of the appellant, who is involved in various disputes involving the city, as well as emails that contain a specific municipal address which has been the focus of some of the disputes. The disputes concern a difference of opinion on various issues relating to:

> a. The construction of, and corresponding inspection, by staff assigned to Toronto Building by requiring a building permit for a garage, and,
>
> b. The compliance with specific municipal regulations concerning certain structures (another garage and retaining wall) on a neighbouring property.

[35] In addition, the city states that the parties to these disputes, or their representatives, advised the city that specific actions, or inactions, of the city with respect to some issues, may expose the city to claims of liability.

[36] In response to these issues, city states that its staff in various divisions obtained advice and assistance from the city's internal solicitors in the city's Legal Services Division (the LSD).

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[5] Order M-352.

[37] The city grouped the records into two "groups":

- Group A - Correspondence, or attachments to correspondence, between the LSD and other city staff concerning legal advice provided by the LSD; and,

- Group B- Correspondence, or attachments to correspondence, between city staff not including the LSD which would directly or indirectly reveal the content of documents collected or received by the city's solicitors for the purpose of formulating legal advice or preparing for potential litigation.

[38] The city states that the Group A and B Records are all records which relate to the participation of city staff in a continuum of consultations with the responsible solicitors. It also states that providing access to certain Group A and B records would reveal the preparation of materials, which would be used in preparing for, or engaging in potential litigation. It further states that the records for which section 12 has been claimed represent a continuum of correspondence in which a variety of legal advice, opinions, and suggestions were either requested from, or provided by, specific solicitors employed by the city to provide legal assistance, in relation to a myriad of developments in relation to the disputes.

[39] The appellant appears to dispute the application of section 12 to the records, but did not provide direct representations on this issue.

Analysis/Findings

[40] Section 12 contains two branches. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.[6]

[41] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[42] Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[43] I will first consider the application of branch 2 solicitor-client communication privilege.

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

[44] Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

[45] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[7]

[46] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[8]

[47] I have reviewed all of the records for which the section 12 exemption has been claimed by the city. The records are all email chains where legal advice was sought or received by city staff from city employed solicitors. A few of the email chains contain attachments of the documents referred to in the email chains.

[48] All of the email chains and attachments for which section 12 has been claimed form part of the continuum of communications between the city's solicitors and city staff as their clients. Solicitor-client privilege applies as it applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[9]

[49] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[10] In this appeal, I also find that the city has demonstrated that the email communications that form the records at issue were made in confidence. I further find that this privilege has not been waived or lost.

[50] Accordingly, I find that all of the records for which section 38(a), read in conjunction with section 12, has been claimed are subject to the statutory branch 2 solicitor-client communication privilege and, subject to my review of the city's exercise of discretion, are exempt.

[51] As I have found the records subject to branch 2 solicitor-client communication privilege, there is no need for me to consider whether they are also exempt under branch 2 litigation privilege or branch 1 of section 12.

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[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[8] Orders PO-2441, MO-2166 and MO-1925.
[9] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[10] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

C. Did the institution exercise its discretion under under section 38(a), in conjunction with section 12? If so, should this office uphold the exercise of discretion?

[52] The section 38(a) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[54] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] This office may not, however, substitute its own discretion for that of the institution.[12]

[55] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[13]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
    - the wording of the exemption and the interests it seeks to protect

[11] Order MO-1573.
[12] Section 43(2).
[13] Orders P-344 and MO-1573.

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

[56] The city provided detailed representations on the exercise of its discretion. It submits that in considering the application of section 38(a), in conjunction with section 12, the head consulted with staff members who were knowledgeable about the relevant issues concerning the content of the requested records and that the head took into account all of the relevant considerations listed above. The city states that:

> There is a need to balance the interests intended to be protected in section 12, and the public interest in disclosure of information concerning the operation of their municipal institutions. The city also recognizes that there is a need to balance the "near absolute" and fundamentally important interests sought to be protected of solicitor-client privilege with the important interest in providing individuals with access to personal information which may relate to the individual making the request. The city thoroughly deliberated these matters in considering the current request and used the discretionary exemptions as sparingly as possible to deny access in specific and limited instances. Where appropriate, the city has taken into account that the records contain the [appellant's] personal information, and has weighed the possible harm that could arise from disclosing solicitor-client privileged communications and information prepared for the dominant purpose of litigation against potential benefits

> to the public or the appellant from releasing the information and has decided against release.

[57] The appellant submits that the city exercised its discretion in bad faith. He states that:

> That the city willingly and obviously misapplied, and misrepresented, and exchanged their privilege of discretion for a tool to obscure and shield responsive records, cannot be rewarded nor condoned.

Analysis/Findings

[58] Based on my review of the records and the parties' submissions, I find that the city exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations, in denying access to records under section 38(a), in conjunction with section 12.

[59] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[14] the Supreme Court remitted back the institution's exercise of discretion under the solicitor-client privilege exemption under section 19 of the *Freedom of Information and Protection of Privacy Act*.[15] The Court explained its different approach to this exemption, as follows:

> We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:
>
> > . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, *and does not involve a balancing of interests on a case-by-case basis*. [Emphasis added; para. 35.]

[60] Given that I have found that the records for which section 12 has been claimed are all privileged communications, and the purpose of the solicitor-client communication privilege is to protect such communications, I find that the city properly exercised its discretion. Therefore, I am upholding the city's exercise of discretion under section 38(a), in conjunction with section 12, and find that the records for which this exemption has been claimed are exempt.

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[14] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII).

[15] Section 19 of the *Freedom of information and Protection of Privacy Act* (*FIPPA*) is the equivalent of section 12 of *MFIPPA*.

D. Does the mandatory personal privacy exemption at section 14(1) apply to the insurance policy number?

[61] Under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy under section 14(1)(f).

[62] If any of paragraphs (a) to (e) of section 14(1) apply, the personal privacy exemption is not available. If any of the paragraphs in section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14(1). Neither section 14(1)(a) to (e) or 14(4) apply in this appeal.

[63] Section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.[16]

[64] The city states that it has reviewed the factors at section 14(2) and submits that none apply that favour disclosure of the information at issue. As such, it is the city's position that there is no need to review the possible application of the presumptions in section 14(3) to the information at issue. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[65] The city states that because section 14(1) is a mandatory exemption and there are no factors favouring disclosure, it submits that disclosure of the other individual's personal information would constitute an unjustified invasion of his personal privacy, and that section 14(1) applies to the severed portion of the records.

[66] The appellant did not address the application of the personal privacy exemption in his representations.

[67] Based on my review of the information at issue, the insurance policy number, I agree with the city that there are no factors favouring disclosure of the insurance policy number at issue and that the mandatory personal privacy exemption in section 14(1) applies to exempt this information.

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[16] Order P-239.

E. Are pages 378-384, 457, and 473-476 of the records not accessible under *MFIPPA* by virtue of section 53(1) of *MFIPPA* as a result of the confidentiality provision in section 173(1) of the *City of Toronto Act?*

[68] The city denied access to pages 378-384, 457, and 473-476 of the records on the basis that they are related to matters which came before the city's Ombudsman's Office during the performance of her duties. The city relies on section 173 of the *City of Toronto Act* (*COTA*), which reads:

> (1) Subject to subsection (2), the Ombudsman and every person acting under the instructions of the Ombudsman shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.
>
> (2) The Ombudsman may disclose in any report made by him or her under this Part such matters as in the Ombudsman's opinion ought to be disclosed in order to establish grounds for his or her conclusions and recommendations.
>
> (3) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*. [Emphasis added by me].

[69] Section 53(1) of *MFIPPA* states:

> This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

[70] The city states that sections 173(1) and (2) of *COTA* meet important public policy objectives, including ensuring confidence in investigative processes, ongoing and future, as well as ensuring the protection of confidential or personal information. The city relies on Reconsideration Order MO-2629-R, where it was found that the prevailing section in that case, section 181 of *COTA*, was found to override the provisions of *MFIPPA*. The city also relies upon two emails from the city's Ombudsman (the Ombudsman) and her staff, confirming that the pages of the records at issue are covered under the confidentiality provision and thus cannot be released under any circumstances.

[71] The appellant did not provide representations on this issue.

Analysis/Findings

[72] Included in the appellant's request is a request for emails sent or received by the Ombudsman's staff, including the Ombudsman herself.

[73] As set out above, the city relies on Order MO-2629-R. The request in that order was for a copy of a specific report completed by the city's Auditor General. Access was denied on the basis that section 181 of *COTA* applied. This section is similar to section 173 of *COTA* and includes a section that states that it prevails over *MFIPPA*. Section 181 of *COTA* reads:

> (1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.
>
> (2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,
>
> (a) in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or
>
> (b) under the *Criminal Code* (Canada).
>
> (3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 179 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.
>
> (4) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*. [Emphasis added by me].

[74] In Order MO-2629-R, Senior Adjudicator John Higgins received representations on behalf of the city's "Independent Accountability Officials" or IAOs, the city's Auditor General, Integrity Commissioner, Lobbyist Registrar and Ombudsman. He then determined that any responsive Auditor General report in the hands of the Auditor General, or anyone acting under his instructions, would be subject to the confidentiality provision in section 181 of *COTA*, which in combination with section 53(1) of *MFIPPA* means that it would not be accessible under *MFIPPA*.

[75] In Order MO-2629-R, Senior Adjudicator John Higgins further stated that:

> On the other hand, if a report had been provided to a city staff member who does not act under the Auditor General's instructions in that regard, it would be subject to an access request under *MFIPPA*.

[76] Upon receipt of the initial request, the city emailed the Ombudsman indicating that it received a request for a copy of all emails from the Ombudsman and three of her staff containing the key words of the appellant's name and two individual addresses. The city told the Ombudsman that:

> If the requested information is not subject to the confidentiality provision under s. 173(1) of the City of Toronto Act, 2006, please conduct a records search for the requested information.

[77] The Ombudsman replied that:

> This request refers entirely to matters captured by s. 171 and cannot be disclosed under any circumstances.

[78] The city also emailed an Ombudsman staff member concerning the appellant's clarified request in the Ombudsman's office stating:

> Please see attached documents. These were pulled from a Building Division file for a request we had from [the appellant] regarding [two addresses]. The investigator on this file was [name]. Could you please tell us if any of the emails in the attachment are covered under the confidentiality provisions of COTA, 2006.

[79] In response, this staff member from the Ombudsman's office stated:

> …in response to your question about the documents provided related to the applicant's Freedom of Information request, I would say that all of the documents would fall under the provisions of COTA, as they related to an investigation conducted by our office.

[80] I note that the city did not advise the Ombudsman that the initial request was for emails sent or received by 20 named individuals in total, 16 of whom do not work at the Ombudsman's office; nor did the city provide the Ombudsman herself with a copy of the pages of the records at issue. As well, the email to the Ombudsman staff member concerning the clarified request, which is the request at issue in this appeal, did not indicate that the request was only for records of six city staff members, none of whom worked in the Ombudsman's office.

[81] I further note that none of the pages at issue contain details of the actual investigative findings of the Ombudsman. These pages concern the logistics of arranging interviews with city staff and were located in the files of the city's Building Department.

[82] The responsive records at pages 378-384, 457, and 473-476 are email chains. All of these email chains contain emails that have been exchanged between or copied to a number of different city staff members. They also include emails in which certain individuals from the Ombudsman's office were copied on or responded to.

[83] All of the records at pages 378-384, 457, and 473-476 were copied to city staff members who do not act under the Ombudsman's instructions in that regard. As such, relying on Order MO-2629-R, I find that all of the information at pages 378-384, 457, and 473-476 of the records are subject to an access request under *MFIPPA*. Therefore, I find that the confidentiality provisions in section 173 of *COTA* do not apply and I will order the city to issue an access decision to the appellant for pages 378-384, 457, and 473-476 of the records.

F. Should the $71.00 fee for preparation time be upheld?

[84] Where the fee exceeds $25, an institution must provide the requester with a fee estimate.[17]

[85] Where the fee is $100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.[18]

[86] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[19]

[87] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[20]

[88] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[21]

[89] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

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[17] Section 45(3).
[18] Order MO-1699.
[19] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[20] Order MO-1520-I.
[21] Orders P-81 and MO-1614.

[90] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[91] Other than a photocopy fee for any copies of the records required by the appellant, the city has only charged the appellant a preparation fee of $71.00 under section 45(1)(b). Section 45(1)(b) does not include time for

- deciding whether or not to claim an exemption[22]
- identifying records requiring severing[23]
- identifying and preparing records requiring third party notice[24]
- removing paper clips, tape and staples and packaging records for shipment[25]
- transporting records to the mailroom or arranging for courier service[26]
- assembling information and proofing data[27]
- photocopying[28]

[22] Orders P-4, M-376 and P-1536.
[23] Order MO-1380.
[24] Order MO-1380.
[25] Order PO-2574.
[26] Order P-4.
[27] Order M-1083.
[28] Orders P-184 and P-890.

- preparing an index of records or a decision letter[29]

- re-filing and re-storing records to their original state after they have been reviewed and copied[30]

- preparing a record for disclosure that contains the requester's personal information [Regulation 823, section 6.1].

[92] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.
>
> 6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:
>
> 1. For photocopies and computer printouts, 20 cents per page.

[29] Orders P-741 and P-1536.
[30] Order PO-2574.

2. For records provided on CD-ROMs, $10 for each CD-ROM.

3. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[93] The city states that it did not charge any fees for searching for responsive records, only for record preparation (severing). Concerning the preparation fee, the city states that it based its fee on actual work done to respond to the request, using the "2 minutes per page" standard when calculating the fees for the request. In addition, it states that the appellant was given 200 pages of sample records at no charge.

[94] The appellant submits that he should not be charged any fees as the records contain his personal information.

Analysis/Findings

[95] The appellant has received 200 pages of sample records from the city. The only fee that the city is charging the appellant, other than a photocopy fee, is the $71.00 fee for preparation time. The appellant has had the choice of paying this fee and reviewing the remaining records, which consist of approximately another 1500 pages of records. Upon payment of this $71.00 preparation fee, he can either receive copies of the

remaining records at $0.20 per page[31] or he can view the records and then choose which records he wishes to obtain copies of at $0.20 per page.

[96] Section 45(1)(b) allows an institution to charge time for severing a record.[32] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[33] The city has appropriately charged a preparation fee of two minutes per page, in accordance with section 6 of Regulation 823. The pages of the records that required severance are the 71 pages noted above that do not contain the personal information of the appellant, but rather that of another individual only. As set out above, the city has severed a cellphone number and an insurance policy number from these pages.

[97] As these pages do not contain the personal information of the appellant, section 6.1 of Regulation 823 do not apply. Section 6.1 of Regulation 823 only applies to waive a preparation fee when a record contains a requester's personal information.

[98] Accordingly, I find that city properly charged the appellant the $71.00 preparation fee under section 45(1)(b) of *MFIPPA* and I will uphold this fee.

G. Did the institution conduct a reasonable search for records?

[99] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[34] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[100] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[35] To be responsive, a record must be "reasonably related" to the request.[36]

[101] 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.[37]

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[31] Section 6.1 of Regulation 823 allows a 20 cent per page photocopy fee to be charged.
[32] Order P-4.
[33] Orders MO-1169, PO-1721, PO-1834 and PO-1990.
[34] Orders P-85, P-221 and PO-1954-I.
[35] Orders P-624 and PO-2559.
[36] Order PO-2554.
[37] Orders M-909, PO-2469 and PO-2592.

[102] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[38]

[103] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[39]

[104] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[40]

[105] The city was required to provide a written summary of all steps taken in response to the request. In particular, it was asked:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

[38] Order MO-2185.
[39] Order MO-2246.
[40] Order MO-2213.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[106] The city's responses to these specific questions are as follows:

1. While the City did not require any clarification, we did contact the Requester informing him of the need to restore back up email tapes in order to respond fully to his request. At that time, the Requester narrowed the scope (time frame) of his request.

2. As the request was very clear on what records were being sought, no further clarification was required.

3. With respect to reasonable search, the only records search at issue in this appeal is for records belonging to [name #1] of the City's Building Division. In this case the City's response was that no records existed from the email account of [name #1]. Details of the search are as follows:

   - [name] (Manager of Customer Service, Toronto Building, North York District) was given …Archive access from Information & Technology Staff to search past e-mails for staffer "[name#1]"between approximately May 2011 to October 17,2013 containing the key words (a) "[appellant's name]" and/or (b) "[address in request]";

   - For the e-mail's 'Subject' and 'Body', the keywords "[appellant's name]" and "[address in request]";" were added;

   - For the e-mail's 'Date' May 1, 2011 to October 17, 2013 was selected; and

   - '[name #1] was checked for both 'Sender' and 'Recipient' and no responsive records were located.

4. It is not possible that records once existed but no longer exist. City staff cannot delete email from the City's email Archive…

[107] The city also provided a detailed affidavit outlining the searches performed by the Building Division staff.

[108] The appellant states that the city has not performed a reasonable search and indicates that he has not received any emails sent or received by two city staff members.

Analysis/Findings

[109] The appellant has only received 200 pages of sample records. There are another approximately 1500 pages of records that he is entitled to view and/or arrange for copies of once the preparation fee of $71.00 is paid.

[110] Although the appellant has raised concerns that records of two staff members have not been located, these records appear to be included in the undisclosed information.

[111] I find that the city has conducted a reasonable search for responsive records and that the appellant has not provided a reasonable basis for concluding that additional responsive records exist responsive to his request as clarified.

[112] Therefore, I am upholding the city's search for responsive records.

ORDER:

1. I uphold the city's exemption claims under sections 12 and 14(1).

2. I order the city to issue an access decision under *MFIPPA* to the appellant for pages 378-384, 457, and 473-476 of the records, treating the date of this order as the date of the request.

3. I uphold the city's preparation fee of $71.00.

4. I uphold the city's search for responsive records.

Original signed by: May 8, 2015
Diane Smith
Adjudicator