Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3311

Appeal MA13-448

City of Toronto

May 18, 2016

Summary: The appellant sought access to various records related to a specified sign. The city granted the appellant partial access to the responsive records, relying on the discretionary exemptions in sections 6(1)(a) (draft by-law), 7 (advice or recommendations), and 12 (solicitor-client privilege) and the mandatory exemption in section 14 (personal privacy) of the *Act* to withhold portions of some records and other records in their entirety. The appellant disputed the reasonableness of the city's search for records and the severance of non-responsive information, appealed the city's decision, and raised the possible application of the public interest override in section 16 as an issue in the appeal. The city's decision is upheld for the most part. Certain records that do not qualify for exemption under sections 7(1) and 14(1), and some information that is found to be responsive to the request, are ordered disclosed.

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"), 6(1)(a), 7(1), 12, 14 and 16.

Orders and Investigation Reports Considered: Orders 24, P-913, PO-2225, PO-3063, PO-3078 and MO-3100.

Cases Considered: *John Doe v Ontario (Finance)*, 2014 SCC 36.

OVERVIEW:

[1] The appellant submitted a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to

the following information:

> Any and all correspondence as it relates to the [named advertising sign]. This includes but is not limited to all correspondence and communications:
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> 1. All correspondence and or meeting minutes that deal with the Request for Proposal issued in 2009.
>
> 2. Sign Bylaw amendment applications.
>
> 3. Inquiries or answers thereto, to/from City Councillors, Sign Bylaw Unit, management and staff, the general public, lobbyist acting as agents or persons and or companies acting for or on behalf of the City and or the Board in an agency relationship or other capacity.
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> 4. Minutes from any and all meetings held with regard to the sign and or by-law amendment applications.
>
> 5. Any other information found as it relates to the sign, its by-law amendment applications or the Request for Proposal issued in 2009.
>
> [*sic*]

[2] The city located records responsive to the request and granted the appellant partial access to them. The city relied on the discretionary exemptions in sections 6(1)(a) (draft by-law), 7 (advice or recommendations), and 12 (solicitor-client privilege) and the mandatory exemption in section 14 (personal privacy) of the *Act* to withhold portions of some records and other records in their entirety. The city also severed portions of the records on the basis that they contained information that was not responsive to the request. With its decision, the city included an index of records listing the responsive records and the exemptions applied. The appellant was not satisfied with the disclosure it received and it appealed the city's decision to this office.

[3] During mediation, the appellant asserted that additional responsive records should exist. In particular, the appellant noted draft reports mentioned in the responsive records that were disclosed to it and additional emails. Accordingly, the reasonableness of the city's search was included as an issue in this appeal. Also during mediation, the appellant confirmed that it was not pursuing access to information withheld by the city under section 14 in pages 143, 145, 186, 188 to 193, 309, 390 to 392, 419, and parts of pages 152, 250, 426 and 435. Accordingly, these records and severances are no longer at issue in this appeal. Finally, the appellant confirmed that it was pursuing access to the parts of the records that the city withheld as non-responsive to the request. Mediation did not resolve the issues, and the appeal was move to the adjudication stage for an inquiry under the *Act.*

[4] I sought and received representations from the city and the appellant and shared

these in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*. During the course of my inquiry, the city issued a revised access decision disclosing the following records which it had previously withheld in their entirety: pages 48 to 52, 124 to 128, 359 to 361, 366, 367, 578 and 579. As a result, these pages are no longer at issue in this appeal.

[5] In this order I uphold the city's decision for the most part, but order the city to disclose some severances which do not qualify for exemption under sections 7(1) and 14(1), and some information that I have found is responsive to the appellant's request.

RECORDS:

[6] The records remaining at issue in this appeal consist of emails, email attachments, and briefing notes. Specifically, they are:

- pages 24-27, 41-42, 47, 53-63, 123, 129, 149-151, 154, 164-169, 179-180, 183-184, 198, 201-202, 206-211, 258-261, 344, 356, 358, 363-365, 371, 375-376, 378-379, 381-389, 470, 475, 510-517, 543, 562, 575-577 and 610-614 that were withheld in their entirety.

- the severed portions of pages 43, 65, 66, 70-72, 74, 76-79, 178, 185, 294, 380, 503 and 615.

- the severances in pages 152, 250, 426 and 435 excluding the severances made under section 14 of the *Act.*

ISSUES:

A. Do the records at pages 43, 66, 70-72, 77, 79, 178, 185 and 503 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory personal privacy exemption at section 14(1) apply to the severed information at pages 66, 178, 185 and 503?

C. Does the discretionary exemption at section 6(1)(a) apply to pages 164-169 of the records?

D. Does the discretionary exemption at section 12 apply to pages 24-27, 41-42, 47, 53-63, 123, 129, 149-151, 154, 179-180, 183-184, 198, 201-202, 206-211, 258-260, 344, 356, 358, 363-365, 371, 470, 475, 512-517, 543, 562 and 575-577, and/or to the severances at pages 261 and 294 of the records?

E. Does the discretionary exemption at section 7(1) apply to pages 375-376, 378-379, 381-389, 510-511, 575-577, 610-614, and/or to the severances in pages 76, 78, 152, 250, 380, 426, 435 and 615?

F. Did the city exercise its discretion under sections 6, 7 and/or 12? If so, should this office uphold the exercise of discretion?

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

H. Are the severances marked as non-responsive in pages 43, 65, 74, 76, 78 and 79 responsive to the request?

I. Is there a compelling public interest in disclosure of the records found to be exempt under sections 7 and 14 of the *Act* such that these records should be ordered disclosed under section 16?

DISCUSSION:

A. Do the records at pages 43, 66, 70-72, 77, 79, 178, 185 and 503 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[7] 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), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual[.]

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

[1] Order 11.

> (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.

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

The parties' representations

[10] The city submits that pages 43, 66, 70-72, 77, 79, 178, 185 and 503 all contain information of a personal nature about individuals named in the records. It explains that pages 43, 72, 77 and 503 consist of emails that contain the personal opinions or personal feelings of certain city staff members on a variety of subjects. It asserts that the comments in the emails are not professional opinion or official determinations of an issue in a professional capacity, but rather, are statements of personal views of a staff member in the context of a larger official discussion. It adds that pages 72 and 77 also contain details about a specific staff member's availability, while page 178 contains the personal email address of a member of the public. The city argues that the personal opinions and schedules of city staff contained in the records and the personal email address of a member of the public, identify the individuals to whom they relate and qualify as personal information as defined under section 2(1) of the *Act.*

[11] The city concludes by submitting that these records contain an individual's name or specify with words, the connection between the specific information and the individual in question, and therefore, disclosure of the records would reveal individuals' personal contact information or personal views or schedules. The city provides confidential representations on this issue as well.

[12] The appellant disputes the city's claim and criticizes the city for not disclosing the nature of the information that it alleges is personal. The appellant states that it is not pursuing anyone's home address, email address or phone number, nor is it interested in the name of a member of the public if that individual is not a representative of a business concern, such as a lobbyist or competitor. It argues that it is entitled to the names and contact information of city staff and representatives, or representatives of

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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] OJ No 4300 (CA).

business concerns under section 2(2.1) of the *Act* which provides that this kind of information is not personal information.

[13] On the issue of personal opinions, the appellant disagrees with the city. It argues that the opinions of its staff member which the city characterizes as personal, clearly relate to these individuals' duties as city employees and are not therefore personal opinions or personal information. The appellant relies on Order P-1602 which stated that "opinions developed or expressed by an individual in an employment, professional or official capacity, and information about other normal activities undertaken in that context" are not generally regarded as the "personal information" of these individuals.[5] The appellant continues that Order P-427 rejected the argument that the city is making in this appeal when the adjudicator held that the views and opinions expressed in the record at issue were expressed in each individual's professional or business capacity and did not qualify as "personal" opinions or views.

[14] In its reply representations, the city disagrees with the appellant's submission that the comments made by city staff in the records are those individuals' opinions communicated while acting as city employees or officials and not personal opinions made in email conversations held at work. The city asserts that the appellant's suggestion that the comments in the records are similar to information addressed in Orders P-157, P-270, M-113, P-1180, P-1409 and P-427 is a flawed conclusion. The city points out that Order P-427 dealt with disclosure of employees' opinions about ministry policies included in the ministry's report about these policies. It also points out that Order P-270 similarly required disclosure of the names of individuals who provided observations to their employer about technical processes and in their professional capacities as part of their official duties. The city states that the records contain information that is inherently different because it includes personal opinions in the context of conversational email. The "voice" expressing each of the opinions is that of the individual communicating it rather than the "voice" of the organization. The city states that the records contain opinions of a personal nature and it relies on Order PO-3063 to support its submission. It then notes that page 66 of the records contains a statement about a staff member's personal feelings. It also provides confidential representations that identify the opinions and comments in certain records which the city claims were made in the staff members' personal capacity.

Analysis and findings

[15] All of pages 43, 66, 70-72, 77, 79, 178, 185 and 503 contain one or more emails circulated among city staff working on sign related issues who are identifiable in the emails by the display of their names and/or work email addresses. In order to determine whether the information contained in the emails at issue relates to the individuals in a personal or professional capacity, I adopt the current approach of this

[5] Order P-1602 cites Orders P-157, P-270, M-113, P-1180 and P-1409 as examples.

office that was set out in Order PO-2225 and considered more recently in Order PO-3063 which analyzed whether records created in a work context contained the personal or professional opinions of employees. The approach involves the consideration of the following two questions:

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

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

[16] All of the city staff members sent or received the emails in these records in their professional capacity during the course of performing their employment duties. Therefore, all of the names of the city staff appear in a professional context. Looking at the particular information identified as personal by the city, I note that much of it is about the city staff in an official capacity in that it relates to their work on sign related issues, and their professional views on these work related issues. I am not convinced that the information withheld by the city in pages 43, 70, 71, 72, 77 and 79 contains information that would reveal something inherently personal in nature about the individuals to whom it relates. The information withheld in page 43 appears as part of a staff member's report to a superior of developments on various files. I find this information is not inherently personal but rather, factual, informational and professional in nature. Pages 70, 71, 72, 77 and 79 contain email chains with a specific email being reproduced in each one. While the city argues that the reproduced email contains the personal views of a staff member, I disagree. The withheld information is largely a factual statement recounting a development at work and a staff member's view of this development. I find that this information is also not inherently personal but rather professional in nature.

[17] Conversely, I am satisfied that some records contain information that relates to the staff members in their personal capacity because it reveals something of a personal nature about them despite the fact that the emails were generated in a professional context. The emails at pages 66 and 503 contain the views of two staff members about certain developments at work and their personal feelings about these developments. I agree with the city that this information would reveal something of an inherently personal nature about these individuals because the focus in each is the staff member's personal feelings. On this basis, I find that this information qualifies as personal information under paragraph (e) of the definition in section 2(1) of the *Act.* The email at page 185 contains the names of identifiable staff members along with information about one staff member's personal daily schedule. I find that this information is of an inherently personal nature and qualifies as personal information under paragraph (h) of the definition. Finally, page 178 contains an email address of an individual who

contacted the city in a personal capacity and this qualifies as personal information under paragraph (h) of the definition.

[18] Having found that pages 66, 178, 185 and 506 of the records contain the personal information one or more identifiable individuals, I must now determine whether this information is exempt from disclosure under section 14(1) of the *Act.*

[19] The personal privacy exemption cannot apply to records that do not contain personal information. As a result, pages 43, 70, 71, 72, 77 and 79, which I have found do not contain personal information, cannot be withheld under section 14(1) of the *Act.* Since the city has not claimed any other exemptions for these records and no other mandatory exemptions appear to apply to them, I will order the city to disclose the portions of these records that it withheld under section 14(1).

B. Does the mandatory personal privacy exemption at section 14(1) apply to the severed information at pages 66, 178, 185 and 503?

[20] Because the appellant seeks personal information of other individuals, section 14(1) applies and prohibits the city from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14(1).

[21] The section 14(1)(a) to (e) exemptions are relatively straightforward. The city submits, and I find, that the exceptions in sections 14(1)(a) to (e) do not apply in this appeal. The only basis upon which the personal information in these records may be disclosed is if I find that the exception in section 14(1)(f) applies; that is, if disclosure of the personal information would not be an unjustified invasion of personal privacy.

[22] In determining whether disclosure would not be an unjustified invasion of personal privacy under section 14(1)(f), sections 14(2) and (3) are instructive. As well, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. The city submits, and I find, that section 14(4) does not apply in this appeal. It also submits, and I find, that the presumptions under section 14(3) do not apply in this appeal.

[23] Accordingly, in determining whether disclosure of the personal information at issue would be an unjustified invasion of personal privacy, I am left to consider and weigh the factors set out in section 14(2). In order for me to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[6] The list of factors under section 14(2) is not

[6] Orders PO-2267 and PO-2733.

exhaustive. The city must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[7]

[24] The parts of section 14 that are relevant to this appeal are the following:

> 14.(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.
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> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> > (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
> >
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request[.]

The parties' representations

[25] The city submits that a review of the factors under section 14(2) supports the finding that the disclosure of the contact information of members of the public, and the personal opinions and schedules of city employees that it has withheld under section 14(1), would constitute an unjustified invasion of privacy. It adds that disclosure of this personal information will expose individuals to a loss of privacy concerning their personal affairs, which cannot be justified. The city also provides confidential representations on this issue.

[26] The appellant accuses the city of "demonstrable misuse" of the section 14(1) exemption to conceal the identity of a city employee at page 43 who instructed a report referenced therein be delayed.[8] The appellant argues that because this city employee was acting in her professional capacity at the time, the employee's name should not qualify as personal information that can be withheld under section 14(1). The appellant submits that even if the staff members' opinions withheld by the city related to the staff members' duties qualified as personal information, sections 14(2)(a) and (d) would provide compelling grounds to conclude that disclosure would not be an unjustified invasion of privacy.

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[7] Order P-99.

[8] The appellant's representations on section 14 focus on page 43 of the records, which I have already decided to disclose. Nonetheless, I have decided to include these representations in this order for completeness and to fully set out the appellant's position.

[27] The appellant does not specifically address the application of the factors in sections 14(2)(a) and (d). However, in its extensive representations, it sets out a history of its dealings with the city regarding the sign from which I glean the following arguments in support of the application of sections 14(2)(a) and (d). The appellant alleges that the city acted in bad faith or failed to perform its public duties with respect to their contract for the sign, and that the withheld personal information sets out the "persistent inappropriate conduct" of city staff who the appellant claims were "indifferent to or contemptuous of their duties to the public and, particularly, to [the appellant]." The appellant alleges that the individual whose personal information has been withheld from page 43 purposely delayed a required by-law amendment process related to the sign without any legitimate reason for doing so. The appellant argues that the withheld personal information in page 43 is "powerful evidence of improper conduct and illegitimate motivation." The appellant further alleges that the city imposed unfair and inappropriate restrictions on it and impeded its use of the sign by serving it with groundless and inappropriate notices of violation.

[28] The appellant states that based on its dealings with the city, it has concerns that members of the city's bureaucracy exercised their authority improperly, or at a minimum, failed to perform their duties as a result of being motivated by personal agendas, personal politics, antagonism toward outdoor advertising and advertisers, or favouritism toward other outdoor advertisers, were petty or incompetent. The appellant asserts that it is entitled to know the whole story, to know why the events surrounding its sign unfolded as they did. The appellant also submits that there is a clear public interest in uncovering incorrect conduct within bureaucracy.

[29] In its reply representations, the city denies the appellant's "unproven and unsupported allegations of misconduct" by it and its staff. It submits that this appeal is not the appropriate venue for a determination of the appellant's allegations against the city and it advises that the appellant has already commenced both contract arbitration proceedings and a proceeding before the Ontario Superior Court of Justice advancing a claim against it and the Board of Governors of Exhibition Place based on similar arguments. It adds that a detailed overview of the relationship between the parties, the relevant municipal by-laws, provincial legislation, the history of the sign and the related contractual agreements is required to fully respond to the appellant's allegations, and that this is more appropriately conducted in the context of other proceedings. The city characterizes the appellant's submissions as merely unsupported allegations of inappropriate conduct on the part of the city that I should reject or disregard on the basis that they are unduly disrespectful of the city. It cites *Practice Direction Number 2* as my authority to disregard the appellant's submissions. The city adds that continuation of multiple simultaneous proceedings is contrary to the public interest in the effective operation of the justice system. It submits that because the veracity of the appellant's allegations has not been established and is the subject matter of other proceedings, I should entirely reject or disregard the appellant's allegations.

[30] On the issue of section 14(1), the city reiterates its original submission that

section 14(2) supports the conclusion that disclosing the information it withheld under section 14(1) would constitute an unjustified invasion of privacy. The city also denies that the factors in sections 14(2)(a) and (d) apply since the personal information does meet the tests for establishing these factors.

Analysis and findings

[31] While the city argues that the factors in section 14(2) support the conclusion that the personal information is exempt, it does not identify any specific factors as relevant. It contends that the factors in sections 14(2)(a) and (d) relied on by the appellant do not apply. The appellant, who asserts that the factors favouring disclosure in sections 14(2)(a) and (d) apply, provides no direct submissions to support its assertion. Rather, it sets out a series of allegations about the city's conduct and the city staff's motivations for dealing with it in an allegedly inappropriate and unfair manner.

[32] The history and dealings between the parties is complex and contentious, as evidenced from the extensive representations before me from both parties and from the existence of other proceedings between the parties. The parties are engaged in alternate processes to resolve their disagreements over their contractual arrangements with respect to the sign and these alternate processes are the appropriate ones for addressing the complex nature of the appellant's dispute with the city. The city is correct in asserting that this appeal is not the proper process for a determination of whether the city conducted itself in a way that was contrary to the requirements of whatever contractual or other relationship that may have existed between the parties. I also agree with the city that this appeal is not the appropriate forum for full consideration and resolution of the issues between the parties. In this regard, I find that many of the allegations put forth as arguments by the appellant, are not relevant to my determination of section 14(1) and I will not address them further in this order.

[33] I am not persuaded that the factors in section 14(2)(a) and (d), which favour disclosure of the personal information in the records, apply in this appeal. As I have noted above, the withheld information at issue is inherently personal to the individuals to whom it relates. For this reason, I am not satisfied that the withheld personal views at issue are sufficiently related to the city's official activities and actions such that their disclosure is desirable for the purpose of subjecting the city's activities to public scrutiny in accordance with the factor in section 14(2)(a). I similarly reject the assertion that the factor in section 14(2)(d) applies. The appellant has not convinced me that the personal information is relevant to a fair determination of its rights primarily because it has not established that the personal information it seeks has some bearing on its rights in the legal proceedings it has commenced. The appellant assumes that the personal information is connected to its allegations in the legal proceedings, however, based on my review of the records, I am not convinced that this is the case. Accordingly, I do not accept that the appellant requires the personal information in order to prepare for the

legal proceedings or to ensure a fair hearing.[9] For these reasons, I find that the factors in sections 14(2)(a) and (d) do not apply, and that there are no factors present in this appeal that favour disclosure of the personal information at issue.

[34] As a result, I find that the exception in section 14(1)(f) is not established and that the personal information is exempt from disclosure under section 14(1), subject to my review of the possible application of the public interest override below.

C. Does the discretionary exemption at section 6(1)(a) apply to pages 164-169 of the records?

[35] Section 6(1)(a) permits the city to refuse to disclose a record that contains a draft of a by-law, while section 6(2)(a) prevents the city from refusing under section 6(1)(a) to disclose a record that has been considered in a meeting open to the public. The city submits that pages 164-169 consist of a draft by-law relating to the appellant's sign. It explains that while there were draft by-laws that were discussed at meetings open to the public, the draft-by-law in pages 164-169 was not one of these publicly discussed documents, and therefore, the section 6(2)(a) exception does not apply. The city adds that pages 164-169 reflect an earlier working draft of the by-law that was prepared in the course of communications between its sign unit and its legal counsel. The city confirms that it has already disclosed the final draft of this by-law which was discussed at a meeting open to the public.

[36] The appellant does not dispute the application of section 6(1)(a) to pages 164-169. Instead the appellant takes issue with the city's decision to withhold these pages under section 6(1)(a) and accuses the city of exercising its discretion to do so incorrectly.

[37] I have reviewed pages 164-169 and they contain a draft by-law that falls within the scope of section 6(1)(a). I accept the city's submission that this draft by-law was not discussed in a meeting open to the public and that section 6(2)(a) does not apply to this version of the by-law. As a result, I find that pages 169-169 are exempt under section 6(1)(a), subject to my review of the city's exercise of discretion below.

D. Does the discretionary exemption at section 12 apply to pages 24-27, 41-42, 47, 53-63, 123, 129, 149-151, 154, 179-180, 183-184, 198, 201-202, 206-211, 258-260, 344, 356, 358, 363-365, 371, 470, 475, 512-517, 543, 562 and 575-577, and/or to the severances at pages 261 and 294 of the records?

[38] The discretionary solicitor-client privilege exemption in section 12 protects privileged records from disclosure under the *Act.* Section 12 contains two branches;

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[9] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc 839329 (Ont Div Ct).

branch 1 which arises from the common law, and branch 2 which is a statutory privilege arising from section 12 of the *Act*. Section 12 reads:

> 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.

[39] Branch 1 encompasses two heads of privilege as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the city must establish that at least one head of privilege applies to the records at issue.[10]

[40] At common law, 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.[11] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[12] The privilege applies to "a continuum of communications" and covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[13] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[14] Confidentiality is an essential component of the privilege. Therefore, the city must demonstrate that the communication was made in confidence, either expressly or by implication.[15]

[41] Branch 2, the statutory solicitor-client communications privilege, exists to protect direct communications of a confidential nature between an institution and its counsel, be it internal counsel or other counsel retained or employed by it. The statutory privilege applies where the records were prepared by or for the institution's counsel for use in giving legal advice.

The parties' representations

[42] The city provides detailed representations addressing the records that it has withheld as solicitor-client privileged. It also provides confidential representations on the application of the solicitor-client privilege exemption to the records. I am not able to describe the city's confidential representations in this order, however, I have reviewed

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[10] Order PO-2538-R; *Blank v Canada (Minister of Justice)* (2006), 270 DLR (4th) 257 (SCC) (also reported at [2006] SCJ No 39).
[11] *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).
[12] Orders PO-2441, MO-2166 and MO-1925.
[13] *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA)
[14] *Susan Hosiery Ltd v Minister of National Revenue*, [1969] 2 Ex CR 27.
[15] *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 (CA); Order MO-2936.

and considered them.

[43] The city states that the general subject matter of the information it withheld under section 12 is the application of Chapter 694 of the *Toronto Municipal Code*, and other pre-amalgamation municipalities' various "sign by-laws" to the operation of the sign in question and the issues arising from the appellant's application for site-specific amendments to Chapter 694. The city explains that in addition to issues regarding the applicability of Chapter 694, there are particular complications concerning the sign and the parameters of acceptable modifications to the sign. The city states that the appellant made applications to City Council to modify the sign, and the city's sign unit had to ensure the appellant's operation of the sign conformed with municipal signage regulations. In dealing with these issues, the city's Building Division staff communicated with the city's Legal Services staff and the withheld records relate to these exchanges between the two departments' staff that took place for the purpose of obtaining assistance from Legal Services on the interpretation of specific municipal by-laws.

[44] The city submits that the withheld information can be summarized as largely comprising documents which reflect the continuum of communications between client and solicitor. The city asserts that one or both of the branches of privilege under section 12 applies to each of the withheld pages and portions. The city describes the withheld records as emails and corresponding attachments circulated between the city's Building Division staff and the Legal Services staff, and emails and corresponding attachments circulated between the city's Building Division staff. It submits that while each of the four types of solicitor-client privileged records noted raises slightly different issues, each group comprises documents that are of a type that this office has repeatedly determined are properly subject to section 12. It submits that all of the information withheld under section 12 was contained in documents that were provided to, or prepared by Legal Services and were used in giving legal advice or in contemplation of litigation, or that would, if disclosed, reveal the content of documents that belong to one of the foregoing classes of records.

[45] The city explains that all of the withheld information contains communications between legal counsel and staff of the city that are either direct communications or email chains incorporating communications between legal counsel, or an email between city staff that would directly or indirectly disclose the content of the communications with legal counsel. The city adds that all of the records for which it has claimed section 12 represent portions of the continuum of correspondence in which a variety of legal advice, opinions and suggestions were either requested or provided in relation to developments regarding the appellant's issues with the sign. The city relies on Order MO-1800 of this office to support its position that email chains involving members of the city's Legal Services staff and their internal clients, as well as draft legal documents and correspondence exchanged between lawyers, are documents that are intended to be treated confidentially and as a result, qualify for exemption under section 12. In an appendix to its representations, the city provides detailed submissions on each page of withheld information. These detailed submissions are largely set out in my analysis and

findings below, except for the portions of the submissions that are confidential. The city concludes its representations by asserting that it has not waived its privilege in the withheld records.

[46] The appellant takes issue with the amount of information the city has withheld under section 12, calling it "extraordinary in number and highly obscured." It argues that the city's representations fall short of demonstrating that the criteria for solicitor-client communication privilege or litigation privilege have been met. The appellant criticizes the city for not identifying the names of the individuals in each withheld communication, including the author and all recipients of each, and whether the entire email chain was forwarded to all of the persons named. The appellant submits that the mere inclusion of a lawyer in a communication does not necessarily make the communication privileged; the communication must be made for the purpose of obtaining or giving professional legal advice in order for the test to be met. The appellant states that government lawyers can wear more than one hat and thus, if the communication relates to the lawyer advocating a policy in contrast to advising the city of its rights under the law, the communication is not privileged.

[47] The appellant also criticizes the city for not identifying the specific branch of solicitor-client privilege that it relies on to withhold each record. Regarding the city's claim that litigation privilege attaches to the records, the appellant asserts there is no indication that any of the withheld documents had anything to do with anticipated litigation and that the required threshold of the dominant purpose test has not been met. The appellant concludes by asserting that the city has not satisfied its onus to establish that at least one branch of section 12 applies to each record.

Analysis and findings

[48] In order to find that the information at issue is exempt under section 12, I must be satisfied that the records comprise confidential communications between a solicitor and client made for the purpose of obtaining or giving legal advice. All of the records and information at issue relate to the city's handling of legal and by-law arising about the appellant's sign and the appellant's various dealings with the city in this regard over the course of approximately four months. I am satisfied that the staff members of the city's Building Division who sought and received legal advice in the emails at issue from the city's internal legal counsel are in a solicitor-client relationship with the city's legal counsel. Having reviewed the records and information at issue, I also am satisfied that common law solicitor-client communication privilege attaches to all of them. I find that all of the pages withheld in their entirety by the city constitute direct communications of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice, and are protected by solicitor-client communication privilege as part of the continuum of communications.

[49] The appellant's argument that the city has not established that privilege attaches to the withheld records is not one that I accept based on my review of the city's

complete representations, including its confidential representations, my consideration of its representations as they apply to the withheld records, and my review of the content of each withheld page of the records. While confidentiality concerns prevent me from divulging the city's confidential representations, I am able to provide the following details on why the records qualify for exemption under section 12.

[50] Pages 24-27, 47, 53-63, 129, 150-151, 179-180, 183-184, 198, 201-202, 358, 363-365, 371, 475, 512-517, 543 and its duplicate at page 562, all consists of one or more email chains between the city's legal counsel and one or more staff members from the city's Building Division. Pages 41, 42, 261 and its duplicate at page 470, and 344 each contain an email from a city staff member to legal counsel and to one or more other city staff. Pages 123, 154, 258-260 and 356 each contain an email from legal counsel to city staff, while page 149 contains an email from a city staff member to legal counsel. It is clear on the face of each of the above records that the purpose of each record was to seek or obtain legal advice. As a result, I find that all of the emails and email chains contained in these pages of the records are solicitor-client communications made confidentially for the purpose of receiving or giving legal advice.

[51] The remaining withheld pages differ slightly from those discussed above. Pages 575-577 consist of an email chain that began as two emails between city staff that were then forwarded to legal counsel for the purpose of keeping legal counsel apprised of a situation and seeking legal advice on it. Pages 206-211 consist of a number of emails generated in response to the first email appearing in page 206 from legal counsel seeking information from city staff on a specific development and providing legal advice. I accept that all of the emails in these pages, including those between city staff alone, form part of the continuum of solicitor-client communications between the city and its legal counsel aimed at keeping both the solicitor and client informed so that advice may be sought and given as required. In doing so, I note that this office has repeatedly held that email exchanges between non-legal institutional staff may qualify as solicitor-client privileged communications in certain circumstances.

[52] In Order PO-3078, the adjudicator found that email chains, including emails that were forwarded to counsel as part of an email chain, formed part of the continuum of communications aimed at keeping the solicitor informed so that advice could be sought and given as required, and on this basis, the entire email chain was exempt under the provincial equivalent of section 12. The adjudicator made this finding even though some of the emails in the email chains before him were "informational, simply confirming that revisions are made to an attached document, or confirming the date or the attendees at meetings." I adopt this approach and find that all of the email communications in pages 575-577 and 206-211 qualify for exemption. I also find that the severance at page 294, which consists of legal advice from the city's legal counsel to city staff, qualifies for exemption under section 12. My findings on section 12 are subject to my review of the city's exercise of discretion below.

[53] The city also argues that the records are also subject to litigation privilege,

however, it is unnecessary for me to review this issue as a result of my finding. Having found that pages 53-59, 208-211, 363, 512-517 and 575-577 are exempt from disclosure under section 12, I need not consider whether they are also exempt under the other discretionary exemption claimed for them, section 7(1).

E. Does the discretionary exemption at section 7(1) apply to pages 375-376, 378-379, 381-389, 510-511 and 610-614, and/or to the severances in pages 76, 78, 152, 250, 380, 426, 435 and 615?

[54] Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[55] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[16] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[17] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[18]

[57] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently

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[16] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43. (*John Doe*)
[17] See above at paras. 26 and 47.
[18] Order P-1054.

communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[19]

[58] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).[20]

[59] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information[21]
- a supervisor's direction to staff on how to conduct an investigation[22]
- information prepared for public dissemination.[23]

[60] Section 7(2) lists a number of mandatory exceptions to the section 7(1) exemption, including sections 7(2)(a) and (k) which state:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> (k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

[61] If the information falls into one of these categories, it cannot be withheld under section 7. For the purposes of section 7(2)(a), factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[24] Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) may not apply.[25]

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[19] See footnote 1 above at para. 51.
[20] See footnote 1 above at paras. 50-51.
[21] Order PO-3315.
[22] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc 721/92 (Ont Div Ct).
[23] Order PO-2677
[24] Order 24.
[25] Order PO-2097.

The parties' representations

[62] The city explains that some responsive records relate to investigations of compliance with municipal regulations, enforcement actions, and the numerous applications made by the appellant for various forms of municipal approvals concerning the sign. The city submits that the information it has withheld under section 7(1) consists of staff discussions related to issues arising from the appellant's applications to city Council and from enforcement of municipal regulations about signage in response to complaints about the appellant's operation of the sign. The city argues that section 7(1) applies to the withheld information because the information documents exchanges among its staff about a variety of matters related to the access request. The city adds that these discussions revolve around various options available to deal with issues arising from these two general subjects and they contain advice sought from the appropriate parties regarding the city's corresponding obligations. The city submits that it has applied the exemption where the disclosure of the withheld portion would reveal the advice by comparing suggestions as to actions with the publicly available information – including responsive records that have already been disclosed to the appellant – which would allow, through comparison of briefing notes, the inference of the particulars of the advice provided in these documents.

[63] The city explains that pages 375-376, 378-379, and 610-614 are briefing notes which contain advice on issues relating to the sign. It submits that it withheld these briefing notes because multiple drafts of them may be compared to determine advice given on their drafting. It adds that pages 612-614 also include an email providing advice on the drafting of the briefing note.

[64] The city states that pages 381-389 contain an email between two staff in its Building Division, an inspector and manager of the sign unit, along with an attached document. The city submits that if these records were disclosed, multiple drafts of the attached document could be compared to determine advice given on the drafting of the attached document, and therefore, it has withheld these records under section 7(1).

[65] The city submits that pages 510 and 511 contain emails between two staff in its Building Division that contain a request for advice along with the facts required to obtain the advice given. It asserts that partial disclosure would result in disclosure of the advice request.

[66] The city explains that the severance in page 250 contains advice on the steps to be taken in advance of a meeting. The advice is contained in an email chain between staff in the sign unit. Similarly, it states that the severances in pages 380, 426 and 435 contain advice that was provided on a specific matter in emails between two staff in its Building Division. Finally, the city states that it withheld the severances in pages 77, 78, 152 and 615 because they contain advice provided on a course of action. The city states that the advice is found in an email chain containing direct communications between staff in the sign unit and the city's Deputy Chief Building Official. The city also

provides confidential representations on this issue which set out the specific advice it submits is contained in the withheld records.

[67] The appellant notes the exceptions in section 7(2) of the *Act* and submits that the undisclosed decision and reasons for the city issuing it Notices of Violation are not "advice or recommendations." The appellant asserts that in general, the city has denied many records in their entirety without explaining who provided the alleged advice or recommendations, which, it asserts, is key. The appellant argues that the city's failure to disclose this key information conceals the genuine nature of the communication when the communication is to a subordinate – typically a decision or direction – as opposed to advice or recommendations. The appellant asserts that the city has not established that section 7(1) applies to any of the records for which it has claimed the exemption, and furthermore, that the records withheld under section 7(1) fall outside the narrow interpretation of "advice or recommendations." The appellant concludes by arguing that even if the city had the discretion to withhold the records under section 7(1), it exercised its discretion incorrectly.

[68] In reply, the city denies that any of the section 7(2) exceptions to the exemption applies. In particular, the city argues that section 7(2)(k) does not apply because the records and severances it has withheld under section 7(1) do not contain the reasons for a final decision of a city employee made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the city. The city also submits that the decision of the Supreme Court of Canada in *John Doe*[26] found that previous interpretations of the terms "advice" and "recommendation" were too narrow and the terms required a broader interpretation than that given to them by this office. The city agrees with the appellant that "directions" or "instructions" are not advice and it confirms that the withheld information does not deal with either of these but rather, contains suggestions for one manner of executing discretionary decisions. The city submits that each is a recommended course of action concerning the execution of discretionary decisions – it is not a specific direction with which the individual was required to comply. The city also provides confidential representations which set out the advice and why it qualifies as a recommended course of action concerning the execution of discretionary decisions.

Analysis and findings

[69] The Supreme Court of Canada recently confirmed that the advice and recommendations exemption includes alternative courses of action to be accepted or rejected in relation to a decision that is to be made.[27] The Court held that an evaluative analysis that involves a public servant's identification and consideration of alternative decisions that could be made, qualifies as advice and recommendations and is

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[26] *Supra*, note 16 above.
[27] *Supra*, note 16 above, para 26.

exempt.[28] The Court further found that where a record that contains the basis for making a decision or formulating a policy has not been publicly cited, disclosure may be refused under section 7(1).[29]

[70] Applying the Court's reasoning to the records at issue in this appeal, I find that the draft briefing notes at pages 375-376, 378-379, and 610-614 qualify for exemption under section 7(1). These records all contain a recommendation relating to the sign as well as an evaluative analysis of the circumstances that inform the recommendation. The briefing notes were prepared by staff in the sign by-law unit of the city's Building Division. I accept that they were prepared to be used as a basis for making a decision and there is no evidence before me that these briefing notes were publicly cited. The briefing notes contain background information that in turn consists of certain factual information. However, a review of these notes confirms that this factual information appears as part of an evaluative analysis of information by the staff who prepared the notes and made the recommendation that is ultimately to be accepted or rejected by the decision maker, and not as a coherent body of facts separate and distinct from the recommendation contained in the records.[30] The information is inextricably intertwined with the recommendation such that it should not be ordered disclosed under the section 7(2)(a) exception to section 7(1). This office has previously accepted that internal discussions among city staff regarding enforcement options and steps that may be taken, may qualify for exemption as advice or recommendations when the records at issue contain advice on how to approach such matters. In Order MO-3100, the adjudicator found that records of communications among city building code enforcement staff about options for the enforcement of the *Building Code Act* contained advice or recommendations provided by city staff because they detailed either an evaluative analysis of information by city staff or consisted of a suggested course of action that would ultimately be accepted or rejected by the person being advised. The briefing notes are records of such communications and I adopt the same reasoning here.

[71] Pages 381-389 contain an email from a staff member in the sign unit to the manager of the unit attaching a draft report. The report contains information similar to that which is found in the briefing notes noted above, including recommendations for a decision making body that are based on an evaluative analysis of a number of facts and issues all set out in the report. As with the briefing notes, there is no evidence before me that this email and draft report were publicly cited. I conclude that the factual information contained in these pages appears as part of an evaluative analysis of information by staff in formulating a recommendation to be accepted or rejected by the decision maker, and is not captured by the exception in section 7(2)(a). Accordingly, I find that pages 381-389 also qualify for exemption subject to my review of the city's

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[28] *Supra*, note 16 above, para 26.
[29] *Supra*, note 16 above, para 34.
[30] Order 24.

exercise of discretion below.

[72] Pages 510-511 are emails. The email at page 510 is from a staff member in the sign unit to the manager containing a draft document, while the email at page 511 is an email from the manager to legal counsel for the city and a building department director enclosing the email at page 510 and seeking advice. Curiously, the city has not claimed the solicitor-client privilege exemption to withhold these two pages even though they would appear to fall within the continuum of privileged communications between a lawyer and client for the purpose of obtaining legal advice. Instead, the city relies on section 7(1). The city does not claim that these records contain advice or recommendations, rather, it claims that disclosure will result in disclosure of the advice request. This, however, is not the appropriate test. Section 7(1) applies only if disclosure of the record would reveal advice or would allow advice to be inferred. The city has not established that disclosure of pages 510 and 511 would do either. As a result, I find that pages 510 and 511 do not qualify for exemption under section 7(1). Since the city has not claimed any other exemption for these records, I will order them disclosed.

[73] I also find that the severances do not contain information that qualifies as exempt under section 7(1). The page 76 and 78 severances, as well as those on pages 250, 426 and 435 (which contain identical information), 380 and 615 (which contain identical information) and 152, do not contain any advice or recommendations on a decision to be made. All of these severances consist of either: requests from staff for information or direction from their superiors; direction from Building Division officials to staff members; or the sharing of a decision made by a staff member and the reason for the decision. None of these three situations involves advice or recommendations. The latter is merely an instance of a staff member reporting to a superior. There is no advice in such a severance and no decision that is to be made. I agree with the appellant's submissions that the directions given by superiors to their staff in the severances are instructions on steps to be taken and the manner in which to take them. The staff member recipients of these directions are not receiving them for the purpose of making a decision, but rather, are receiving them as part of their work duties in order to implement them and carry out the wishes of their superior in the manner dictated by the superior. The staff members' requests for information from their superiors also do not qualify as advice or recommendations - they are merely requests for information or instruction on work to be done. Having found that these severances do not qualify for exemption, and considering the city has not claimed any other exemptions for these severances, I will order them disclosed.

[74] I will only consider the city's exercise of discretion under section 7(1) for pages 375-376, 378-379, 381-389 and 610-614 which I have found qualify for exemption.

F. Did the city exercise its discretion under sections 6, 7 and/or 12? If so, should this office uphold the exercise of discretion?

[75] The section 6, 7 and 12 exemptions are discretionary, and permit the city to disclose information, despite the fact that it could withhold it. The city must exercise its discretion. On appeal, the Commissioner may determine whether the city failed to do so. In addition, the Commissioner may find that the city 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.

[76] In either case this office may send the matter back to the city for an exercise of discretion based on proper considerations.[31] This office may not, however, substitute its own discretion for that of the city.[32] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant[33]:

- 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
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- whether disclosure will increase public confidence in the operation of the institution

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[31] Order MO-1573.
[32] Section 43(2).
[33] Orders P-344 and MO-1573.

- 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.

[77] The city submits that it considered all of the relevant implications of releasing or denying access to the information at issue, including:

- the purposes and principles of the *Act* including the principles that information should be available to the public and that exemptions to the right of access should reflect the limited and specific circumstances where non-disclosure is necessary for the proper administration of municipal institutions
- the wording of the relevant exemptions and the interests it seeks to protect
- the fact that the appellant has presented no sympathetic or compelling need to receive the information
- the fact that the appellant's interest is a private interest concerning disputes relating to specific contractual entitlements of a for-profit enterprise, rather than an interest shared by the public at large
- the nature of the relationship between it and the appellant
- the fact that disclosure will not increase or decrease public confidence in its operation but it will have an adverse effect on the ability of its staff to properly consider the advice given in order to formulate decisions
- the nature of the information and the fact that the records are highly significant and sensitive to it
- its historic practice in relation to the requested information.

[78] The city adds that it is necessary to balance the interests intended to be protected by the *Act* and the public interest in disclosure of information about the operation of municipal institutions. It states that it has disclosed considerable amounts of information relating to the sign including public reports and other documents that are published on its web site, and hundreds of pages in response to the appellant's access request. It explains that it chose to deny access to the specific and limited information contained in the few pages in question in this appeal to prevent exposing itself, and as a result the public, to the risk of harms which the *Act* seeks to prevent. It submits that its access decision is a favourable decision for the appellant based on an exercise of discretion which limits the amount of withheld records because it has chosen to disclose the maximum amount of information possible, while not disclosing information that

would, for example, violate solicitor-client privilege. The city also notes that it provided additional disclosure during the inquiry stage of the appeal which resulted in the disclosure of 17 pages of records that it had previously withheld under sections 6 and 7 of the *Act.*

[79] The city states that the records at issue all relate to one of the many issues surrounding the appellant's business decisions relating to the operation of the sign and the appellant appears to be seeking access to this information in order to use it in furtherance of its private interests in yet further negotiations, arbitration or other proceedings related to the operation of the sign. The city submits that considering all relevant factors, the head properly engaged in a good faith exercise of her discretion under the *Act*, and as a result, its exercise of discretion should be upheld.

[80] The appellant takes the position that if the city exercised its discretion, it did so incorrectly. It asserts that the city failed to take relevant considerations into account, particularly by relying on a materially incorrect and inaccurate narrative that failed to consider the problems that the appellant encountered and the evidently questionable conduct of the municipal bureaucracy. The appellant submits that the head's exercise of discretion was not made in full appreciate of the facts of the case, and it cites Order P-58 as establishing this requirement.

[81] The appellant further submits that most of the considerations the city did take into account were incorrect and irrelevant. It asserts that the disclosure of what it alleges is evidence demonstrating incorrect, oppressive or self-interested conduct within the municipal bureaucracy will increase public confidence in the city by exposing bureaucratic impropriety and deterring it, rather than hiding the city's internal problems from public scrutiny. It also argues that it has a sympathetic or compelling need for the records as a result of being victimized by failure or refusal of a bureaucracy to perform its duties according to the law. It opposes the city's position that the withheld information is highly significant and sensitive, arguing there is no or insufficient foundation for this position.

[82] Regarding the public interest aspect of the appeal, the appellant asserts that there is nothing wrong with having a private interest in the information at issue and that a private interest should not weigh against disclosure. It relies on Orders M-864 and MO-1168-I to support is position. The appellant argues that the *Act* exists in part to serve private interests, as stated by the Supreme Court of Canada in *Ontario v Criminal Lawyers' Association*:[34]

> …the discretion conferred by the work "may" recognized that there may be other interests, whether public or private, that outweigh this public interest in confidentiality.

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[34] 2013 SCC 43.

[83] The appellant submits that seeking access for the purpose of using the information against the city is consistent with the spirit of the *Act*, which "exists in part as an accountability mechanism in relation to government organizations" as stated in Order MO-1168-I. It also notes that the adjudicator in MO-1168-I found that making a request for the purpose of access is not contradicted by the possibility that the appellant may also intend to use the document against the institution once access is granted. The appellant concludes by stating that it believes the city's decision to withhold the information at issue was made in bad faith or for an improper purpose – namely, to conceal improper conduct from public scrutiny – and it asserts that an examination of the documents by me will further support its conclusion.

[84] In reply, the city asserts that the appellant's allegations are entirely unfounded and that disclosure of the records at issue would not undermine the credibility of its decisions. It states that it was aware of the appellant's position when it exercised its discretion to release as much information as possible to reveal its actions in dealing with issues related to the sign. The city asserts that there are compelling reasons to deny access to the records and that it balanced the public interest in protecting its ability to obtain advice while recognizing the public interest – including that of the appellant – to know how local government operates. The city adds that a review of the records reveals that it did not exercise its discretion in bad faith to conceal alleged improprieties. It adds that its actions concerning the sign were the subject of numerous public meetings and are recorded in numerous publicly available documents.

Analysis and findings

[85] I am satisfied that the city exercised its discretion under sections 6, 7 and 12 when it decided to deny the appellant access to some of the many responsive records that fall within the scope of the appellant's request. I am not persuaded by the representations of the appellant that the city exercised its discretion in bad faith or for an improper purpose. The appellant's submissions in this regard consist of allegations that are not supported by either the records themselves or the circumstances of this appeal, which are that the city disclosed a significant amount of information to the appellant in response to the access request, and it disclosed considerable additional information during my inquiry.

[86] The factors the city states it considered are all relevant, including its consideration of how disclosure would affected the proper administration of municipal institutions, and the wording of the solicitor-client privilege, advice or recommendations and draft by-law exemptions which it is entitled to claim to protect its interests. I also agree with the city that the appellant does not have a sympathetic or compelling need to receive the withheld information. Rather, the appellant has a private interest in the records and information at issue which are very specific to the appellant's interactions with the city and its business interests regarding its operation of the sign. While this private interest does not disentitle the appellant to its right to access, it nonetheless remains a private interest about contractual entitlements as noted by the city. The city

rightly considered the absence of a public interest in disclosure of the records, as well as the nature of the relationship between it and the appellant. The city also appropriately turned its mind to the significance of the information and the adverse effect that disclosure would have on the ability of its staff to properly consider advice in order to formulate decisions on regulatory and contractual matters; such matters impact the city's ability to properly function and in turn, impact the city's citizens, thereby engaging the public interest in withholding related exempt information.

[87] With the exception of some information which I have found does not qualify for exemption under sections 7(1) and 12 that I will order disclosed, I have found that most of the records that the city has withheld under sections 6, 7 and 12, are exempt, and I am satisfied that the city properly exercised its discretion to withhold them. I uphold the city's exercise of discretion with respect to the records and information I have found to be exempt.

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

[88] The appellant claims that additional records exist beyond those identified by the city and as a result, I must decide whether the city has conducted a reasonable search for records as required by section 17.[35] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the city's decision. If I am not satisfied, I may order further searches.

[89] The *Act* does not require the city to prove with absolute certainty that further records do not exist. However, the city must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[36] To be responsive, a record must be "reasonably related" to the request.[37]

[90] 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.[38] 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.[39]

[91] 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.[40]

[92] The city submits that there is no reasonable basis to conclude that there are

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[35] Orders P-85, P-221 and PO-1954-I.
[36] Orders P-624 and PO-2559.
[37] Order PO-2554
[38] Orders M-909, PO-2469, PO-2592.
[39] Order MO-2185
[40] Order MO-2246.

additional records. It states that it adopted a liberal and expansive interpretation of the request in order to best serve the purpose and spirit of the *Act*. In processing the request, it states that its staff in the Building Division and Sign Unit searched for and located the responsive records since they were knowledgeable about the administration and decision making processes related to the subject of the request. Along with its representations, the city provides two affidavits that it submits attest to the thoroughness of the searches conducted. The first affidavit is sworn by the city's Manager, Access & Privacy and the second by the city's Manager, Sign Unit, Toronto Building. The affiants swear that searches were conducted of the electronic and physical files of Toronto Building, and in particular, the Sign Unit; of the city's Integrated Business Management System which contains emails and other files; and of the records contained in the inspector files within the Sign Unit. The individuals who conducted the searches are identified in the affidavits as the Access and Privacy Officer of the city, individuals assigned by her to Toronto Building to conduct searches, the Manager, Sign Unit, and a specific inspector within the Sign Unit. The affiants also swear that they are not aware of any responsive records which would exist in another format, or of any files or records being deleted or destroyed that are related to the subject matter of the request with the exception of transitory records that may have been destroyed in accordance with the city's applicable retention policies. The city notes that much of the subject matter of the request is a matter for another institution, the Board of Governors of Exhibition Place, which would have custody or control of responsive documents in addition to a greater interest in them. It states that this is the reason it transferred portions of the access request to the Board of Governors.

[93] The appellant asserts that the city has not discharged its burden on this issue. It states that the affidavit evidence does not detail the steps that were allegedly taken to respond to the request. It also objects to any part of its request having been transferred by the city and criticizes the city for not making proper inquiries for the responsive records from sources other than the Board of Governors.

[94] In reply, the city asks that I reject the appellant's argument that the Board of Governors should not be considered a separate legal entity in this appeal. It states that the Board of Governors is a City Board under the *City of Toronto Act*, and therefore, specifically included within the definition of "institution" in section 2(1)(b) of the *Act.*

[95] The affidavit evidence tendered by the city provides a sufficient basis for me to conclude that the city conducted a reasonable search for responsive records as required by the *Act*. The two affidavits identify the individuals who were tasked with processing the access request and conducting searches for responsive records, and note the types of records searched; specifically, electronic and physical records within the Toronto Building and Sign Unit areas, including emails, inspection notes and photos, draft reports and by-law amendments, and details about enforcement action. The appellant has not established any basis for believing that additional records exist. From my own review of the records at issue, including the disclosure made by the city, I do not see any gaps or omissions from the information that would suggest additional records exist.

As a result, I find that the city conducted a reasonable search for responsive records in this appeal. Regarding the Board of Governors, I agree with and accept the city's position, which is supported by sections 2(1)(b) and 18 of the *Act*, and I note that two orders with respect to that institution and the appellant have already been issued by this office.

H. Are the severances marked as non-responsive in pages 43, 65, 74, 76, 78 and 79 responsive to the request?

[96] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. It states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record[.]

[97] This office has found that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act* and should resolve any ambiguity in the request in the requester's favour.[41] To be considered responsive to the request, records must "reasonably relate" to the request.[42]

[98] The city submits that some of the email records that are responsive to the request discuss many topics, including topics that are entirely unrelated to the subject matter of the request; one example being staff dealing with other reports concerning issues other than those related to the topic of the sign, that were unrelated to the site-specific amendment commenced by the appellant. The city states that it determined the scope of the request to be for records relating to the topic of the appellant's dealings with respect to the sign and that it interpreted this request in the appellant's favour. It states that it has gone to extensive lengths to exercise its discretion to disclose information to which various exemptions clearly apply, while disclosing as much as it is able to from the records.

[99] The appellant states that it is not in a position to address the redactions purporting to sever information that is irrelevant or unresponsive to the inquiry other than to reiterate that nothing should be redacted from a responsive record unless the redacted information is subject to a specific exemption.

[100] I have considered the appellant's submissions on non-responsive information.

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[41] Orders P-134 and P-880.
[42] Orders P-880 and PO-2661.

Previous orders of this office have consistently held that portions of records that do not reasonably relate to a request may be identified as non-responsive to the request and withheld from the requester on that basis.[43] I adopt this approach and reject the appellant's argument.

[101] As submitted by the city, all of the severances withheld as non-responsive are contained in records that discuss the sign as well as other topics. Most of these severances concern scheduling matters and the personal schedules and obligations of the city staff who participated in the email chains contained in the records. I find that these severances at pages 74, 76, 78 and 79 – some of which contain identical information as a result of some duplication of the emails in the email chain - do not reasonably relate to the appellant's request for records relating to the sign and were properly withheld by the city as being non-responsive. I also find that the severance at page 65 does not reasonably relate to the appellant's request because it relates to other matters and signs, despite the fact that the subject line of the email is the name of the sign at issue in this appeal.

[102] Similarly, most of the severances withheld as non-responsive in page 43 relate to other matters and signs that city staff were dealing with at the time of the email chain and are properly withheld as non-responsive to the request. However, the first sentence and most of the information in the final three sentences of the email on page 43 address the sign and reasonably relate to the appellant's request, even though some of this responsive information relates to other matters and signs too. I find that the information relating to the sign in the first sentence and most of the final three sentences of the email falls within the scope of the appeal. The city has not claimed any exemptions for this information in the alternative, and I am satisfied that no mandatory exemptions apply to it. Accordingly, I will order the city to disclose this responsive information to the appellant.

I. Is there a compelling public interest in disclosure of the records found to be exempt under sections 7 and 14 of the *Act* such that these records should be ordered disclosed under section 16?

[103] In its representations, the appellant raises the possible application of the public interest override in section 16 of the *Act*, which states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[104] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption. The *Act* is silent as to who bears the burden of

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[43] Order P-913, pages 1-3.

proof in respect of section 16, however, this office recognizes that this onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, this office reviews the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[44]

[105] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[45] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[46]

[106] A public interest does not exist where the interests being advanced are essentially private in nature.[47] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[48]

[107] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[49]

[108] Any public interest in non-disclosure that may exist also must be considered.[50] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[51]

[109] A compelling public interest has been found to exist where, for example:

- the integrity of the criminal justice system has been called into question[52]
- public safety issues relating to the operation of nuclear facilities have been raised[53]

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[44] Order P-244.
[45] Orders P-984 and PO-2607.
[46] Orders P-984 and PO-2556.
[47] Orders P-12, P-347 and P-1439.
[48] Order MO-1564.
[49] Order P-984.
[50] *Ontario Hydro v Mitchinson,* [1996] OJ No 4636 (Div Ct).
[51] Orders PO-2072-F, PO-2098-R and PO-3197.
[52] Order PO-1779.

- disclosure would shed light on the safe operation of petrochemical facilities[54] or the province's ability to prepare for a nuclear emergency.[55]

[110] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[56]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[57]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[58]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[59]
- the records do not respond to the applicable public interest raised by appellant.[60]

[111] The appellant submits that section 16 overrides both sections 7 and 14 in this appeal. It asserts that city staff failed to perform their public duties and conducted themselves inappropriately. It alleges that city staff were indifferent to or contemptuous of their duties to the public and particularly to it, and that they failed to perform their public duties and treated it with indifference and contempt. The appellant asserts that there is clear public interest in uncovering what it alleges is the incorrect conduct of city staff and an improper exercise of discretion.

[112] The city submits that the appellant's allegations of wrongdoing are insufficient to justify the application of the public interest override in this appeal. It denies there is any public interest in disclosure of the records and disputes the appellant's contention that disclosure of the records at issue would assist the public. It states that the appellant appears to be seeking disclosure to assist in advancing its private interest in its dispute with the city and the Board of Governors. The city acknowledges that a private dispute may raise a public interest in disclosure concerning the operations of an institution, however, it asserts that no such general interest exists in this appeal. It relies on Order PO-3082 to assert that unsubstantiated allegations of wrongdoing against an institution

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[53] Order P-1190, upheld on judicial review in *Ontario Hydro v Ontario (Information and Privacy Commissioner)* at note 49 above, leave to appeal refused [1997] OJ No 694 (CA), Order PO-1805.
[54] Order P-1175.
[55] Order P-901.
[56] Orders P-123/124, P-391 and M-539.
[57] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[58] Orders M-249 and M-317.
[59] Order P-613.
[60] Orders MO-1994 and PO-2607.

made to advance a private dispute do not transform a private interest into a legitimate public interest. The city notes that the appellant's objections to its actions have been the subject of numerous meetings open to the public and there is an exceptional volume of records available online for public inspection relating to the various sign developments and its regulation of the sign. The city submits that any general public interest has been satisfied by its public disclosure of information. The city concludes by asserting that the appellant has failed to establish that any general public interest in disclosure would outweigh the operational interest in full and frank discussion and the personal privacy interest that it seeks to protect through its application of sections 7 and 14.

[113] Having reviewed the records, I agree with the city that there is no compelling public interest in disclosure of the records withheld under sections 7 and 14 and that the appellant has failed to establish the first part of the test for the application of section 16 of the *Act*. This appeal concerns a private matter relating to the appellant's commercial and regulatory disputes with the city, and the allegations the appellant makes in its representations that are supposed to ground its public interest assertion are subjective and unfounded. The circumstances of this appeal do not raise a general public interest. The evidence before me is that the city has published a significant amount of information relating to the sign and the appellant's disputes with it, and this is in addition to the considerable information that the city disclosed to the appellant during the course of the access request and this appeal. Therefore, any public interest that may exist in disclosure of the records has already been addressed by the volume of relevant and responsive information the city has published and disclosed. Furthermore, I note that the appellant has availed itself of other avenues of recourse to address its allegations against the city. For these reasons, I find that the public interest override in section 16 does not apply in this appeal.

ORDER:

1. I uphold the city's application of sections 6(1)(a), 12 to the relevant records.

2. I partially uphold the city's application of sections 7(1) and 14(1) to the relevant records, with the exception of certain records that I have found do not qualify for exemption and have ordered disclosed below.

3. I uphold the city's exercise of discretion to withhold the records that I have found to be exempt under sections 6(1)(a), 7(1), 12 and 14(1).

4. I uphold the city's search for records as reasonable.

5. I uphold the city's decision that portions of the records are not responsive to the request and should not be disclosed, with the exception of the information in page 43 of the records that I have ordered disclosed below.

6. I order the city to disclose to the appellant, by **June 23, 2016, but not before June 20, 2016**:

    - The severances at pages 76, 78, 250, 426 and 435 (which contain identical information), 380 and 615 (which contain identical information) and 152, and all of pages 510 and 511 that I have found not to be exempt under section 7(1).

    - The severances at pages 43, 70, 71, 72, 77 and 79 that I have found not to be exempt under section 14(1).

    - The portions of page 43 of the records that I have found to be responsive to the request.

    For certainty, I attach to the city's copy of this order, copies of these severed pages highlighting the portions of the pages that I am ordering disclosed.

7. I reserve the right to require the city to provide me with a copy of the records it discloses to the appellant.

Original Signed by: May 18, 2016

Stella Ball
Adjudicator