Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3314

Appeal MA13-596

City of Toronto

May 24, 2016

Summary: A reporter sought records relating to certain case studies summarized by the Auditor General's Office in the 2012 Report on Fraud in the City of Toronto. The reporter argued, among other things, that the confidentiality provision in the *City of Toronto Act, 2006* (*COTA*), which protects information relating to investigations of the Auditor General, infringes on the guarantee of freedom of expression in the *Canadian Charter of Rights and Freedoms*. The adjudicator decides that section 181 of *COTA* applies to any responsive records in the Auditor General's office, and to the information redacted by the Auditor General from the city's own investigation records. The city conducted a reasonable search for responsive records. Records relating to the city's investigation of its employees for fraud-related allegations are excluded from the scope of the *Act* under section 52(3). Records relating to the city's investigation of allegations of subsidy fraud are partly exempt under the personal privacy exemption in section 14(3), but do not qualify for the exemption for law enforcement reports in section 8(2).

The public interest override in section 16 does not apply to the information exempt under the personal privacy exemption. Section 181 of *COTA* does not infringe the guarantee of freedom of expression under the *Charter*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(2)(a), 14(1) and (3), 16, 17, 52(3) and (4), and 53; *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, section 2(b); and *City of Toronto Act, 2006*, S.O. 2006, c 11, Schedule A, section 181.

Orders and Investigation Reports Considered: MO-2629-R, MO-2975-I, MO-1200-R, MO-1584-F, P-352.

Cases Considered: *Ontario (Ministry of Correctional Services) v. Goodis,* [2008] O.J. No. 289, 89 O.R. (3d) 457, 290 D.L.R. (4th) 102 (Div. Ct); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23.

BACKGROUND:

[1] The following background is based on the submissions of the Auditor General's Office (Auditor General or AGO) and the AGO's "2012 Annual Report on Fraud Including Operations of the Fraud and Waste Hotline" (the 2012 Report or the Report).[1]

[2] The responsibilities of the Auditor General are described in section 178(1) the *City of Toronto Act, 2006* (*COTA*), and include assisting city council in holding itself and its administrators accountable for the quality of stewardship over public funds. Under the city's Fraud Prevention Policy, the AGO has primary responsibility for the investigation of all suspected fraud. Beginning in 2000, the AGO has issued an annual report relating to fraud activities at the city that have been reported to it. Since 2002, when the city established a Fraud and Waste Hotline Program, operated by the Auditor General's Office, the activities of that Program have been included in the annual report. The AGO's Forensic Unit is responsible for the operation of the Program and for conducting or coordinating investigations directed at the detection of fraud, waste and wrongdoing involving city resources.

[3] On January 28, 2013, the Auditor General's Office issued its 2012 Report. In that Report, among other things, the AGO describes its activities and processes in relation to the investigation of fraud during 2012.

[4] According to the Report, the AGO received 774 complaints in 2012. Most were received through the AGO's on-line complaint form or direct telephone calls to the Hotline. In most of the complaints, the AGO conducted preliminary investigative inquiries to determine whether the allegations had merit, and the disposition or action to be taken. Sixty-five complaints led to further investigation by either the AGO or divisional management. The Report also refers to a larger number that were referred by the AGO to city divisions for "review and appropriate action or for information only."

[5] Although the Auditor General has the primary responsibility for fraud investigations, the AGO is selective in the investigative work it conducts and which investigations it will take a lead role in conducting. The Report indicates that the majority of investigations are coordinated with divisional management within the city

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[1] See 2012 Annual Report on Fraud Including the Operations of the Fraud and Waste Hotline, http://www.toronto.ca/legdocs/mmis/2013/au/bgrd/backgroundfile-55726.pdf.

and, in these circumstances, divisional management takes the lead role in the investigation. Divisional management reports back to the Auditor General's Office on complaints referred to them for review or investigation. The Auditor General's Office determines whether the information provided is adequate and whether additional action is required by a division before the AGO closes the complaint.

[6] In 2012, fifty complaints of fraud or related activity made to the AGO were found to be substantiated in whole or in part. Exhibit 2 to the Report, entitled "Substantiated Complaint Summaries", describes some of those substantiated complaints, providing summaries of certain reviews and investigations concluded in 2012.

[7] The Report generated attention from several news media outlets, and resulted in the request at issue in the present appeal.

HISTORY OF THE REQUEST

[8] The requester made a six-part 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:

- Electronic copies of all documents related to the first case study regarding fraud relating to subsidy claims activities in the Exhibit 2 – Substantiated Complaint Summaries section of the 2012 Annual Report on Fraud Including Operations of the Fraud and Waste Hotline [Request 2013-2300];

- Electronic copies of all documents related to the sixth case study regarding conflict of interest activities in the Exhibit 2 – Substantiated Complaint Summaries section of the 2012 Annual Report on Fraud Including Operations of the Fraud and Waste Hotline [Request 2013-2301];

- Electronic copies of all documents related to the ninth case study regarding misappropriation of funds and conflict of interest in the Exhibit 2 – Substantiated Complaint Summaries section of the 2012 Annual Report on Fraud Including Operations of the Fraud and Waste Hotline [Request 2013-2302];

- Electronic copies of all documents related to the tenth case study regarding inappropriate inspection activities in the Exhibit 2 – Substantiated Complaint Summaries section of the 2012 Annual Report on Fraud Including Operations of the Fraud and Waste Hotline [Request 2013-2303];

- Electronic copies of all documents related to the eighth case study regarding misappropriation of funds in the Exhibit 2 – Substantiated Complaint Summaries section of the 2012 Annual Report on Fraud Including Operations of the Fraud and Waste Hotline [Request 2013-2304]; and

- Electronic copies of all documents related to the fourth case study regarding abuse of employee benefits in the Exhibit 2 – Substantiated Complaint Summaries section of the 2012 Annual Report on Fraud Including Operations of the Fraud and Waste Hotline [Request 2013-2305].

[9] The requester asked that all names of complainants and victims be redacted from the requested documents.

[10] The city issued a decision denying access in full on the basis the requested records are records of the AGO, and thus subject to section 181 of the *City of Toronto Act, 2006* (*COTA*),[2] which states:

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

[11] In its decision letter, the city explained that section 181 of *COTA* sets out the duty of confidentiality of the Auditor General and anyone acting under her instructions, and specifically establishes that this obligation prevails over the *Act*. As a result, the city denied access to the records based on the combined effect of section 181 of *COTA* and section 53(1) of the *Act* (prevailing confidentiality provision). The city also took the position that records of the Auditor General's office are not in the custody or under the

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[2] S.O. 2006, c 11, Schedule A.

control of the city.

[12] The requester (now the appellant) appealed the city's decision to the Office of the Information and Privacy Commissioner (this office, or the IPC).

[13] In discussions with an analyst from this office, the city took the position that any records responsive to the request are in the custody and control of the Auditor General, and that, pursuant to section 181 of *COTA*, the city is neither required nor permitted to conduct a search for records that are, or may be, in the custody or control of the Auditor General.

[14] The analyst requested submissions from the appellant on whether the appeal should proceed, expressing the preliminary view that it should be dismissed. The appellant provided his submissions by letter dated January 30, 2014. The appellant took the position that the city had interpreted section 181 of *COTA* in an overly broad manner in finding that any records responsive to his request fall within its scope. He also maintained that the city had not conducted a reasonable search for any responsive records held by city officials acting outside the scope of the Auditor General's instructions, which are not subject to section 181 of *COTA*.

[15] The IPC decided not to dismiss the appeal at this early stage and streamed it to mediation. The parties were unable to resolve the appeal through mediation, and it was transferred to the adjudication stage of the appeal process for a written inquiry under the *Act*.

THE ADJUDICATION PROCESS

[16] I began my inquiry by seeking representations from the city and the Auditor General on the two issues raised in the appeal by that stage: the reasonableness of the city's search for responsive records in its custody or control and the impact of section 181 of *COTA*. With the Notices of Inquiry, I enclosed, among other things, the appellant's letter dated January 30, 2014.

[17] The city subsequently issued a revised decision on access in light of its review of the appellant's January 30, 2014 submissions. In its August 1, 2014 decision letter, the city advised that it now understood the scope of the appellant's request "to include not only the documents related to the specified case studies, but also the documents related to the *activities mentioned in each of the specified case* studies,"[3] and that, as a result, the city contacted each of the city divisions involved in the activities mentioned in each of the case studies to search for records responsive to its new understanding of the appellant's request. The city advised that its August 1, 2014 revised decision reflects the results of those additional searches.

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[3] Emphasis in original.

[18] In its revised decision, the city stated that it refused to confirm or deny the existence of any records relating to the duties of the Auditor General, or any person acting under the Auditor General's instructions, in the course of fulfilling the duties outlined in Part V of *COTA*. The city also made the following claims for any records held by city staff (the "divisional records") which are not subject to section 181:

- Any records responsive to Request 2013-2300 are exempt under sections 8(2)(a) (law enforcement) and 14(1) (personal privacy) of the *Act*;
- Any records responsive to Requests 2013-2301, 2013-2303 and 2013-2304 are exempt under sections 52(3)1 and 52(3)3 (labour relations and employment records), and section 12 (solicitor-client privilege) of the *Act*;
- Any records responsive to Request 2013-2302 fall under the control of a "City Service Corporation" and do not fall under the custody or control of the city; and
- Any records responsive to Request 2013-2305 are exempt under sections 52(3)1 and 52(3)3 (labour relations and employment records).

[19] As well, the city and the Auditor General provided representations in response to the Notices of Inquiry, which I shared with the appellant. In his representations, the appellant identified the constitutionality of section 181 of *COTA* as an additional issue, and submitted a Notice of Constitutional Question.

[20] I served the Notice of Constitutional Question on the Attorneys General for Ontario and Canada, and sought their representations on the constitutionality of section 181 of *COTA*. I also sought representations from the city and the Auditor General on the constitutional question and in response to the appellant's representations.

[21] The Lobbyist Registrar, the Toronto Ombudsman and the Toronto Integrity Commissioner (collectively referred to as the Accountability Officers) requested that they be given an opportunity to participate in the appeal. I allowed them to make representations on the statutory interpretation and constitutional validity of section 181 of *COTA.*

[22] The Attorney General of Ontario submitted a response to the Notice of Constitutional Question; the Attorney General of Canada declined to make representations. I also received representations on this issue from the city, the Auditor General and the Accountability Officers.

[23] I also sought and received representations from the appellant and the city regarding the city's application of sections 8(2)(a) (law enforcement report), 12 (solicitor-client privilege), 14(1) (personal privacy), and 52(3) (labour relations and employment records) of the *Act* to the divisional records. I requested that the city provide me with copies of the records responsive to Request 2013-2300, reserving the right to require copies of the other records at issue. The city provided approximately 40

pages of redacted records in response, which comprised only a portion of the divisional records responsive to this part of the request.

[24] After my review of these records, I requested that the city provide this office with all non-redacted divisional records responsive to Request 2013-2300 in its custody or control. In response, the Auditor General provided this office with 173 pages of records. The city states that this group of records comprises all of the divisional records responsive to Request 2013-2300. These records also contained redactions which, according to the AGO, relate only to information covered by section 181 of *COTA.*

[25] The city transferred Request 2013-2302 to the Lakeshore Arena Corporation (LAC), which is now the subject of a separate appeal at this office. Accordingly, Request 2013-2302 will not be addressed in this order.

RECORDS:

[26] At issue in this appeal are records held in the Auditor General's Office, as well as records held by city staff (the "divisional records"), relating to the case studies identified by the appellant.

[27] I have not requested that the city or the Auditor General provide me with copies of responsive records in the Auditor General's Office and I am satisfied that I can determine the issues with respect to those records without inspecting them.

[28] With respect to the divisional records, as indicated above, I requested and received records in relation to the first case study. I have not requested copies of the divisional records relating to the remaining case studies and I am satisfied that I can determine the issues with respect to those records without inspecting them. Although the city has not provided a record-by-record index of them, it has provided sufficient information about them which, combined with the other information before me, enables me to make the necessary determinations on the issues applicable to them.

[29] The city describes the divisional records at issue as follows:

2013-2300

- Approximately 200 pages of documents related to a city division's investigation concerning the allegation that 7 members of the public were receiving subsidies through fraudulent claims, including:
  - Details of allegations;
  - Investigation notes;
  - Chronology of events;

- Disposition details;
- Summaries of evidence; and
- Information collected in support of those summaries.

2013-2301

- Approximately 1,300 pages of documents related to the investigation conducted by a city division, in consultation with the city's Human Resources Division (HRD) and Legal Services, concerning an employee's non-compliance with applicable workplace policies, including:
  - Documents pertaining to the investigation process, including briefing notes, emails and reports;
  - Documents related to management's decision to terminate the employee following the investigation;
  - Notes from meetings and interviews between the Divisional Manager, the Director and the affected employee concerning the complaints;
  - Notes from meetings between Divisional Manager, the Director and the Employee & Labour Relations section of the HRD;
  - Emails between the Divisional Manager, the Director and the Employee & Labour Relations section of the HRD concerning the affected employee; and
  - Notes from meetings between the Divisional Manager, the Director and the assigned Legal Services counsel regarding the division's receipt of legal advice with respect to the affected employee's compliance with applicable employment policies and the decision to terminate employment.

2013-2303

- Thousands of pages of documents related to a city division's investigation and termination of an employee, and the subsequent ongoing grievance proceedings, including:
  - Information gathered for investigation purposes, such as the employee's log book and field books, cost sheets, progress payment documents, supervisors' audit reports, emails and diary notes from management; and
  - Records created in the context of meetings, consultations or communications about the employee's conduct and suitable employment

sanctions, such as meeting notes, emails between management employees, and emails between management and Legal Services counsel regarding labour relations legal advice and anticipated or active grievance proceedings.

2013-2304

- Numerous documents related to a city division's investigation of an employee's actions, and subsequent proceedings concerning the employment sanctions imposed, including:
    - Information pertaining to the investigation process, such as investigation notes, briefing notes, status updates and interview notes;
    - Information gathered for investigation purposes, such as bank statements, account summaries, account analyses, credit card information and transactions, invoices and receipts, and emails seeking legal advice concerning issues that arose throughout the investigation;
    - Information relating to the meetings, consultations, discussions or communications about the employee's conduct and suitable employment sanctions; and
    - Records concerning subsequent grievance proceedings.

2013-2305

- Approximately 20 pages of documents related to the city's benefits provider's investigation of an employee's alleged engagement in employment with a second employer while in receipt of long-term disability benefits, including:
    - Benefits provider's summary of allegations, status updates on the investigation and a briefing note regarding the disposition of the complaint; and
    - Emails between divisional staff regarding the affected employee and the appropriate employment response.

ISSUES:

A. What impact does section 181 of the *City of Toronto Act, 2006* have on this appeal?

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

C. Does section 52(3) exclude the records responsive to Requests 2013-2301, 2013-2303, 2013-2304 and 2013-2305 from the *Act*?

D. Does the solicitor client exemption at section 12 apply to the records responsive to Requests 2013-2301, 2013-2303 and 2013-2304?

E. Do the records responsive to Request 2013-2300 contain "personal information" as defined in section 2(1)?

F. Does the personal privacy exemption at section 14(1) apply to the personal information in the records responsive to Request 2013-2300?

G. Does the law enforcement exemption at section 8(2)(a) apply to the records responsive to Request 2013-2300?

H. Is there a compelling public interest in the disclosure of the records responsive to Request 2013-2300 that clearly outweighs the purpose of the section 14 exemption?

I. Does section 181 of *COTA* infringe section 2(b) of the *Charter*?

DISCUSSION:

PREVAILING CONFIDENTIALITY PROVISION

Issue A: What impact does section 181 of the City of Toronto Act, 2006 have on this appeal?

[30] As noted above, section 181 of *COTA* sets out the duty of confidentiality applicable to the Auditor General:

> (1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

[31] Section 181(4) of *COTA* provides that this confidentiality requirement prevails over the provisions of the *Act.* The only exceptions to the duty of confidentiality are found in section 181(2) and pertain to criminal proceedings and to the exercise of the Auditor General's functions in reporting to City Council.

[32] Section 53(1) of the *Act* speaks to the relationship between the *Act* and a confidentiality provision in another statute:

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

[33] This office has found that section 181(1) of *COTA* is a confidentiality provision that prevents a requester from having access under the *Act* to records covered by that provision.[4] Section 181(1) applies to the Auditor General and his or her staff. Section 181(1) may also apply to information acquired by a person who is not a member of the AGO's staff, but who acts "under the instructions of the Auditor General" in the course of duties under *COTA*.[5]

Representations

[34] The city relies on Reconsideration Order MO-2629-R in support of its argument that section 181 of *COTA* prevails over the *Act* and requires that records related to the Auditor General's duties be kept confidential. The city submits that Order MO-2629-R determined that it is not required to search the Auditor General's records in circumstances where section 181 of the *COTA* would apply to any responsive record. The city states that it may search its own records, however, to determine the existence of any responsive records that do not relate to the Auditor General's duties.

[35] The city states that some of the responsive divisional records may have originally been created by city divisions in furtherance of divisional activities, where city staff were not acting under the instructions of the AGO. In its first set of submissions on the application of section 181(1) of *COTA* to the divisional records, the city takes the position that even disclosure of those records would reveal which specific divisional activities were the subject of review by the AGO in the preparation of the 2012 Report. It submits that section 181(1) would still apply to the entirety of those records. In its submissions, the city suggests that disclosure of any information beyond what has been made public in the AGO's report would contravene the secrecy requirements imposed by *COTA*.[6]

[36] The city also submits that it cannot be required to confirm or deny the existence of records subject to section 181.

The Auditor General

[37] The Auditor General states that it is possible that records subject to section 181 are held by both the city and the Auditor General, as many complaints of fraud are investigated by it with the cooperation of other city divisions. In some instances, the city division affected by the alleged fraud will be instructed by the Auditor General to conduct the investigation and report back. At times, the Auditor General will work in direct collaboration with the affected city division, and in some cases the Auditor General will conduct the entire investigation.

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[4] See Order MO-2629-R.
[5] See Order MO-2843.
[6] City of Toronto submissions, August 14, 2014, at p. 4

[38] The Auditor General submits that section 181 prevents the city from being able to search the Auditor General's records in response to an access request. Further, the Auditor General submits that neither the city nor the Auditor General can be required to confirm or deny the existence of records covered by section 181. Accordingly, the Auditor General submits that she is unable to specifically address the appellant's six requests and the complaint summaries beyond the details shared in the Report.

The appellant

[39] The appellant submits that the city's interpretation of section 181 of *COTA* is overly broad. He submits that there is a distinction between "communicating information to another person," as stated in section 181(2) of *COTA,* and "the disclosure of documents." The appellant submits that since section 181(3) expressly lists a category of documents that shall not be disclosed without consent, the omission of this type of list in section 181(1) implies that other documents and information can be disclosed by those required to preserve secrecy under subsection 181(1).

[40] Additionally, the appellant submits that city staff who may be asked to provide the Auditor General with information under section 179 of *COTA* are not "acting under the instructions of the Auditor General," and any records under the custody and control of the city should be disclosed. The appellant further submits that any records supplied by the city to the Auditor General are only protected in relation to ongoing matters, and not in relation to concluded investigations.

[41] The appellant also argues that the records of city staff members not acting under the instructions of the Auditor General do not fall within the scope of section 181. The appellant submits that records generated by city staff for the purpose of carrying out ordinary tasks are not subject to section 181, even if a copy has been given to the Auditor General.

[42] The appellant also notes that he is only requesting anonymized information, and that the Auditor General has already confirmed that the activities documented in the records were under review.

The city's reply

[43] In the city's reply submissions of December 14, 2014, it states that, with respect to the divisional records, section 181 is triggered "only where portions of the City Records would, if disclosed, reveal specific information communicated in the course of Part V duties [under COTA]." Addressing the appellant's statement that he seeks only anonymized information, the city submits the possibility remains that disclosing portions of the divisional records would contravene the section 181 secrecy obligation.

[44] The city also submits that the appellant's request is an attempt to utilize the *Act* to force disclosure of more information about the AG's activities than the AG determined was appropriate to include in the Report. It states that it has only applied section 181 to

those portions of the divisional records which could, if disclosed, have indirectly disclosed information about the AGO's duties which the AGO did not believe should be disclosed under Part V of *COTA*. The city also states that its application of section 181 to the divisional records does not deny access to information concerning divisional activities but only keeps confidential which specific divisional records were provided to the AG.

[45] The city submits that the main factor triggering the application of section 181 is the format of the appellant's requests. The city notes that the appellant may make an access request for information held by city divisions that does not reference specific activities of the Auditor General that are subject to section 181. The city also states that, contrary to the appellant's contention, records within the city's divisions are not necessarily excluded from the scope of section 181.

[46] The city submits that the appellant's interpretation of section 181(3) is unreasonable and does not achieve the legislative objective of confidentiality. The city also rejects the appellant's submission that there is a distinction between the reference to communication in section 181(2) and the potential disclosure of documents. Further, it submits that there is no basis to suggest that concluded Auditor General investigations should be excluded from the scope of matters contemplated by section 181.

The Auditor General's reply

[47] The Auditor General responded to the appellant's submissions regarding an unduly broad interpretation of *COTA*. The AGO submits that the section 181 protection does not extend to records that come into the custody or under the control of the city in the ordinary course of business, when it is not acting under the instructions or the AGO or when the AGO is not carrying out its statutory functions. The AGO states, in this regard,

> Such records relating to the *subject-matter* of the Auditor General's investigation (for instance, fraud related to subsidy claims in the Auditor General's Report) that arose through the operations of the City divisions may therefore be subject to *MFIPPA*. [emphasis in original]

[48] The AGO submits that section 181 does not extend to actions or investigations that are carried out by city staff who are not acting under the instructions of the AGO. A city division may investigate a matter for its own purposes to address its own concerns, such as employment, and act in response to its findings independently of the AGO. Records relating to such actions would not fall within the protections provided by section 181.

[49] The AGO submits that, subject to the relevant exemptions under the *Act*, a person is entitled to seek access to records created or held by the city as part of its own

functions. Nor, in her submission, would an original record that was subject to the *Act* on the day prior to the commencement of an investigation by the AGO become immune from disclosure the next day when that investigation has commenced.

[50] In the AGO's submission, records relating to the subject matter of the case studies are therefore subject to the *Act* to the extent they are records created separate from and outside of the AGO's duties under section 181.

The Accountability Officers

[51] The Accountability Officers submit that the confidentiality provisions in section 181 are an essential part of the accountability and oversight framework. They submit that the Auditor General requires confidentiality in order to,

> . . . ensure that [she] receives and analyzes the appropriate information, protects whistleblowers and city staff from reprisal, and encourages complaints. Ultimately, [she] must exercise [her] discretion to report publicly. . . [she] must "include information that will allow for public scrutiny", "without violating the necessary confidentiality" that allows [her] to discharge [her] duties.

[52] In their submission, access rights under the *Act* "should not be interpreted in a way that undermines or eliminates the duty of secrecy established by *COTA,* in order to support the important work of the Accountability Officers."

[53] The Accountability Officers also submit that the appellant's contention that section 181 only applies to ongoing investigations is contrary to the legislative intent, the purpose of *COTA,* the context of the provision, and the text of section 181(1).

Analysis

[54] In addressing the impact of section 181 of *COTA* on this appeal, I will deal separately with records in the office of the Auditor General, and the city's divisional records.

Records in the office of the Auditor General

[55] This office determined in Orders MO-2629-R and MO-2975-I that the Accountability Officers, including the Auditor General, are part of the city as an "institution", for the purposes of the *Act*. However, this office has also found, and I agree, that the duty of confidentiality established in section 181 of *COTA* prevails over the provisions of the *Act.* Section 53(1) of the *Act* provides for the primacy of a confidentiality provision in another statute if the other statute specifically provides for that result. As noted above, section 181(4) of *COTA* explicitly states that section 181 "prevails over the Municipal Freedom of Information and Protection of Privacy Act."

[56] I do not accept the appellant's submission that section 181(1) applies only in relation to "ongoing" matters, and not in relation to concluded investigations. The wording of the section does not, on a plain reading, support that interpretation. It states, in the present tense, that the Auditor General "shall preserve secrecy" with respect to "all matters that come to his or her knowledge" in the course of her duties under *COTA*. If the Legislature had intended that concluded investigations are no longer subject to this confidentiality requirement, it could have stated so. Further, I reject the contention that reading in a time limit is consistent with the purposes of *COTA*. On the contrary, I accept the submission that the prospect of future disclosure of information gathered during the course of investigations would have a chilling effect on the ability of the AGO to perform her functions.

[57] I also do not accept the submission that section 181(1), read together with sections 181(2) and (3), does not prohibit the disclosure of "documents" under access to information legislation, but only "information". The interpretation urged by the appellant in this regard, excluding documents from the requirement to preserve secrecy with respect to "all matters", is strained and unsupported by the intent and language of these provisions. Reading the provisions together, in the context of their purpose and the statute as a whole, section 181(1) contains a general obligation of secrecy that applies to any information or documents. Section 181(2) permits communication about such matters by the Auditor General in the discharge of her functions, including accountability and transparency functions. However, section 181(3) limits the discretion under section 181(2), in relation to privileged information provided by a source.

[58] For the reasons above, and based on the scope and nature of the appellant's request, I find that any responsive records which exist in the hands of the Auditor General relate to "matters that [came] to his or her knowledge in the course of his or her duties" under *COTA*. They cannot be disclosed, as a result of the confidentiality provision in section 181(1) of *COTA*.

The city's divisional records

[59] Below, I find that responsive records in relation to four of the five case studies are excluded from the scope of the *Act*, as they relate to employment or labour relations matters. It is therefore only necessary for me to consider the application of section 181 of *COTA* to the records covered by Request 2013-2300.

[60] This part of the request concerns allegations that 7 members of the public were receiving city subsidies through fraudulent claims, and the city's investigation of these allegations. The city provided this office with 173 pages of records, which it states comprise the divisional records responsive to Request 2013-2300. The records contain redactions that the Auditor General describes as information covered by section 181. The AGO provided this office with confidential representations regarding the types of information redacted from the records responsive to Request 2013-2300.

[61] I will first consider the city's submission that all of the divisional records responsive to Request 2013-2300 are covered by section 181 of *COTA*. Having regard to the submissions and information before me, including the records, I do not accept the submission that these records are, in their entirety, covered by that confidentiality provision.

[62] The Case Summary states that the AGO received a complaint alleging that seven members of the public were receiving subsidies through fraudulent claims. It conducted preliminary investigative work and forwarded the matter to the division for further investigation. To the extent that the city investigated the allegations of subsidy fraud at the behest of and in order to report to the Auditor General, any records related to the AG's referral to the city, and the city's report to the AG, are covered by *COTA*. However, the city also had its own interest in investigating those allegations and seeking recovery of subsidy funds it concluded were improperly claimed. The records generated in the course of the city's own investigation are not covered by *COTA*.

[63] The fact that, in conjunction with its own investigation, the city also reports back to the AGO, does not result in section 181 covering the entirety of its investigations for its own purposes. The AGO's own submission is to the effect that section 181 does not extend this far.

[64] With regard to the portions redacted by the AGO, I have considered the confidential and non-confidential representations of all the parties and have reviewed the non-redacted portions of the records responsive to Request 2013-2300. I am satisfied that the information redacted by the Auditor General in those records falls within the confidentiality provision in section 181 of *COTA.* I accept the AGO's description of the nature of the information she has redacted from the records. I am satisfied that the redacted information relates to her office's role in receiving the initial complaints about fraudulent subsidy claims, conducting a preliminary investigation as described in the Case Summary, and forwarding the matter to the division for further investigation. I conclude that disclosure of that information would reveal matters that came to the AGO's knowledge in the course of duties under *COTA*.

[65] I do not accept the appellant's argument that the Auditor General has already revealed what matters were under review in the Report. The information the Auditor General has redacted pursuant to section 181 would reveal substantially more information about the complaint that her office received, its preliminary investigation and the referral of the matter to the city, such as the city divisions involved, the type of subsidy under investigation, and the nature of the fraud allegations.

[66] Accordingly, I find that the information redacted from the records responsive to Request 2013-2300 cannot be disclosed as a result of the confidentiality provision in section 181 of *COTA*. However, for the reasons above, section 181 does not apply to the balance of the information in these records.

SEARCH FOR RESPONSIVE RECORDS

Issue B: Did the city conduct a reasonable search for records?

[67] The issue of reasonable search arose at the outset of this appeal, when the appellant took issue with the city's interpretation of his request. The city interpreted the request to cover records relating to the AGO's investigation of the fraud cases referred to in the request, held in the office of the AGO. The city initially took the position that such records were in the custody and control of the AGO, that the city is neither required nor permitted to conduct a search for records that are in the custody or control of the Auditor General, and that any such records are covered by section 181(1) of *COTA*.

[68] During the course of this appeal, after the appellant clarified that he was also seeking records in relation to the city's own investigation of those cases, the city conducted a further search. The appellant maintained his position that the city has not conducted a reasonable search.

[69] Where a requester claims that additional records exist beyond those identified by the institution, the relevant issue is whether the institution has conducted a reasonable search for records as required by section 17.[7] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[8] To be responsive, a record must be "reasonably related" to the request.[9]

[70] 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.[10] 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.[11]

[71] 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.[12]

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[7] Orders P-85, P-221 and PO-1954-I.
[8] Orders P-624 and PO-2559.
[9] Order PO-2554.
[10] Orders M-909, PO-2469 and PO-2592.
[11] Order MO-2185.
[12] Order MO-2246.

Representations

The city

[72] The city states that it reasonably initially interpreted the appellant's request to cover only records related to the Auditor General's preparation of the case studies described in its Annual Fraud Report, 2012. In describing how it responded to the request, the city submitted an affidavit sworn by the city's Manager of Access & Privacy. The affiant states that the city asked the Auditor General to conduct searches for records responsive to the appellant's requests, and to forward any responsive records not subject to section 181 of *COTA* to the city. In response, the Auditor General confirmed that all responsive records fall under section 181 of *COTA.* The requester was informed accordingly.

[73] The affiant states that the city did not become aware of the appellant's intention to also request access to records held within city divisions until receipt of correspondence from this office in May 2014. The city subsequently contacted the Auditor General to clarify which areas should be searched within the city's organizational structure, and searched those areas. The city subsequently provided the appellant with a second access decision. Its revised decision states, in part:

> In light of the scope of the request outlined in your representations [to the IPC intake analyst] in the aforementioned appeal, we contacted the Auditor General's Office to identify the division involved in the activities in each of the case studies specified in your original request. As your representations established that you now intend the scope of the request to include not only the documents related to the specified case studies, but also the documents related to the *activities mentioned in each of the specified case studies*, we contacted each of these divisions and requested the divisions to search for records responsive to the expanded scope of your request. This decision reflects the results of those additional searches.[13]

[74] In response to my request for an index of the divisional records, the city provided me with a document titled "Description of Responsive Divisional Records ('Index)", which was shared with the appellant. This document lists the types of records within the city's divisions that relate to each of the case studies. It does not identify each division and it identifies, by title, the person who performed the searches in each division.

[75] The city maintains its position that it does not have custody or control over the records in the hands of the Auditor General.

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[13] Emphasis in original.

[76] In its reply representations of April 27, 2015, the city also clarified that the records it searched for were those related to the city's investigations, in relation to each of the case studies. It did not search for other copies of the records that may be maintained for other purposes.

The Auditor General

[77] The Auditor General described how her records are kept and the inability of city staff to have access to them.

The appellant

[78] In his initial representations at the early stage of the appeal, the appellant explains his interest in the records, stating, among other things, that the investigations and results should be accessible for public scrutiny once closed, in order for the public to know how governments act "in our name." He submits that the records requested indicate how such fraud is executed, whether there are sufficient system protections in place and how the city deals with employees found guilty of these offences. In explaining why the city's initial search was inadequate, he submits that the Report states that certain aspects of the investigations were carried out by city officials and further, some of the conduct investigated was originally identified by a city division, which then forwarded the information to the AGO for investigation.

[79] The appellant submits that the city has an obligation to work with the Auditor General's office to search its records. The appellant submits that Order MO-2629-R, in which the adjudicator found that the city has no obligation to search the Auditor General's records in response to an access request, was wrongly decided on this point.

[80] The appellant submits that the Auditor General and/or the city must indicate whether responsive records exist. He states that section 181 of *COTA* does not grant the Auditor General and/or the city the right to refuse to confirm or deny the existence of responsive records.

[81] Lastly, the appellant submits that the city has not provided sufficient evidence regarding the results of the searches. The appellant states that the affidavit provided by the city "is vague and wholly inadequate." The appellant submits that the city should be required to provide further affidavit evidence in relation to the following issues:

a. A description of the individuals, qualifications, positions and responsibilities of those conducting the searches in each location;

b. The date(s) the person conducted the search and the names and positions of any individuals who were consulted;

c. Information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search;

d. A list and description of any records responsive to the requests; and

e. A list of records which existed, but no longer exist, if any, and details of when and by whom such records were destroyed.

The city's reply

[82] In its reply representations, the city submits that its ability to refuse to confirm or deny the existence of records subject to section 181 of *COTA* is essential to avoid revealing which matters are, or are not, under investigation by the Auditor General.

[83] The city submits that this office has found that section 181 of *COTA* would preclude city staff not employed at the Auditor General's Office from conducting a search of the Auditor General's records in response to an access request.

[84] Lastly, the city maintains that it has supplied the appellant and this office with sufficient information regarding the searches it conducted.

The Accountability Officers

[85] The Accountability Officers submit that Orders MO-2629-R and MO-2975-I have determined that the city cannot search the records of Accountability Officers, including the Auditor General. Additionally, the Accountability Officers submit that agreements between each Accountability Officer and the city establish boundaries between the information of each Accountability Officer and that of the city, and are specifically designed to protect the confidentiality of Accountability Officers' records. The Accountability Officers state that these factors, combined with *COTA,* indicate that the city does not have custody or control over Accountability Officers' records, and therefore cannot conduct a search of these records.

The appellant's reply

[86] In reply, the appellant submits that since the Auditor General is part of the city for the purposes of the *Act,* and as the Auditor General is not separately identified as an institution under the *Act,* the Auditor General's records must be in the custody and/or control of the city.

Analysis

[87] As set out above, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. The *Act* does not require the city to prove that additional records do not exist, but only to provide sufficient evidence

to establish that it made a reasonable effort to locate any responsive records.[14]

[88] The issue of reasonable search arises with respect to both the city's initial search efforts, leading to its first decision, and the subsequent search conducted after the filing of this appeal. As described above, the city's initial search was based on its understanding that the request was limited to records about the Auditor General's activities in connection with the six cases cited. It therefore did not consider whether the search should include the city divisions involved in those cases. On a plain reading, the request is broad enough to reasonably encompass records of the Auditor General as well as records with city divisions. While the city's initial interpretation of it was not in itself unreasonable, given the potential breadth of the request it would have been a simple matter for the city to have clarified the requester's intention.

[89] I therefore reject the city's contention that the requester expanded the scope of the request after receiving the city's decision and filing this appeal. However, given that the city did subsequently conduct a search consistent with the broader understanding of the request, the question of whether its initial search was reasonable is moot. The remaining issues regarding the reasonableness of the city's search can be distilled into two questions: 1) was the city required to search for responsive records in the office of the Auditor General? and 2) was the city's subsequent search for records in its own divisions reasonable?

[90] With respect to (1), given my conclusion that the confidentiality provision in section 181 of *COTA* prohibits the disclosure of any responsive records that exist in the hands of the Auditor General, I see no purpose in requiring the city to conduct a search for any such records. My conclusion is consistent with that reached in Reconsideration Order MO-2629-R, in which this office stated that "it is clear that the City was not required to search the Auditor General's records because, as noted, section 181 of the *COTA* would apply to a responsive record found there, if one exists."

[91] The parties all made submissions about whether responsive records in the office of the Auditor General are in the custody or control of the city. As in Order MO-2629-R, and given my findings above, it is not necessary for me to decide this issue. Any such records would in any event be covered by section 181 of *COTA*.

[92] I now turn to consider the city's search of its divisional records. The city has described in general terms the location, nature and volume of the responsive records and the employee who undertook the search. This information has been shared with the requester. The appellant has requested further and more detailed affidavit evidence from the city on the issue of the search.

[93] I am satisfied that neither further evidence nor a further search is required in order to respond to this request. With respect to the records relating to Request 2013-

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[14] Order PO-1954.

2300 (the allegations of subsidy fraud), the city has provided me with the contents of its investigation file. Based on my review of those records, the submissions and evidence of the parties and the appellant's request, I am satisfied that the city made a reasonable effort to locate any responsive records.

[94] With respect to the other parts of the appellant's request, the city did not provide me with the records but did provide evidence about its search, the location of the records, the nature and classes of records, the volume of records in each class and their purpose and use. I find below that these records are excluded from the *Act* in that they relate to labour or employment matters. Based on the nature of the requests and the information provided by the city, I am satisfied that the city made a reasonable effort to locate the records responsive to those requests.

[95] In conclusion, I uphold the city's search and dismiss this part of the appeal.

[96] Before leaving this section, I wish to address the parties' submissions on whether the city, as a result of section 181 of *COTA*, may refuse to confirm or deny the existence of any records that are covered by that confidentiality provision. This question cannot be answered in the abstract. In a given set of facts, it is possible that the disclosure that records exist or do not exist may reveal information that is captured by section 181 of *COTA*. That is not the issue before me. My finding that the city is not obliged to conduct a search for responsive records in the hands of the AGO is not a finding that it may refuse to confirm or deny the existence of any such records. It is simply a recognition that such a search is not necessary in order to respond to this specific request because of my conclusion that there would be no right of access to any such records in any event.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Issue C: Does section 52(3) exclude the records responsive to Requests 2013-2301, 2013-2303, 2013-2304 and 2013-2305 from the Act?

[97] In its decision of August 1, 2014, the city claims the exclusions at paragraphs 1 and 3 of section 52(3) of the *Act* for any records responsive to Requests 2013-2301, 2013-2303, 2013-2304 and 2013-2305 that are not subject to section 181 of *COTA*.[15] Sections 52(3)1 and 3 state:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

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[15] These records relate to the sixth, tenth, eighth and fourth case studies, respectively.

> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[98] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[99] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraphs 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[16]

[100] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[17]

[101] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[18]

[102] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[19]

[103] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[20]

[104] I will first consider whether section 52(3)3 applies to the records responsive to Requests 2013-2301, 2013-2303, 2013-2304 and 2013-2305. Given my conclusion that section 52(3)3 applies, it is not necessary to consider the application of section 52(3)1.

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[16] Order MO-2589; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991, 101 O.R. (3d) 142 (Div. Ct.).
[17] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.) [*MOHLTC*]; see also Order PO-2157.
[18] Order PO-2157.
[19] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.) [*Solicitor General*], leave to appeal refused [2001] S.C.C.A. No. 507.
[20] *MCSCS*, cited above.

Section 52(3)3: matters in which the institution has an interest

INTRODUCTION

[105] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Parts 1 and 2

[106] The city submits that the records responsive to these requests were "created, used or maintained" by it or on its behalf in relation to either a) meetings, consultations, discussions or communications, or b) proceedings or anticipated proceedings about labour relations or employment-related matters in it has an interest.

[107] While the appellant generally disputes the application of section 52(3) to the records at issue, he does not make any specific submissions on whether the records were "collected, prepared, maintained or used" in relation to "meetings, consultations, discussions or communications."

[108] On my review of the material before me, including the Report, the request and the city's description of the records responsive to the request, I am satisfied that these records were all collected, prepared, maintained or used by the city, in relation to meetings, consultations, discussions or communications involving city staff. Therefore, I find that the first two requirements of section 52(3)3 have been met for these records.

Part 3

[109] The records collected, prepared maintained or used by the institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[110] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[21] This office has applied the phrase "labour relations or employment-related matters" to the following:

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[21] *Solicitor General*, cited above.

- a job competition[22]
- an employee's dismissal[23]
- a grievance under a collective agreement[24]
- disciplinary proceedings under the *Police Services Act*[25]
- a "voluntary exit program"[26]
- a review of "workload and working relationships"[27]

Representations

[111] The city describes the records responsive to Request 2013-2301 as,

> . . . related to the City's managerial response (investigation, confirmation, and imposition of employment sanctions) to allegations that an employee ("Mr. C") was using his position with the City for personal gain in contravention of applicable workplace policies (Conflict of Interest Policy and Acceptable Use Policy).

[112] The records responsive to Request 2013-2303 are described as,

> . . . related to the City's managerial response to allegations that an employee ("Mr. I") was not performing his assigned workplace responsibilities correctly, and as such, the employee's misconduct, through inappropriate inspection activities, led to the use of incorrect materials, inaccurate measurement of materials, duplicate cost sheets and approval of cost sheets for payment of work not performed.

[113] Similarly, the city describes the records responsive to Request 2013-2304 as,

> . . . related to the City's managerial response that an employee ("Mr. M") was not performing his assigned workplace responsibilities correctly, and as such, the employee's misconduct, through misallocation of funds [and] inappropriate inspection activities, led to funds being applied to uses other than what was required by the individual's employment responsibilities.

[114] The city submits, based on the above, that the responsive records relate to the

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[22] Orders M-830 and PO-2123.
[23] Order MO-1654-I.
[24] Orders M-832 and PO-1769.
[25] Order MO-1433-F.
[26] Order M-1074.
[27] Order PO-2057.

activities undertaken in the relevant city divisions in response to allegations that employees did not conduct themselves in accordance with their employment obligations. In response to the allegations, it submits, the affected city division worked with the city's Human Resources Department and Legal Services counsel to:

1. Investigate allegations of the employees' misconduct;
2. Review the appropriate workplace policies and requirements;
3. Determine appropriate employment sanctions in light of the employees' failure to comply with employment responsibilities and appropriate policies; and
4. Implement appropriate employment sanctions.

[115] The city also states that further proceedings concerning the employment sanctions were commenced in relation to Requests 2013-2303 and 2013-2304, and that proceedings remain anticipated in relation to Request 2013-2301. Accordingly, all records responsive to Request 2013-2303 are being maintained by the Legal Services lawyer assigned to the ongoing related grievance matter, and some of the documents responsive to Request 2013-2304 are related to grievance and arbitration proceedings.

[116] The city gives as examples of the types of records responsive to the above-noted requests:

- An email chain that sets out a timeline of events for review and comment by city staff, and discusses which city staff should attend a meeting to discuss Mr. C's potential conflict of interest;
- Information compiled for meeting attendees to review for the purposes of discussion and to make determinations on whether the employee's activities were appropriate;
- Particulars of the method in which decisions related to the employee were made, such as a legal opinion on the suitability of a particular investigatory method concerning the allegations of employee wrongdoing, and an outline of the facts relied upon to make such a determination; and
- Discussions concerning the suitability of various proposed employment sanctions.

[117] The city states that the records covered by Request 2013-2305 relate to its managerial response to allegations that an employee was committing fraud in relation to Long Term Disability (LTD) benefits, by engaging in unreported alternative employment. While the relevant city division worked alongside the city's benefits provider to investigate the allegations, the division's activities arose out of its interest as the employer. The city submits that this office has determined that issues about an employee's LTD benefits claims and return to work are employment-related matters.

[118] The appellant submits generally that the city's claim of section 52(3) in relation to all the records responsive to Requests 2013-2301, 2013-2303, 2013-2304 and 2013-2305 strains credulity. He submits that section 52(3)3 does not function to exclude all records relating to the actions of an employee, and, in particular, does not cover factual information about the employee's actions that gave rise to the employment discussions. The appellant states that section 52(3)3 only covers those records that are prepared or maintained by the City in relation to meetings or discussions about the terms of the employee's employment. He submits, therefore, that records such as log books, cost sheets, progress payment documents, audit reports, diary notes, bank statements, account summaries, account analyses, invoices, receipts, and credit card information and transactions, do not relate to employment related matters and do not fall within the labour relations exclusion at section 52(3)3.

[119] Lastly, the appellant states that it is "highly unlikely" that the thousands of pages held by the Legal Services lawyer assigned to the proceedings relevant to Request 2013-2303 are human resources documents being held for use in active labour proceedings.

[120] In reply, the city states that the fact that there are thousands of pages of excluded records means nothing more than that the appellant chose to request a lot of records to which section 52(3) applies. The city submits that whether other copies of the records at issue in this appeal are maintained by the city for purposes unrelated to the above-noted employment/labour relations purposes is irrelevant to whether the records at issue are excluded from the *Act* pursuant to section 52(3).

Analysis

[121] I find that the records responsive to Requests 2013-2301, 2013-2303, 2013-2304 and 2013-2305 are about labour relations or employment-related matters in which the city has an interest.

[122] The records responsive to the above-noted requests consist of investigation notes and summaries, evidence gathered in the course of an investigation, correspondence regarding appropriate employment sanctions, and correspondence regarding requests for, and receipt of, legal advice regarding the investigation and any employment sanctions. These records relate to matters in which the city is acting as an employer, in which the terms and conditions of employees' employment are at issue. Accordingly, I am satisfied that these records are about labour relations or employment-related matters.

[123] This office has found that a grievance under a collective agreement constitutes a labour relations or employment-related matter, and I agree with that conclusion.[28] I also note that once it has been determined that section 52(3) applied at the time the

[28] See Orders PO-1769, P-1223, P-1253 and P-1255.

record was collected, prepared, maintained or used, it does not cease to apply at a later date.[29] Accordingly, I am satisfied that the records responsive to Requests 2013-2303 and 2013-2304, which relate to grievance proceedings, are about labour relations or employment-related matters, regardless of whether the proceedings are concluded or ongoing.

[124] Similarly, in Reconsideration Order MO-1200-R, this office determined that records about meetings, consultations, discussions or communications regarding an employee's LTD benefits claims and her return to work related to employment matters. On the same basis, I am satisfied that the records responsive to Request 2013-2305 are about labour relations or employment-related matters.

[125] As noted above, the terms "labour relations" and employment-related" have different meanings. "Labour relations" specifically refers to matters arising from the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation or analogous relationships. While only some of the records are related to grievances filed under a collective agreement between the city and a union, the records all relate to employment-related matters as they address human resources and staff relations matters arising from the employment relationship between the city and the employees involved.[30] Consequently, I am satisfied that the records at issue fall within one of the two terms contemplated in the exclusion at section 52(3)3.

[126] As mentioned above, the final requirement for section 52(3)3 to apply is that the city must have an interest in these labour relations or employment-related records. Given that the records address investigations into the actions of city employees for workplace misconduct and resulting employment sanctions, I am satisfied that they relate to the city's management of its own workforce. I accept that the city has more than a mere curiosity or concern with respect to these matters. Accordingly, I am satisfied that the city has an interest in these records as contemplated by the third requirement of the section 52(3)3 test.

[127] I therefore find that all three requirements have been established to support the application of the exclusionary provision in section 52(3)3 to the records responsive to Requests 2013-2301, 2013-2303, 2013-2304 and 2013-2305. All of these records were collected, prepared, maintained or used by the city in relation to meetings, consultations, discussions or communications about either labour relations or employment-related matters in which it has an interest.

[128] In arriving at my conclusion, I have considered and rejected the appellant's contention that records compiled as evidence in the course of an investigation, which the appellant refers to as "factual information," are not related to employment-related

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[29] *Solicitor General,* cited above.
[30] See Order PO-3391.

matters. As those records form part of the city's investigation files into the allegations of workplace misconduct, and form the basis for any sanctions undertaken against an employee, I find those records to be related to "employment-related" matters.[31] The decision in *Ontario (Ministry of Correctional Services) v Goodis*[32] (relied on by the appellant) does not cast doubt on this conclusion. In that decision, the court determined that section 52(3)3 does not operate to exclude records relevant to lawsuits filed against employers for their employees' actions. The court found that "employment-related" did not extend to cover records concerning the actions of an employee simply because this conduct may give rise to a civil action in which the employer may be held vicariously liable for torts caused by employees.

[129] The records at issue before me do not arise out of litigation between the city and third parties. Their connection to employment is not through the potential for vicarious liability of the city for the conduct of its employees. Rather, they are directly related to the city's investigations of misconduct by its own employees, and ensuing proceedings between the city and those employees as a result of the employment sanctions imposed.

[130] I stress that I am not finding that ordinary business records generated in the course of the conduct of business by employees are excluded from the *Act*, simply on the basis that they may later give rise to an investigation into their conduct. If such records happened to be responsive to a request that was not based on an interest in that very employment-related investigation, the city would be obliged to give access to them, subject to any exemption. In this case, however, the requester seeks precisely the records that were relevant to the investigations by the Auditor General and the city. He has defined his request through reference to the Auditor General's investigation and the city's own investigations, which it conducted for employment-related reasons. Given the nature of the appellant's request, whether those records consist of copies in the investigation file or originals in the city's business files, the same legal conclusion applies.

[131] Given my conclusion that section 52(3)3 applies, I need not consider the potential application of section 52(3)1 to these records. I will now consider whether any of the exceptions in section 52(4) apply.

Section 52(4): exceptions to section 52(3)

[132] The appellant submits that the exception at section 52(4)4 must apply to some of the responsive records. That section states that the *Act* applies to "an expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her

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[31] See Order PO-2625-I.

[32] *Ontario (Ministry of Correctional Services) v Goodis,* [2008] O.J. No. 289, 89 O.R. (3d) 457, 290 D.L.R. (4th) 102 (Div. Ct) [*Goodis*].

employment."

[133] The appellant argues that the cost sheets responsive to Request 2013-2303 and the invoices and receipts responsive to Request 2013-2304 should be classified as 'expense accounts' to which the *Act* applies and should therefore be disclosed.

[134] The city submits that the cost sheets, invoices and receipts at issue were not submitted to an employer by an employee, fraudulently or otherwise, for a reimbursable expense related to the employment responsibilities. The city states,

> The "cost sheets" and "invoices and receipts" are not expense accounts used for processing reimbursements for employees, but documents for the processing of payments to third parties… The [section 52(4)4] exclusion is restricted to documents related to employee reimbursement for expenses and does not include standard business documents of institutions such as the "cost sheets" and "invoices and receipts" used for dealing with expenses to third parties.

<u>Analysis</u>

[135] I have reviewed the representations of the city and the appellant and the relevant portions of the Report, and find that the cost sheets, invoices and receipts at issue are not expense accounts under section 52(4)4. I am satisfied that the records relate to expenses owed to third parties, and not expense accounts submitted to the city by its employees for the purpose of reimbursement of expenses incurred in his or her employment. For example, in one case study referenced in the Report, a third party supplier contacted the city to complain that an account had not been paid by the relevant city employee.[33]

[136] Consequently, as section 52(3)3 applies, and the records do not fall within the exceptions in section 52(4), the records responsive to Requests 2013-2301, 2013-2303, 2013-2304 and 2013-2305 are excluded from the *Act.*

SOLICITOR-CLIENT PRIVILEGE

Issue D: Does the solicitor client exemption at section 12 apply to the records responsive to Requests 2013-2301, 2013-2303 and 2013-2304?

[137] The city claims section 12 of the *Act* as an alternative to its section 52(3) claims for any records within its divisions which are responsive to the appellant's Requests 2013-2301, 2013-2303 and 2013-2304.

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[33] See https://www1.toronto.ca/static_files/auditorgeneral/pdf/2013/2012_annual_report_on_fraud.pdf at page 27.

[138] As I have determined that any records responsive to Requests 2013-2301, 2013-2303 and 2013-2304 are excluded from the *Act* under section 52(3), and do not qualify for the exception to the exclusion under section 52(4)4, I need not consider whether those records also fall within the exemption at section 12.

PERSONAL INFORMATION

Issue E: Do the records responsive to Request 2013-2300 contain "personal information" as defined in section 2(1)?

[139] This part of the request does not relate to workplace misconduct investigations and responses. Rather, it relates to allegations of fraud against individuals in receipt of city subsidies. Despite the redactions, a considerable amount of information in this group of records remains subject to the access provisions of the *Act*. The records consist of the city's summaries of its investigations into the seven complaints of subsidy fraud and the evidence collected during those investigations, including various communications between the city, witnesses and the individuals who were the subject of the investigations.

[140] The city claims section 14(1) (mandatory personal privacy exemption) of the *Act* to deny access to these records. In order to determine whether this exemption may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,

> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[141] 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.[34]

[142] 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.[35] Even if information relates to an individual in a professional, official or business capacity, however, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[36]

[143] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[37]

Representations

<u>The city</u>

[144] The city submits that even if the names of any complainants or victims are withheld, the volume of remaining personal information contained in the records would render numerous parties identifiable and lead to the disclosure of personal information about the subject of the investigation and others. The city notes that as the investigations relate to individuals' entitlement for needs-based subsidies, the records include the following types of information "about" individuals: client codes, home residence, the number of individuals within a family, issues as to spousal relationships, details as to individuals' income (including tax reports), medical conditions, treating physicians, educational history and employment history. According to the city, the redaction of identifying personal information would result in disconnected snippets

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

consisting of effectively meaningless or misleading information. In short, the city submits that the redactions necessary to protect individuals' personal information would prevent the appellant from receiving meaningful disclosure.

The appellant

[145] The appellant states that he is willing to accept severed copies of the records with the individual applicants' and their family members' names, addresses and phone numbers redacted. The appellant also states that if there are other personal identifiers, such as client codes, which in conjunction with the remaining information may render an individual identifiable, that information may also be redacted. The appellant submits that the city must sever as much of the record as reasonably possible. He submits that the city's argument that individuals will still be identifiable after the redactions of this information is without merit.

[146] The appellant also submits that even if the records still contain personal information after the redaction of the above-listed types of personal information, disclosure of that information does not constitute an unjustified invasion of personal privacy under section 14(1)(f) of the *Act*.

The city

[147] The city states that the redactions proposed by the appellant would still allow for the identification of the individuals mentioned in the records through a modicum of effort. The city submits this office has stated that the provisions of the *Act* relating to protection of personal privacy should not be read in a restrictive manner, and submits that the redaction of sufficient information to eliminate the possibility that individuals in the records could be identified would render the records meaningless. The city claims that such an interpretation is not overly broad, as suggested by the appellant, but simply demonstrates the difficulty in anonymizing the requested information.

[148] Regarding the appellant's argument that any personal information remaining in the records, which does not fall into the appellant's listed categories, should be disclosed, the city notes that the section 14(2) factors cannot overcome a finding that disclosure of information would be presumptively prohibited under section 14(3).

Analysis

[149] I have reviewed the information in the records responsive to Request 2013-2300, but for the information that I have found subject to section 181 of *COTA.* The records contain information relating to various individuals, including individuals investigated in relation to alleged subsidy claim fraud, and their family members. The information relating to these individuals includes:

- Name;

- Date of birth;
- Social Insurance Number;
- Home address;
- Family status;
- Financial information (including tax return, Ontario Works status, Employment Insurance status, Child Benefits information and support payments)
- Medical information (including name of physician, special needs status, psychiatric/psychological history, medication and medical diagnoses)
- Employment information (including attendance at an employment agency or resource centre);
- Volunteering information;
- Residency or citizenship status;
- Educational status or enrollment (including post-secondary, secondary, and locally-run courses); and
- Registration or attendance at a community resource centre (including centres affiliated with a certain religion or nationality).

[150] I find that the records contain extensive personal information within the meaning of paragraphs (a), (b), (d) and (h) of the definition of this term in section 2(1).

[151] I also find that severance of the names, addresses, phone numbers, and client codes of the individuals and their family members, as proposed by the appellant, does not eliminate the identifiable personal information in most of the records. I agree with the city's submission that even without names or addresses, it is reasonably foreseeable that the remaining information could be used to identify the individuals. This may be accomplished through analysis of information in combination such as places and dates of employment, date of birth, nationality, race, dates and names of educational institutions attended, medical diagnoses, names of physicians and religion.

[152] I therefore find that, even without the information the appellant suggests can be severed, the records contain the personal information of the individuals who were investigated for subsidy fraud.

[153] I will now turn to consider whether the records at issue are exempt under the personal privacy exemption in section 14(1).

PERSONAL PRIVACY

Issue F: Does the personal privacy exemption at section 14(1) apply to the personal information in the records responsive to Request 2013-2300?

[154] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[155] The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[156] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.[38]

[157] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).[39] If neither the section 14(3) presumption nor the exception in section 14(4) apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[40] In order 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.[41]

[158] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[42]

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[38] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.) [*John Doe*].
[39] *John Doe*, cited above.
[40] Order P-239.
[41] Orders PO-2267 and PO-2733.
[42] Order P-99.

Representations

The city

[159] The city submits that none of the exceptions to the prohibition on disclosure in section 14(1) apply. Regarding section 14(1)(f), the city points to the guidance in sections 14(2) and (3), and notes that a presumption against disclosure established in section 14(3) cannot be rebutted by one or a combination of the factors in section 14(2).[43] Further, the city submits that section 14(4) does not apply to the records, and therefore, the disclosure of the personal information in the records would constitute an unjustified invasion of personal privacy.

[160] The city relies on the presumptions in sections 14(3)(a), (b), (c), (f) and (h). These sections provide:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
>
> [….]
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> [….]
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[161] The city submits that,

> These records relate to individuals' applications for entitlement to a subsidy and whether the applications filed were improperly submitted. Due to the nature of the potential eligibility for the benefits in question… these records contain information relating to individuals' medical

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[43] Orders MO-1212 and MO-2174.

> history/condition, as well as individuals' finances, income, assets or educational history. Also, certain documents obtained to determine the relevant information contained therein may have been gathered for the purpose of collecting a tax, or would, due to the nature of the service providers in question, indicate individuals' racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[162] For these reasons, the city states that disclosure of the records would constitute an unjustified invasion of the personal privacy of the identified individuals.

[163] The city notes that the factors listed under section 14(2) support the finding that disclosure of the records would constitute an unjustified invasion of privacy. The city submits that there is no basis to suggest that disclosure will promote public health or safety, or an informed choice in the purchase of goods or services. The city also states that disclosure would not assist the public to expose the operations of government to increased public scrutiny, and there is no indication that the appellant requires this information to assist in obtaining a fair determination of rights.

[164] In the city's representations on its section 8(2)(a) (law enforcement) exemption claim, the city submits that the records responsive to Request 2013-2300 relate to the city's investigation into "the allegation that seven members of the public were receiving subsidies through fraudulent claims made by filing applications for subsidies in contravention of the obligations imposed by statute on applicants." The city notes that the subsidies were for "members of the public with respect to costs of certain services." In its confidential representations, the city outlines the nature of the subsidized services in more detail.

The appellant

[165] The appellant submits that disclosure of any personal information in the records is "clearly outweighed by the interest in better informing the public about the ways in which these subsidies were obtained, and in subjecting the City's subsidy programs to public scrutiny," pursuant to section 14(2)(a) of the *Act.* The appellant also notes that since he has agreed to the redaction of "names and other identifiers," there is no evidence to suggest that the individuals in question will be exposed unfairly to the harm contemplated in sections 14(2)(e) or (f).

[166] The appellant also submits that none of the presumptions listed in section 14(3) apply to the records. Alternatively, in the event that I find one or more of the presumptions apply, the appellant states that there is a compelling public interest in disclosure of the records which clearly outweighs the purpose of the exemption.

The city's reply

[167] In its reply, the city reiterates its position that disclosure of the information in the records would be a presumed unjustified invasion of privacy under section 14(3).

Analysis

[168] On my review of the representations of the appellant and the city, and the other material before me, I conclude that all of the personal information, including medical, employment, educational, financial, and religious information, was compiled for the purpose of determining the individuals' eligibility for certain benefits. In MO-1584-F, this office determined that section 14(3)(c) applied to personal information regarding individuals' eligibility for social service benefits in the nature of rent subsidies. The benefits at issue in this appeal are comparable to those considered in that order. I am satisfied that section 14(3)(c) applies to the records and their disclosure would therefore be presumed to be an unjustified invasion of personal privacy. Some of the information is also covered by other presumptions, such as section 14(3)(a) (medical diagnosis), 14(3)(d) (employment or education history) and 14(3)(e) (tax return).

[169] The presumptions in section 14(3) cannot be rebutted by the factors in section 14(2).[44] Accordingly, I find that disclosure of the personal information in the records would constitute an unjustified invasion of personal privacy.

SEVERANCE

[170] Section 4(2) of the *Act* requires the city to disclose as much of a record as can reasonably be severed without disclosing information that falls under one of the exemptions. As noted above, the records contain extensive personal information about several individuals. This office has found that a severance of exempt information is not reasonable if doing so would result in the disclosure of only disconnected snippets of information or worthless, meaningless or misleading information.[45]

[171] I am satisfied it is not possible to reasonably sever most of the records that I have found exempt under section 14(1). With respect to the evidence collected by the city, such as forms, letters, income tax statements, medical assessment and treatment documentation, and educational and employment attendance records, severance of all personal information that may be attributable to an individual would result in the disclosure of fragmented information that would not provide the appellant with any meaningful information. Consequently, I uphold the city's decision to deny access to the entirety of these records under section 14(1).

[172] I conclude, however, that the personal information in two types of records is reasonably severable: the charts summarizing the progress of the investigations into the seven complaints of subsidy fraud and the documents titled "Investigation Synopsis". On my review, the personal information in these two types of records is limited in nature and can be severed in a manner which would not result in the

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[44] *John Doe*, cited above.

[45] Orders PO-2033-I, PO-1663 and PO-1735 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

reasonable identification of the affected individuals, while leaving intact a coherent and meaningful body of information. This remaining information is not exempt under section 14(1), as its disclosure would not reveal the personal information of identifiable individuals.

LAW ENFORCEMENT

Issue G: Does the law enforcement exemption at section 8(2)(a) apply to the records responsive to Request 2013-2300 ?

General principles

[173] Section 8(2)(a) provides a discretionary exemption in relation to reports prepared in the course of law enforcement activities, as follows:

> A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[174] In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[46]

[175] The term "law enforcement" is defined in section 2(1) as follows:

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

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[46] Orders P-200 and P-324.

Representations

[176] The city division's investigation into the allegation that seven members of the public were receiving subsidies through fraudulent claims concluded that three clients received subsidies for which they were ineligible, and that the other allegations were not well-founded. The city submits that under the provincial statute governing the subsidy, it is an offence for an individual to knowingly furnish false information in applications, statements, reports, or returns made under that act or its regulations.[47] The offence is subject to penalties upon conviction, such as fines or imprisonment, or both. It submits that Request 2013-2300 is a request for records related to investigations into allegations of a violation of legal requirements, where a penalty could be imposed before a court, concerning legislation where the city is a service provider responsible for its administration.

[177] The city submits that the city division activities constituted "law enforcement" as this office has interpreted this phrase. It received a complaint, and commenced an investigation. The reports were not part of a routine inspection but rather investigations with respect to specific incidents. Disclosure of the records would reveal the conclusions and actions of the city in the investigations.

[178] The appellant submits, among other things, that the records at issue are not a "report" within the meaning of section 8(2)(a). He also submits that the city has not met its burden of establishing that the records were prepared in the course of law enforcement activities and that the city has the function of enforcing and regulating compliance with the law that was allegedly contravened. Relying on Order P-352, he states that section 8(2)(a) only applies if the city has *enforcement* authority to sanction violations under the statute in question, not merely *investigative* authority. The appellant submits that it is unlikely that the city has enforcement authority in this case, in that the Auditor's Report indicates that as of January 2013, the city division was in the process of providing information about the activities to the Toronto Police Service. In the appellant's submission, this suggests that authority for enforcing compliance with the law in relation to the fraudulent subsidies at issue rests with the police.

[179] In response, the city states, among other things, that the fact that the police were informed of the situation indicates only that the city believed that such information may be relevant to the police for some purpose, such as enforcement of violations of the *Criminal Code*, and not that the police are exclusively responsible for the enforcement of the provincial statute. The city submits that non-compliance with a statute's requirements may constitute both an offence under the statute, and may address subject matters that are regulated by other law enforcement agencies.

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[47] I am not able to disclose the specific legislation to which the city referred in its representations, as to do so would reveal information about the Auditor General's investigation that is protected by section 181 of COTA.

Analysis

[180] Order P-352, to which the appellant refers, is instructive on this issue. In that case, the IPC decided that an investigation conducted by the Inspections and Standards Branch of the Ministry of Correctional Services was undertaken in pursuance of the ministry's responsibility for ensuring the proper administration of a training school. However (and regardless of the fact that the report was forwarded to the Crown Attorney and could result in charges), the ministry's investigation was not conducted as part of law enforcement activities as the ministry was not in a position to enforce or regulate compliance with the statute governing the schools, or any other statute.

[181] In the city's submissions, it describes its role under the legislation governing the subsidies, which does not include a responsibility for enforcing the offence provisions. A review of the material before me, including the city's submissions, the statute and the records themselves, does not establish that the city has a role in enforcing the offence provisions. From my review, I conclude that the city's investigation was undertaken with a view to determining whether it should take action to recover city funds that were paid to the individuals as subsidies. I find the circumstances of this case analogous to those considered in Order P-352. The investigation undertaken by the city was not in pursuance of a law enforcement mandate, but in pursuance of its interests as the administrator and funder of the subsidies.

[182] This case is distinguishable from others where this office has recognized that a municipality's by-law enforcement processes qualify as "law enforcement" activities.[48] In an early decision on this point, the IPC described that process, in relation to zoning by-laws:

> In cases where the property owner does not comply with a Notice of Violation, the inspector may lay charges pursuant to the by-law and the *Provincial Offences Act*, which charges are dealt with by either the Provincial Offences Court or the Ontario Court (Provincial Division). Based on the foregoing, I am satisfied that the institution's process of by-law enforcement involves investigations or inspections which could lead to proceedings in a court of law where penalties could be imposed and, therefore, qualifies as "law enforcement" under the *Act*.

[183] Unlike the above, the investigation conducted by the city does not arise out of a by-law which the city is responsible for enforcing. The city does not assert that it may lay charges pursuant to the legislation governing the subsidies at issue, nor has it established that it has the function of enforcing and regulating compliance with the offence provisions of the legislation.

[184] It is unnecessary to consider whether the records are a "report". I conclude that,

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[48] Orders M-16 and MO-1245.

whether or not the circumstances under investigation might lead to charges under the provincial statute, the records at issue were not prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law. The information in the records is therefore not exempt from disclosure under section 8(2)(a).

PUBLIC INTEREST OVERRIDE

Issue H: Is there a compelling public interest in the disclosure of the records responsive to Request 2013-2300 that clearly outweighs the purpose of the section 14 exemption?

[185] The appellant takes the position that there is a compelling public interest in disclosure of the records. Therefore, I will consider the possible application of section 16 of the *Act* to information I have found exempt under section 14.

[186] Section 16 reads:

> 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.[49]

[187] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption.[50]

[188] The *Act* is silent on the issue of who bears the burden of proof regarding the application of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested record before making submissions in support of his or 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 will review the record with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[51]

Compelling public interest

[189] 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.[52] Previous orders

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[49] Emphasis added.
[50] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.) [*MOF*].
[51] Order P-244.
[52] Orders P-984 and PO-2607.

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 effectively express public opinion or to make political choices.[53]

[190] A public interest does not exist where the interests being advanced are essentially private in nature.[54] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[55] A public interest is not automatically established where the requester is a member of the media.[56]

[191] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[57]

[192] Any public interest in *non*-disclosure that may exist also must be considered.[58] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[59] A public interest has been found not to exist where the records do not respond to the applicable public interest raised by the appellant.[60]

Purpose of the exemption

[193] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[194] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[61]

Representations

The appellant

[195] The appellant submits that there is a compelling public interest in the dissemination of information about the use of taxpayer funds and the processing of

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[53] Orders P-984 and PO-2556.
[54] Orders P-12, P-347 and P-1439.
[55] Order MO-1564.
[56] Orders M-773 and M-1074.
[57] Order P-984.
[58] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[59] Orders PO-2072-F, PO-2098-R and PO-3197.
[60] Orders MO-1994 and PO-2607.
[61] Order P-1398, upheld on judicial review in *MOF*, cited above.

fraudulent subsidy claims at the city. He states that the central purpose of the *Act,* and the public interest override in particular, is to inform citizens about the activities of their government and to add to the information to which the public has access in order to make informed choices and express opinions. The appellant submits that the amount of information disclosed in the Auditor General's Report regarding the investigated subsidy claims is insufficient, and that investigative journalism is essential to fulfill the *Act*'s purpose.

[196] The appellant states that the compelling interest in openness and transparency regarding the city's fiscal management clearly outweighs the purpose of the personal privacy exemption. He submits that disclosure of the records will increase the public's confidence in the city as a service provider and foster open discussion about its activities, mandate and internal procedures. The appellant argues that the lack of trust and confidence engendered by non-disclosure of the records is a far greater harm than disclosure of any limited personal information.

The city

[197] The city submits that in Order PO-2041-I, this office established that a compelling public interest in the disclosure of a record may,

> . . . only be found where it is concluded that the specific information in each individual 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.

[198] The city submits that while there may be a public interest in the general topic of the city's effectiveness in dealing with allegations of fraud in relation to subsidy claims, the appellant has not provided a reasonable basis to establish that the personal information sought would be useful to the public in expressing opinions or making informed decisions. The city states that the protection of privacy is one of the *Act's* purposes, and is not outweighed by the fact that the appellant engages in "investigative journalism." The city cites Orders M-773, M-1074 and PO-3407 to support its argument that the mere fact that a requester is a member of the media is insufficient to establish a compelling public interest in the disclosure of the information sought.

Analysis

[199] As noted above, the first issue to address is whether there is a relationship between the information contained in the records and the *Act*'s central purpose of shedding light on the operations of government. In this case, the information which I have found to be exempt under section 14 consists, for the most part, of the evidence collected during the city's investigation, including documentation relating to the

individuals' finances, marital status, nationality, medical history, employment history, educational history, and other personal matters. Some of the records reveal details of mental health diagnoses, financial hardship, and personal issues. The exempt information also includes details in the investigation progress charts and investigation synopses that could reasonably be used to identify the individuals involved.

[200] While I accept that there is a public interest in transparency regarding the use of taxpayer funds and the processing of fraudulent subsidy claims at the city, I am not convinced that there is a compelling public interest in disclosure of the information described above. A compelling public interest is not established simply because the cases relate to the use or misuse of certain city subsidies. Further, I take account of the fact that I have ordered disclosure of redacted charts documenting the progress of the city's investigations, and its Investigation Synopses. This information will provide some insight into those investigations.

[201] Further disclosure would reveal the particular documentary evidence the city collected during the course of the specific investigations, as well as information which could identify the individuals investigated. On my review of the records, the parties' representations, and the information which has been and will be available about these investigations, I am not convinced that the public interest in disclosure of this additional information qualifies as "compelling".

[202] Even if there were a compelling public interest in the disclosure of the evidence collected by the city during the course of these investigations and the identity of the individuals, I find that this interest does not clearly outweigh the purpose of the personal privacy exemption in section 14(1). I have found in my discussion of section 14(1) that some of the personal information in the records is highly sensitive and, further, that its disclosure is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(c). Given the nature of the information in the records, the evidence before me does not convince me that any public interest, compelling or otherwise, in the disclosure of the exempted information outweighs the privacy protection purpose of the section 14(1) exemption.

[203] Therefore, I find that the public interest override provision in section 16 does not apply.

CONSTITUTIONAL VALIDITY

Issue I: Does section 181 of *COTA* infringe section 2(b) of the *Charter*?

[204] As described above, the appellant served this office with a Notice of Constitutional Question, in which the legal basis of the constitutional question is stated as follows:

> The IPC must interpret and apply *COTA* and the *Act* consistently with the *Canadian Charter of Rights and Freedoms* (the *"Charter"*).
>
> Section 2(b) of the *Charter* is engaged because section 181 prevents meaningful public discussion about the financial management of the City of Toronto and the extent and nature of the Auditor General's oversight of these issues.
>
> Section 181 violates section 2(b) of the *Charter* as it is overly broad, vague, and prevents public access to information that is vital to public discussion and debate. This violation is not saved by section 1 of the *Charter*.
>
> Section 181 is inconsistent with the *Charter* and therefore is [sic] no force and effect.

[205] In short, the appellant argues that his right to freedom of expression, as guaranteed in section 2(b) of the *Charter,* is infringed by section 181 of *COTA*. Section 2(b) of the *Charter* states:

> Everyone has the following fundamental freedoms:
>
> [. . .]
>
> > (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[206] The parties agree that the test articulated by the Supreme Court in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*[62] applies to the determination of whether section 2(b) of the *Charter* is engaged.

[207] The test, which I will refer to as the *CLA* test, is as follows:

1. Does the denial of access effectively preclude meaningful commentary on a matter of public importance?

2. Are there factors that remove section 2(b) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question?

3. If the activity is protected, does the state action infringe that protection, either in purpose or effect?[63]

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[62] 2010 SCC 23 at para 31 [*CLA*].
[63] *CLA*, cited above, at para 33.

[208] If it is determined that the denial of access fulfills all three requirements of the above test, it is then necessary to determine whether the infringement of the *Charter* right is justifiable under section 1 of the *Charter.*[64]

Part 1: does the denial of access effectively preclude meaningful commentary on a matter of public importance?

Representations

The appellant

[209] The appellant generally submits that,

> … if section 181 of *COTA* is interpreted as shielding from public scrutiny all records relating to financial oversight of the City's functions held by the Auditor General's office and/or City staff, as suggested by the City, such an interpretation is unconstitutional and amounts to an unjustifiable violation of freedom of expression and public access to information under section 2(b) of the [*Charter*].

[210] Regarding part one of the test, the appellant submits that access to records relating to the Auditor General is "absolutely necessary for meaningful public discussion and criticism on the financial management of the City of Toronto," particularly in regard to the "nature and extent of City employee fraud, waste and negligence." He states that "the records requested indicate how such fraud is executed, whether there are sufficient system protections in place and how the City deals with employees found guilty of these offences." The appellant argues that the case studies attached to the Report are "not sufficient for meaningful public engagement on the activities and issues in question" and are "vague and do not provide the level of detail necessary for meaningful commentary."

The city

[211] The city submits that section 181 of *COTA* does not preclude the appellant from participating in meaningful commentary on the city's financial management. The city states that although section 181 prohibits disclosure of information relating to the Auditor General's duties under Part V of *COTA*, section 181 would not be triggered by more generalized requests for the city's records that are unconnected to the Auditor General's activities.

[212] The city notes that it only applied section 181 to prevent disclosure of records directly related to the Auditor General's preparation of the Report. In particular, the city applied section 181 to prevent disclosure of the Auditor General's records and those

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[64] *R v Oakes,* [1986] 1 SCR 103.

portions of the city's records that could reveal specific information received or disclosed by the city's divisions to the Auditor General in connection with the preparation of the Report. The city submits that section 181 was only applied to specific information regarding the Auditor General's processes, and was not applied to generally restrict access to the city's records.

[213] The city submits that the Report contains "much data for commentary and public debate." The city also notes that there is information publicly available which provides further insight into issues raised in the Report, such as the Minutes of the Auditor General's appearance at the Audit Committee on February 15, 2013 and the slide deck for the Auditor General's presentations to the committee. Lastly, the city notes that publication of articles on various aspects of the alleged fraud by several media outlets, including the appellant's, demonstrates how meaningful commentary on these issues was not stifled.

The Auditor General

[214] The Auditor General submits that the numerous public and social media articles about the case studies in the Report, including articles by the appellant, suggest that access to the records withheld under section 181 of *COTA* is not necessary for the meaningful exercise of free expression in this very case. The Auditor General submits that the scope of protection under section 181 is narrowly tailored to protect records in the hands of the Auditor General, not to cloak documents that are otherwise subject to the *Act* in a shroud of secrecy.

[215] The Auditor General proposes that the issue be framed as "whether the application of MFIPPA to the Auditor General's records in respect of his statutory duties is required for a meaningful public debate of issues of public importance." On this issue, the Auditor General submits:

> . . . neither the application of *MFIPPA's* right of access, nor the disclosure of the Auditor General's section 181 records are required for a meaningful public debate. The [appellant's] derivative right to obtain information necessary for public debate, applicable in exceptional circumstances, cannot extend to all work product arising from the Auditor General [sic] section 181 duties. The constitutionally required disclosure of information is more than satisfied by allowing the public to make requests for information outside of section 181… Indeed, the Auditor General does disclose information in its Reports to City Council to ensure a meaningful public debate.

The Accountability Officers

[216] The Accountability Officers submit that the appellant has failed to note "the Auditor General's reporting requirements under COTA and the Accountability Officers

By-Law, including the Auditor General’s annual reports, which fulfill a transparency and accountability function by promoting public dialogue and awareness.” The Accountability Officers note that there is a significant amount of information available in the public domain, and that the city’s records are subject to access requests under the *Act.* In their submission, the restriction of confidentiality protection to records held by the Auditor General, or individuals acting under her instruction, demonstrates the narrow scope of the limitation.

[217] The Accountability Officers disagree with the appellant’s claim that the city’s interpretation of section 181 results in complete and sweeping secrecy, with no limitation or balancing of rights and interests, and suggest that in the exercise of discretion with respect to reporting, the Auditor General balances the interests of transparency and confidentiality.

[218] Lastly, the Accountability Officers submit that the appellant has not provided any evidence that the Auditor General’s reports, combined with the ability to seek access to city documents which exist independently of the Auditor General’s investigations, is not enough to ensure meaningful public commentary.

Attorney General of Ontario

[219] The Attorney General submits that the appellant bears the onus of establishing that disclosure of the exempt records is necessary to meaningful public discussion and criticism on a matter of public interest, and that the appellant has not met this onus.

[220] The Attorney General states that,

> In this case, the numerous newspaper articles on fraud at the City of Toronto published in Toronto and Windsor newspapers immediately after the 2012 Report on Fraud was released indicate not only that meaningful discussion did take place but also that the discretionary decision of the Auditor General to release the summaries in Exhibit 2 actually generated meaningful discussion that would not have otherwise taken place.[65]

[221] The availability of other publicly available information related to the Report, such as that noted above by the Accountability Officers, is also referenced by the Attorney General.

Appellant’s reply

[222] The appellant submits that the small set of news stories relied upon by the city and the Auditor General indicate that there is insufficient detail being provided by the Auditor General to allow for meaningful public discussion. He submits that four of the

[65] Emphasis in original.

articles referenced by the Auditor General stem from police charges against a city employee and appear to be based on a police press release about this issue, not information disclosed by the Auditor General.

[223] The appellant submits that in order to fully engage the public in a meaningful debate about these issues, including enabling scrutiny of the findings and functions of the Auditor General, the press needs more information than the few details provided in the Auditor General's case studies. He argues that the other parties' submission that there is already sufficient information available is intrinsically problematic as it is impossible to know what the public conversation would be like if more information had been disclosed.

Analysis

[224] To fulfill part one of the *CLA* test, "the claimant must establish that the denial of access effectively precludes meaningful commentary."[66] The court notes that "there is a prima facie case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded."[67] In other words, the appellant must demonstrate that meaningful public discussion about the city's financial management cannot take place under the current legislative scheme.

[225] I find that the appellant has failed to establish that public discussion and criticism regarding the financial management of the city has been substantially impeded by the application of *COTA* to records held by the AGO and portions of the city's divisional records.

[226] I have reviewed the parties' submissions, which discuss the information publicly available about financial management of the city and, in particular, the nature and extent of employee fraud, waste and negligence. I note that several news articles were published subsequent to the release of the Auditor General's Report, which comment on the types of complaints and investigations, the outcomes of those investigations, and the amount of funds at issue. I find that the release of the Report generated meaningful discussion that would have otherwise not taken place. Even if some of the news articles were based on sources other than the city, the availability of information from other sources diminishes the force of the appellant's contention that section 181 of *COTA* precludes meaningful public commentary.

[227] Further, as the city and the AGO have submitted, section 181 of *COTA* does not preclude access to city records about the same subject matter of an AGO investigation, so long as they do not reveal information covered by that confidentiality provision. Above, I order the disclosure of some of the city's records documenting its own

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[66] *CLA,* cited above, at para 33.
[67] *CLA*, cited above, at para 59.

investigation of a matter also considered by the AG. To the extent other city records are not available to the appellant under *MFIPPA*, it is primarily as a result of the exclusion of employment-related records from that *Act*, not through the application of *COTA*.

[228] I accept that it may not possible to know how much more meaningful the public discussion might have been if section 181 of *COTA* were not in effect. Nevertheless, applying the *CLA* test, I do not need to engage in such speculation. If the evidence does not establish that meaningful public commentary was effectively precluded by the confidentiality provision in *COTA*, there is no *prima facie* case of a violation of section 2(b). Based on the material before me, I find that despite the existence of section 181 of *COTA*, the Report and other associated publicly-available information support meaningful public commentary on fraud and waste in the city.

[229] Accordingly, I find that the appellant has not met the onus in part one of the *CLA* test, and section 2(b) is not engaged.

Part 2: are there factors that remove section 2(b) protection?

[230] Even if the appellant established that disclosure of records subject to section 181 of *COTA* is necessary to meaningful discussion about the city's financial management, the appellant would still have to demonstrate that there are no countervailing considerations arising from disclosure of the records. As described in the reasons in *CLA,* countervailing considerations include impairment of the proper functioning of the relevant government institution.

Representations

<u>The city's representations</u>

[231] The city submits that both this office and the Supreme Court of Canada have recognized the necessity of privacy in order to effectively and efficiently carry out government processes.[68] In relation to the Auditor General's ability to carry out her functions under *COTA*, the city states that disclosure of the requested information subject to section 181 could jeopardize investigations and cast a chill on the full cooperation of staff from the subject divisions/entities, as individuals in possession of relevant information may be deterred from assisting the Auditor General's investigation for fear of reprisal.

[232] The city states that a finding that section 181 of *COTA* violates the *Charter* would necessarily impact the constitutionality of similar confidentiality provisions governing the federal Auditor General, the Ontario Ombudsman, the city's Integrity Commissioner and this office. The city relies on the Supreme Court's reference to the decision in *Ontario*

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[68] *CLA,* cited above, at para 40; *Montreal (City) v 2952-1366 Quebec Inc.,* [2005] 3 SCR at para 76; and Order MO-3053 at para 38.

(Attorney General) v Fineberg,[69] in which the Ontario Divisional Court stated that the difficult accommodation of the public interest in the transparency of government information and of the public interest in matters of privacy is "evolving in a manner consistent with political tradition and discourages sweeping Charter pronouncements of the type requested[.]"[70]

The Auditor General

[233] The Auditor General submits that the appellant has failed to show that "access would not interfere with the proper functioning of the Auditor General's Office." Further, the Auditor General states:

> In fact, the nature of the Auditor General's functions requires shielding the details of the Auditor General's investigation from public scrutiny, for the same reasons that law enforcement investigations are granted such protection. The Auditor General is conferred significant statutory powers to carry out investigations of wrongful conduct by City officials. Despite these powers, both the Auditor General's ability to investigate and obtain evidence of wrongdoing depends on the cooperation of City officials, not simply their subjection to the Auditor General's statutory powers of investigation. Confidentiality ensures that such cooperation does not result in the potential for reprisal by those who are subject to the Auditor General's investigation and for those complainants commonly referred to as whistleblowers.
>
> In that regard, many of the considerations relevant to law enforcement exemptions apply equally to the Auditor General's Office. As in the law enforcement context, shielding the details of the investigative process from scrutiny is necessary to avoid a chilling effect on cooperation in future investigations…

[234] The Auditor General also submits that protection from public scrutiny is required in order for investigative staff to have full and frank discussions about the subject matter of an investigation, to document the investigation, and to ensure the protection of witnesses' identities. Additionally, the Auditor General submits that preventing the disclosure of internal memoranda protects those subjects of an investigation in which no finding is ultimately made.

[235] The Auditor General further submits that the redaction of personal information is insufficient protection, as city staff cooperating with the Auditor General could be identified from the nature of the remaining information. Accordingly, the Auditor General submits that the disclosure of information found to fall within section 181

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[69] [1994] OJ No 1419 [*Fineberg*].
[70] *Fineberg,* cited above, at para 22.

relating to the Auditor General's investigations,

> … whether completed or not, separate and apart from the original records responsive to the subject-matter of that investigation to which *MFIPPA* may apply, would compromise the ability of the Auditor General to carry out its functions in the future by chilling cooperation of City Officials and precluding candid internal discussions by the Auditor General's own staff.

<u>The Accountability Officers</u>

[236] The Accountability Officers raise the following issues:

- Without the assurance of confidentiality, complainants would be less likely or unwilling to come forward with complaints, and witnesses would likely refuse to cooperate with the Accountability Officers;
- A lack of confidentiality would have a chilling effect on the Accountability Officers' advice functions, and would deter councillors or local board members from seeking advice on compliance with ethical codes;
- Councillors, individuals and city staff have already expressed concern about reprisals to the Accountability Officers (which were alleviated upon receiving an explanation of the relevant confidentiality provisions);
- Confidentiality is particularly important when city employees and councillors provide information to Accountability Officers as whistleblowers, as these individuals are currently assured that their warnings will be heard without risking their livelihoods and those of their families;
- Confidentiality ensures that Accountability Officers are not forced to 'show their hands' mid investigation, thus allowing those under investigation an opportunity to cover up their behaviour;
- Confidentiality promotes early resolution and protection of the innocent (both individuals under investigation and witnesses); and
- Confidentiality is a widely accepted principle of oversight and accountability officers.

<u>The Attorney General of Ontario</u>

[237] The Attorney General notes that even if the appellant could establish that the requested records are necessary to meaningful discussion on a matter of public interest, it would still have to demonstrate that there are no countervailing considerations arising from production.

[238] The Attorney General submits that the purpose of section 181 is to facilitate the proper functioning of the Auditor General, and notes that the Supreme Court listed impairment to the proper functioning to the relevant government institution as a possible countervailing consideration.[71] As noted by the Auditor General and the Accountability Officers, the Auditor General requires the cooperation of city officials, employees and the public in order to investigate alleged wrongdoing.

[239] The Attorney General submits that the Supreme Court's determination that the purpose of protecting investigations from disclosure is to "further the goal of getting at the truth of what really happened"[72] is applicable to the current appeal. The Attorney General submits that, similar to law enforcement bodies, as contemplated in *CLA,* the Auditor General is required to investigate and report on the city's stewardship over public funds, and a successful investigation is often dependent on witnesses' full and frank disclosure.

<u>The appellant's reply</u>

[240] The appellant submits that since each of the Accountability Officers perform a different function, their submissions regarding any countervailing considerations are of no value to this appeal. The appellant notes that the only issue is whether the production of the Auditor General's records would be incompatible with the Auditor General's function.

[241] The appellant submits that the concerns raised by the Auditor General and Accountability Officers, should they be valid, can be addressed through the various exemptions in the *Act.* For example, the appellant states that individuals' concerns about reprisal, adverse publicity, reputational harm, or withdrawal of services can be addressed by the exemptions at section 8(1)(d) (confidential source of information) and/or section 14 (personal privacy). The appellant also notes that the law of defamation functions to protect reputation, not the *Act.*

[242] Further, the appellant submits that the argument that secrecy is necessary to ensure people continue to provide information voluntarily is not persuasive, as the appellant is only seeking anonymized information, and the Auditor General has significant powers to compel witnesses and documents under *COTA.*

Analysis

[243] I find that the parties have established the existence of countervailing considerations arising from disclosure of the records subject to section 181 of *COTA.* The purpose of section 181 is to aid in the proper functioning of the Auditor General, namely, the ability to investigate alleged wrongdoing related to the use of city finances.

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[71] *CLA,* cited above, at para 60.
[72] *CLA,* cited above, at para 50.

In order to effectively investigate these matters, the Auditor General relies heavily on the cooperation of city officials, employees and the public to provide evidence of wrongdoing. I accept that a successful investigation generally depends on full and frank disclosure by witnesses. I find it likely that the disclosure of documents subject to the confidentiality provision in section 181 of *COTA*, and the prospect of disclosure in future cases, will have a chilling effect on individuals' willingness to volunteer information in other investigations and limit the Auditor General's ability to investigate fraud within the city. I also find that a lack of confidentiality would impinge on councillors' or board members' willingness to proactively seek advice from the Auditor General.

[244] While *COTA* empowers the Auditor General to obtain various records and examine any person under oath in relation to the performance of her duties, the use of these powers is contingent on the receipt of initial information from city councillors, management, employees or members of the public.

[245] Although anyone has the option of submitting an anonymous complaint through the city's Fraud and Waste Hotline, I accept that individuals, particularly those who are employed by the city, are more likely to provide detailed information that will aid a potential investigation if there is an assurance of confidentiality.

[246] I do not agree with the appellant's submission that individuals' concerns about reprisal, adverse publicity, reputational harm or withdrawal of services are addressed by the various exemptions in the *Act*, such as section 8(1)(d) (confidential source of information) or section 14 (personal privacy). Although I make no definitive finding regarding the application of section 8(1)(d) to AGO investigations, it is not clear that these would qualify as law enforcement investigations within the meaning of the *Act*.

[247] Further, while the section 14 personal privacy exemption may apply in some instances, it may not apply to information given by individuals employed by the city or acting in a business or official capacity.

[248] Finally, with respect to the appellant's arguments that there are no countervailing considerations given that he seeks only anonymized information, I find this does not assist. The appellant seeks to have section 181 of *COTA* declared unconstitutional, as an unreasonable limitation on freedom of expression. Without this confidentiality provision there is no assurance that information about AGO investigations, anonymized or not, would not become public. The constitutionality of the confidentiality provision does not depend on the particular manner in which this requester seeks information.

[249] Consequently, I find that the appellant has failed to establish that there are no countervailing considerations arising from the production of information subject to section 181. I find that disclosure of records subject to section 181 would impair the proper function of the Auditor General's Office.

[250] In arriving at this conclusion, I have had regard to the submissions of the Accountability Officers to the extent that they reinforce those of the AGO about the importance of confidentiality to the functions performed by the AGO. I wish to emphasize, however, that my analysis relates only to section 181 of *COTA* and whether it infringes the protections in section 2(b) of the *Charter* and should not be taken to speak more broadly to the circumstances of other Accountability Officers.

[251] As I have determined that disclosure of the records subject to section 181 is not necessary for meaningful public discussion, and even if it were, that there are countervailing considerations inconsistent with production, it is not necessary to consider part 3 of the test established in *CLA.*

CONCLUSION

[252] In sum, I find that section 181 of *COTA* applies to any responsive records in the Auditor General's Office, and to the information redacted by the Auditor General from the city's divisional records. The city conducted a reasonable search for responsive records. Records relating to the city's investigation of its own employees for fraud-related allegations are excluded from the scope of the *Act*. Records relating to the city's investigation of allegations of subsidy fraud are partly exempt under the personal privacy exemption. Non-exempt information in this group of records shall be disclosed.

[253] The public interest override does not apply to the information exempt under the personal privacy exemption. Section 181 of *COTA* does not infringe the guarantee of freedom of expression under the *Charter*.

ORDER:

1. I uphold the city's decision to deny access to responsive records held by the Office of the Auditor General, and partly uphold its decision to deny access to the divisional records responsive to Request 2013-2300, under section 181 of *COTA*.

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

3. I uphold the city's decision that the divisional records responsive to Requests 2013-2301, 2013-2303, 2013-2304 and 2013-2305 are excluded from the *Act* as a result of section 52(3)3.

4. I partly uphold the city's decision to exempt the divisional records responsive to Request 2013-2300 under section 14(1).

5. I order partial disclosure of the divisional records responsive to Request 2013-2300, in accordance with the reasons above. For clarity, I have provided the city

with copies of the relevant pages to be disclosed, highlighting the portions which should **not** be disclosed.

6. I order the city to disclose the records in compliance with provision 5 of this order by **June 28, 2016, but not before June 22, 2016**.

7. In order to verify compliance with order provisions 5 and 6, I reserve the right to require the city to provide me with proof of disclosure to the requester in accordance with order provisions 5 and 6.

Original Signed by: May 24, 2016
Sherry Liang
Assistant Commissioner