Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3326

Appeal MA14-50

City of Toronto

June 29, 2016

Summary: The city received a request for certain records regarding the Pedestrian Tunnel Project at the Billy Bishop Toronto City Airport, particularly as they related to a noise exemption permit for the project. The city granted partial access to the records, but denied access to portions of the records under the solicitor-client privilege in section 12. The requester appealed the decision to deny access and also claimed that the city's search was not reasonable, as it did not conduct searches in the record-holdings of a named city councillor. In this order, the adjudicator finds that the records remaining at issue qualify for exemption under section 12, and that the searches conducted by the city for records were reasonable given the nature and scope of the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 17.

Orders and Investigation Reports Considered: Orders PO-2087-I, Order M-1112, and PO-1631.

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information regarding the Pedestrian Tunnel Project (the Project) at the Billy Bishop Toronto City Airport, for a defined period of time. The lengthy request specified that it was for access to all records concerning a noise prohibition or noise limitation provision exemption [the Exemption] under article 591-10 of the Toronto *Municipal Code*. In particular, the

requester sought access to records related to two separate applications for a noise Exemption permit for the Project.

[2] In response to the request, the city issued a decision letter granting partial access to certain responsive records, with severances pursuant to the exemptions in sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*.

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

[4] During mediation, the appellant's representative (hereafter "the appellant") advised that he believed additional responsive records exist. The city conducted further searches and, after locating further records, issued supplementary decisions granting partial access to the records.

[5] Mediation did not resolve this appeal, and this file was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the city and the appellant, and shared the non-confidential portions in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction number 7. I also sought and received reply and sur-reply representations from the parties.

[6] In this order, I find that the records remaining at issue qualify for exemption under section 12. I also find that the searches conducted by the city for records were reasonable given the nature and scope of the request.

[7] As set out later in this order, the request and resultant appeal were both complicated by some confusion regarding the noise exemption permit process, particularly questions about who grants a noise exemption permit and the nature of a named city councillor's involvement in the noise exemption application process.

[8] In its reply representations, the city provides an Appendix entitled "Background Information - Chapter 591" which summarizes in some detail the nature of the noise exemption permit process. Because of the detailed nature of this information, and its relevance to the issues in this appeal, I reproduce the relevant portions of it below:

1. Contrary to [the appellant's] suggestions, the involvement of [the named councillor], in his capacity as Office of Councillor-Ward 20, in the Noise Exemption Applications was minor. Under Chapter 591-10, an individual may seek an exemption from a noise prohibition or noise limitation provision, in connection with an event or activity, ("Noise Exemption") by filing with the "Commissioner" the approved application form; and the non-refundable application fee.

2. Chapter 591, defines the "Commissioner" as "The Commissioner of Urban Development Services or his or her designate". Subsequent to the adoption of Chapter 591, the City's administrative structure was restructured, and these

responsibilities of the Commissioner were delegated to the Executive Director of Municipal Licensing and Standards ("Exec. Director-MLS").

3. Under Chapter 591, the authority to grant a Noise Exemption is assigned to the Exec. Director-MLS. An individual member of Council does not have the authority to grant or refuse a Noise Exemption. In this case, [the named councillor] did not (be it in his capacity as Office of Councillor-Ward 20, or his political role as Councillor …) have the authority to grant or refuse the Noise Exemption Applications related to the Project. However, [the named councillor] did have, due to his capacity as Office of Councillor-Ward 20, the ability to be notified of the Noise Exemption Applications and to provide a response concerning his opinion on the Noise Exemption Applications to the Exec. Director-MLS.

4. Under Chapter 591, the Exec. Director-MLS is required to provide notice of Noise Exemption Applications to certain individuals; specifically, the individuals who hold the position of members of council for the electoral wards in which, (or adjacent to a "boundary street" where), the event or activity is to be held, in whole or in part. Under Chapter 591, the Exec. Director-MLS is required to evaluate, confirm and require compliance with the conditions for issuance of a Noise Exemption. If all specified conditions are met, the Exec. Director-MLS issues the Noise Exemption applied for.

5. One of these conditions is that all of the individuals required to be notified have either: not responded or responded indicating no objections to the application within 14 days of the notice. Therefore, the limited role that an individual member of Council may have under Chapter 591 would be the ability to respond within 14 days to a Noise Exemption Application. An individual member of Council has no further role in dealing with any Noise Exemption Application. An individual member of Council is entitled to inform the Exec. Director-MLS of their position concerning certain Noise Exemption Applications; this is all.

6. No specific timeframe for Noise Exemption Application processing by the Exec. Director-MLS is mandated by Chapter 591. Under Chapter 591, a Noise Exemption Application may be rejected regardless of any response provided by a Member of Council. While a response indicating an objection may provide grounds to refuse a Noise Exemption Application, the decision to issue or refuse a Noise Exemption is that of the Exec. Director-MLS.

7. As such, the total involvement of [the named councillor] in this process - although described by [the appellant] as an "obvious and statutory role" - would be the exceptionally limited role assigned to the Office of Councillor-Ward 20. That is the ability to receive notice of the Noise Exemption Application, and to inform the City Official with the responsibility to process the Noise Exemption Application of a position concerning the advisability of issuance of the requested Noise Exemption. This involvement is exceptionally minor. It is Exec. Director-

MLS who approves or refuses any Noise Exemption Application, and not any individual member of Council.

[9] The city also provides a detailed summary of the manner in which Noise Exemption Application Decisions can be appealed. It identifies who gets notice of these appeals, and which parties have the delegated authority to make decisions concerning the Noise Exemption Appeals (ordinarily, the local Community Council, but occasionally, City Council as a whole). It is City Council, or a specific Community Council, and not an individual member of Council who has the authority to issue or refuse an appeal of a Noise Exemption application, with or without conditions. The city also notes that, in the current circumstances, no appeals were filed in relation to any of the Notice Exemption applications. As a result, it states that "the full extent of the involvement of the Office of Councillor-Ward 20 was receiving notice of the two Noise Exemption Applications, and providing notice of objection to the two Noise Exemption Applications."

[10] Within the context of this background information (which was only provided by the city later in the process) I will review the issues in this appeal.

RECORDS:

[11] The records at issue in this appeal consist primarily of correspondence and emails. The following records remain at issue in this appeal: pages 95 to 99, part of 101, 102, parts of 104 and 105, A4, A5, A7 to A9, part of A10, and A12 to A36.

ISSUES:

A. What is the scope of the request? What records are responsive to the request?

B. Does the discretionary exemption at section 12 apply to the records?

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

DISCUSSION:

Issue A: What is the scope of the request? What records are responsive to the request?

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

> (1) A person seeking access to a record shall,

> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
> …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[13] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1]

[14] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[15] In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive." She went on to state:

> ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to [section 17(2) of the Act] to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

[16] In Order 134, former Commissioner Sidney B. Linden also commented on the proper interpretation of section 17(2) of the Act, stating, among other things:

> ...the appellant and the institution had different interpretations as to what this meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the *Act* compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and,

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

> if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

[17] In Order PO-1897-I, commenting on the above orders, Assistant Commissioner Sherry Liang noted that in the appeal under consideration in Order 134, the request was somewhat vague, and that the institution had genuine difficulty in interpreting the scope of the request. She pointed out, however, that "even there, the former Commissioner resolved the ambiguity in favour of the appellant's view of the request."

Details of the request and subsequent clarifications

[18] As noted above, the lengthy request resulting in this appeal was for access to information regarding the Pedestrian Tunnel Project (the Project) at the Billy Bishop Toronto City Airport, for a defined period of time, particularly access to all records related to two separate applications for a noise Exemption permit for the Project. The request identified by name certain companies or individuals who "may have contacted the Commissioner of Urban Development Services [the Commissioner], or any other branch of the City of Toronto" regarding the Exemption. The request also stated that the types of records sought included correspondence; memoranda; minutes of any meeting relating to the Exemption; recordings of public meetings involving the Project and Ward 20, where the Project took place; and documentary material of public meetings involving Ward 20 and the Project, including materials presented to attendees.

[19] The request then referred to certain correspondence between a named company and the City Clerk's office which was in the possession of the requester. It also set out the requester's understanding of the review and appeal process for the granting of the Exemption. The request also stated:

> We understand that as part of the application process, … the Commissioner would have given Notice of [the applications for the exemptions] to the Councillor of Ward 20.
>
> We further understand that …. the Councillor of Ward 20 would have responded to the Commissioner's notice within 14 days, or otherwise the application would have been granted.
>
> We request access to any such relevant correspondence or other documentary material between the Councillor of Ward 20 and the Commissioner or relating to or issuing from either, in respect of the project, in addition to any records relating to the Exemption involving the City Clerk's Office or the Commissioner.

[20] As noted above, the city issued a decision letter granting partial access to certain responsive records, with severances pursuant to the exemptions in sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. In its decision, the city

explained the following:

> Municipal Licensing and Standards staff has advised that the City did not hold any public meetings on the tunnel project as it is a Toronto Port Authority project. The City has not received any appeals from [a named company] regarding the application for noise exemption permit.

[21] Following the appeal of the city's decision, and during mediation, the appellant advised that he believed additional responsive records exist, and provided information in support of this position. The appellant sent a letter to the city identifying its concerns that additional responsive records exist. A portion of this "clarified" request stated:

> Particulars of our concerns include the fact that there is no document … which contains any information as to:
>
> > 1) Which City of Toronto employee, Councillor or councillor staff … made the decisions not to grant [a named company] an Exemption, or
> >
> > 2) The reasons and basis for two refusals to grant [the Exemption] …

[22] In addition, the appellant identified its concern that only one branch of the city conducted a review of their records. The appellant also noted that meetings were held with the named company to discuss the project and the noise issue, and confirmed that its request was for all records of "city personnel" relating to the decisions regarding the exemption. The letter also stated "We expect that this request will involve a search of documentation involving any City Councillor (and staff) who was in any way involved in the decision not to grant … the Exemption."

[23] As noted above, the city conducted additional searches and located further records.

Representations of the parties

The city's initial representations

[24] In its initial representations, the city submits that it conducted a search based on a broad, expansive and liberal interpretation of the request as initially worded, as well as the subsequent clarification from the appellant.

[25] The city notes that to be responsive, a document must "reasonably relate" to the subject matter of the request. The city submits that the request pertains to the noise Exemption for the Pedestrian Tunnel Project at the Billy Bishop Toronto Airport. The city takes the position that six pages of records (pages A30 to A35) relate to taxi service, traffic chaos and other actions, and are therefore not responsive to the request as they

do not relate to the noise prohibition Exemption.

The appellant's initial representations

[26] With respect to the city's position that records A30 to A35 do not reasonably relate to the request, the appellant asks that this position be reviewed by this office.

[27] Regarding the scope of the request, the appellant submits that the context of its initial request was "the [Pedestrian Tunnel Project] and the applications 'into or discussions about, a noise prohibition or noise limitation provision exemption' under article 591-10 of the [Municipal Code]." The appellant states that it provided the city with the names of parties (individual and corporate) anticipated to have been involved in the communications with "the Commissioner of Urban Development Services, or any other branch of the City of Toronto". The appellant also states that it specifically requested:

> […] access to any such relevant correspondence or other documentary material between the Councillor of Ward 20 and the Commissioner [of Urban Development Services],[3] or relating to or issuing from either, in respect of the [Pedestrian Tunnel Project], in addition to any records relating to the Exemption involving the City Clerk's Office or the Commissioner.

[28] On this basis, the appellant submits that the request always sought access to records from a named councillor in respect of the two noise Exemption applications related to the Project.

[29] The appellant submits that the city sought and the appellant subsequently provided clarification of the scope of the request. It submits that the city asked to narrow the scope of the request concerning the named councillor to "records maintained by the Commissioner/department", and that the appellant advised that its request related to "records maintained by any relevant branch of the City of Toronto subject to the Act", not just those maintained by the Commissioner."[4] The appellant submits that the city failed to take into account this clarification.

[30] The appellant submits that it never advised the city that its request would be adequately responded to without a search of the named councillor's records, and that the city therefore failed to respond literally to the request, as required by section 17(2) of the *Act*.

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[3] Note: In its clarification, the appellant indicated that its initial request referred to the "Commissioner" because that is the title used in article 591 of the Toronto Municipal Code, but that the District Manager of Toronto East York may have been delegated the Commissioner's authority. The appellant also noted that the District Manager at the time referred to the city Clerk's Office in his correspondence. Therefore, the appellant asked the city to consider both the District Manager and the Clerk's Office for the request.

[4] i.e. the District Manager of Toronto East York and city Clerk's Office.

[31] In addition, the appellant notes that another option open to the city was for the city to narrow the scope of its search but to outline the limits of the search to the appellant. It submits that the city also failed to do this, and that it also never provided any reason why the request was narrowed to exclude the named councillor's records, nor did it inform the appellant of that decision until its initial representations. As such, the appellant submits that the city failed to meet its obligations under the *Act*.

[32] In addition, the appellant submits that subsequent correspondence between it and the city confirmed the appellant's concerns with the scope of the disclosure, and that the city's subsequent disclosure letter was also inadequate, as it did not identify the staff members involved in a further search.

The city's reply representations

[33] In its reply, the city notes that the appellant's clarification of the scope of the request was:

> City records (i.e. records in the custody or control of the city) which deal with the issue of Noise Exemption Applications regarding the Project [including] documents related to these Noise Exemption Applications and any inquiries, negotiations and discussions relating to the Noise Exemption Applications and that any records that are not so described are not responsive to the request.

[34] In view of this clarification, the city submits that seven more records, namely A4 to A5, A7 to A10 and A12, are not responsive to the request. Therefore, the city submits that the application of section 12 to these records is no longer at issue. Moreover, the city submits that only one or two of the redactions in records A15 to A29 relate to the clarified request.

[35] The city also states that the appellant's submissions on the scope of the request are based on a mistaken understanding of the process related to the issuance of noise prohibition exemptions, and the role of individual members of City Council. The city provided detailed information about the permit process, which I have set out above, and which confirms that the Commissioner's authority to grant or refuse the noise exemption applications related to the project was delegated to the Executive Director of Municipal Licensing and Standards [the Exec. Director-MLS].

[36] In addition, the city provides information about the distinction between documents of the named Councillor in his capacity as the holder of the "Office of Councillor-Ward 20" and personal documents the councillor would have maintained in his "political" or "constituent-relationship" roles during the time in question.

[37] In the alternative, the city suggests that, given the misunderstandings regarding the scope of the request and the potential for further issues concerning the custody and control of documents, the portions of the appeal dealing with scope and reasonable

search should be returned to mediation.

The appellant's sur-reply representations

[38] The appellant's sur-reply representations identify its frustration that it was only in the city's reply representations that the city's identified the Exec. Director-MLS as the party with the authority to grant or refuse the noise exemption applications. The appellant submits that the city itself is confused and that its reply representations fail to adequately clarify the terms of the search it undertook.

[39] The appellant also provides representations regarding the nature of the named councillor's involvement in the project, which I review under my consideration of the reasonableness of the search, below.

[40] Finally, the appellant submits that for various reasons, it is unnecessary to return the issues of scope and reasonable search to mediation, as suggested by the city.

Analysis and findings

[41] The request resulting in this appeal is lengthy, and the subsequent correspondence did little to clarify the specific information responsive to the request. Some of this confusion related to questions about the noise exemption application process, and the appellant's initial assumptions regarding this process. The city's initial responses to the appellant's "clarifications" were not particularly helpful, and contributed to the confusion surrounding the scope of the request and, consequently, whether the city's searches for records were reasonable. However, these concerns have been clarified through the representations of the parties, and other than to comment on the city's response to the appellant's request for records of the councillor or his staff, below, I will not review the other aspects of the clarifications and subsequent responses.

[42] Remaining at issue under the "Scope of the Request" are three categories of records, and I will review each category in turn.

Pages A30 to A35

[43] These six pages of records are the pages that the city states relate to taxi service, traffic chaos and other actions, and are therefore not responsive to the request as they do not relate to the noise prohibition Exemption. Although the appellant does not object to the city's determination that records A30 to A35 do not reasonably relate to the request, it states that it is not in a position to comment on the responsiveness of the records.

[44] On my review of these records, I am satisfied that they do not "reasonably relate to the request." These six pages concern issues that do not relate to the noise limitation provision exemption, but relate to other matters. As a result, I find that they are not

responsive to the request.

Pages A4, A5, A7 - A10, A12 and portions of A15 - A29

[45] These pages and portions of records are the ones that the city, in its reply representations, now submits are not responsive to the request. However, the city did not take this position earlier in this appeal, and this appeal proceeded on the understanding that these records were responsive to the request. Because I have received representations from the parties on these records, and because of my findings below, I will consider these records responsive to the request and will not review whether or not some pages or portions of pages are responsive.

Councillor Records

[46] The request resulting in this appeal and the subsequent correspondence is detailed above. It is apparent from the documentation in this file that the city considered the scope of the request to include any records in its own record-holdings relating to the Exemption, but that it did not search the councillor's own office or staff record-holdings for responsive records. Based on the information provided by the city about the noise exemption permit process, set out above, the city's position is that any records held by the named councillor and not located in city record-holdings constituted the councillor's personal, political or constituent records, and are therefore not in the custody or control of the city for the purposes of the *Act*.

[47] However, it was not until the city provided its reply representations that its position regarding the councillor's records became clear. The city's initial and subsequent access decisions did not identify its position that any records located in the councillor's own office or staff record-holdings were not in the city's custody or control for the purpose of the *Act*. This resulted in much of the confusion regarding the scope of the request and the adequacy of the city's search for records. The appellant argues that the scope of the request included the councillor's own record holdings, and that the searches conducted should have included those record-holdings.

[48] I review the issue of the nature of the councillor's involvement in the noise prohibition Exemption below under my discussion of the reasonableness of the city's search. There, I confirm that the city's search for responsive records was reasonable, and that it was not obligated to search for records existing in the municipal councillor's record holdings.

[49] However, in this appeal, the initial request referred to the named councillor, and the appellant's subsequent "clarification" indicated its position that the named councillor and his staff were, in its view, "city personnel." The city did not directly address this portion of the request, nor did it identify its position regarding whether any records in the councillor's own record-holdings were in the city's custody or control. The city simply failed to address the appellant's references to the city councillor records until its

reply representations.

[50] Given the wording of the initial request and particularly the subsequent "clarifications" provided by the appellant, the city ought to have clearly stated its position that records held by the named councillor, and not otherwise contained in the city's own record-holdings, were not in the city's custody or control. This would have clearly identified the city's position, and allowed the appellant to address this issue directly and earlier in this process. The city's failure to do so resulted in much of the confusion about what the scope of the request was and whether the searches conducted by the city were reasonable.

[51] Lastly, I have considered whether to refer this matter back to mediation for clarification. In the circumstances, in light of the fact that both parties provided representations on the nature of the councillor's involvement in this matter, and given my findings below, I will not refer this matter back to mediation.

Issue B: Does the discretionary exemption at section 12 apply to the records?

[52] The city submits that section 12 of the *Act* applies to the records. Section 12 reads:

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

[53] Section 12 contains two branches as described below. To rely on this exemption, the city must establish that one or the other (or both) branches apply.

[54] Branch 1 derives from the first part of section 12, which permits the city to refuse to disclose "a record that is subject to solicitor-client privilege".

[55] Branch 2 derives from the second part of section 12 and it is a statutory exemption that is available in the context of institution counsel giving legal advice or conducting litigation. The statutory exemption and common law privilege, although not necessarily identical, exist for similar reasons.

[56] The city takes the position that the records qualify for under both solicitor-client privilege and litigation privilege.

Branch 1: common law privilege

[57] Branch 1 of the section 12 exemption applies to a record that is subject to "solicitor-client privilege" at common law. The branch encompasses two heads of common-law privilege: (i) solicitor-client communication privilege; and (ii) litigation

privilege. In order for branch 1 of section 12 to apply, the city must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[5]

Solicitor-client communication privilege

[58] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[6]

[59] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[7]

[60] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[8]

[61] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[9]

[62] Confidentiality is an essential component of the privilege. Therefore, the city must demonstrate that the communication was made in confidence, either expressly or by implication.[10]

Litigation privilege

[63] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.[11]

[64] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver,[12] the authors offer some assistance in applying the dominant purpose test, as follows:

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[5] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[6] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[7] Orders PO-2441, MO-2166 and MO-1925.
[8] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[9] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[10] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[11] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).
[12] Butterworth's: Toronto, 1993, pages 93-94.

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
> >
> > It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both. …
> >
> > [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privilege

[65] Branch 2 is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons.

Representations of the parties

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

[66] The city takes the position that 23 emails, which the city refers to as "Staff Communications", qualify for exemption under section 12 of the *Act*.[13] These records consist of email communications between city staff, some of which include staff at the city's Legal Services Division (LSD), in which issues relating to the pedestrian tunnel are discussed.

[67] The city divides the 23 records into 2 categories. It identifies the first category (Group 1 records) as emails between LSD staff and staff in other Divisions, and submits that the exemption in section 12 applies to these records as disclosure would reveal communications between city lawyers and institutional clients. The city then identifies that the second category (Group 2 records) are emails between city staff that do not include staff at the LSD. It submits that the section 12 exemption also applies to these

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[13] The 23 emails consist of: pages A4-A5, A7, A8, A9, A10, A12, A13, A14, A15-A16, A17-A18, A19-A20, A21-A23, A24-A25, A26-A27, A28-A29, A36, 95, 97, 98-99, 101, 102, 104, and 105.

records, as disclosure of them would indirectly reveal the content of communications with the city's LSD, including legal advice.

[68] With respect to the solicitor-client communication privilege, the city submits that the Group 1 records qualify for exemption as they constitute documents that were prepared by or for legal counsel employed or retained by the city for the purpose of providing legal advice. It submits that these records, including the documents attached to these records, represent a "continuum of correspondence in which a variety of legal advice, opinions, and suggestions were either requested or provided in relation to a myriad of developments in relation to the Pedestrian Tunnel Issue." As such, the city maintains that these records are at the "core" of the solicitor-client relationship that is protected by the section 12 exemption.

[69] With regard to the 16 emails that comprise the Group 2 records (namely, records A8, A9, A12, A13, A14, A17-A18, A21-A23, A24-A25, A36, and parts of 101, 104 and 105), the city maintains that the solicitor-client communication privilege applies to these as well. In support of its position, the city refers to Order MO-2211 which found that records qualified for exemption under the solicitor-client privilege because disclosing the records at issue in that appeal would reveal to an "assiduous investigator the nature of solicitor-client communication." The city submits that disclosing the Group 2 records in this appeal would provide the appellant with correspondence that explains or includes advice provided by the LSD in other documents, and that the appellant would be able to ascertain the nature and content of the solicitor-client communications. The city also submits that confidential communications between staff does not constitute waiver of solicitor-client privilege. As such, it is the city's position that these records are also protected by solicitor-client privilege under the section 12 exemption.

[70] The city also submits that the staff communications are protected by litigation privilege. The city submits that the records are documents that were used to form or implement legal advice with respect to the pedestrian tunnel. The city states that the disputes and issues surrounding the pedestrian tunnel are broad, and that not all of them are resolved. The city submits that the litigation for which privilege is being claimed in this appeal remains a possibility, and that the disclosure of the records would allow for the identification of the strengths and weaknesses of the city's position with respect to the issues that may arise in litigation. It is the city's position that disclosure of these records would reveal information that could be highly prejudicial to its legal interests in contemplated litigation. As such, the city submits that the litigation privilege branch of the section 12 exemption also applies to exempt the records at issue from disclosure.

[71] The city submits that the records were treated as confidential communications at all times and were not shared with any party outside of the solicitor-client relationship. As such, the city submits that there has been no waiver of the privilege applicable to these records, and they therefore qualify for exemption pursuant to section 12.

The appellant's initial representations

[72] The appellant cites the three requirements of solicitor-client privilege, as articulated by the Supreme Court of Canada (SCC) in *Pritchard v Ontario (Human Rights Commission)*,[14] being:

i. a communication between solicitor and client;

ii. the communication involves the seeking or giving of legal advice; and

iii. the communication is intended to be confidential by the parties.

[73] The appellant submits that it is unable to comment on the application of solicitor-client privilege without reviewing the records; however, it has asked that I review each record, as required by the SCC's decision in *Pritchard*, to determine whether the exemption applies.

[74] The appellant submits that if the records involve communications where the purpose is not seeking or giving legal advice, then the second requirement for solicitor-client privilege has not been met.

[75] Regarding the Group 1 records containing correspondence from LSD staff, the appellant submits that simply having a staff lawyer on an email chain is insufficient grounds to claim solicitor-client privilege.[15] The appellant submits that the correspondence must include requests for or the provision of legal advice before such privilege attaches.

[76] The appellant submits that the city has improperly claimed privilege over the Group 2 records consisting of communications that do not directly involve LSD staff, as there is no solicitor involved in these communications. The appellant emphasises the SCC's first requirement for privilege to attach: that the communication be between a solicitor and client. The appellant also submits that in Order MO-3045, this office decided that "solicitor-client communication privilege protects *direct* communications of a confidential nature between a solicitor and client." [emphasis added]

[77] The appellant asserts that the city is mistaken in stating that privilege is absolute and attaches to any further communications that refer to the subject matter of the privileged communications. It states that, according to the Ontario Court of Appeal[16] and the Ontario Superior Court of Justice,[17] "privilege extends to communications in whatever form, but does not extend to facts which may be referred to in those communications if they are otherwise discoverable and relevant." The appellant submits

[14] 2004 SCC 21 at para 15 [*Pritchard*].
[15] *Humberplex Developments Inc v TransCanada Pipelines Ltd*, 2011 ONSC 4815 at para 49
[16] *General Accident Assurance Co v Chrusz*, [1999] OJ NO 3291 at para 90 (CA).
[17] *Humberplex Developments Inc v TransCanada Pipelines Ltd*, 2011 ONSC 4815 at para 32.

that finding that privilege attaches to internal communications where legal advice is *not* sought or received would defeat the purpose of requesting internal documents, such as those discussing on-going projects and day-to-day activities, from institutions under the *Act*.

[78] The appellant submits that the requirement that communications must involve legal counsel is not met with the Group 2 records. The appellant asserts that the city has provided no authority for its position that the absence of a solicitor in a communication is not a bar to privilege attaching, or that written communications between staff of a solicitor's client may be considered privileged.

[79] Moreover, the appellant asserts that the authority relied upon by the city, Order MO-2211, is distinguishable on the basis that it involves records related to legal fees and billing information. The appellant submits that legal invoices prepared by a solicitor for a client are distinguishable from the Group 2 records, which include communications where no lawyer is involved. The appellant submits that whether these communications discuss the Project or other legal matters is not a relevant consideration for determining whether privilege attaches.

[80] Rather than the "assiduous investigator" test proposed by the city, the appellant submits that test is to determine if the internal communications among employees constitutes "the passing on of confidential legal advice or directly [involves] the seeking of legal advice."[18] The appellant submits that it is unclear from the city's representations whether the Group 2 records disseminate specific legal advice obtained from LSD, or merely identify that LSD was consulted, nor is it clear that the communications amount to seeking or passing on confidential legal advice.

[81] Finally, the appellant states:

> [If] having a solicitor involved can in some circumstances be inadequate to ground a privilege claim vis a vis corporate in-house or public in-house counsel, surely not having a solicitor involved where advice is not sought or provided cannot be adequate to ground a privilege claim.

[82] Regarding the city's claim of litigation privilege, the appellant submits that the city's position that a construction project might lead to litigation is the broadest and vaguest basis for claiming litigation privilege. The appellant submits that absent any particulars about anticipated or ongoing litigation, the city's position is unreasonable.

[83] The appellant notes that the test for litigation privilege is the "dominant purpose test,"[19] one requirement of which is that the records must have been prepared "in a

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[18] Imperial Tobacco Canada Ltd v Canada, 2013 TCC 144 at para 57.
[19] *Blank v Canada (Department of Justice)*, 2006 SCC 39 at paras 59-60.

realistic anticipation of litigation".[20] The appellant submits that only one of the LSD staff identified in the city's representations has a position related to litigation, and that this individual is only involved in ten of the records over which the city claims privilege.

[84] Furthermore, the appellant submits that at the time that the records were created, no dispute or litigation was contemplated by the city. The appellant notes that the city does not provide any particulars regarding the anticipated litigation, such as which issues regarding the Project may be in dispute, when the city began to anticipate that a dispute may proceed to litigation, and/or any potential parties to litigation. On this basis, the appellant submits that the city's representations on litigation privilege are overly broad and fail to address the requirements of the dominant purpose test.

The city's reply representations

[85] In its reply representations, the city asserts that its decision regarding the application of section 12 should be upheld.

[86] Regarding the Group 1 records, the city submits that the appellant has groundlessly taken the position that the records contain "non-legal duties" of the individuals in LSD, or were used for purposes other than seeking or communicating legal advice. The city requests that the appellant's submissions be dismissed.

[87] The city notes that judicial and IPC jurisprudence have held that "communications for the purpose of legal advice" must be construed broadly to cover the whole of the continuum of communications between the solicitor and client advising on matters great or small at various stages.

[88] The city acknowledges that some LSD staff have executive or non-legal job responsibilities, but submits that there is no indication that those responsibilities arose in connection with LSD's involvement in the matter. Moreover, the city submits that many LSD staff function exclusively as solicitors or litigators, and have no duties relating to an "executive or non-legal capacity". The city suggests that a review of the records indicates that LSD staff were involved as legal advisors, and not in any "executive or non-legal capacity". Therefore, while the city acknowledges that the nature of in-house counsel work may include non-legal responsibilities, the city submits that the records at issue do not contain any non-legal communications that would be outside the scope of the section 12 exemption.

[89] Regarding the Group 2 records, the city submits that the appellant is wrong in asserting that solicitor-client privilege does not apply to communications between members of an institutional client unless a solicitor is a party to the internal communication.

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[20] *Liquor Control Board of Ontario v Magnotta Winery Corp* (2009), 97 OR 3d 665 at para 36 (Div Ct).

[90] The city notes that this office has previously applied section 12 to internal client communications where disclosure would reveal the content of solicitor-client communications. The city submits that the Group 2 records incorporate direct and paraphrased communications from LSD, and that a comparison of these records with other publicly available material would allow an individual to conclude the nature and content of the solicitor-client communications. As examples, the city submits that records A12 and A13 discuss courses of action that were proposed as a result of specific legal advice, while record A17-A18 includes and forwards two Group 1 records, which are direct communications with LSD staff. On this basis, the city submits that each of the Group 2 records fits into a category of records that this office has determined to be covered by section 12.

[91] Finally, the city disputes the appellant's position regarding the possibility of litigation. The city submits that the records contain information that addresses many potential disputes concerning various topics related to the Project. The city refers to the appellant's statement of claim made under the *Construction Lien Act*, and notes that it contains 17 paragraphs detailing the issue of "delays and costs incurred relating to the Noise By-law and the Noise By-law Arbitration". The city suggests that the potential for the Noise By-law and/or Noise By-law Arbitration to give rise to litigation is not speculative or unsubstantiated. As such, the city maintains that the 23 records were properly withheld pursuant to the litigation privilege in section 12 of the *Act*.

<u>The appellant's sur-reply representations</u>

[92] The appellant's sur-reply representations refer back to its original submissions on solicitor-client privilege. The appellant asks that I review each record, as the city's representations are based on evidence that is not available to the appellant and the reply representations do not provide adequate direct evidence that the communications seek or provide legal advice, as required for privilege to attach.

[93] Regarding litigation privilege, the appellant submits that the city has still failed to identify any specific litigation over which privilege may be claimed. The city refers to an action commenced by the appellant, but both the city and the appellant acknowledge that the action will not proceed. The appellant submits that the city does not provide any evidence or valid assertion that it will become a party to litigation arising from the Project, and therefore privilege cannot exist.

Analysis and findings

[94] Based on my review of the staff communications and the parties' representations, I am satisfied that all of the records qualify for exemption under section 12 because they are subject to common-law solicitor client communication privilege.

[95] First, I find that records 95, 96-97, 98-99, 102, A4-A5, A7, A10, A15-A16, A19-

A20, A26-A27, and A28-A29 (the Group 1 records), qualify for exemption under section 12 because they are documents that were prepared by or for legal counsel employed or retained by the city for the purpose of providing legal advice. Disclosure of these documents would reveal to the requester confidential communications between city lawyers and their institutional clients, which is precisely what the section 12 exemption aims to protect.

[96] The appellant requested that I review each of the records to ensure that the city has not improperly claimed solicitor-client privilege by unnecessarily including staff lawyers on correspondence. Based on my review of the records and the representations provided by the city, I am satisfied that the Group 1 records constitute documents that were prepared by or for legal counsel employed or retained by the city for the purpose of providing legal advice. As a result, I find that the Group 1 records qualify for exemption under section 12.

[97] Next, I turn to the Group 2 records, namely records A8, A9, A12, A13, A14, A17-A18, A21-A23, A24-A25, A36, and parts of 101, 104 and 105. These records consist of communications that do not directly involve legal counsel employed or retained by the city. The appellant submits that solicitor-client privilege cannot attach to the Group 2 records because they do not involve direct communications between a solicitor and a client, as required in Order MO-3045-I. The city maintains that disclosure of these records would reveal to an "assiduous investigator" the nature of solicitor-client communications, as contemplated in Order MO-2211.

[98] While I acknowledge that the Group 2 records do not contain direct communications between city staff and city lawyers, I note that this office has previously applied section 12 to internal communications not involving a lawyer where disclosure would reveal the content of communications between a solicitor and client. For example, in Order PO-2087-I, Adjudicator Cropley considered whether briefing papers prepared by non-legal staff at the Ministry of Finance would qualify for solicitor-client privilege under section 19 of the *Freedom of Information and Protection of Privacy Act*, which is equivalent to section 12 under the *Act*. In doing so, she stated the following:

> These records were prepared by non-legal staff in the Ministry. However, large portions of them refer to or reflect the legal advice that is contained in the other records at issue in these discussions. In my view, disclosure of this information would reveal the legal advice that was provided and should, therefore, be protected under section 19.

[99] Moreover, in Order M-1112 Adjudicator Hale found that documents passing between employees of a client can be subject to solicitor-client privilege if they transmit or comment on communications with lawyers that are connected with legal advice or contemplated litigation. Similarly, in Order PO-1631, the adjudicator concluded that internal communications containing instructions to seek legal advice on a particular

issue should qualify for exemption. Based on the analysis found in these orders, the solicitor-client privilege may apply to the Group 2 records, even though they are not direct communications with legal counsel. Rather, each record must be examined to determine whether its disclosure would reveal the content of solicitor-client communications.

[100] On my review of the Group 2 records and the representations of the city, I find that the exchange of information contained in the communications is either in the context of planning to seek legal advice from legal counsel (A8, A9, A21-A23 and A24-A25), processing and implementing the privileged legal advice received from counsel (A12, A17-18, 104 and 105) or directly or indirectly revealing the content of communications with legal counsel (A13, A14, A36, and 101). On this basis, I conclude that each of the Group 2 records represent communications which, if disclosed, would reveal the content of solicitor-client communications where legal advice, opinions, and suggestions were either requested or provided in relation to the pedestrian tunnel issue and the noise Exemption permit. As such, I find that the Group 2 records also qualify for exemption under section 12 on the basis of solicitor-client privilege, regardless of the fact that they were not prepared by or for counsel directly.

[101] The city submits that the records at issue were treated as confidential communications at all times and were not shared with any party outside of the solicitor-client relationship. Accordingly, there is no evidence that the solicitor-client privilege attaching to these records has been waived.

[102] As I have determined that each of the 23 records at issue qualify for exemption under solicitor-client communication privilege as contemplated by section 12, it is unnecessary for me to consider whether litigation privilege also applies.

Exercise of discretion

[103] The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could be withheld. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

[104] In either case this office may send the matter back to the institution for an

exercise of discretion based on proper considerations.[21] This office may not, however, substitute its own discretion for that of the institution.[22]

[105] The city submits that, in determining whether to disclose the records to the appellant, it took into consideration: The purposes of the *Act*; the meaning of section 12 and the interests it is meant to protect; the relatively young "age" of the information being requested; the historic practice of the city with regard to disclosing records subject to solicitor-client privilege; the likely impact of disclosure on public confidence in the operation of the city; the nature of the information being requested; the fact that the appellant has not provided a sympathetic or compelling interest favouring disclosure; the fact that this information sought is not the appellant's "own" information; and the fact that other information on this matter has already been disclosed to the appellant.

[106] The city notes that other information regarding the pedestrian tunnel has been released. The city submits that it does not object to disclosure of information generally related to the subject matter of the request; however, it does object to disclosure of records containing or pertaining to confidential communications between the city's LSD and its institutional clients. The city submits that it exercised its discretion in balancing the interests intended to be served by the section 12 exemption and has determined that such information is not suitable for public disclosure. As such, the city submits that it has properly engaged in a good faith exercise of discretion under the *Act* and that its decision regarding the application of the exemption should be upheld.

[107] The appellant did not address the exercise of discretion issue in its representations.

[108] On my review of the circumstances of this appeal and the city's representations on the manner in which it exercised its discretion. I am satisfied that the city considered a number of relevant factors when determining whether to disclose the records to the appellant, that it did not take into account irrelevant considerations nor fail to take into account relevant considerations.

[109] As a result, I am satisfied that the city properly exercised its discretion to apply the section 12 exemption to the records, and I uphold the city's decision that the records qualify for exemption under section 12.

Issue C: Did the institution conduct a reasonable search for records?

[110] In appeals involving a claim that additional responsive records exist, as is the case in the appeal before me, the issue to be decided is whether the city has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am

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[21] Order MO-1573.
[22] section 43(2).

satisfied that the search carried out was reasonable in the circumstances, the city's decision will be upheld. If I am not satisfied, further searches may be ordered.

[111] A number of previous orders have identified the requirements in reasonable search appeals.[23] In Order PO-1744, the adjudicator made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[112] I agree with the adjudicator's statement, and have applied this approach in previous orders.[24]

[113] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[114] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.[25]

[115] Most of the submissions received from the parties on whether the search was reasonable relate to the issues concerning the searches for the named councillor's records, which I review separately below. However, the parties also provided submissions on whether other aspects of the searches were reasonable.

Searches in the city's own record-holdings

[116] The city notes that the *Act* does not require it to prove with absolute certainty that additional records do not exist. Rather, under the *Act*, the onus is on the requester to provide a reasonable basis for a belief that further records may exist while the city only has to provide sufficient evidence to show that it has made a reasonable effort to

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[23] Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.
[24] Orders PO-3114, PO-3494.
[25] Order MO-2246.

identify and locate responsive records. The city submits that it has not been provided with a reasonable basis for the appellant's belief that additional responsive records "ought to exist". As such, the city submits that it is at a disadvantage in providing representations on this issue.

[117] The city provided this office with written representations and an affidavit as evidence in support of its position that a reasonable search was conducted. The city submits that the appellant's original request and subsequent clarification clearly indicate that the requested records pertain to noise under the Toronto Municipal Code, Article 591. The city also submits that the appellant advised that a named individual, who was the former Manager of Investigation Services of the city's Municipal Licensing and Standards Division (the division), should be considered as the city official with designated authority for the purpose of his request. The city felt that it was clear that the requested records would be maintained at the division, which is responsible for enforcing the city's noise by-law.

[118] The city submits that during its initial search, the named individual's archived email account was accessed and searched along with 18 boxes of office records which had been put into storage. The division's staff also contacted the Waterfront Secretariat to search for any records relating to public meetings.

[119] The city conducted two subsequent searches, the first of which took place during mediation. During the first subsequent search, the division's staff accessed and searched the archived email account of the former Director of Investigation Services. In addition, the Waterfront Secretariat was asked to conduct another search for responsive records. During the second subsequent search, which took place after the city received a Notice of Inquiry from this office, the city requested access to the personal employee drives in the city's network for the former Manager and Director of Investigation Services. Both subsequent searches yielded additional responsive records. The city issued decisions about these records on April 4, 2014, and June 23, 2014, respectively.

[120] Given the recent dates of the records and the nature of the records being requested, the city submits that they would not have been destroyed in accordance with its approved retention schedules.

[121] The affidavit attached to the city's representations also provides significant details about the searches conducted for responsive records and the results of the searches. In addition, it refers to a flood that occurred in July 2013 at a building where some Investigation Services records were stored. The city submits that it is unable to confirm whether any records responsive to this request were damaged or destroyed by the flooding event.

[122] The city submits that, in the circumstances, a reasonable search for responsive records was conducted, as required by section 17 of the *Act*.

[123] As noted above, the appellant's concerns regarding the reasonableness of the searches conducted by the city relate primarily to the city's failure to search the record holdings of the named councillor. I address this issue separately below. However, in its sur-reply representations the appellant also raises a concern about the searches for records held by the Exec. Director-MLS. The appellant states:

> … the city also failed to search the records of the Executive Director, Municipal Licensing and Standards, even though the city now submits that this would have been the individual with the discretion to consider the Exemption applications. ….

Analysis and findings

[124] As noted, the *Act* does not require an 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. 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.

[125] 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.

[126] From my review of the representations of the parties, and in particular the affidavit evidence provided by the city (which was shared with the appellant), I find that the searches conducted by the city for records in its own record-holdings were reasonable. The affidavit provided by the city was sworn by the Manager, Policy Planning and Services, MLS. This affidavit reviews the nature of the searches conducted in the city's own record-holdings, and the results of those searches. It also identifies the subsequent searches conducted by the city. Given the identities of the individuals who conducted the searches, the nature and results of the searches, and the affidavit evidence provided, I am satisfied that the searches were conducted by employees experienced in the subject matter of the request and that these individuals expended reasonable efforts to locate responsive records.

[127] I have also considered the appellant's concerns about the searches conducted for records of the Exec. Director-MLS. Although I acknowledge that the city's representations do not focus on the records held by this individual, the affidavit provided by the city specifically identifies the nature of the searches conducted for records held by this individual, including that these searches were conducted by this individual's Administrative Assistant.

[128] As a result, I find that the searches conducted by the city for records in its own record-holdings were reasonable.

Councillor records

The appellant's initial representations

[129] The appellant submits that the city conducted an incomplete search on the basis that it has not searched the named councillor's records. The appellant submits that the grounds upon which the city claims that it was unnecessary to search the named councillor's records are unreasonable, and that until the city searches those records, it is not in a position to make informed representations regarding the responsiveness of the records searched.

[130] The appellant also takes the position that there is a reasonable basis to believe that additional responsive records ought to exist from the office of the named councillor. In support of this position, the appellant submits the following:

- The named councillor was the only person with discretion to approve or deny an application under the City's Municipal Code 591-10, making him an integral actor in the noise Exemption application process;
- The city's initial disclosure provided documents that suggest the named councillor required more information about the Project before approving the application;
- Municipal Code 591-10 requires a response to an application within two weeks, but it took over four months for the city to reject a particular application, which provides reason to believe that records would have been created by, or involving, the named councillor during that period of time; and
- Records were obtained through a parallel federal process involving a relevant third party, which indicate that the named councillor was involved in discussions concerning two identified applications.

[131] Finally, the appellant submits that the city's unreasonable search cannot be attributed to a lack of diligence on the appellant's behalf, and identifies how it clarified its request within a short period of time, and identified its concerns about the city's response early in the process.

The city's reply representations

[132] In its reply representation, the city directly addresses the appellant's arguments.

[133] The city states that the appellant's submissions regarding the scope and search issues reveal that the appellant has a mistaken understanding of the actions of individual members of Council in relation to the process for noise Exemptions under Chapter 591. It also provided the summary of the noise permit application process set out above. The city confirms that it did not search the records of the former named

councillor, as those documents relate to the constituency work of the city councillor, and not to the limited role of providing comments on noise Exemption applications assigned to the "Office of Councillor-Ward 20" under Chapter 591. It submits that it was unaware of the appellant's misunderstandings about these matters until it received the appellant's submissions.

[134] In addition, the city states that it confirmed with the appellant that the request did not seek the personal records of the former city councillor, as such records are outside the scope of the *Act*, and that it believed the appellant understood that searches of the personal record-holdings of the former city councillor were not being conducted, as those records relate to his personal political-constituency relationship and could not be considered to be documents in the custody or control of the city.

[135] The city also submits that the media reports relied on by the appellant do not provide a basis to conclude that further records relating to the "Office of Councillor-Ward 20" exist. The city submits that while the former named councillor may have attended meetings with other organizations, given press statements, engaged with members of the community, etc., these actions were done in his political-constituency relationship work. In other words, these actions were not in the realm of his responsibilities as the holder of the "Office of Councillor-Ward 20".

The appellant's sur-reply representations

[136] The appellant indicates its frustration with the fact that the city only identified the nature of the councillor's involvement in the process in its reply representations.

[137] Regarding the city's position that the named councillor's records may be "constituent related", the appellant submits that it confirmed that it was only seeking access to relevant documents that were created during the process of considering the Exemption applications.

[138] The appellant then addresses the city's claim that records produced by the named councillor are not subject to the request on the basis that they were created for "political" or "constituent-relationship" purposes. The appellant submits that the city's reply submissions must be cautiously considered as the city's position is not fact nor a description of any judicially recognized position of law, but merely its own interpretation of the Toronto Municipal Code 591-10.

[139] The appellant notes that section 591-10B of the Code states that the Commissioner "shall give written notice to the councillor of any ward where the event or activity is to be held." The appellant submits that while the term "councillor" is not defined in the Code, its plain meaning is that of a City of Toronto Councillor in his/her role as such (i.e. as a representative of both a ward and the city). The appellant states that the city's attempt to "parse so many personalities from the official role" the named councillor played is disingenuous.

[140] The appellant provides three documents in support of its position that the named councillor had an instrumental and possibly determinative role in approving/rejecting the Exemption Permit. The first is an email from the named councillor's office in which the councillor requested a Construction Management Plan be produced to inform his decision on the Exemption Permit. The second is an email exchange which indicates that the City Clerk's office waited on the named councillor's input before finalizing a decision on the Exemption Permit. The third is a letter from the Toronto Port Authority indicating that it was informed that a permit would not be granted on account of the named councillor declining its approval.

[141] The appellant submits that these three documents show that the named councillor's input was far more than an "exceptionally limited role," as suggested by the city. Accordingly, the appellant submits that any document produced by the named councillor during the approval process is relevant and ought to be made available. Despite this, the city has failed to conduct a search of the named councillor's records to determine whether any are relevant.

[142] Finally, the appellant submits that it is unnecessary to return the issues of scope and reasonable search to mediation, as suggested by the city, as any relevant documents have already been created and to do so would only increase the cost in time and money to all parties involved.

Analysis and findings

[143] I have found above that the city's searches conducted in its own record-holdings were reasonable. I note that some of the responsive records, as well as the records referred to by the appellant, involve the named councillor.

[144] Based on my review of the specific request resulting in this appeal and the subsequent "clarifications" provided by the appellant, I find that the request was for information relating to the city's decisions regarding whether to grant the noise exemption permits, including who made the decisions and the reasons and basis for the decisions.

[145] The city has provided detailed representations on how the named councillor was involved in decisions regarding the noise exemption bylaw. In the summary set out above, the city identifies that the councillor, as an individual member of Council, does not have the authority to grant or refuse a Noise Exemption. However, due to his capacity as Office of Councillor-Ward 20, the named councillor was notified of the Noise Exemption Applications and entitled to provide a response concerning his opinion on the Noise Exemption Applications to the Exec. Director-MLS. The city confirms that this "limited role" relates only to the individual member of Council's entitlement to inform the Exec. Director-MLS of his position, and that he would have no further role in dealing with any Noise Exemption Application. The city states that while a response indicating an objection may provide grounds to refuse a Noise Exemption Application, the decision

to issue or refuse a Noise Exemption is that of the Exec. Director-MLS.

[146] Based on the city's representations, I am satisfied that the named councillor was not the decision-maker making the decision to approve the Exemption, but rather an individual member of council who could respond to the noise exemption application. Although the city characterizes this role as "exceptionally minor" I would rather characterize it as limited to the ability to respond to the exemption application. As noted by the appellant, this response could trigger further communications between the city and the councillor relating to the Exemption application.

[147] However, I am satisfied that, given the nature of the councillor's role and involvement in the exemption application, any records relating to the councillor's response to the application and any subsequent communications between the councillor and the city regarding the application would be located in the city's record holdings. Searches for these responsive records were conducted by the city when it searched in its own record-holdings, and records were located.

[148] I am also satisfied that, given the limited role the councillor had in the application and approval process, records contained in the councillor's own record-holdings would constitute records relating to the councillor's political and/or constituent role.[26] I make this finding based on the material before me as well as on my view of the nature of the councillor's involvement in the approval process. It is clear to me that the official decision to approve or not approve the exemption is a decision made by the city. Records relating to the named councillor's involvement in the process as a party required to be notified of the application are contained in the city's record-holdings, and I have found those searches to be reasonable. With respect to records which may be contained in the named councillor's own record-holdings, given the nature of the councillor's involvement in the process, I find that the councillor was not acting as an "officer" or "employee" of the city or discharging a special duty assigned by council such that he may be considered part of the "institution." As a result, I find that any records contained in the councillor's own record-holdings (and not otherwise contained in the city's record-holdings) are not in the custody or under the control of the city on the basis of established principles.[27] In addition, I am satisfied that the city could not reasonably expect to obtain a copy of such records upon request.[28]

[149] Based on these findings, I am satisfied that the city conducted a reasonable search for responsive records.

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[26] This office has determined that records of city councillors are not generally considered to be in the custody or under the control of the city, as an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. For a recent detailed review of this issue, see Orders MO-3281 and MO-3287.
[27] Ibid.
[28] Ibid. See also in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

ORDER:

I uphold the decision of the city.

Original Signed by: June 29, 2016

Frank DeVries
Senior Adjudicator