Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3381

Appeal MA13-471

City of Toronto

November 23, 2016

Summary: The appellant seeks access to records relating to his residential property. The city located records responsive to the appellant's request and granted him partial access to them. The city advised the appellant that it withheld portions of the records under the discretionary exemptions in sections 38(a), read with section 12 (solicitor-client privilege), and 38(b) (personal privacy). In addition, the city advised that certain information was withheld as not responsive to the appellant's request. Finally, the city issued a fee estimate of $121.40 for the paper copies of the records. The appellant sent the city a request for a fee waiver, but that request was denied. The appellant appealed the city's exemption claims, fee estimate and denial of fee waiver. The appellant also claims that additional responsive records exist, thereby raising the issue of reasonable search. The adjudicator upholds the city's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12, 14(1), 17, 38(a) and 38(b)

Orders and Investigation Reports Considered: PO-1744

OVERVIEW:

[1] The appellant made a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to his residential property and a non-residential property.

[2] Following clarification with the appellant, the city opened two separate files to deal with each property. The clarified request that is the subject of this appeal relates

to the appellant's residential property and reads as follows:

> … a copy of the records regarding any violations, issues, and inspections from year 2000 to present for the property at [specific address] for this property related to [specific numbered company] or [the appellant] from these following City divisions:
>
> 1. Municipal Licensing Standards
>
> 2. Toronto Public health
>
> 3. Revenue Services – the amount of property taxes paid, owing, charges added
>
> 4. Affordable Housing
>
> 5. Toronto Building
>
> 6. Toronto Fire Services – fire prevention and inspection reports from only year 2005 to present.

[3] The city located a number of records and issued a decision granting the appellant partial access, citing the discretionary exemption in section 12 (solicitor-client privilege) and the mandatory exemption in section 14(1) (personal privacy) of the *Act* to withhold some of the records. The city further indicated that some information was removed as not responsive to the request as it relates to properties at addresses other than the address identified in the request.

[4] The city also stated the following:

> In response to your request for information regarding the tax history of [residential property], staff of the Revenue Services Division have advised that this information is available to property owners under its Routine Disclosure policy. You may want to contact the Revenue Services directly at [specified phone number].

[5] The city further indicated that the records in PDF format on a CD would be mailed to the appellant after he sent the city a cheque for $16.00. The city provided the appellant with the following fee breakdown:

Cost of copying 627 pages onto a CD	$10.00
Cost of severing records at $30/hour – 5 pages at two minutes per page (excluding duplicates)	$6.00

Total **$16.00**

The city also advised the appellant that it could provide him the records on paper at $0.20 per page for $115.40 for photocopying plus $6.00 for severing to a total of $121.40.

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

[7] During mediation, the appellant paid the $16.00 fee requested by the city and the city provided a copy of the record on CD. The appellant also submitted a fee waiver request, seeking a copy of the paper records, on the basis that the dissemination of records will benefit public health or safety pursuant to section 45(4)(c) of the *Act*. The city issued a fee waiver decision denying the appellant's fee waiver request and stated:

> As you have already paid $6.00 in severing costs and we will credit you with the $10 paid for the CD, the total cost payable is $99.40.

The appellant submitted further correspondence regarding his fee waiver request. The city maintained its decision to deny the fee waiver.

[8] The appellant indicated that he believes additional responsive records should exist. Specifically, the appellant indicated that he seeks an Electrical Safety Authority (ESA) report referred to on page 249 of the records that he received from the city. The appellant also claimed that he seeks records relating to visits by health inspectors at the property in question, and takes the position that these records should exist.

[9] The city conducted another search for records but reported that it did not locate additional records. The appellant advised the mediator that he continues to believe that additional responsive records exist. Accordingly, the reasonableness of the city's search remains at issue.

[10] The city clarified that it relies on section 15(a) of the *Act* to deny the appellant access to tax history records because these records are available to the public for a fee through the city's Revenue Services Routine Disclosure Policy. The city indicated that the tax history records are listed on the city's Revenue Services website, and that the appellant will need to contact the city's Revenue Services to identify the specific records he seeks.

[11] The appellant objected to the city's application of section 15(a) of the *Act* to the tax history records. The appellant submitted that these records are not publicly available as the fees charged by the city's Revenue Services are prohibitive.

[12] With respect to the remainder of the records, the city clarified that it relies on sections 38(b) and 38(a) in conjunction with section 12 because the records appear to contain the appellant's personal information.

[13] The appellant confirmed that he is not interested in the personal information of other individuals, such as names, addresses and telephone numbers in the records. As

a result, the information withheld on pages 2, 13, 21, 37, 41, 49, 56, 78 and 593 is no longer at issue in the appeal.

[14] Mediation could not resolve the issues and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The IPC provided the city with the opportunity to provide representations in response to the issues set out in a Notice of Inquiry. The city submitted representations. In its representations, the city states that it acknowledged that section 15 does not apply to the records during mediation. As a result, this exemption is no longer at issue in this appeal and I do not need to consider it in this order.

[15] The non-confidential portions of the city's representations were shared with the appellant in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*. The appellant submitted representations. I note that the appellant made a number of allegations regarding the city's conduct in relation to public housing projects, the city's use of public funds and various "cover-ups". The appellant also submits that the city's conduct has caused serious harm to himself, both financially and physically. While I reviewed all of the appellant's arguments, I will only consider those that are relevant to the issues outlined below and not any allegations raised by the appellant that do not relate to his request and appeal.

[16] Subsequently, the appeal was transferred to me. In the discussion that follows, I uphold the city's decision and dismiss the appeal.

RECORDS:

[17] There are 18 pages of records that remain at issue, which consist of portions of reports, letters, emails, an invoice, a fire inspection chronology and other correspondence.

ISSUES:

A. Should the fee for the paper records be upheld?

B. Should the fee be waived?

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

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

E. Does the discretionary exemption at section 38(a), in conjunction with the section 12 exemption, apply to the information at issue?

F. Does the discretionary exemption at section 38(b) apply to the information at issue?

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

DISCUSSION:

Issue A: Should the fee for the paper records be upheld?

[18] Previous orders established that, where the fee is $100.00 or more, the fee estimate may be based on either:

- Actual work done by the institution to respond to the request, or
- A review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.[1]

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees. In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[2]

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

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

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

[21] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. As I find that the records contain the appellant's personal information, section 6.1 of Regulation 823 applies. This section reads:

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[1] Order MO-1699.
[2] Orders P-81 and MO-1614.

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

[22] In reviewing the city's fee, I must consider whether it is reasonable, giving consideration to the content of the appellant's request, the circumstances of the appeal and the provisions set out in section 45(1) of the *Act* and Regulation 823. The burden of establishing the reasonableness of the fee estimate rests with the city. To discharge this burden, the city must provide me with detailed information as to how the fee was calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.

[23] The city states in its representations that I should uphold its $115.40 fee for paper records. The city states that it charged $16.00 for a copy of the records on a CD, as per section 6(2) of Regulation 823. The city stated that where the cost of photocopies is greater than providing the records on a CD, the city will provide the records on CD. As the cost with the CD was only $16.00, no fee estimate was necessary.

[24] In any case, the city states that it provided the appellant with a fee estimate for access to the paper records. The city states that it also offered the appellant an opportunity to view the records and choose the pages he wished to copy in order to reduce the photocopy fees. However, the appellant did not request to view the records.

[25] The city submits that, given that the fee for paper records was calculated as per section 6(1) of Regulation 823 and was based on actual work done, I should uphold the $115.40 fee. The city notes that it reduced the fee for the actual number of photocopies because it decided not to charge the appellant for duplicate copies of records. In addition, the city submits that while it attempted to work with the appellant to narrow the scope of his request to lower the fee, the appellant did not wish to narrow his request.

[26] The appellant did not make submissions on the appropriateness of the city's fee.

[27] As stated above, initially, the city charged the appellant a fee of $16.00 for the

CD-ROM and the cost of severing the records. The city also advised the appellant that it could provide him the records on paper at $0.20 per page for $115.40 for photocopying plus $6.00 for severing to a total of $121.40. However, when the appellant asked the city to send him a copy of the paper records, the city advised as follows:

> As you have already paid $6.00 in severing costs and we will credit you with the $10 paid for the CD, the total cost payable is $99.40.

[28] As stated above, the purpose of a fee estimate is to provide the requester with sufficient information to make an informed decision on whether or not to pay the fee and pursue access to the requested records. In the current appeal, the city's fee estimate is based on actual work done to copy and sever the records. The city charged the time at the rate prescribed by the *Act* at $7.50 for each 15 minutes spent by any person or $30.00 per hour and the photocopy fees were charged at $0.20 cents per page.

[29] However, I note that, as the records located by the city contain the appellant's personal information, section 6.1 of Regulation 823 governs the fees to be charged. Section 6.1 of Regulation 823 does not permit an institution to charge a requester for severing records that contain their own personal information. As such, the city was not permitted to charge the appellant $6.00 for severing the records at issue.

[30] The city decided not to charge the appellant for any duplicate records and it appears that it inadvertently charged the appellant a discounted final fee of $115.40 in its fee waiver decision rather than the originally quoted $121.40, effectively removing the $6.00 charge for severing the records. Therefore, the only cost that remains at issue is the cost of photocopying the 627 pages of records at $0.20 per page. Based on the information provided by the city and the fact that the only charge that remains at issue is the photocopy fees for an undisputed number of pages, I am satisfied that the city's fee of $115.40 is justified and uphold the city's fee.

Issue B: Should the fee be waived?

[31] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. That section states:

> A head shall waive the payment of all or any part of an amount required to be paid under section (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> > (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
> >
> > (b) whether the payment will cause a financial hardship for the person requesting the record;

> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.

Section 8 of Regulation 823 sets out the following additional matters for a head to consider in deciding whether to waive a fee:

> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

[32] A requester must ask the institution for a fee waiver and provide detailed information to support the request before the IPC will consider whether a fee waiver should be granted. The IPC may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.[3] In reviewing a decision by an institution denying a fee waiver, the IPC may decide that only a portion of the fee should be waived.[4]

[33] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they do not do so. The fees referred to in section 45(1) and outlined in section 6 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees. The appellant bears the onus of establishing the basis for the fee waiver under section 45(4) and must justify the waiver request by demonstrating that the criteria for fee waiver are present in the circumstances.[5]

[34] There are two parts to my review of the city's decision under section 45(4) of the *Act*. First, I must determine whether the appellant established a basis for the fee waiver under the criteria listed in subsection (4). If I find that there is a basis for a fee waiver, I must then determine whether it would be fair and equitable to waive the fee, either in whole or in part.[6]

[35] In his fee waiver request, the appellant asked the city to waive the fee because the matter is one of public interest that concerns both city and federal public policy. While *public interest* is not one of the considerations listed in section 45(4), section 45(4)(c) contemplates "whether dissemination of the record will benefit public health or safety" and I will consider whether this section applies to the circumstances of this appeal.

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[3] Orders M-914, P-474, P-1393 and PO-1953-F.
[4] Order MO-1243.
[5] Order PO-2726.
[6] Order MO-1243.

[36] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
    a. disclosing a public health or safety concern, or
    b. contributing meaningfully to the development of understanding an important public health or safety issue
- the probability that the requester will disseminate the contents of the record.[7]

[37] The focus of section 45(5)(c) is *public health or safety*. It is not sufficient that there be only a *public interest* in the records or that the public has a *right to know*. There must be some connection between public interest and a public health and safety issue.[8]

[38] The appellant did not address any of the factors listed above. However, in his representations on the application of section 12 of the *Act*, the appellant submits that public safety and public policy weigh in favour of disclosure. Further, the appellant asserts that the ESA report must be disclosed to him for public safety purposes.

[39] The city submits that the appellant failed to make a link between his reference to *public policy* and a benefit to public health or safety. Furthermore, the city submits that the appellant did not provide any evidence of a public interest in the records, nor did he explain how the disclosure of these records would benefit public health or safety. The city states that the records consist of essentially complaints, inspection reports and repair invoices/receipts for his own personal property. Given the nature of these records, the city submits that the request is clearly a matter of private interest.

[40] Based on my review of the parties' representations and the specific wording of the appellant's request, I find that the appellant did not establish the grounds for fee waiver in section 45(5)(c) of the *Act*. As stated above, it is not sufficient that there be only a *public interest* in the records or that the public has a *right to know*. Previous orders of this office have established that there must be some connection between public interest and a public health and safety issue.[9] However, the appellant only makes a number of vague assertions that the disclosure of the records would serve the public interest and potentially benefit public safety. The appellant did not provide me with

[7] Orders P-2, P-474, PO-1953-F and PO-1962.
[8] Orders MO-1336, MO-2071, PO-2592 and PO-2726.
[9] *Ibid*.

sufficient evidence to demonstrate that the disclosure of records relating to this specific property relate directly to a public health or safety issue or that dissemination of this information will contribute meaningfully to the development of understanding about a public health or safety issue.

[41] Furthermore, it is not evident to me that disclosure of records that concern violations, issues and inspections at the identified property will improve the city's transparency with respect to public health or safety issues. Accordingly, I uphold the city's decision to deny the appellant's request for fee waiver.

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

[42] 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).

[43] 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.[10] To be considered responsive to the request, records must *reasonably relate* to the request.[11]

[44] The appellant's original request reads as follows:

> … a copy of the records regarding any violations, issues, and inspections from year 2000 to present for the property at [specific address] for this property related to [specific numbered company] or [the appellant] from these following City divisions:
>
> 1. Municipal Licensing Standards

[10] Orders P-134 and P-880.
[11] Orders P-880 and PO-2661.

2. Toronto Public health

3. Revenue Services – the amount of property taxes paid, owing, charges added

4. Affordable Housing

5. Toronto Building

6. Toronto Fire Services – fire prevention and inspection reports from only year 2005 to present.

[45] The city submits that the appellant's request relates to a specific property and the city confirmed the scope of his request on May 24, 2013. The city submits that each of the program areas identified in the appellant's request searched for records responsive of the request.

[46] The city states that portions of Records 517, 605, 606, 610, 611, 614 and 615 were withheld as not responsive. In addition, the city withheld Records 341, 342, 449, 450 and 539 as not responsive in their entirety. The city submits that the information withheld as not responsive does not pertain to the property subject to the appellant's request. The city states that the information withheld as not responsive relates to different addresses. As a result, the city submits that the appellant should not take issue with the city's severances.

[47] The appellant did not make submissions on whether the information withheld as not responsive is responsive to his request.

[48] Based on my review of the records, I find that the information withheld by the city as not responsive is not responsive to the appellant's request. The appellant clearly identified the property or address that is the subject of his request. As the city submits, the portions it withheld from disclosure as not responsive relate to different addresses or properties. Information contained in the records that relate to a different address and property do not reasonably relate to the appellant's request, which clearly identifies the property that is the subject of his request. Therefore, I uphold the city's decision to withhold portions of Records 517, 605, 606, 610, 611, 614 and 615 and Records 341, 342, 449, 450 and 539 in their entirety as not responsive.

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

[49] In order to determine which sections of the *Act* may apply, I need to decide whether the records at issue contain *personal information* and, if so, to whom it relates. The term *personal information* 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 other 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.

[50] 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.[12]

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

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

[12] Order 11.

[52] 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.[13]

[53] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[14]

[54] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[15]

[55] The following records remain at issue: 513, 619, 623, 624, 625 and 628.

[56] Based on my review of Records 513, 619, 623, 624, 625 and 628, I find that they contain *personal information*, as that term is defined in section 2(1) of the *Act*. Specifically, I find that the records contain the personal information of the appellant, including his address (paragraph (d)), the views or opinions of other individuals about him (paragraph (g)) and his name as it appears with other personal information relating to him (paragraph (h)).

[57] In addition, I find that Records 619, 623, 624, 625 and 628 contain the *personal information* of other individuals. Specifically, I find that the records contain these other individual's addresses and telephone numbers (paragraph (d)), the views and opinions of these other individuals (paragraph (e)) and their names as they appear with other personal information relating to them (paragraph (h)).

[58] As Records 513, 619, 623, 624, 625 and 628 contain the appellant's personal information, I must consider the appellant's right of access to these records under Part II of the *Act* even though the portions that contain the appellant's own personal information were already disclosed to him.

Issue E: Does the discretionary exemption at section 38(a), in conjunction with the section 12 exemption, apply to the information at issue?

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

[60] Under section 38(a), an institution has the discretionary to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

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

[61] The city takes the position that portions of Record 513 are exempt under section 12. That section states:

> 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.

Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[62] 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.[16] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[17]

[63] 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.[18]

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[19] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communications was made in confidence, either expressly or by implication.[20]

[64] The city submits that it applied section 12 to portions of Record 513, which is entitled *Fire Inspection Chronology* which outlines the steps taken in relation to a specific proceeding permitted under the *Fire Protection and Prevention Act, 1997* (the *FPPA*). The city submits that the portions it withheld under section 12 were prepared by Toronto Fire Services in the context of a larger legal dispute concerning compliance with specific fire safety requirements relating to the property that is the subject of the appellant's request.

[65] As background, the city states that Toronto Fire Services ("TFS") has certain investigatory responsibilities under the *FPPA* for the purpose of public safety. The city states that certain city staff members are assigned to the TFS as *inspectors* under the

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[16] *Decôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[17] Orders PO-2441, MO-2166 and MO-1925.
[18] *Balabel v. Air Indian*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[19] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[20] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

FPPA and are empowered under section 21 of the *FPPA* to issue orders to "the owner or occupant of the land or premises to take any measure necessary to ensure fire safety on the land and premises." Under section 25(1) of the *FPPA*, an individual "who considers himself or herself aggrieved by an order made by an inspector... may… submit a written request to the Ontario Fire Marshal for a review of the order." Under section 25(4) of the *FPPA*, the Ontario Fire Marshal may either refuse to consider the request for reconsideration and refer it to the Fire Safety Commission for a hearing or decide to confirm, amend or rescind the order or make any other order as the Fire Marshal deems appropriate. Section 26 of *FPPA* provides for the ability of individuals aggrieved by an order to be referred to the Fire Safety Commission, which may also "confirm, amend or rescind the order of the Fire Marshal or make such other order as the Commission deems appropriate."

[66] In the case before me, the city submits that the subject matter of the portions of Record 513 subject to its section 12 claim are questions between City staff concerning developments in a hearing to review a specific Inspection Order. At the point that Record 513 was created, the city states that the responsible inspector contacted a member of the Toronto Fire Service's Legal Unit. The city states that the TFS' Legal Unit supervises, assists and coordinates the activities of TFS inspectors to ensure materials are properly collected and prepared for purposes of potential future legal proceedings. TFS' Legal Unit also directs matters requiring the assistance of the City's Legal Services Division to the appropriate staff members at the appropriate stage in the proceedings. In this regard, the city states that the TFS' Legal Unit acts as a liaison between TFS' inspectors and the city's legal counsel.

[67] The city submits that the materials at issue were collected and prepared in anticipation of further litigation. Specifically, the city submits that the portions of Record 513 subject to its section 12 claim contain information that summarizes the communications between city's legal counsel and its clients at the Toronto Fire Services. The city submits that the portions subject to its section 12 claim address a matter of "legal concern" relating to the preliminary stages of an application by an individual who considered themselves aggrieved by an Inspection Order. The city submits that, generally, the redacted portions of Record 513 relate to the next steps to be taken in light of these preliminary developments to ensure that legal difficulties are avoided and the appropriate steps are taken in view of the potential for future litigation.

[68] The appellant submitted extensive representations on the city's application of section 12 of the *Act*. However, the appellant did not make representations on the city's application of section 12 to Record 513. Rather, the appellant claims that the city applied section 12 to withhold an "ESA [Electrical Safety Authority] Report" from disclosure. However, the ESA Report is not before me in this appeal. Accordingly, I cannot determine whether this record is exempt from disclosure under the *Act*. In any case, I will consider the appellant's arguments relating to the solicitor-client privilege exemption generally.

[69] The appellant submits that the city ought to disclose the records subject to its

claim of section 12 in the interests of public safety and policy. The appellant states that the public must not be put in danger and, given the circumstances of this appeal, the records should not be "kept secret". The appellant also notes that the city disclosed over 600 pages of records without applying the exemption in section 12. As a result, the appellant submits that the city should not apply section 12 to withhold some of the information at issue.

[70] In addition, the appellant questions whether confidentiality applies to the information subject to the city's section 12 claim. The appellant submits that the city did not provide enough evidence to demonstrate that privilege applies to the information subject to the section 12 claim.

[71] Based on my review of Record 513 and the representations provided by the city and appellant, I am satisfied that the portions of Record 513 that were withheld under section 12 qualify for exemption under that section. As the city states, Record 513 contains information that relates to a legal matter that would, if disclosed, reveal the content of communications with legal counsel. Based on my review of the information withheld under the section 12 exemption, I find that disclosing it would reveal the nature of the confidential legal advice sought by city or TFS staff, the confidential legal advice received from the city's legal counsel, or otherwise is a part of the *continuum of communications* between a solicitor and client.

[72] While the appellant questions whether the information subject to the city's section 12 claim is, in fact, confidential, there is no evidence before me that would suggest that the city did not treat the information at issue as confidential. Furthermore, there is no evidence before me to suggest that the information contained in the record was shared with any party outside the solicitor-client relationship. Accordingly, there is no evidence that the information subject to the city's section 12 claim was not treated confidentiality nor is there any evidence that the solicitor-client privilege attaching to this information was waived.

[73] As I have determined that the portions subject to section 12 qualify for exemption under solicitor-client communication privilege as contemplated by section 12, it is not necessary for me to consider whether litigation privilege also applies. Accordingly, I uphold the city's application of section 38(a), in conjunction with section 12, to withhold portions of Record 513 from disclosure, subject to my review of its exercise of discretion below.

[74] I note that the appellant submits that the city ought to disclose the information it withheld under section 12 in the interest of public safety and policy, thereby raising the potential application of the public interest override in section 16 of the *Act*. However, section 16 cannot apply to override an application of section 12 of the *Act*[21]. Therefore, I cannot consider whether it would be in the public interest to disclose the record. In

[21] Section 16 of the *Act* states: "An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

any case, I will consider the public interest in my review of the city's exercise of discretion, below.

Issue F: Does the discretionary exemption at section 38(b) apply to the information at issue?

[75] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an *unjustified invasion* of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[76] Section 38(b) may apply to a *record* that contains the personal information of both the appellant (the requester in this case) and other individuals. As discussed in Issue D, above, I reviewed the records that remain at issue and find that section 38(b) is the proper exemption to consider because the records that contain information that the city withheld under the personal privacy exemption also contain the appellant's personal information. The city submits that the only information that remains at issue consists of the names and contact information of individuals that made complaints about the appellant's property.

[77] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). There is no suggestion that any of paragraphs (a) to (e) of section 14(1) applies in this appeal and I find that none does. Further, none of the parties argued that any of the circumstances in section 14(4) apply and I find that they do not.

[78] Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal information of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists that types of information that disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

[79] The city submits that the information it withheld from disclosure in Records 619, 623, 624, and 625 contain the personal information of other individuals who submitted a complaint about the appellant's property. In addition, the city submits that none of the factors favouring disclosure in section 14(2) apply. Finally, the city submits that there is no need to review the possible application of the presumptions in section 14(3) of the *Act* to the information at issue. Accordingly, the city submits that because none of the exceptions listed in section 14(1) or (4) apply and none of the section 14(2) factors favouring disclosure of the information at issue apply, the disclosure of the other individuals' personal information to the appellant would constitute an unjustified invasion of their personal privacy.

[80] The city also submits that there is no evidence before the city to suggest that the appellant either provided to the city or has knowledge of the names and contact information of the complainants. Therefore, the city submits that the absurd result principle does not apply and that it withheld the information that remains at issue properly.

[81] In response, the appellant suggests that the city could redact the other individuals' names from the records and disclose the remainder of the information at issue to him without breaching the personal privacy of those individuals. The appellant did not make any specific representations on the application of section 38(b) or 14 to the information at issue. However, he submits that invasions of individual personal privacy can be justified in situations where "health and safety" are at risk, thereby raising the factor weighing in favour of disclosure in section 14(2)(b) indirectly. While the appellant alleges that the records should be disclosed for the purposes of "health and safety", he did not provide any evidence to demonstrate that this factor applies in this case and I find that this factor does not apply to the information that remains at issue. Further, the appellant did not demonstrate that any of the other considerations favouring disclosure in section 14(2), listed or otherwise, are relevant in the circumstances of this appeal.

[82] I note that the information subject to the section 38(b) claim is not merely other individual's names and simply redacting their names from the records would not anonymize the records. In the absence of any factors favouring the release of the personal information of identifiable individuals and on my review of the records and the circumstances of this appeal, I find that disclosure of the information subject to the section 38(b) claim would constitute an unjustified invasion of the personal privacy of the individuals identified in Records 619, 623, 624, and 625. Therefore, these portions of the records are exempt under section 38(b), subject to my review of the city's exercise of discretion below.

[83] I note that the appellant submits that the city ought to disclose the information it withheld under section 38(b) in the interest of public health and safety, thereby raising the possible application of the public interest override in section 16 of the *Act*. However, the appellant does not make any further submissions to support his claim. I have reviewed the information that I find to be exempt from disclosure under section 38(b), which consists of the personal information of other individuals who submitted a complaint about the appellant's residential property. Given the nature of the records and the circumstances of this appeal, it is clear that disclosure of this information would serve the appellant's *private* interests, rather than a public interest. In any case, I reviewed all of the appellant's submissions and find that he did not demonstrate that the disclosure of the information I find to be exempt under section 38(b) would serve the public interest. Further, I will also consider the public interest in my review of the city's exercise of discretion below.

Exercise of discretion under sections 38(a) and (b)

[84] The exemptions in sections 38(a), read with section 12, and 38(b) are

discretionary. As such, they permit an institution to disclose information despite the fact that the information could be withheld. An institution must exercise its discretion.

[85] On appeal, the IPC may determine whether the institution failed to do so. In addition, the IPC may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, takes in consideration irrelevant considerations and/or fails to take into account relevant considerations. In either of these cases, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[22] This office may not, however, substitute its own discretion for that of the institution.[23]

[86] While the city did not submit specific representations on its exercise of discretion, I reviewed the circumstances of this appeal and the parties' representations. Based on this review, 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. I note that the city withheld only discrete portions of the records and disclosed the vast majority of the responsive records to the appellant.

[87] I note that throughout his representations, the appellant submits that the information at issue should be disclosed to him as a matter of public policy or would subject the city to public scrutiny. However, as discussed above, the appellant did not provide sufficient evidence to demonstrate that the disclosure of the records would serve the public interest or would increase public confidence in the city. I have reviewed the records and, without sufficient evidence demonstrating a public interest in the records at issue, I find that this factor is not relevant to the city's determination of whether the information at issue should be disclosed to the appellant.

[88] As a result, I am satisfied that the city properly exercised its discretion to apply sections 38(a), read with section 12, and 38(b) to the records and I uphold the city's decision that the records qualify for exemption under those sections of the *Act*.

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

[89] In appeals involving a claim that additional records exist, as is the case in this appeal, the issue I must decide is whether the city conducted a reasonable search for the records as required by section 17 of the *Act*. If I am 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.

[90] A number of previous orders identified the requirements in reasonable search appeals.[24] In Order PO-1744, the adjudicator made the following statement with respect to the requirements of reasonable search appeals:

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[22] Order MO-1573.
[23] Section 43(2) of the *Act*.
[24] See, for example: Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.

> … 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).

I agree with the adjudicator's statement and will adopt it for the purposes of my analysis.

[91] Where a requester provides sufficient detail about the records that s/he is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution 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 order to properly discharge its obligations under the *Act*, the city must provide me with sufficient evidence to show that it made a reasonable effort to identify and locate records responsive to the request.

[92] 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]

[93] During mediation, the appellant advised that he believes the city should have a copy of an Electrical Safety Authority (ESA) report that is referred to on page 249 of the records he received from the city. In addition, the appellant indicated that he believes that there should be records related to visits by health inspectors at the property in question in the city's records.

[94] The city submits that it conducted a reasonable search for records responsive to the appellant's request. The city's staff reviewed its file notes and request tracking database and confirmed that the divisions identified in the appellant's request were all asked to perform a search for records responsive to the request. The city provided me with an affidavit detailing its review of the file and describing the searches that took place. The affidavit was shared with the appellant. The city states it located 627 pages of records. The city states that it conducted subsequent searches in its Public Health and Affordable Housing Offices, specifically, to locate the ESA report the appellant believes the city should have a copy of.

[95] The city submits that it is not possible that records that once existed no longer exist. The city states that its staff cannot delete emails from its email archive system. Furthermore, given the dates and nature of the records being requested, no records would have been destroyed in accordance with the city's retention schedule.

[96] With regard to the ESA report, the city states that it asked the recipient of the

[25] Order MO-2246.

fax for which the ESA report was supposedly attached to conduct another search for this document. The city submits that the Affordable Housing staff confirmed that she did not locate a copy of the ESA report. Further, during the preparation of the city's submissions, the Affordable Housing Division reviewed the Residential Rehabilitation Assistance Program file for the document, but it was not located. The city submits that the fax is dated 2009 and, therefore, it is not possible for the city to definitively determine whether the report was indeed enclosed and received by the city or, if it was received, what happened to the report. The city submits that it made "every effort" to locate the ESA report. However, as it noted during mediation, the city states that the ESA report is not a *city record* and it directed the appellant to contact the Electrical Safety Authority directly for a copy. The city states that it appears that the appellant did not contact the ESA for a copy of the report.

[97] In his representations, the appellant submits that the city's position regarding the ESA report is false. The appellant submits that he paid for and requested the ESA report from the city and therefore it must exist. The appellant also takes issue with the city's claim that the ESA report is not a city record. The appellant did not make submissions to substantiate the claim he made during mediation that records related to visits by health inspectors at the property in question should also exist.

[98] From my review of the parties' representations and specifically 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 city's affidavit was sworn by its Manager of Access and Privacy. The affidavit reviews the nature of the searches conducted that were described in the Access and Privacy Unit File. Further, the affidavit and representations review the nature of the searches conducted in the city's records holdings, including those held by the Affordable Housing Office, and the results of those searches. 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.

[99] I have also considered the appellant's arguments and find that he did not provide a reasonable basis for concluding that the ESA report exists in the city's records. As the city confirmed, it conducted a number of searches for that record and was unable to locate a copy of the attachment to Record 249. I note that the city confirmed that the ESA report is a record that was created by and belongs to the Electrical Safety Authority and it is unclear whether the ESA report was actually attached to the fax Record 249. Given the number of searches conducted, both in response to the request and during the appeals process, and upon review of the city's evidence, I am satisfied that the city conducted a reasonable search for responsive records.

[100] Finally, with regard to the appellant's claim that there should be records related to visits by health inspectors at the property in question in the city's records, I find that

he did not provide me with a reasonable basis to conclude that such records exist.

[101] Therefore, I uphold the city's search for responsive records as reasonable.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed By: November 23, 2016
Justine Wai
Adjudicator