Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3437

Appeal MA13-84

City of Vaughan

May 12, 2017

Summary: The city received a request under the *Act* for email records exchanged between certain city staff, other individuals and the city's Compliance Audit Committee. The city issued an interim access decision with a fee estimate to search for the responsive records and prepare them for disclosure. The appellant paid the interim fee estimate in full and the city issued a final access decision granting partial access to the records. Portions of the records were withheld pursuant to the discretionary exemptions in sections 7(1) (advice or recommendations), 11 (economic or other interests) and 12 (solicitor-client privilege) and the mandatory personal privacy exemption in section 14(1). The city also claimed that certain records were not subject to the *Act,* either because they were not in its custody or control or due to the operation of section 52(3), the labour relations and employment exclusion. The appellant appealed the city's decision to withhold portions of the records, as well as the fee charged on the basis of her belief that some of the records contain her personal information. The appellant also challenged the reasonableness of the city's search for responsive records.

In this order, the adjudicator partly upholds the city's access decision that some records are excluded from the *Act* and that others are exempt under the claimed exemptions. The adjudicator upholds the city's search and partly upholds the city's fee, but orders a fee reduction because some of the records contain the appellant's own personal information. The city is ordered to refund the appellant's overpayment.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of "personal information"),

4(1), 7(1), 11(a), 11(f), 11(g), 12, 14(1), 17, 38(a), 38(b), 45(1), 52(3); Regulation 823, ss. 6 and 6.1.

Orders and Investigation Reports Considered: Orders MO-1285, MO-2528 and MO-3313.

Cases Considered: *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

OVERVIEW:

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

> Please accept this letter as a freedom of information request filed under *MFIPPA* for copies of all emails to and from [the City Clerk], the Clerk's office, [Election Coordinator] and to and from any of the following: members of the Audit Committee, [and two named individuals] May 1, 2011 until present.

[2] Several days later, the requester provided some clarification. The city then sought additional clarification of the scope in terms of its start date, as well as the individuals and the email accounts to be included in the search. The requester subsequently added several individuals to the list, including a specific city councilor, and the city proceeded with its searches on that basis.

[3] The city issued an interim decision with a fee estimate of $576.40, which the requester paid in full. The city then issued its final access decision, granting partial access to the records and providing an index of records. The city withheld records, or portions of them, under section 7(1) (advice or recommendations), section 11 (economic interests), section 12 (solicitor-client privilege) and section 14 (invasion of privacy). The city also claimed that some records are excluded from the *Act* under section 52(3) (labour relations and employment records) and that the records of the named councilor are not in its custody or under its control.

[4] The requester, now the appellant, appealed the city's decision and a mediator was appointed to explore resolution. The appellant challenged the city's fee on the basis that some of the records contain her personal information – she believes search and preparation fees should not have been charged for those records. She also claims that the search time is excessive. The appellant also asserted that additional records should exist. The city provided an explanation in response to the appellant's search concerns, but since it did not fully satisfy her, the issue of reasonable search was added to the issues on appeal. A mediated resolution of the appeal was not possible and it was transferred to the adjudication stage for an inquiry.

[5] The appeal was placed on hold for a period of time after it reached adjudication and once reactivated, I sought representations from the city, which I received. Next, I sent a non-confidential copy of the city's representations to the appellant and invited her to provide representations. The appellant did not provide representations.

In this appeal, I find the following:

- Section 52(3)3 applies to some of the records for which it is claimed by the city, meaning that those records fall outside the scope of *MFIPPA.*
- Many of the records contain the personal information of individuals other than the appellant, while some of the records at issue contain her personal information.
- The personal privacy exemption applies to some, but not all, of the records for which the city claimed it.
- The advice or recommendations exemption in section 7(1) applies.
- The solicitor-client communication privilege exemption in branch 1 of section 12 applies to many, but not all, of the records for which the city claimed it.
- The city's section 11 claim for valuable government information is not established.
- The city's exercise of discretion under sections 38(b) and 38(a), together with sections 7(1) and 12, was proper.
- The city councillor's records in this appeal are not in the city's custody or under its control according to section 4(1) of *MFIPPA.*
- The city's search for responsive records was reasonable, based on the scope of the request.
- The city's fee is partly upheld, but the search and preparation fees are reduced to account for some of the records containing the appellant's personal information.

RECORDS:

[6] Several hundred pages of emails, as described in the city's index, remain at issue, either in part or in their entirety. The specific page numbers are identified under the relevant issue headings, below.

ISSUES:

A. Does section 52(3) exclude the records from the *Act*?

B. Do the records contain "personal information" as defined in section 2(1)?

C. Does the personal privacy exemption in section 14(1) or 38(b) apply?

D. Do pages 678-679 contain advice or recommendations for the purpose of section 7(1) of the *Act*?

E. Does the discretionary exemption in section 11 protecting the economic or other interests of an institution apply to the records?

F. Does the discretionary solicitor-client privilege exemption at section 12 apply?

G. Did the city properly exercise its discretion?

H. Are pages 881-886 in the city's custody or control for the purpose of section 4(1) of the *Act*?

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

J. Should the city's fee decision be upheld?

DISCUSSION:

A. Does section 52(3) exclude the records from the *Act*?

[7] Vaughan claims that the emails at pages 412-440 are excluded from the *Act* under section 52(3). Section 52(3) is an exclusion that limits the authority of this office to review access decisions by institutions. It differs from the exemptions found in section 6 to 15 of the *Act*. If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[8] Since section 52(3) of the *Act* pertains directly to the issue of my jurisdiction, I must review its possible application. The city relies on paragraphs 2 and 3 of section 52(3), which state:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution

> between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

[10] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[2] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[3]

[11] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[4]

[12] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.[5]

[13] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[6]

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[1] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[2] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[3] Order PO-2157.
[4] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[5] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[6] *Ministry of Correctional Services*, cited above.

Representations

[14] According to the city, because the appellant's request sought *all* communications between two staff members – one of whom was the supervisor of the other – without specifying a subject, the search resulted in the identification of communications between those employees that related to employment-related matters, including "staff attendance and employee negotiations." The city submits that some of these communications with one of its employees reflects the collection, preparation and use of information to finalize an employment contract and fit within section 52(3)2. Other communications contain information about sick time and work attendance which, the city submits, fit within section 52(3)3 as excluded communications prepared or used by the city regarding employment-related matters in which the city has an interest.

[15] As noted, the appellant did not submit representations.

Analysis and findings

[16] To establish that section 52(3)3 applies to exclude the records, the city was required to provide evidence that:

1. the records were collected, prepared, maintained or used by the city or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the city has an interest.

Part 1: collected, prepared, maintained or used

[17] From my review of the records the city claims are excluded, I am satisfied that these records were collected, prepared, maintained or used by the city. This finding satisfies part 1 of the test under section 52(3)3.

Part 2: meetings, consultations, discussions or communications

[18] Similarly, from my review of these records, I am satisfied that the records were collected, prepared, maintained or used by the city in relation to consultations, discussions and communications involving an identified individual and the city. Therefore, I find that part 2 of the section 52(3)3 test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[19] For the collection, preparation, maintenance or use of a record to be "in relation

to" labour relations or employment-related matters in which the city has an interest, it must be reasonable to conclude that there is "some connection" between them.[7] The phrase "labour relations or employment-related matters" has been found to apply in the context of, for example, a job competition[8] or an employee's dismissal.[9]

[20] In the circumstances of this appeal, I find that pages 421-422, 430-434, 436 and 437 were collected, prepared, maintained or used by the city in relation to employment matters in which it had an interest, namely firming up the details of the individual's employment contract with the city. I conclude, therefore, that part 3 of the section 52(3)3 test has been met.

[21] Section 52(4) provides exceptions to section 52(3) that relate to agreements and expense accounts, but I find that none of them apply in the circumstances of this appeal. As a result, I find that pages 421-422, 430-434, 436 and 437 are excluded from the *Act* pursuant to section 52(3)3, and I will not address them further in this order. In light of this conclusion, I do not need to consider whether these records are also excluded from the *Act* by virtue of section 52(3)2.

[22] On the other hand, there are other emails in this group that were exchanged between these two individuals or between one of these individuals and others that I find are not excluded from the *Act.* Specifically, pages 412-420, 423-425, 429, 435 and 438-440 deal with varied matters that do not, in my view, qualify as "labour relations or employment-related matters." The records consist of incidental communications about work and weather, recommendations, inquiries about other individuals or events, and greetings. On the whole, these informal email exchanges do not lead me to reasonably conclude that they were collected, prepared, maintained or used by the city in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the city had an interest. Accordingly, I find that pages 412-420, 423-425, 429, 435 and 438-440 do not meet the third part of the test for exclusion under section 52(3)3 and are not excluded on that basis.

[23] The city had also claimed that this group of records was excluded under paragraph 2 of section 52(3) of the *Act.* The third requirement the city was required to establish under section 52(3)2 was that the "negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding." None of the records described above that failed to satisfy the third part of the test under section 52(3)3 meet this part of the test under paragraph 2. Specifically, I am not persuaded that the collection, preparation, maintenance and use of pages 412-420, 423-425, 429, 435 and 438-440 was in relation to negotiations between either of these individuals and the city.

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[7] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[8] Orders M-830 and PO-2123.
[9] Order MO-1654-I.

Therefore, I find that these particular pages are also not excluded under section 52(3)2.

[24] Given my conclusion that pages 412-420, 423-425, 429, 435 and 438-440 are subject to the *Act,* I will review them under the city's alternate claim that they are exempt under the personal privacy exemption in section 14(1).

B. Do the records contain "personal information" as defined in section 2(1)?

[25] Before reviewing the city's exemption claims and the fee charged to the appellant, I must first determine if the records contain "personal information" and, if so, to whom it relates. This is because the city applied the mandatory personal privacy exemption in section 14(1) to many records, but also because the appellant asserts that some of the records contain her personal information, thereby possibly making sections 38(a) and 38(b) relevant, as well as the fee provisions relating to requests for one's own personal information.

[26] "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual" of a type that fits within a non-exhaustive list outlined in the section. Information that does not fall under paragraphs (a) to (h) of the list set out in section 2(1) may still qualify as personal information.[10]

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.

[27] These provisions affirm past orders that held that in order 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 generally not be considered to be "about" the individual.[11] However, even information that relates to an individual in a professional, official or business capacity may qualify as personal information if the information reveals something of a personal nature about the individual.[12]

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[10] Order 11.
[11] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[12] Orders P-1409, R-980015, PO-2225 and MO-2344.

Representations

[28] The city's brief submissions contend that any personal information about the appellant appears in the records due to her candidacy in the 2010 municipal election or as a result of the request she filed for compliance audits of other candidates in the same election. In its representations on section 14(1), the city states that the only undisclosed pages containing the appellant's personal information are pages 686-688. The city's only other comment on the issue is that the records otherwise contain "an extensive amount of personal information relating to others."

[29] The appellant does not offer submissions on this issue.

Analysis and findings

[30] Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual (paragraph (h)).

[31] Having reviewed the records, I find that some of them contain personal information about the appellant along with the personal information of other individuals. However, most of these records contain only the personal information of other identifiable individuals and not the appellant. Much of the personal information in the records fits within paragraph (h) of the definition in section 2(1), but also paragraphs (a) (marital or family status), (b) (education, medical or employment history), (c) (identifying number), (d) (address or telephone number), (e) (personal views), (f) (confidential correspondence) and (g) (views of others about the individual).

[32] For the most part, the "personal information" severances made by the city are of names or personal email addresses of staff, the public and, in some cases, candidates for municipal office. On my review, I note that the city applied severances to this type of information sparingly for the most part. To the extent that the exception in section 2(2.1) might have applied to certain staff or other names, I am satisfied that those withheld names appear together with other information about them such that the information instead falls under paragraph (h) of the definition. The context goes beyond the mere identification of the individual in his or her professional or official capacity.[13]

[33] There are several exceptions to my finding, above. First, section 14 was claimed for certain records, or portions of records, that do not contain personal information about identifiable individuals. Specifically, I find that the information on the following pages, or parts of them, does not fall within the definition of "personal information" in

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[13] See Order MO-3355.

section 2(1): pages 20 (part), 69[14] and 669-670 (part) (duplicated at page 673). Those portions of the identified records cannot be withheld under section 14(1) and since no other mandatory exemptions apply, I will be ordering those portions disclosed, subject only to my review of the possible application of section 11 to page 69.

[34] Next, the city withheld the email at pages 678-679 in its entirety under section 7(1) only, and did not list this record as exempt under section 14(1). However, on my review of this email, I find that it also contains the personal information of individuals other than the appellant that fits within the definition in section 2(1). The same is true of page 107, withheld only under section 11, and pages 408-410 and 759-761, withheld only under section 12, which also contain the personal information of individuals other than the appellant.

[35] For the records that contain only the personal information of identifiable individuals, but not the appellant, Part I of the *MFIPPA* applies and I must consider whether the personal information is properly exempt under the mandatory personal privacy exemption at section 14(1).

[36] On my review of the records, several records that were withheld contain the appellant's personal information, namely pages 686-688, as the city identified, but also pages 404-405 and 456-457 (duplicated at 462-463). Pages 404-405 were withheld in part under section 14(1), while pages 686-688 were withheld in full under sections 7 or 12.[15] As these records contain personal information belonging to the appellant, however, Part II of the *Act* applies.[16] Therefore, I must determine whether the discretionary exemption at 38(b) applies to pages 404-405 and whether section 38(a), read in conjunction with the advice or recommendations or solicitor-client privilege exemptions at sections 7 or 12, applies to pages 686-688 as claimed by the city.

[37] I will also review any possible implications of this finding for the fee issue later in this order.

C. Does the personal privacy exemption in section 14(1) or 38(b) apply?

[38] The city relies on section 14(1) to deny access to portions of pages 20-24, 35-36,

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[14] The city made a concurrent claim to sections 11(f) and (g) respecting this same record.
[15] This submission varies from the index of records where only a claim of section 12 is made in relation to this record.
[16] Section 36(1) of *MFIPPA* 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. Under section 38, a head may refuse to disclose to the individual to whom the information relates personal information: (a) if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information; or (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

43-45, 68, 189, 193-194, 198, 233-236, 241-244,[17] 259-264, 268-270, 280, 283, 288-289, 291, 295-296, 309, 313, 321-322, 324, 382, 394-395, 404-405, 411, 441-442,[18] 470, 482-484, 490-493, 496-497, 520-522, 526, 563-570, 572-573, 579, 583-591, 596-598, 617-619, 626, 630, 643-647, 649-650, 652-653, 656, 669-674, 678-679,[19] 684-685, 699-701, 711-717, 726-735, 737-744, 754-758, 762, 788-789, 800-805, 810-812, 814-815, 823-824, 828-835, 841, 851, 854, 857, 860-861, 863-888, 871-872, 875-878, and 880.[20]

[39] The city denies access to pages 412-440, in their entirety. The alternate claim for these pages was that they are excluded from the *Act*, pursuant to section 52(3), but I concluded above that only pages 421-422, 430-434, 436 and 437 fit within section 52(3). I also determined that page 414 and parts of 420, 669-670 (duplicated at 673) did not contain personal information. This particular information cannot be withheld under section 14(1) and will not be reviewed here. However, pages 412-413, 415-420, 423-425, 429, 435 and 438-440 remain at issue under this exemption.

[40] Under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy under section 14(1)(f). The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[41] As noted above, pages 404-405 must be reviewed under section 38(b) because the record contains both the appellant's and another individual's personal information.

[42] 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, however, the institution may also decide to disclose the information to the requester. This office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified

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[17] The city identified the pages in this series as 241-243. However, the same personal information withheld from page 241 and 243 is also severed from page 244.

[18] The city does not include 442 in its index, but the page contains severances under section 14 as well.

[19] These pages are added in accordance with my finding under the personal information issue, above. Although the city's claim was limited to section 7(1), section 14(1) is mandatory.

[20] The page ranges provided do not necessarily refer to single records. Consecutively numbered individual records have been collapsed into page ranges to save space.

invasion of personal privacy.[21]

[43] Under the section 14(1) analysis that must be conducted for the majority of these records, however, section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.[22]

[44] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[23] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[24]

Representations

[45] The city asserts that all of the records containing the appellant's own personal information were disclosed to her in full, except pages 686-688. Further, the city maintains that section 14(1) applies to the rest of the records because there are no applicable exceptions in section 14(1)(a) through (e) that apply and the personal information of other individuals in the records is therefore exempt. The city does not otherwise address the personal privacy exemption.

[46] As stated, the appellant provided no representations in this appeal.

Analysis and findings

[47] The city withheld pages 404-405, in part, under section 14(1). As I found above, however, the appellant's personal information appears in the record. However, the city disclosed the appellant's personal information to her and withheld only email addresses of other individuals. This meets with the city's obligation to sever the records in accordance with section 4(2) of the *Act* to disclose to the appellant her own personal information and other non-exempt information. Beyond that, the factors and presumptions in sections 14(2) and (3) must be weighed to balance the interests of the

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[21] Order MO-2954. Under this office's previous approach under both sections 38(b) and 14, a finding that a section 14(3) presumption applied could not be rebutted by any combination of factors under section 14(2).
[22] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).
[23] Order P-239.
[24] Orders PO-2267 and PO-2733.

parties in determining whether the disclosure of the remaining withheld personal information in the records would be an unjustified invasion of personal privacy.

[48] For its part, the city offers no submissions to support the application of any of the presumptions against disclosure in section 14(3) or the factors in section 14(2) that favour the protection of privacy. However, the appellant has not argued that any of the section 14(2) factors favouring disclosure apply; nor does the evidence before me suggest that any of the factors listed in section 14(2) or any unlisted factors favouring disclosure apply. Additionally, based on the withheld content of these numerous section 14(1) severances, which is mirrored in the remaining withheld content of pages 404-405 under section 38(b), I conclude that no such factors apply.

[49] Given my conclusion that no factors or circumstances weigh in favour of the disclosure of the personal information that was severed from the records, I find that the exception at section 14(1)(f) is not established. Therefore, I uphold the city's decision to withhold the severed information from the records listed above under the mandatory exemption in section 14(1) or, in the case of pages 404-405, section 38(b).

[50] The city's treatment of the partially withheld records under section 14(1) involved severance of discrete portions. Where entire records were withheld under section 14(1), which is the case for pages 412-413, 415-420, 423-425, 429, 435, 438-440 and 678-679, the severance provision in section 4(2) of the *Act* must be considered. Under this provision, "the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions." The key question raised by section 4(2) is one of reasonableness: severance and disclosure of portions of a record is not required where doing so would reveal only "disconnected snippets," or "worthless," "meaningless" or "misleading" information.[25]

[51] With the exception of pages 678-679, I conclude that it would not be reasonable to sever and disclose those portions not qualifying for exemption under section 14(1) in the records since the remaining information would consist mainly of "To:" and "From:" lines, brief salutations and signature lines. This is the type of information that past orders have determined does not meet the "reasonableness" threshold. Accordingly, I find that such information need not be disclosed. The same is not true for the remaining withheld content of pages 678-679, which is more fulsome. However, I have yet to review this record under the original exemption claim of section 7(1).

[52] For the information in pages 404-405 that I found exempt under section 38(b) above, I will review the city's exercise of discretion for that one record, below.

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[25] See Order PO-2858-I and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

D. Do pages 678-679 contain advice or recommendations for the purpose of section 7(1) of the *Act?*

[53] The city's claim to section 7(1) was initially made only in relation to pages 678-679. In its representations, however, the city also claimed for the first time that section 7(1) applies to pages 686-688 along with section 12. Given my finding on section 12 in relation to those records, I will not be reviewing pages 686-688 under section 7(1).

Section 7(1) states:

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

[54] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[26]

[55] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [27] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.[28]

[56] Advice or recommendations may be revealed if the information itself consists of advice or recommendations or if the information when disclosed would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[29]

Representations

[57] Noting that this exemption provides discretionary authority to deny access to a record if its disclosure would reveal the advice or recommendations of an officer or

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[26] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[27] See above at paras. 26 and 47.
[28] Order PO-3315.
[29] Order P-1054

employee of an institution, the city submits that pages 678 to 679 contain advice from the Election Coordinator to the City Clerk (as returning officer) regarding rebate applications for contributions to candidates. The city asserts that the record contains a summary of the issue and the Election Coordinator's recommendation and the communication therefore fits into section 7(1).

Analysis and findings

[58] Based on my review of pages 678-679 and the city's representations, I am satisfied that the record contains advice or recommendations within the meaning of section 7(1) of the *Act*.

[59] I note that this record contains personal information that I concluded above was exempt under the mandatory personal privacy exemption in section 14(1). That personal information is contained in an email that describes the details of specific situations to a decision maker, presents an analysis of the relevant municipal elections statute (*Municipal Elections Act*) and by-laws and then identifies a course of action. I am satisfied that the Election Coordinator's suggested course of action can be accurately described as a recommendation. Although some of the information in this email has a certain factual nature, I find that it is so intertwined with the recommendation that its disclosure could reasonably permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[30] Severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.

[60] I also considered whether any of the section 7(2) or 7(3) exceptions to section 7(1) could apply to this record, and I find that none of them apply. Therefore, I find that pages 678-679 are exempt, subject to my review of the city's exercise of discretion.

E. Does the discretionary exemption in section 11 protecting the economic or other interests of an institution apply to the records?

[61] According to the city's index, it relies on section 11(a) to deny access to portions of pages 875-877. The city's index also lists records that it claims that sections 11(f) and (g) apply to, either in part or in their entirety. Of the partially disclosed records, only those pages from which the city severed information need be reviewed: pages 69, 170, 180, 226, 293 and 303.[31] The city withheld pages 106-109, 158-164, 211-224, 485-489, 500-502, 504-507, 574, 594-595, 601-604, 613, 682-683, 763-764, 769 and 858, in their entirety.

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[30] Order P-1054

[31] The page ranges for these single page severances are listed in the index as pages 68-69, 165-176, 179-180, 225-228, 293-294 and 303-306, respectively.

[62] The relevant parts of section 11 state:

> A head may refuse to disclose a record that contains,
>
> > (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
> >
> > (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
> >
> > (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Representations

[63] The city's representations on sections 11(a), (f) and (g) begin with a statement of the purpose of each of these parts of section 11 as a provision that is intended to protect certain economic interests of institutions.

[64] The city submits that its account number with its telephone provider and certain phone numbers associated with internet access for election purposes were withheld from pages 875-877 under section 11(a) on the basis that this information constitutes technical information belonging to the city. According to the city, disclosure of this information "potentially allows a person intent on disrupting an election to interfere with the voting process."

[65] The city also submits that it withheld portions of the records containing communications on matters such as proposed plans, methods and policies leading up to the municipal election under sections 11(f) and 11(g). The city argues that disclosure of the sensitive documents detailing "matters such as emergency planning, resource planning, risk assessment, etc." would provide "insight into the logistics of the municipal election process" and could potentially undermine the integrity of the process or interfere with the administration, or results, of an election. The city's representations on its exercise of discretion under section 11 describe the importance of "the administration of fair elections in democratic societies," including associated principles such as process integrity. There, the city argues that disclosure of the information withheld under section 11 "may undermine confidence in the [city] if the information can be used to counter measures employed to enhance the integrity of election processes."

Analysis and findings

[66] As Commissioner Brian Beamish emphasized in Order MO-2363, an institution should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*. In this appeal, the city's representations on section 11 provide only brief statements into the claimed connection between the withheld information and the three exemptions raised. The city's primary concern appears to be with the misuse of the withheld information to interfere with municipal election processes. However, the withheld information is not of the specified type or extent required to establish sections 11(a), (f) or (g) of the *Act.*

Section 11(a) – information that belongs to government

[67] For me to find that section 11(a) applies to pages 875-877, the city was required to demonstrate that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

[68] As stated, the city is concerned that disclosure of the account and telephone numbers could potentially permit interference with "the voting process." However, section 11(a) does not require an institution to establish a reasonable expectation of harm. Regardless, the withheld account and telephone numbers do not meet any part of this three-part test because they do not fit within the definition of "technical information," "belong to" the city, or have inherent monetary value as contemplated by section 11(a).

[69] Past orders have defined "technical information" as "… information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts."[32] I find that the withheld account and telephone numbers do not meet the definition.

[70] Second, the term "belongs to" refers to "ownership" by an institution.[33] As far as

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[32] Order PO-2010. The definition continues: "… Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing."

[33] It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

the account and telephone numbers are concerned, the city has (or had) no more than the right to use them; they did not "own" them. I do not accept that this information can be said to "belong to" the city within the meaning of part 2 of the section 11(a) test.

[71] Finally, to have "monetary value", the information itself must have an intrinsic value. There is insufficient evidence to persuade me how this particular information has inherent monetary value, and I find that it does not. As all three parts of the test must be established for the exemption to apply, I find that the discretionary exemption at section 11(a) does not apply to the account and telephone numbers withheld from pages 875-877.

Section 11(f) – Plans relating to the management of personnel

[72] In order for section 11(f) to apply, the city was required to show that:

1. the record contains a plan or plans, and
2. the plan or plans relate to:
   (i) the management of personnel, or
   (ii) the administration of an institution, and
3. the plan or plans have not yet been put into operation or made public[34]

[73] The city's representations refer to the records addressing issues that are important to the municipality, such as logistics, risk assessment and emergency and resource planning. That such issues are important to the management of a municipality is beyond dispute, as is the goal of preventing or avoiding interference with municipal elections. However, the mere reference to these issues or even the presence of information about them in a record do not necessarily support a finding that the record contains a "plan," as that term is understood in past orders. This office has adopted the dictionary definition of "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme".[35]

[74] On my review of the records, I conclude, with a single exception, that these records do not contain information that meets the first part of the test under section 11(f). The single-page records from which some lines were withheld certainly do not contain a plan or plans and the same is true for certain records withheld in their entirety, such as, for example, pages 158-164, 485-489, 504-507 and 613. Rather, the

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[34] Orders PO-2071 and PO-2536.
[35] Orders P-348 and PO-2536.

withheld information consists merely of directions given or requested, questions from municipal staff or consultants, and even document file paths or website addresses. The records at pages 211-224 consist of emails and a discussion guide, but while pages 214-224 do describe an approach to an election outreach effort, I am unable to conclude that this description amounts to a plan for the purpose of sections 11(f) and (g). Therefore, I find that the withheld information does not constitute a design, scheme, or formulated, especially detailed, method by which something is to be done.

[75] Even if I had accepted that the single-page severances or whole-record email strings contained plans, there is similarly unpersuasive evidence to support the city's claim that the records could satisfy the next two parts of the test for exemption under section 11(f). For example, the content of pages 106-108 relates to the same election outreach activity noted in pages 211-224, but I am unable to conclude from the city's evidence how that relates either to the management of personnel or the administration of the institution. The same holds true of the remainder of the records, except for pages 858-859, for which there is insufficient evidence to establish a connection between them and the requisite elements of management or administration under section 11(f).

[76] Pages 858-859 relate to planning around issues of municipal election administration. The record contains an outline of a plan to deal with a specific election finance issue. I am prepared to accept that this record relates to the management of personnel or administration of the institution. However, the plan outlining the management of the specific election finance issue is found in a March 2011 email and it includes a direction that the procedure be made public. In the circumstances, neither the records nor the city's evidence satisfy me that the content of this record has either not yet been put into operation or made public. Accordingly, pages 858-859 do not meet the third part of the test under section 11(f) and are not exempt on that basis.

Section 11(g) – Proposed plans, policies or projects

[77] Of the three exemptions the city claimed under section 11, section 11(g) is the only one that imports a reasonable expectation of harm requirement. For me to find that section 11(g) applies, the city had to provide sufficient evidence about the potential for harm to demonstrate a risk of harm that is *well beyond the merely possible or speculative*. It need not have proven that disclosure will in fact result in such harm.[36]

[78] To establish the elements of section 11(g), the city was required to satisfy me that:

> 1. the record contains information including proposed plans, policies or projects of an institution; and

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[36] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

2. disclosure of the record could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or

   (ii) undue financial benefit or loss to a person.[37]

[79] For reasons similar to those given respecting section 11(f), above, and in spite of the city's expressed concerns about the potential for disclosure to undermine the integrity or administration of its elections and processes, I find that the city has not met its burden.

[80] The definition of "plan" is the same one used under section 11(f), while the term "pending policy decision" refers to a situation where a policy decision has been reached, but has not yet been announced.[38] Based on my review of these records and the city's representations, I find that none of them meet the requirements for exemption under it. There is simply not sufficient evidence to establish that section 11(g) applies to the information at issue, even pages 858-859, which I concluded above contained a plan. The city did not provide the requisite evidence to establish that disclosure of these records would result in premature disclosure of a pending policy decision, particularly in the context described above, where the plan's author (for pages 858-859) specifically directs that it be made public – in 2011. Nor has the city established, or even suggested, any reasonable expectation of "undue financial benefit or loss to a person" with disclosure of this information. In the circumstances, I find that section 11(g) does not apply to any of the records for which it is claimed.

[81] In sum, I find that sections 11(a), (f) and (g) do not apply to the records. As no other exemptions were claimed in relation to these records and no mandatory exemptions apply, except to one brief portion of page 107, I will order the records disclosed. As noted previously, part of page 107 contains personal information, and I will order the city to sever that information before it discloses that record.

F. Does the discretionary solicitor-client privilege exemption at section 12 apply?

[82] The city relies on section 12 to deny access to portions of pages 586, 638, 752 and 775-777, in part, and pages 408-410, 456-457, 462-463, 668, 675-677, 686-694, 759-761 and 793-795, in their entirety. Section 12 of the *Act* 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

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[37] Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).
[38] Order P-726.

> an institution for use in giving legal advice or in contemplation of or for use in litigation.

[83] 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 city relies on both branches.

Branch 1: common law solicitor-client communication privilege

[84] At common law, solicitor-client privilege encompasses solicitor-client communication privilege and litigation privilege; only solicitor-client communication privilege is relevant in this appeal.

[85] 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.[39] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[40] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[41] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[42]

[86] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[43] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[44]

[87] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[45]

[88] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a

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[39] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[40] Orders PO-2441, MO-2166 and MO-1925.
[41] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[42] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[43] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[44] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[45] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

finding of an implied or objective intention to waive it.[46]

[89] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[47] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[48]

Branch 2: statutory solicitor-client communication privilege

[90] 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. Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

Representations

[91] In its very brief representations on the issue, the city claims that both the common law and statutory solicitor-client communication privilege apply to the records identified in its index. The city argues that the records reflect a continuum of communications between a solicitor and a client and were prepared by or for counsel for use in giving legal advice. The subject matter of the advice is identified in the city's submissions on the exercise of discretion as matters relating primarily to the administration of a municipal election.

[92] The appellant offered no submissions on section 12.

Analysis and findings

[93] Based on my review of the records and the city's representations, I conclude that there is evidence to support the claimed application of section 12 to pages 456-457 (duplicated at 462-463), 668, 675-677, 686-694, 752 (part) and 793-795 on the basis that they are subject to solicitor-client communication privilege. Each of these records involves a direct communication between the city and its legal counsel and they relate to city election staff – the client - seeking or receiving legal advice. Disclosure of these records would reveal to the appellant confidential communications between city lawyers and their institutional clients on matters related to election administration and issues management, which is precisely what the section 12 exemption aims to protect.

[94] As past orders have noted, some classes of records claimed to be exempt under section 12 may be subject to an order that they be severed and partially disclosed. In

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[46] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[47] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[48] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

my view, it would not be possible to do so in this appeal. As the Divisional Court stated in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*:[49]

> Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication *in its entirety* is subject to privilege.

[95] As all of these records are direct solicitor-client communications that relate to city elections staff seeking or receiving legal advice, I conclude that they are subject to class-based privilege and cannot be severed. Furthermore, since I have no evidence to suggest that the privilege was waived by the city, I find that pages 456-457 (duplicated at 462-463), 668, 675-677, 686-694, 752 (part) and 793-795 fit within branch 1 of section 12. Accordingly, I find that pages 456-457 (duplicated at 462-463) and 686-694 are exempt under section 38(a), together with section 12, and that pages 668, 675-677, 752 (part) and 793-795 are exempt under section 12 alone, subject to my review of the city's exercise of discretion, below.

[96] As for pages 586, 638 and 775, which were partially withheld, and pages 408-410 and 759-761, which were withheld in their entirety, I find that section 12 does not apply. These records contain or consist of communications that do not directly involve legal counsel employed or retained by the city. Further, my review of their content does not suggest that disclosure of these internal communications would somehow otherwise reveal the content of communications between a solicitor employed or retained by the City of Vaughan and their clients, the elections staff.

[97] Confidentiality is an essential component of the privilege. Some of these records – pages 408-410 and 775 (part) for example - address election management issues and include information shared by other municipal institutions with Vaughan officials. I have not been presented with sufficient evidence that these communications remain confidential as between any particular solicitor and client. Rather, the evidence suggests that privilege has been waived. By sending emails that included information that may once have been privileged to the group of municipal administrators, the senders appear to have voluntarily waived privilege. Accordingly, I find that these communications from other municipal elections administrators are not privileged and cannot be withheld by Vaughan as such under *MFIPPA*.

[98] I find that section 12 does not apply to the withheld parts of pages 586, 638 and 775 or pages 408-410 and 759-761, which were withheld in their entirety. Having made this finding, however, I note that pages 408-410, 586 and 759-761 contain the personal information of individuals other than the appellant that must be severed prior to disclosure in accordance with section 4(2) of the *Act.*

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[49] (1997) 102 O.A.C. 71, 46 Admin L.R. (2d) 115, [1997] O.J. No. 1465 (Div. Ct.) at para. 17.

G. Did the city properly exercise its discretion?

[99] In claiming discretionary exemptions, the city retained discretion to disclose the withheld information, even if it qualified for exemption. This is the essence of a discretionary exemption.

[100] In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, I may review the institution's decision to exercise its discretion to deny access. In doing so, I may determine whether the city erred in exercising its discretion and whether it considered irrelevant factors or failed to consider relevant ones. I may not, however, substitute my own discretion for that of the institution.

[101] Since I did not uphold the city's decision to deny access under section 11, no review of the exercise of discretion under section 11 is necessary. However, I did uphold the denial of access to certain portions of the records under sections 7(1) and 12, and I will review the exercise of discretion by the city in doing so. I must also consider the exercise of discretion under section 38(b) in relation to pages 404-405.

[102] In the Notice of Inquiry sent to the city, I provided a list of considerations generally viewed as relevant to the exercise of discretion. The outline notes that not all of the considerations will necessarily be relevant in any given situation and that additional unlisted considerations may be relevant.[50]

[103] Relevant considerations include:

- the purposes of the *Act*, including the principles that:
    - information should be available to the public;
    - individuals should have a right of access to their own personal information;
    - exemptions from the right of access should be limited and specific; and
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information

[50] Orders P-344 and MO-1573.

- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the historic practice of the institution with respect to similar information.

Representations

[104] As a general matter, the city submits that it did not deny access to any of the withheld records in bad faith or for an improper purpose.

[105] The city acknowledges that one of the principles of the *Act* is that individuals should have the right of access to their own personal information. However, the city claims that only 5% of the records contain the personal information of the appellant and of those pages, access was denied to only three pages on the basis that the privacy of third parties ought to be protected by severances of their personal information.

[106] Regarding section 7(1), the city submits that it severed pages 678-679 to "allow for advice and recommendations to flow between its Election Coordinator and Returning Officer to determine how to administer an election related program."

[107] Regarding section 12, the city submits that it exercised its discretion to deny access to records containing solicitor client communication privileged information in order to support the integrity of the municipal election and compliance audit process. The city maintains that protecting solicitor client privilege is necessary to allow for full and frank exchange between a solicitor and client and the receipt of legal advice.

Analysis and findings

[108] As stated, I upheld the city's decision to apply sections 7(1) and 12 to certain records and this requires me to review its exercise of discretion in doing so. In the case of pages 678-679, 456-457 (duplicated at 462-463) and 686-694, the exemptions were claimed in relation to records that contain the appellant's personal information, making section 38(a) relevant. I also upheld section 38(b) to pages 404-405. Where section 38(a) or 38(b) applies, the city was required to demonstrate that in exercising its discretion, it considered whether these records should be released to the appellant because they contained her personal information. Given the nature of the information for which I have upheld sections 7(1) and 12 - with or without section 38(a) being relevant - and the overall circumstances of this appeal, I am satisfied that the city exercised its discretion properly and with regard for relevant factors. The city applied sections 7(1) and 12 sparingly, and I accept that the purpose of each of the exemptions were considered. I am also satisfied with the evidence of a proper exercise of discretion to withhold other individual's personal information from pages 404-405 under section 38(b). As I am satisfied that the exercise of discretion was carried out in good faith, I

will not interfere with it on appeal.

H. Are pages 881-886 in the city's custody or control for the purpose of section 4(1) of the *Act?*

[109] Under section 4(1) of *MFIPPA*, the *Act* applies only to records that are in the custody or under the control of an institution. In this appeal, the city takes the position that portions of the emails on pages 881-886 are not in its custody or under its control.

[110] A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.[51] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[52]

[111] The courts and this office have applied a broad and liberal approach to the custody or control question.[53] This office has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution.[54] Some of the listed factors may not apply in a specific case, while other unlisted factors may apply. In determining whether records are in the "custody or control" of an institution, these factors are considered contextually in light of the purpose of the legislation.[55]

[112] The factors that this office has found to be relevant include whether the record was created by an officer or employee of the institution;[56] the use that the creator intended to make of the record;[57] whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record;[58] whether the activity in question is a "core", "central" or "basic" function of the institution;[59] whether the content of the record relates to the institution's mandate and functions;[60] whether

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[51] Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[52] Order PO-2836. A record within an institution's custody or control may be excluded from the *Act* under one of the provisions in section 52 or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).
[53] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.
[54] Orders 120, MO-1251, PO-2306 and PO-2683.
[55] *City of Ottawa v. Ontario,* cited above.
[56] Order 120.
[57] Orders 120 and P-239.
[58] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[59] Order P-912.
[60] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.

the institution has physical possession of the record and if so, whether it is more than "bare possession";[61] [62] whether the institution has a right to possession of the record or to regulate its content, use and disposal;[63] [64] the extent to which the institution has relied upon the record;[65] how closely the record is integrated with other records held by the institution;[66] and the customary practice of the institution and similar institutions in relation to possession or control of records of this nature, in similar circumstances.[67]

[113] Several additional factors have been found to be relevant where an individual or organization other than the institution holds the record. These factors include who has possession of the record, and why;[68] the circumstances surrounding the creation, use and retention of the record;[69] whether there are any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record;[70] whether the individual who created the record was an agent of the institution for the purposes of the activity in question; and the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances.[71]

Representations

[114] The city identifies pages 881 to 886 as records that are not in its custody or under its control, but notes that it disclosed three of those pages.[72] The city submits that the remaining three pages contain communications between a member of City Council and his legal counsel on matters not related to city business. According to the city, this is a personal use of a city email account and the withheld portions are not under its control. The city also argues that:

- it has no more than bare possession of the withheld portions of the emails;

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[61] Orders 120 and P-239.
[62] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[63] Orders 120 and P-239.
[64] Orders 120 and P-239.
[65] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above, and Orders 120 and P-239.
[66] Orders 120 and P-239.
[67] Order MO-1251.
[68] PO-2683.
[69] PO-2386.
[70] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[71] Order MO-1251.
[72] This decision to disclose pages 882, 884 and 886 is not explained by the city, and I do not have copies of those pages.

- the emails do not relate to a statutory or core function of the city;
- the city does not rely on or use the records in any way; and, finally,
- the city has no authority over their storage or destruction.

[115] The appellant did not submit representations, but she did express her disagreement with the city's position that the councilor's records are not in the city's custody or control.

Analysis and findings

[116] Based on the content of the withheld records, which consist of communications between a member of City Council and his legal counsel, I accept city's submission that pages 881, 883 and 885 are not in its custody or control for the purpose of section 4(1) of the *Act.*

[117] Records of city councillors are not generally considered to be in the custody or under the control of the city because an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense.[73] However, records held by municipal councillors may be subject to an access request under the *Act* in two situations:

- Where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the "institution"; or
- Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.[74]

[118] In this appeal, there is no evidence to support a finding that this councilor was acting as an officer or employee of the City of Vaughan at the time the records were created. Rather, the analysis of the issue turns on consideration of the established principles, under which I conclude that these communications between the member of City Council and his legal counsel are not under the control of the city.

[119] As I noted above, in determining whether records are in the "custody or control" of an institution, the factors usually considered in deciding the issue must be reviewed contextually in light of the purpose of the legislation.[75] While the records are clearly in the city's physical possession, there is not a sufficient connection to bring them under the control of the city. Given their content, I accept the city's claim that it would not

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[73] *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).
[74] Order M-813.
[75] *City of Ottawa v. Ontario,* cited above.

rely on or use the records in any way. The named councillor caused the records to be sent to his legal counsel, not pursuant to a council direction or an assigned responsibility, but rather as a means of keeping his solicitor informed on matters related to him personally. In this sense, therefore, the records do not relate to the city's mandate and functions but rather to the independent and personal actions of the named councillor in the context of his personal activities.

[120] I agree that the city merely has "bare possession" of the records, and I find that pages 881, 883 and 885 are not in the custody or under the control of the city under section 4(1) of the *Act.* Accordingly, these records are not addressed further in this order.

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

[121] Because the appellant challenged the adequacy of the city's search for responsive records, I asked the city to comment on its interpretation of the scope of the request. The appellant had not identified any particular subject matter in her request and I concluded that it would be best to establish the request's scope before determining the search issue.

[122] 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).

[123] 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.[76] To be considered responsive to the request,

[76] Orders P-134 and P-880.

records must "reasonably relate" to the request.[77]

[124] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[78] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[125] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[79]

[126] 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.[80] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[81]

[127] 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.[82]

[128] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[83]

Background and representations

[129] As stated previously, the appellant and the city exchanged emails about the scope of this request, which the city argues supports it position that it did not unilaterally limit the scope of the request. In response to the city's contact seeking clarification, the appellant stated that she sought emails between: the Clerk/the City's Clerk's Office/the Election Coordinator; and the Clerk/the City's Clerk's Office/the Election Coordinator and the Audit Compliance Committee/two named individuals.[84] The appellant stated that "The subject matter is not limited. I can limit the time period, however, to December 27, 2010 until the present." The city notes that this expanded the request because the "original request had a search start date of May 1, 2011."

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[77] Orders P-880 and PO-2661.
[78] Orders P-85, P-221 and PO-1954-I.
[79] Orders P-624 and PO-2559.
[80] Orders M-909, PO-2469 and PO-2592.
[81] Order MO-2185.
[82] Order MO-2246.
[83] Order MO-2213.
[84] These two named individuals acted as legal counsel for individuals who were the subject of an audit.

However, the city appears to have accepted this expansion of the time frame for the request.

[130] As stated, the appellant did not provide representations during the inquiry. However, during mediation, she argued that additional records should exist, such as more emails involving Vaughan City Council and emails to and from one of the two named individuals[85] and Vaughan City Council, the City Clerk, the Election Coordinator and the Auditor. The appellant's position is based, in part, on the number of pages referred to in the interim fee decision versus the number in the final decision. In response, the city explained that the membership of the Compliance Audit Committee is separate from the council: Vaughan Council is not part of the Compliance Audit Process and, therefore, emails sent to that committee are not sent to council. The city maintains that there are no further emails concerning the specified individual and Vaughan City Council, the City Clerk, the Election Coordinator, and the Auditor.[86] As for there being fewer pages, the city confirms that after completing the search, fewer responsive records were identified than had been estimated.

[131] At adjudication, the city argued that although the appellant's request was broad, its scope was interpreted liberally and it was well defined prior to the initiation of the searches because of the email contact with the appellant. Two options outlining the city's understanding of the request's scope were given to the appellant, together with an invitation for her to provide further information if neither option was acceptable. The city states that the appellant accepted one of the outlined options. The city also asked the appellant to clarify what she meant by "the City Clerk's Office" because the office has a general email account, but also over 50 staff – each with their own account. The city claims that the appellant responded that she would review the city's directory and send a list of clerk's staff that were to be included. When she agreed to review the staff list, the appellant added the names of four other individuals who were involved with the Audit Compliance Committee.

[132] The city submits that there was a further email exchange with the appellant approximately six weeks later when she had not yet sent a list of clerk's staff to be included in the search. The city submits that the appellant asked that the searches proceed with the names already provided, adding that she stated:

> … the fact that I don't know where the emails are contained is clearly a search issue. The purpose of clarifying a request is NOT to limit the search but to provide assistance in determining where the records exist. In this

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[85] References to "named individual(s)" are to individuals who acted as legal counsel for people who were subject to an audit. The other individuals specifically named in the request are identified by their title with the city.

[86] The city auditor was not initially named in the original or in the revised request, but the city appears to have conceded the inclusion of this individual in the scope of the request.

> case you are limiting the search by making it my responsibility to determine where the records exist. …

[133] The city submits that because the appellant did not provide further names from the clerk's staff list or a subject matter for the request, it was difficult to assist her in ascertaining what areas of the city may hold records responsive to her request.

[134] The city submitted four affidavits regarding the searches conducted by the staff named in the request, or in the case of the former Commissioner of Legal Services, her acting successor. According to the city, the records that were identified as responsive were limited to emails and included all communications between the named individuals within the stated timeline and which "covered any subject – all search parameters provided by the appellant."

[135] The city refutes the appellant's claim that she ought to have received emails exchanged between the named individuals and members of Vaughan City Council, noting that the appellant did not identify the council in the initial request, in any of the subsequent clarification correspondence or when she received the interim decision and fee estimate. The city argues that if the appellant had any concerns regarding the adequacy of the city's search for records as it related to the people involved, she had the chance to raise the matter at that time.

[136] The city provided four affidavits from the following staff about the searches conducted by them in response to this request: the City Clerk, the Director of Legal Services, the Election Coordinator and an assistant in the city office responsible for the Audit Committee. These individuals attest, as follows:

- To locate the requested emails between himself and the Election Coordinator or the Audit Committee and the two named individuals (legal counsel), the City Clerk searched his general email inbox and outbox and 10 specified email folders for responsive messages falling within the stated time period.

- For the part of the request relating to emails between a named city councillor and the Audit Committee and two named individuals (legal counsel), the City Clerk states that the search was conducted by the councillor's assistant.

- The current Director of Legal Services states that when the searches for this request were initiated, she was the Acting Commissioner of Legal & Administrative Services for the city and was asked to conduct the searches for possible responsive records with the former commissioner. Her assistant searched the former Commissioner's paper files and she searched the former commissioner's inbox, sent items, deleted, drafts and elections email folders. These searches did not result in the identification of responsive records.

- The Election Coordinator searched all "Q drive" documents in the Election Section, as well as all inbox and archived emails, using the terms of the request.

- The Administrative & Special Projects Assistant in the City Manager's office searched for all emails between the (former) City Manager named in the request and the Audit Committee and the two named individuals (legal counsel), but did not locate any responsive records.

Analysis and findings

[137] As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided.

[138] I have considered the city's written representations which included four affidavits provided by the City Clerk, the Director of Legal Services, the Election Coordinator and an assistant in the city office responsible for the Compliance Audit Committee. These describe the overall circumstances of this appeal and are sufficient to satisfy me that the city made a reasonable effort to identify and locate any records that might be responsive to the appellant's request.

[139] I note that the appellant did not submit representations for my consideration in this appeal. As previously noted, however, the appellant asserted during the earlier stages of the appeal that more emails should exist and she provided some descriptions of the records she believed should have been located. In response to these claims, however, I am satisfied that the city made reasonable efforts to establish the scope and parameters of this request.

[140] In particular, I accept that clarification was sought from the appellant regarding which particular staff in the City Clerk's Office should be included given the nature of its operations. Although the appellant expresses concern about how helpful some of these efforts were at assisting her in identifying appropriate areas for searches, I note that the appellant ultimately did not provide a list of staff in the clerk's office as requested, nor did she provide a more specific subject matter for the request. This likely limited the possibility of further assistance to the appellant from city staff.

[141] Regarding additional emails involving Vaughan City Council that the appellant asserted should exist, the city provided explanations that I find to be reasonable. First, the membership of the Compliance Audit Committee is separate and distinct from Vaughan Council, and I accept that emails sent to the Compliance Audit Committee are not sent to Vaughan Council. Second, I accept the city's response to the appellant's concern about the adequacy of the searches regarding communications between certain named individuals and members of Vaughan City Council. There is insufficient evidence to support the inclusion of council in the scope of this request and the required searches: the council is not identified in the initial request, in the subsequent

clarification correspondence, or in any responses to the interim decision and fee estimate. I accept as reasonable, therefore, that the city did not include "emails exchanged between the named individuals and members of Vaughan City Council" in the scope of its searches.

[142] In sum, I am satisfied that the city performed searches possessing adequate knowledge of the records that were of interest to the appellant in the circumstances. I have also considered the fact that the city utilized experienced and relevant employees to undertake to locate the emails sought by the appellant. Based on the evidence before me, I am satisfied that the city made a reasonable effort to identify and locate responsive records. The fact that fewer responsive records were identified when the searches were conducted compared to the estimates originally provided to the appellant does not affect my conclusion.

[143] Accordingly, I find that the city conducted a reasonable search for the purposes of section 17 of the *Act*, and I dismiss this part of the appeal.

J. Should the city's fee decision be upheld?

[144] Under section 45(1) of the *Act*, the city is required to charge fees for processing access requests according to the following framework:

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

[145] Other specific and relevant provisions regarding fees are found in sections 6 and 6.1 of Regulation 823:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> > 1. For photocopies and computer printouts, 20 cents per page.
> >
> > 2. For records provided on CD-ROMs, $10 for each CD-ROM.

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

[146] The difference between parts 6 and 6.1 of the regulation is that an institution is not permitted to charge search and preparation fees for access to personal information about the appellant. This part of the regulation provides the basis of the appellant's challenge to the fee charged by the city in this appeal.

[147] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

[148] The city's final fee was set out in its final access decision as follows:

Search - 6. 5 hours @ $7.50 /15 min	$195.00
Preparation 158 pages @ 1 min/page	$79.00

158 min @ $7.50/15 min	
Copies - 785 @ $.20	$157.00
TOTAL	$431.00[87]
DEPOSIT - Feb. 14/ 13	$576.40
CREDIT	**<$145.40>**

Representations

[149] The city submits that six people were involved in the searches for this request, which covered a two-year period, and they could not be narrowed "to any particular topic or subject matter as the appellant refused to provide one." The city notes that upon completion of the searches, the estimated and actual search times were the same. However, the number of copies was lower than estimated and the preparation time was reduced accordingly from $127.00 to $79.00.

[150] As stated, the appellant argued that because the records, generally, contain her personal information, the city was not entitled to charge her for the search and preparation time for those records. The city acknowledges that some of the records contain information about the appellant. However, the city submits that this request is one for access to general records – communications exchanged between named city staff and other individuals – it is not for the appellant's personal information. The city argues that since this search lacked a specified subject matter, it was a general search for records and some of them incidentally contained the appellant's personal information. The city maintains that a search for general records that results in locating a small amount of a requester's personal information does not make the entire search a search for "personal information." Furthermore,

> Of the over 800 responsive pages to this request, approximately 5% of the records contain personal information of the appellant.
>
> Of the records that triggered preparation time fees, four of those pages contain the name of the appellant. The severing on those pages is to remove the personal information of others. The balance of the records that incurred preparation time do not contain any personal information of the appellant.

[87] In the table provided with the city's final decision, this amount is given as $421.00. In the sentence directly above this table, however, the correct total of $431.00 appears and all other amounts are correct.

Analysis and findings

[151] With consideration of the city's representations and the final fee charged to the appellant to process this request, I am prepared to uphold most aspects of it.

[152] The appellant does not appear to be taking issue with the photocopying fee of $157.00. On my review of it, I am satisfied that it has been calculated in accordance with the *Act* and I uphold it.

[153] Section 6 of Regulation 823 provides for certain required fees for access to records. Under that part of the fee regulation, the city is entitled (in fact, required) under section 45(1)(a) to charge the appellant a fee for "the costs of every hour of manual search required to locate a record" at a rate of $7.50 for each 15 minutes spent and without regard for whether or not access is to be granted. The costs of preparing the record for disclosure contemplated by section 45(1)(b) comes into play only with records that are to be disclosed in part and at the same rate as search.

[154] Given the positions taken by the parties in this appeal on the issue of the allowable fees for search and preparation time, I must consider section 6.1 of Regulation 823*,* which states:

> 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** [emphasis added].

[155] In Order MO-3313, Adjudicator Catherine Corban addressed the same arguments from the same parties and was guided by past decisions analyzing the issue. I agree with her analysis of the issue and I adopt it for use in assessing the search and preparation fees in this appeal.

[156] To begin, however, I reject the city's approach to calculating these particular portions of the fee because it relies on a characterization of the appellant's request as one for "general records." A number of decisions have concluded that this approach is not sustainable in the face of clear legislative intent to differentiate between fees to be charged for access to general records and access to records containing a requester's own personal information. This can be seen in the different wording of sections 6 and 6.1 of Regulation 823. As Adjudicator Corban pointed out in Order MO-3313 (at paragraph 29),

> Section 6.1 does not stipulate that the subject matter of the request itself has to be able to be characterized as specifically for the individual's personal information. The section simply identifies the fees to be charged for "access to personal information about the individual making the request for access." Additionally, in differentiating between the fees that can be charged for the processing of general government records as opposed those which contain the personal information of the requester, in

> my view, the intent of the legislature is to ensure that a requester is charged lower fees to exercise their right of access to their own personal information.

[157] In Order MO-1285, Adjudicator Laurel Cropley addressed a similar situation in which a requester's personal information was incidentally contained in the records he requested from multiple departments of the City of Toronto. Adjudicator Cropley disallowed the City of Toronto's claimed fees for search and preparation time, stating:

> [A]lthough the *Act* clearly contemplates that requesters pay for the records for which they have requested, the inclusion of section 6.1 of Regulation 823 recognizes the higher right to access to one's own personal information in the custody or control of government institution as set out in section 1 of the *Act*. Where there is doubt as to how the fees should be applied, in my view, the balance must weigh in favour of the appellant.
>
> Therefore, I find that the city should have calculated its fee is accordance with section 6.1 of Regulation 823. […]

[158] The approach applied by Adjudicators Corban and Cropley was to assess on a record-by-record basis whether the record contains the requester's personal information and then calculate the permissible search and preparation fees accordingly.[88] As stated, this is the approach I will take in this appeal. Therefore, if a record contains the personal information of the appellant, the city cannot charge the appellant a fee for searching for, or preparing, those particular records for disclosure.

[159] The city's representations refer to "over 800 responsive pages" and an estimate that "5% of the records" contained the appellant's personal information. As stated, the review for fee purposes must be conducted on a record-by-record basis. When the city submitted the records associated with the appeal, however, only records which were partly or completely withheld were provided and in the case of records partly withheld, only the pages with severances were provided and it is not clear whether the pages from these partially disclosed records that were *not* provided also contained the appellant's personal information. This renders determination of the accuracy of the city's percentage estimate difficult, to say the least.

[160] The city's index of records does not assist me on this point. It is separated into three parts: records disclosed in full, records disclosed in part, and records withheld in full. Viewing each separate entry on the three lists of records as comprising a record, which is consistent with the descriptions provided beside each entry, it appears that 252 records were fully disclosed, 125 records were partly disclosed, and 24 records were fully withheld. This adds up to 401 records. Three records are unaccounted for by any

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[88] See Orders MO-1285, MO-2528 and M-514.

of the lists in the index: pages 244, 255-256 and 442-443.

[161] The city maintains that all records containing the appellant's personal information were disclosed to her. Of the records that were provided for me to determine the application of the exemptions, the city's claim is that only pages 686-688 contain the appellant's personal information.[89] I found this to be inaccurate on my own review of the records. The appellant's personal information also appears in pages 404-405, 456-457 (duplicated at pages 462-463) and 759-761. This inaccuracy leads me to doubt the estimate given by the city regarding the number of records containing the appellant's personal information. I agree with Adjudicator Cropley's statement in Order MO-1285 that where there is uncertainty as to how the fees should be applied, "the balance must weigh in favour of the appellant." Therefore, using the method adopted in past orders, such as Order MO-3313:

> the appropriate way to establish the percentage of search time that should be attributed to the appellant's own personal information is to establish the percentage of those responsive records that can be characterized as containing the appellant's personal information and, therefore, ineligible for search charges. Once that percentage is established, the search fee should be reduced by that amount.

[162] As stated, there are 404 records. Given the doubt as to the accuracy of the city's estimate of the percentage of records containing the appellant's personal information, I am prepared to allot a greater percentage. In my view, 10% is more appropriate and I will order the city to decrease its original search fee of $195.00 by that amount. Accordingly, I permit the city to charge the appellant a revised search fee of $175.50 under section 45(1)(a) for the records that do not contain the appellant's personal information.

[163] With regard to the preparation time the city is permitted to charge under section 45(1)(b), I note that the city claims one minute per page for severing, an approach I accept given that the records did not, for the most part, require multiple severances and were straightforward. The city based its preparation fees on 158 pages at one minute per page. As with the search fees, I will subtract 10% from this number, which results in 142 pages. However, there is personal information of other identifiable individuals that must be severed from on page 107 (not exempt under section 11) and pages 409-410 and 759-761 (not exempt under section 12) prior to disclosure to the appellant. Therefore, I will allow the city to charge preparation fees for those additional six pages for 148 pages in total. At one minute per page, this results in an allowable preparation fee of $74.00, rather than $79.00.

[164] In sum, I permit the city to charge the appellant a photocopying fee of $157.00,

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[89] Approaching this from the appropriate record-by-record basis, pages 686-688 are part of one record that runs from pages 686-694.

a search fee of $175.50 and a preparation fee of $74.00 for a total final fee of $406.50. As the appellant had paid the city the full amount of the interim fee estimate – $576.40 – to process this request, the city must reimburse the $169.90 difference to the appellant.

ORDER:

1. I partly uphold the city's decision that section 52(3)3 applies and find that pages 421-422, 430-434, 436 and 437 are excluded from the *Act*.

2. I find that certain records or information withheld under the personal privacy exemption do not contain personal information and cannot be withheld on that basis. Accordingly, I order the city to disclose pages 20 (part) and 669-670 (part) (duplicated at page 673). Where I have upheld the city's decision on these pages only in part, a copy of the record is provided with this order to demonstrate the upheld severances.

3. Apart from the records identified above, I uphold the city's decision to withhold records, or portions of records, under section 38(b) or 14(1), including those records to which I concluded the exclusions in section 52(3) did not apply.

4. I uphold the city's claim that section 7(1) applies to page 678 and 679.

5. I do not uphold the city's section 11(a), (f) or (g) claims and order the city to disclose the withheld portions of pages 69, 170, 180, 226, 293, 303 and 875-877, as well as the records withheld in their entirety under section 11: pages 106-109, 158-164, 211-224, 485-489, 500-502, 504-507, 574, 594-595, 601-604, 613, 682-683, 763-764, 769 and 858. The personal information of another individual must be severed from page 107 prior to disclosure to the appellant, as marked on the copies of the records provided with this order.

6. I partly uphold the city's claim to section 12 of the *Act* and find that it applies to pages 456-456 (462-463), 668, 675-677, 686-694, 752 (part) and 793-795. However, I find that section 12 does not apply to pages 586, 638 and 775 or pages 408-410 and 759-761 and order the city to disclose those records, subject to the severance of the personal information of other individuals on pages 409-410, 586 and 759-761, as marked on the copies of the records provided with this order.

7. I uphold the city's exercise of discretion under sections 7(1) and 12, with or without section 38(a), and section 38(b).

8. For the records identified in provisions 2, 5 and 6, I order the City of Vaughan to disclose them to the appellant by **June 19, 2017,** but not before **June 12, 2017.**

9. I find that the councillor's records at pages 881, 883 and 885 are not in the city's custody or under its control under section 4(1) of the *Act*.

10. I find that the city reasonably interpreted the scope of the appellant's request in the circumstances and also conducted reasonable searches to identify responsive records.

11. I partly uphold the city's fee decision, but order a reduction in the total fee from $431 to $406.50. Since the appellant had already paid the interim fee estimate of $576.40 in full, I order the city to refund the appellant the $169.90 difference.

Original Signed by: May 12, 2017

Daphne Loukidelis
Adjudicator