Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3620

Appeal MA17-327

The Corporation of the City of Sault Ste. Marie

June 8, 2018

Summary: The Corporation of the City of Sault Ste. Marie (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records about the cessation of employment of a named city staff member. The city denied access to a letter under the employment and labour relations exclusion in section 52(3)3 and to a Release under the discretionary solicitor-client privilege exemption in section 12. This order upholds the city's decision.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 52(3)3, 12.

Orders Considered: Order MO-2609-I.

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (*Magnotta*), 2010 ONCA 681.

OVERVIEW:

[1] The Corporation of the City of Sault Ste. Marie (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for the following information:

> Employment contract for [named individual].

> Separation Agreement and financial compensation and/or another material provide to the [named individual] upon end of employment.

[2] The city located three responsive documents. The city issued a decision letter denying access to the records on the basis they were excluded from the scope of the *Act* under section 52(3)3, as they relate to employment-related matters.

[3] In the alternative, the city advised that, if the records are found to be subject to the *Act*, access would be denied in accordance with the mandatory exemption in section 14(1) (personal privacy) of the *Act.*

[4] The requester, now the appellant, appealed that decision.

[5] During the mediation process, the mediator contacted the appellant, the city and the affected person (the person named in the access request).

[6] The affected person advised that he objects to any portion of the records being disclosed.

[7] The city confirmed its decision to deny access to the records.

[8] The appellant advised the mediator that she continues to seek access to the records. In addition, she raised the possible application of the public interest override in section 16 of the *Act* and asked that section 16 be added to the issues on appeal.

[9] Accordingly, the file was referred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry.

[10] I noted that in the city's Index of Records, it claimed the application of the discretionary solicitor-client privilege exemption in section 12 for one record, the Release. The mediator then confirmed that the city was claiming this exemption for this one record. Therefore, I have added this exemption and the issue of the late raising of this exemption to the issues in this appeal.

[11] Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[12] In it representations, the city decided to disclose Record 1, the Offer of Employment, except for the affected person's address and one number on page 1 of this record. The appellant is not interested in receiving access to this information, therefore, Record 1 is no longer at issue. According to the city's representations, section 14(1) only applied to this record, therefore, this exemption is no longer at issue.

[13] As well, the city conceded in its representations that the section 52(3)3 exclusion

does not apply to Record 3, as the exception to the exclusion in section 52(4)3[1] applies to this record.

[14] The affected person provided confidential representations objecting to disclosure of the records on the basis that they were confidential documents.

[15] In this order, I uphold the city's decision that the letter (Record 2) is excluded from the application of the *Act* by reason of section 52(3)3 and that the Release (Record 3) is exempt from disclosure by reason of section 12.

RECORDS:

[16] Remaining at issue are the records set out below:

Record #	Description	Sections claimed by city in its representations
2	E-mailed letter, End of Employment Relationship	52(3)3
3	Release	12

ISSUES:

A. Does the section 52(3)3 labour relations and employment records exclusion exclude the Record 2 from the *Act*?

B. Should the city be allowed to claim the application of section 12 to Record 3 late?

C. Does the discretionary solicitor-client privilege exemption at section 12 apply to Record 3?

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[1] Section 52(4) reads:

> This Act applies to the following records:
> 1. An agreement between an institution and a trade union.
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

D. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the section 52(3)3 labour relations and employment records exclusion exclude Record 2 from the *Act*?

[17] Section 52(3)3 states:

> 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:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[18] 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*.

[19] 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.[2]

[20] 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]

[21] 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]

[22] 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

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[2] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[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.

employees.[5]

[23] 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]

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

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

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

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

Part 1: collected, prepared, maintained or used

[25] The city states that Record 2 was prepared and maintained by city staff, namely its Chief Administrative Officer (the CAO).

[26] The appellant did not provide direct representations on the exclusion in section 52(3).

Analysis/Findings

[27] Based on my review of Record 2, I agree that this record was prepared by the city, therefore, part 1 of the test has been met.

Part 2: meetings, consultations, discussions or communications

[28] The city states that Record 2 itself is a communication, which stemmed from various meetings and discussions and was prepared for the purpose of and used in relation to an employment-related matter; that matter being the end of the city's employment relationship with the affected person. It states that this record is a direct communication between the CAO and the affected person, a former member of the city's workforce.

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[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.

Analysis/Findings

[29] I find that Record 2, which is a communication between the city and the affected person, was used in relation to communications and part 2 of the test has been met for this record.

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

[30] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition[7]
- an employee's dismissal[8]
- a grievance under a collective agreement[9]
- disciplinary proceedings under the *Police Services Act*[10]
- a "voluntary exit program"[11]
- a review of "workload and working relationships"[12]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.[13]

[31] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review[14]
- litigation in which the institution may be found vicariously liable for the actions of its employee.[15]

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[7] Orders M-830 and PO-2123.
[8] Order MO-1654-I.
[9] Orders M-832 and PO-1769.
[10] Order MO-1433-F.
[11] Order M-1074.
[12] Order PO-2057.
[13] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[14] Orders M-941 and P-1369.
[15] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

[32] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[16]

[33] The records collected, prepared, maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.[17]

[34] The city states that in this case, the city was acting as an employer, dealing directly with a human resources matter, that being the end of the affected person's employment with the city. It states that it has a direct interest in this matter, as the then-employer of the affected person and, therefore, was dealing with a matter directly involving its own workforce.

Analysis/Findings

[35] Based on my review of Record 2, I agree with the city that this detailed letter contains communications about employment-related matters concerning the affected person in which the city, as the affected person's employer, has an interest. These employment-related matters concerned the terms of the end of the affected person's employment with the city. Therefore, part 3 of the test under section 52(3)3 has been met for Record 2.

[36] As section 52(3) applies and as Record 2 does not fall within any of the exceptions listed in section 52(4), this record is excluded from the application of the *Act*.

B. Should the city be allowed to claim the application of section 12 to Record 3 late?

[37] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the

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[16] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[17] *Ministry of Correctional Services*, cited above.

> Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[38] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[18]

[39] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[19] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[20]

[40] The parties were asked to consider the following:

1. Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption or exemptions. If so, how? If not, why not?

2. Whether the institution would be prejudiced in any way by not allowing it to apply an additional discretionary exemption or exemptions in the circumstances of this appeal. If so, how? If not, why not?

3. By allowing the institution to claim an additional discretionary exemption or exemptions, would the integrity of the appeals process been compromised in any way? If so, how? If not, why not?

[41] The city states that it raised section 12 as an exemption within 35 days of being notified of the appeal, when it submitted its Index of Records to the IPC on June 19, 2017, which was 21 days after being notified of the appeal. It acknowledges that it did not claim the section 12 exemption in a new written decision to the appellant and the IPC pursuant to section 11.01 of the *Code*.

[42] The city further states that this issue was discussed during mediation and was included in the Notice of Inquiry and, therefore, did not result in the IPC having to send the parties a Supplementary Notice of Inquiry or host a second mediation.

[43] Further, the city states that it would be prejudiced by not allowing the application of this additional discretionary exemption. It notes that the record relates to

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[18] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[19] Order PO-1832.
[20] Orders PO-2113 and PO-2331.

the employment history and personal information of the affected person, which it describes as a high profile matter. The city submits that the prejudice to it and to the affected person far outweigh any prejudice to the appellant in allowing the inclusion of this exemption.

[44] The appellant states that she does not know what constitutes Record 3 and, therefore, cannot make a submission on this matter, and does not know if she is being prejudiced in any way. She relies on the adjudicator to weigh this information accordingly.

Analysis/Findings

[45] Although the city did not issue a revised decision claiming the application of the section 12 exemption as required by section 11.01 of the *Code of Procedure*, the city raised the issue of the application of section 12 at an early stage in the proceedings in its index of records, prior to the mediation of the appeal. The appellant had an opportunity to discuss the applicability of the section 12 exemption during mediation and to provide representations on this exemption at adjudication.

[46] I find that the appellant has not been prejudiced in any way by the late claiming of the discretionary exemption in section 12, as she has had the opportunity to fully address the application of this exemption.

[47] In particular, the Notice of Inquiry sent to the appellant indicated that section 12 was being claimed for Record 3, the Release, and that it was being raised late by the city. The appellant's response did not specifically object to the late claiming of this exemption. She stated that:

a. the appellant doesn't know what constitutes Record 3 and therefore cannot make a submission on this matter, and

b. the appellant doesn't know if she is being prejudiced in any way. She relies on the adjudicator to weigh this information accordingly.

[48] I further find that the city would be prejudiced if not allowed to raise the application of this exemption, as Record 3 may not be subject to the application of another exclusion or exemption.

[49] Accordingly, I will allow the city to claim the application of section 12 to Record 3 late.

C. Does the discretionary solicitor-client privilege exemption at section 12 apply to Record 3?

[50] Section 12 states as follows:

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

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

[52] The city submits that branch 2 of section 12 applies to Record 3. 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.

[53] The city submits that Record 3, being a release, was made in settlement of reasonably contemplated litigation. It states that this record contains a full and final settlement and legal release between the parties, and was prepared by counsel to settle the issue of the cessation of the affected person's employment with the city. It also provided confidential representations on the application of section 12 to Record 3.

[54] The city relies on Interim Order MO-2609-I, where I found that branch 2 of section 12 applied to a Release Agreement concerning a municipality's former police chief as being an agreement made in settlement of contemplated litigation.

[55] The appellant did not provide representations on the application of section 12.

Analysis/Findings

[56] The statutory litigation privilege in branch 2 applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[21]

[57] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[22]

[58] In contrast to the common law privilege, termination of litigation does not end

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[21] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[22] *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (*Magnotta*), 2010 ONCA 681.

the statutory litigation privilege in section 12.[23]

[59] Record 3 is a release prepared by counsel to settle the issue of the cessation of the affected person's employment with the city. It is clear that this record was prepared in contemplation of litigation. The record is similar to the record at issue in Order MO-2609-I, which was an agreement detailing the cessation of a police chief's employment with the institution, containing a full and final settlement and legal release between the parties.

[60] In Order MO-2609-I, I relied on the Court of Appeal findings in *Magnotta,*[24] which found that the word "litigation" in branch 2 encompasses mediation and settlement discussions. In that case, the Court stated:

> Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records – both those prepared by Crown counsel and those prepared by Magnotta – fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions. To limit the second branch to records prepared by, or at the behest or on behalf of, Crown counsel is contrary to the plain meaning of the language of the second branch. Furthermore, it is antithetical to the public policy interest in settlement of litigation because it would lead to situations in which the government entity's records would be exempt from production while the private party's mediation material would be producible…
>
> The Disputed Records are documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Furthermore, the Disputed Records were explicitly cloaked in confidentiality. Before undertaking the mediation, the parties signed a mediation agreement that contained a confidentiality provision and the settlement documents were replete with extensive confidentiality provisions. Clearly, the Disputed Records fall within any reasonable "zone of privacy".

[61] In Order MO-2609-I, I found that in order to conclude that there was "contemplated" litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of

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[23] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[24] See footnote 22.

litigation.[25]

[62] The questions of whether records were prepared for use in mediation or settlement of litigation or contemplated litigation, and/or whether litigation is reasonably in contemplation, are questions of fact that must be decided in the specific circumstances of each case.

[63] Similar to my findings in Order MO-2609-I, in the specific circumstances of this appeal, based on the confidential representations of the city, I am satisfied that litigation was reasonably in contemplation, and that there was more than a vague or general apprehension of litigation. I am also satisfied that the record at issue is an agreement that was made in settlement of this reasonably contemplated litigation.

[64] As was the case in Order MO-2609-I, the record at issue, Record 3, contains a full and a final settlement and legal release between the parties, and was prepared by counsel for the city. The record was delivered to the affected person to settle the issue of the cessation of his employment with the city.

[65] Accordingly, like the records in *Magnotta* and the record in MO-2609-I, I find that Record 3 was prepared by or for counsel for the institution in contemplation of or for use in the settlement of reasonably contemplated litigation, and is therefore subject to branch 2 statutory litigation privilege. On this basis, I find the record is subject to the section 12 solicitor-client exemption. This statutory privilege in section 12 has not been lost through waiver.[26]

[66] As the section 12 exemption is discretionary, I will now consider whether the city properly exercised their discretion under section 12 of the *Act*.

D. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[67] The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[68] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations

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[25] See Order PO-2323.

[26] See discussion above under Branch 1, "Loss of Privilege." Also, see Order PO-3627 and *Ontario (Attorney General)* v. *Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

- it fails to take into account relevant considerations.

[69] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[27] This office may not, however, substitute its own discretion for that of the institution.[28]

[70] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[29]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- 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 age of the information
- the historic practice of the institution with respect to similar information.

[71] The city submits that in exercising its discretion in deciding to withhold Record 3, it took into account:

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[27] Order MO-1573.
[28] Section 43(2).
[29] Orders P-344 and MO-1573.

- The general purposes of the legislation;
- The wording of the discretionary exception and the interests which the section attempts to balance, and additionally the city is held to consider the employee's prospect of future employment, the affected [person's] position not to disclose the information, and the confidentiality provisions in Record 3;
- The historic practice of the public body with respect to the release of similar types of documents, as the city's practice is to provide information of this nature if not effected by the prospect of litigation, as evidenced by an earlier request similar in nature that was shared with the public;
- The age of the record; the record is new and litigation contingent upon the outcome of further court scrutiny; and,
- Previous orders of the Commissioner were considered and the city found that a full appreciation of the facts of the case warrant nondisclosure.[30]

[72] The appellant argues that Record 3 needs to be disclosed to the public to ensure public confidence in the operation of the city. She submits that the institution did not consider the overriding public interest factor in this case despite the fact that the affected person has been the subject of media stories.

[73] The appellant submits that the public's right to know and government transparency remain paramount. This is in order for the public to determine whether their elected officials, who ultimately approved the severance package, acted responsibly and in the taxpayer's best interest.

Analysis/Findings

[74] I have found that the record for which section 12 has been claimed, Record 3, is subject to litigation privilege under section 12.

[75] The appellant has raised the application of the public interest override in section 16 to Record 3. I am unable to consider the application of the public interest override claimed by the appellant in section 16 of the *Act* as regards to a record found to be subject to section 12. In particular, section 16 does not include the application of the public interest override to records subject to section 12. Section 16 reads:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.[31]

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[30] Order P-344 and Order MO-1573.

[76] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[32] the Supreme Court of Canada upheld the constitutionality of the provincial equivalent to section 16 as not being applicable to the solicitor-client privilege exemption in section 12.[33]

[77] Furthermore, Record 3, the Release, is a general release and does not contain the information that the appellant claims is subject to the public interest. In particular, it does not contain details of any severance package, nor does it reveal details about the reasons for the cessation of the affected person's employment with the city. I find that the public interest identified by the appellant was not a relevant consideration for the city in the circumstances of this appeal.

[78] Based on my review of Record 3 and the parties' representations, I agree with the city that it exercised its discretion in a proper manner under section 12, taking into account relevant considerations and not taking into account irrelevant considerations.

[79] Therefore, I am upholding the city's exercise of discretion under section 12, and find that the record for which this exemption has been claimed, Record 3, is exempt under that section.

ORDER:

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

Original Signed by: June 8, 2018
Diane Smith
Adjudicator

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[31] See also see Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 S.C.R. 815.
[32] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII).
[33] Section 19 of the *Freedom of information and Protection of Privacy Act* (*FIPPA*) is the equivalent of section 12 of *MFIPPA*.