

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3913-I

Appeal MA15-571

The Corporation of the City of Oshawa

March 11, 2020

Summary: Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the appellant made an access request to the Corporation of the City of Oshawa (the city) for “all emails and any other communication” between an investigator retained by the city and city staff or councillors. The city located records and provided partial access to them, withholding records and portions of records on the basis of several exemptions from the right of access in the *Act*. The city also relied on the confidentiality provisions found at sections 223.5 and 223.22 of the *Municipal Act* to deny access.

In Interim Order MO-3513-I, the adjudicator found that the *Municipal Act* provisions do not apply to the records at issue, with the result that access to the records was to be decided under the *Act*. The city then issued a revised decision, disclosing further information, and subsequently disclosed yet more information by way of proactive disclosure. However, some information remained withheld by the city. In this order, the adjudicator upholds the exemptions at sections 7(1) (advice or recommendations), 14(1) (personal privacy), and 12 (solicitor-client privilege), in part, and orders disclosure of non-exempt information. She defers the public interest and reasonable search issues pending further representations from the parties.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, sections 2(1) (definition of “personal information”), 7(1), 12 and 14(1) and (3).

Orders Considered: Orders P-721, PO-1772, PO-2477, PO-2976, MO-1194 and PO-2632.

BACKGROUND:

[1] The appellant submitted a request to the City of Oshawa (the city) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to the following information:

I am requesting all emails and any other communication (electronic or hard copy ie. texts or voice messages, fax) between [a named investigator] and any and all members of council as well as any members of city staff for the period of May 1, 2013 and September 15, 2013.

I would like a copy of the dockets of all time for all work performed by [the investigator] from May 22, 2013 to Sept. 15, 2013 noted by [the investigator] on invoices July 29, 2013 and August 21, 2013 under purchase order 16050.

[2] By way of background, in 2013 the city purchased property to house its Consolidated Operations Depot. Following the purchase, the city's Auditor General issued a report, Report AG-13-09, in which he was critical of the process leading to the purchase. Report AG-13-09 was made public, as were some attachments to the report, but certain "confidential attachments" (designated as such by the Auditor General) were not.

[3] The city then appointed an investigator (the investigator named in the access request cited above) to investigate the allegations contained in the Auditor General's report. The investigator conducted an investigation and issued a report.

[4] In response to the appellant's access request, the city located 107 records and issued an access decision granting partial access to them. The city withheld much information in the records, including approximately 60 records in their entirety, citing various exemptions including the discretionary exemption for advice and recommendations at section 7(1) of the *Act*, the discretionary law enforcement exemption at section 8(1), the mandatory exemption for third party information at section 10(1)(a), the discretionary exemption for solicitor-client privilege at section 12, and the mandatory personal privacy exemption at section 14(1). The city included an index of records with its access decision.

[5] The appellant appealed the city's access decision to this office. During the mediation stage of the appeal, the appellant disputed the applicability of the exemptions claimed by the city to deny access, and also expressed his view that there is a public interest in disclosure of the requested records, thereby raising section 16 of the *Act*. The appellant also contended that further records responsive to his request should exist, raising the issue of whether the city had conducted a reasonable search for responsive records. The city maintained its decision to deny access to the withheld information. The city also maintained that it had conducted a reasonable search for the

records.

[6] Also during mediation, the city took the position that sections 223.5 and 223.22 of the *Municipal Act, 2001* (the *Municipal Act*) apply to the records, as these sections impose a duty to maintain secrecy over matters involving the municipal Auditor General and the Integrity Commissioner.¹ The city issued a revised decision and a revised index of records, reflecting its position on these provisions.

[7] As the appeal was not resolved during mediation, it was moved to the adjudication stage of the appeal process, and I conducted an inquiry under the *Act*. I began my inquiry by seeking representations from the city, the investigator as an affected party, and the Durham Regional Police Services Board as an affected party (in relation to the city's section 8(1) claim). The city filed representations; the affected parties did not. I then sought and received representations from the appellant, reply representations from the city, and sur-reply representations from the appellant.

[8] Although I did not invite further representations after receiving the appellant's sur-reply representations, the appellant then filed additional representations on the issue of reasonable search, which he informed me he was providing in response to information that the city had provided in its representations in a related appeal, Appeal MA16-83. I decided to allow the representations and invited the city to provide further representations in response, which it did.

[9] In Interim Order MO-3513-I, I found that sections 223.5 and 223.22 of the *Municipal Act* do not apply to the records at issue, with the result that access to the records was to be decided under *MFIPPA*. I deferred the remaining issues pending notification of additional affected parties.²

[10] I then notified six additional affected parties and invited representations. No representations were received, but two affected parties provided their consent to the release of information about them in the records. I was unable to locate two additional affected parties.

[11] The city then did three things that are relevant for the purposes of this appeal. First, it issued a second revised decision, granting partial access to many records it had withheld in their entirety in its first decision. This resulted in significant additional disclosure to the appellant. The appellant confirmed his interest in pursuing access to the remaining information.

[12] Second, the city separately (not as a decision in this access request) posted to its website one of the records at issue in this appeal, the complete Auditor General's Report AG-13-09, including the "confidential attachments" referred to above, with some

¹ The city took the position that the named investigator was an Integrity Commissioner.

² I also found that the City Clerk was not in a conflict of interest in making a decision on the appellant's access request; the appellant had raised this as a preliminary issue.

severances.

[13] Finally, the city proactively disclosed on its website (with severances) over 1,000 records relating to the city's property purchase and the resulting investigations by the Auditor General and the investigator.³ Most of the 107 records identified by the city as responsive to the request in this appeal were included in the subsequent proactive disclosure, and for the most part, more information in the records was released in the proactive disclosure than had been released in the city's decisions to the appellant.

[14] As a result of the city's further disclosures, much of the information initially withheld by the city, and the exemptions claimed for that information, are no longer at issue.

[15] In the course of reviewing the information remaining at issue, I decided that three additional affected parties should be notified. I notified two of them of the appeal, and invited them to make representations. Neither one responded to the Notice of Inquiry. I was unable to locate the third affected party.

[16] In this interim order, I identify the information still at issue, which is the information that the city withheld from the requester in its access decisions and which it did not subsequently proactively disclose. With respect to this information still at issue, I partially uphold the city's application of exemptions, and order the disclosure of non-exempt information.

[17] I defer the city's application of a new section 12 claim to a small piece of information pending the appellant's confirmation that he is pursuing access to this information. I also defer consideration of the possible application of the public interest override to the information I have found in this order to qualify for the section 7(1) and 14(1) exemptions, pending representations from the parties on the specific information remaining at issue.

RECORDS:

[18] The city's revised index of records (accompanying its second revised decision) lists 131 records.⁴ The city granted full access to some records, and as a result of the city's subsequent proactive disclosure, other records are also no longer at issue.⁵ The records remaining at issue are set out in the following table, using the numbering on the city's April 9, 2018 revised index of records.

³ The city's proactive disclosure can be found on its website here: <https://www.oshawa.ca/city-hall/foi-activities.asp>

⁴ The discrepancy between this number and the number of records in the original index (107 records) is a result of the city's choosing to characterize bundles of documents differently, not as a result of any additional responsive records being identified.

⁵ In my view, there would be no useful purpose to my determining the applicability of the city's claimed exemptions to information that it later proactively disclosed.

Record Number	Date	Record description	City's access decision	Exemptions claimed ⁶
1	May 22 and 23, 2013	Emails between the investigator and the City Clerk	Severed	10(1)(a), 12
4	February 21, 2007	Letter from an individual to the city (duplicate of information remaining at issue in Confidential Attachment 6, below)	Severed	14(1)
28	May 28, 2013	Email between the investigator and the City Clerk	Severed	14(1)
29	May 24, 26, 27 and 28, 2013	Emails between the investigator, City Clerk and another	Severed	7(1) 14(1)
37	June 6 and 7, 2013	Emails between the investigator, City Clerk and another	Severed	7(1)
38	May 30 and June 9, 2013	Emails between the investigator and the City Clerk	Severed	7(1)

⁶ The exemptions claimed are the exemptions claimed by the city when it withheld the records from the appellant. In some cases, the city applied different exemptions to withhold the information in its proactive disclosure. However, those exemption claims are not before me. The proactive disclosure is relevant only because some information that the city withheld from the appellant was subsequently proactively disclosed and is therefore no longer at issue.

42	May 30 and June 9 and 11, 2013	Emails between the investigator, City Solicitor and City Clerk	Severed	7(1) 12 14(1)
61	June 22, 2013	Emails between the investigator, Auditor General and City Clerk	Severed	14(1)
62	June 21 and 22, 2013	Emails between the investigator, Auditor General, City Clerk and others	Severed	14(1)
63	June 21 and 22, 2013	Emails between the investigator, Auditor General, City Solicitor, City Clerk and others	Severed	14(1)
64	May 17, June 21 and 22, 2013	Emails between the investigator, City Solicitor, City Clerk and others	Severed	12 14(1)
65	June 25, 26 and 27, 2013	Emails between the investigator, Council, City Clerk, City Solicitor and external parties	Severed	14(1)

75	July 3, 2013	Emails between the investigator the City Clerk, another and an external party	Severed	14(1)
80	July 24 and 25, 2013	Emails between the investigator, the City Clerk, the Auditor General, a councillor and another	Severed	14(1)
81	July 24, 26 and 29, 2013	Email between the investigator and the City Clerk	Severed	14(1)
82	July 29, 2013	Email between the investigator and the City Clerk	Severed	10(1)(a)
84	July 29, 2013	Emails between the investigator and the City Clerk	Severed	10(1)(a)
85	July 29, 2013	Emails between the investigator, councillors, the Auditor General and the City Clerk	Severed	14(1)
87	July 24, 25 and 31, 2013	Emails between the investigator, Auditor General, City Clerk, and councillor and	Severed	14(1)

		another		
91	August 1 and 6, 2013	Emails between the investigator, the Auditor General, the City Solicitor, the city clerk, another and an external party	Severed	8(1)(g) 12
104	August 13 and 14, 2013	Emails between the investigator, the Auditor General, and the City Solicitor	Severed	14(1)
105	August 14, 2013	Emails between the investigator and another	Severed	14(1)
106	August 16, 2013	Email between the investigator, City Solicitor, City Clerk and others	Severed	14(1)
107	August 21, 2013	Email between investigator and the City Clerk	Severed	10(1)(a)
109	August 22, 2013	Emails between the investigator, the Auditor General and others	Severed	14(1)
110	August 13 and	Emails between the	Severed	14(1)

	14, 2013	investigator, the Auditor General, the City Solicitor, the City Clerk and others		
118	August 27 and 28, 2013	Emails between the investigator, City Clerk and others	Severed	14(1)
124	September 3, 2013	Memo to Council from the Auditor General's Office Re: Investigation of Report AG-13- 09, Independence of the Auditor General	Severed ⁷	12
125	September 5, 2015	Emails between the investigator and the City Clerk	Severed	14(1)
131	September 9, 2013	Email between the investigator and the City Clerk	Severed	14(1)

[19] Also at issue are portions of the confidential attachments to the Auditor General's Report AG-13-09. I will refer to those as the Auditor General referred to them: Confidential Attachments 6, 9, 10, and B to E. Again, the information remaining at issue is the information that was withheld by the city in its access decision, other than information that was subsequently proactively disclosed.

⁷ While the city's index stated that record 124 was disclosed in full, the copy it provided to this office shows that the city severed some information on the basis of various exemptions. Much of the information has now been proactively disclosed, and what remains at issue was withheld by the city in its revised decision on the basis of section 12.

Record Number	Date	Record description	City's access decision	Exemptions claimed ⁸
Original Record 109	May 23, 2013	Email from the City Clerk to the investigator, attaching Report AG-13-09	Withheld	7(1), 14(1)
Confidential Attachment 6	February 21, 2007	Letter from an individual to the city (duplicate of Record 4)	Withheld	7(1), 14(1)
Confidential Attachment 9	October 19, 2012	Memorandum from the Auditor General to the Commissioner of Development Services	Withheld	7(1), 14(1)
Confidential Attachment 10	Undated	Review of the accuracy of reports CM-12-23 and CM- 13-29	Withheld	7(1)
Confidential Attachment B	August 13, 2012	Letter from Durham Region to the Auditor General	Withheld	7(1), 14(1)
Confidential Attachment C	April 11, 2013	Letter from real estate appraiser to Auditor General	Withheld	7(1)
Confidential Attachment D	Various	Correspondence	Withheld	7(1)

⁸ See footnote 6.

⁹ "Original Record 10" refers to the city's original numbering of the record. The original numbering is used for this record because it was not considered in the city's revised decision.

Confidential Attachment E	Various	Correspondence	Withheld	7(1)
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ISSUES:

- A. Does the discretionary exemption at section 7(1) (advice and recommendations) apply to the information withheld under that exemption?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory personal privacy exemption at section 14(1) apply to the personal information at issue?
- D. Does the mandatory exemption for third party information at section 10(1) apply to the information withheld under that exemption?
- E. The city's late raising of section 12 (solicitor-client privilege) for record 124
- F. Does the discretionary exemption at section 12 (solicitor-client privilege) apply to the information withheld under that exemption? Did the city properly exercise its discretion under section 12?
- G. Does the discretionary law enforcement exemption at section 8(1) (law enforcement) apply to the information withheld under that exemption?
- H. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 7(1) and 14(1) exemptions?
- I. Did the city conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the discretionary exemption at section 7(1) (advice and recommendations) apply to the information withheld under that exemption?

[20] The city has withheld portions of the following records on the basis of section 7(1): records 29, 37, 38, and 42. It also withheld the following records, in their entirety, under section 7(1): original record 10, and Confidential Attachments 6, 9, 10, B, C, D and E. Some of the information in these records was later proactively disclosed, but some was not and therefore remains at issue.

[21] 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.

[22] 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.¹⁰

[23] "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.

[24] "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.¹¹

[25] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[26] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹²

[27] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.¹³

[28] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of

¹⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

¹¹ See above at paras. 26 and 47.

¹² Order P-1054.

¹³ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

the deliberative process leading to a final decision and are protected by s. 7(1).¹⁴

[29] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information¹⁵
- a supervisor's direction to staff on how to conduct an investigation¹⁶
- information prepared for public dissemination¹⁷

[30] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7(1). The only exception with potential application here is found in section 7(2)(a), which states as follows:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

[31] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.¹⁸ Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) may not apply.¹⁹

Representations

[32] The city submits that the records contain advice, "namely the views or opinions of public servants as to the range of policy options to be considered by the decision maker as well as possible recommendations." It submits that the investigator's final report (a public report) provided advice and recommendations to council, pursuant to his mandate. The city submits that the access request at issue is "targeted at the nature and method of his investigation, which necessarily include the sharing of advice and recommendations of an inchoate nature." The city submits that any factual information in the records is inextricably intertwined with the advice and recommendations themselves, such that the exception in section 7(2)(a) does not apply.

¹⁴ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

¹⁵ Order PO-3315.

¹⁶ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

¹⁷ Order PO-2677.

¹⁸ Order 24.

¹⁹ Order PO-2097.

[33] The appellant argues that the investigator, according to the terms of his hire set out in the motion of council on May 21, 2013, was to prepare a report and present it in an open session of council, thereby enabling full public disclosure of findings and recommended actions. He argues that this mandate did not include providing advice to staff. He also points out that the investigator was not a practising lawyer nor was he a public servant. In reply, the city notes that the investigator was not retained as a lawyer. In sur-reply, the appellant questions the qualifications of the investigator to offer any advice on the subject matter of Report AG-13-09.

Analysis and findings

Original Record 10, and Confidential Attachments 6, 9, 10, B, C, D and E

[34] The city withheld these records in their entirety on the basis of section 7(1) and the city's revised decision did not alter its position on these records. Although much of the information was later proactively disclosed, the remaining withheld information remains subject to the city's section 7(1) claim, which it has not abandoned.

[35] Original record 10 is an email from the City Clerk to the investigator. The Confidential Attachments are all attachments to the Auditor General's Report AG-13-09. None of these records was authored by the investigator. Therefore, I do not accept the city's argument that they consist of the investigator's advice or recommendations. I find, however, that some of the withheld information in Confidential Attachment 9 consists of the Auditor General's recommendations to the city, and is exempt on that basis.

[36] I will also consider under issues B and C, below, whether the information withheld in these records is exempt under the mandatory personal privacy exemption at section 14(1).

Records 29, 37, 38, and 42

[37] The information withheld under section 7(1) in Record 29 is the text of an email from the investigator to the City Clerk on May 28, 2013 at 11:36 am. The remainder of the content on this email string has been proactively disclosed.

[38] I have reviewed the information at issue, and I find that it meets the requirements of the section 7(1) exemption. The information contains advice from the investigator to the Clerk with respect to the conduct of the investigator's investigation. While I accept that according to the terms of his engagement, the investigator was to provide a report to council at the conclusion of his investigation, I do not share the appellant's view that this precluded him from providing advice to the city from time to time during the course of his investigation.

[39] Record 37 was partially proactively disclosed. What remains at issue are two portions of an email exchange between the investigator and the City Clerk on June 6,

2013 at 9:43 and 9:52 am. The information consists of a query from the investigator and the clerk's response. In my view, there is nothing evaluative about this information; it is factual information. The section 7(1) exemption, therefore, does not apply to it. As no other exemption has been claimed for this information and no mandatory exemptions are evident, I will order it disclosed.

[40] Record 38 is an email from the investigator to the City Clerk. I am satisfied that the information remaining at issue, following the city's proactive disclosure of some of the email, consists of the investigator's advice to the city with respect to matters relating to his investigation. Therefore, this information qualifies for exemption under section 7(1).

[41] It is not necessary for me to consider the application of section 7(1) to record 42, because I find below under Issue F that the information withheld under section 7(1) in that record is exempt from disclosure under section 12 (solicitor-client privilege).

[42] Since section 7(1) applies to some of the information withheld under that exemption, it is exempt from disclosure unless the public interest override at section 16 applies to it. I discuss the public interest issue below under Issue H.

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

[43] The city withheld information in many of the records at issue on the basis of the mandatory personal privacy exemption found at section 14(1). Because the section 14(1) exemption only applies to information that is "personal information", it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1), the relevant portions of which are as follows:

"personal information" means recorded information about an identifiable individual, including,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[44] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.²⁰

[45] Sections 2(2.1) and 2(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.

[46] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²¹

[47] Even if information relates to an individual in a professional, official or business capacity, however, it may still qualify as personal information if the information reveals something of a personal nature about the individual.²²

[48] To qualify as personal information, it must also be reasonable to expect that an individual may be identified if the information is disclosed.²³

Representations

[49] The city submits that the records contain communications to and from the investigator, and that during the course of these communications, the confidential attachments to the Auditor General's Report AG-13-09 were discussed. The city submits that these attachments relate to serious allegations against identifiable individuals. The city submits that the records include financial information, including home addresses and assets, and employment information about identifiable individuals, and that the records also contain the opinions of individuals about other individuals. The city further

²⁰ Order 11.

²¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

²² Orders P-1409, R-980015, PO-2225 and MO-2344.

²³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

submits that the records contain non-business email addresses and telephone numbers. It submits that although a particular individual was dealing with the city in a professional capacity, the information itself is personal and not business-related.

[50] The appellant submits that the investigator has already revealed the names and professional titles of a number of his interviewees to the press. The appellant submits, further, that any reference to a city employee or councillor is in their official capacity. He also submits that the investigator's cell phone number and email address appear in his professional capacity, and he notes that the city disclosed this information in some instances in the records. In reply, the city explains that this was a clerical error, and maintains that the cellphone number and email address are personal information, versus the phone number the investigator had at the city and his city email address ending in "Oshawa.ca".

[51] The city submits, further, that employees' employment history and personnel evaluations are personal information. It refers to Order P-1180, where the adjudicator found that information that involves an examination of an employee's performance or an investigation into his or her conduct is the individual's personal information.

Analysis and findings

[52] I have reviewed all of the information for which the city claimed the personal privacy exemption at section 14(1), and which remains at issue. Because section 14(1) is a mandatory exemption, I have also considered whether some additional information that was withheld under the section 7(1) exemption, and which remains at issue, is personal information.²⁴

The investigator's email address

[53] The city withheld the investigator's email address in records 28, 29, 61, 62, 63, 64, 80, 109, 118, 125, and 131, and original record 10.

[54] From my review of the records, it is clear that the investigator used the email address at issue for his professional work for the city. While the city supplied him with a city email account, he does not appear to have used it. The email address, therefore, falls within the exceptions to the definition of personal information found in sections 2(2.1) and 2(2.2). I find, further, that disclosure of this email address would not reveal anything of a personal nature about the investigator. Since the city has not claimed any other exemptions for this information, and no mandatory exemptions apply to it, I will

²⁴ As mentioned above, the city subsequently proactively disclosed some information that it had withheld in its access decisions to the appellant. In some cases, notably the confidential attachments to Report AG- 13-09, the city had withheld the records in their entirety on the basis of section 7(1), not section 14(1). I have reviewed this withheld information with a view to determining whether the mandatory section 14(1) exemption applies notwithstanding that the city did not claim it in the access decisions before me.

order the city to disclose this information to the appellant.

Email addresses/cellular phone numbers of other individuals

[55] The city redacted the email addresses and/or cellular telephone numbers of other individuals in records 65, 75, 80, 81, 85 and 87.

[56] I find that one of the email addresses at issue in record 65 is a business email address. This is clear from the rest of the content of the email, which has been disclosed. Furthermore, disclosure of this address would not reveal anything of a personal nature about the individual; therefore, it is not personal information. As no other exemptions have been claimed and no mandatory exemptions apply, I will order it disclosed.

[57] I do not have sufficient information before me to find that the other withheld contact information in records 65, 75, 80, 81, 85 and 87 consists of professional information, rather than personal information. I find, therefore, that this is personal information of the individuals to whom it relates, and I will consider whether the mandatory exemption at section 14(1) applies to it.

Employment history

[58] The withheld information in record 104 (duplicated in record 110), an email, consists of a list of former city employees from whom the Auditor General proposed the investigator obtain statements. I am satisfied that the list of names reveals that these individuals were former employees of the city and that they were involved in the matters being investigated. I find, therefore, that the appearance of each name on the list constitutes that individual's personal information within the introductory words of the definition as well as paragraph (b).

[59] Each of records 105 (duplicated in 110) and 106 contains additional information about former city employees. For similar reasons, I find this to be their personal information.

[60] The following records contain other information about individuals relating to their employment history: records 64, 80, 81, and 87. I find that this is their personal information within paragraph (b) of the definition.

Information in Records 124 and Confidential Attachments 9 and 10

[61] I have reviewed the information the city withheld in these records. While it relates to individuals in their employment capacities, it consists of evaluations of their

work performance, in a context where their conduct has been called into question.²⁵ I find in the circumstances that this information reveals something of a personal nature about these individuals, and therefore, it constitutes their personal information within the introductory wording of the definition. While the city did not claim the personal privacy exemption at section 14(1) for all of this information, I will consider whether this mandatory exemption applies to it.

Information in Confidential Attachment B – letter from Durham Region to the Auditor General

[62] The only information remaining at issue in this letter is an address for the Auditor General that is not his professional address, and the signature of the person who signed the letter. I find that the Auditor General's address is his personal information, since I have no information before me to suggest that he generally used this address to conduct business. The signature of the other individual appears in a business or professional context and is not personal information.²⁶ As no mandatory exemptions apply to this information and no other discretionary exemptions have been claimed (except for section 7(1), which I did not uphold), I will order it disclosed.

Information in Confidential Attachments C, D and E

[63] The only information remaining at issue in Confidential Attachments C, D and E consists of the signatures of the individuals who wrote the letter on behalf of various companies. I have already found that section 7(1), which is the only exemption claimed for this information, does not apply to it. For completeness, I also find that these signatures appear in a professional capacity, and are not personal information. As no mandatory exemptions apply to this information and no other discretionary exemptions have been claimed, I will order it disclosed.

Address and signature in Confidential Attachment 6 and Record 4

[64] The information remaining at issue in these two records (duplicates of one another) is a letter. It has been disclosed with the exception of the home address and signature of an affected party. I find that this is the affected party's personal information under paragraph (d) of the definition, as the information appears in a personal, rather than business capacity.

Other information claimed to be personal information

[65] The city has withheld some information in record 87 relating to an individual in his professional capacity. This information reveals nothing of a personal nature about

²⁵ Previous decisions from this office have found that information relating to an individual's professional or official capacity can take on a more personal nature if it relates to that individual's performance or conduct (See, for example, Orders P-721, PO-1772, PO-2477 and PO-2976).

²⁶ See Orders MO-1194 and PO-2632, among others.

him, and is therefore not his personal information. I will order that information disclosed.

[66] Having found that the some of the withheld information is personal information, I will now consider whether that personal information is exempt from disclosure under section 14(1).

Issue C: Does the mandatory personal privacy exemption at section 14(1) apply to the personal information at issue?

[67] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure.

[68] The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 14.

[69] The two exceptions of relevance to this appeal are found in sections 14(1)(a) and (f). Those sections read:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(1)(a): consent

[70] For section 14(1)(a) to apply, the consenting party must consent to the disclosure of his or her personal information in the context of an access request.²⁷ Here, two affected parties have consented to certain information about them being disclosed. The section 14(1)(a) exception, therefore, applies to this information. Where no other exemptions apply, I will order this information disclosed. As a result, I will order disclosure of certain information in records 80, 81, 87, 104, 105, 110, Confidential Attachment 9, and Confidential Attachment 10. Record 124 also contains some personal information for which consent has been obtained. The city has also claimed section 12 (solicitor-client privilege) for the information in Record 124; I consider that claim below under issue F.

²⁷ Order PO-1723.

Section 14(1)(f): not an unjustified invasion of personal privacy

[71] The other relevant exception here is section 14(1)(f), which provides that if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure under section 14(1).

[72] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. None of the circumstances set out in section 14(4) is applicable here.

[73] 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.²⁸

Representations

[74] The city submits that the presumptions at sections 14(3)(d) and (g) apply to some of the personal information at issue. Those sections state:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(d) relates to employment or educational history;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations[.]

[75] The city submits, further, that it carefully considered the factors set out in section 14(2) and weighed the entirety of the records. It is the city’s position that it would be an unjustified invasion of personal privacy to disclose the personal information of one or more individuals. It submits that the more sensitive the nature of the personal information sought, the more the scale tips in favour of non-disclosure. It submits, further, that where the personal information is supplied in confidence, there is an expectation and understanding that the personal information will not be disclosed.

[76] The appellant submits that the factor at section 14(2)(a) applies, which states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

²⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

[77] He submits that it has been alleged that the purchase of property for the Consolidated Works Depot was for a sum in excess of \$1.3 million over market value, and that the city used improper practices to make its purchasing decisions.

Analysis and findings

[78] I find that the presumptions at sections 14(3)(d) and (g) are relevant to some of the personal information at issue, namely that found in records 64, 104, 106, 110, and Confidential Attachments 9 and 10. These records contain sensitive information about the affected parties' employment history, as well as information that qualifies as personal evaluations. The latter information describes views about some of the affected parties in carrying out the duties associated with the positions that they held with the city. I find that this information falls under the presumption at section 14(3)(g) and its disclosure is presumed to amount to an unjustified invasion of the affected parties' personal privacy.

[79] As noted above, a presumption under section 14(3), once established, cannot be outweighed by any of the factors under section 14(2); only the circumstances set out in section 14(4) can overcome a section 14(3) presumption. I find, therefore, that the disclosure of this information would be an unjustified invasion of personal privacy. The section 14(1)(f) exception is therefore not established, and the information is exempt under section 14(1).

[80] For the personal contact information in records 4, (duplicated in Confidential Attachment 6), 65, 75, 80, 81, 85 and 87, and Confidential Attachment B, no listed or unlisted factors in section 14(2) weigh in favour of disclosure of this particular information. The individuals' names have been disclosed, just not their contact information (and in one instance, signature). I find that the public scrutiny factor in section 14(2)(a) does not apply to the contact information of these people, as disclosure of this information would not serve to promote public scrutiny of the city. It is, therefore, also exempt under section 14(1).

[81] Since section 14(1) applies to all of the personal information remaining at issue, it is exempt from disclosure unless the public interest override at section 16 applies to it. I discuss the public interest issue below under Issue H.

Issue D: Does the mandatory exemption for third party information at section 10(1) apply to the information withheld under that exemption?

[82] The city withheld some information in records 1, 82, 84 and 107 on the basis of the section 10(1) exemption. This information relates to amounts that the investigator charged to the city.

[83] Section 10(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[84] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.²⁹ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.³⁰

[85] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

²⁹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

³⁰ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Representations

[86] The city made limited representations on the application of section 10(1) to the records. The city states:

The records referred to under this issue contain personal information of third parties such as non-business email addresses and telephone numbers, that is, information about an individual in a personal capacity. Although the individual was dealing with the city in a professional capacity, the information itself is personal and not business contacts.

[87] The appellant submits that the investigator's rate was made public, so the release of the information withheld under section 10(1) cannot be subject to that exemption.

Analysis and findings

[88] The information withheld under section 10(1) in record 1, an email, is the investigator's hourly rate. The information withheld in statements of account found in records 82 (duplicated in record 84) and 107 is the amount the investigator charged in disbursements per trip. I find that this is commercial and financial information, and thus satisfies the first part of the section 10(1) test.³¹

[89] With respect to the second part of the test, the requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.³² Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.³³

[90] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.³⁴

[91] If the figures withheld in the records at issue were agreed upon as between the investigator and the city, they are considered to have been negotiated and not "supplied". In any event, however, I do not need to decide whether this information

³¹ See Orders P-1621 and PO-2010.

³² Order MO-1706.

³³ Orders PO-2020 and PO-2043.

³⁴ This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

was supplied in confidence, because as explained below, the third part of the test is not satisfied.

[92] In establishing the third part of the test (harms), the party resisting disclosure must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.³⁵

[93] In applying section 10(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for detailed evidence to support the harms outlined in section 10(1).³⁶

[94] I find that neither the city nor the investigator (the latter did not make representations) has shown that disclosure of the information withheld under section 10(1) could reasonably be expected to result in any of the harms set out in section 10(1). I also note that the information dates back to 2013, making the prospect of any competitive disadvantage or similar harm resulting from disclosure less likely. I find, therefore, that section 10(1) does not apply to this information. As no other exemptions have been claimed for it and no mandatory exemptions apply, I will order this information disclosed.

E: The city's late raising of section 12 (solicitor-client privilege) for record 124

[95] The city did not claim the discretionary exemption at section 12 for record 124 until during mediation, and only after the permissible 35-day period for claiming it.

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

³⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

³⁶ Order PO-2435.

[97] 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.³⁷

Representations

[98] The city submits that its late raising of this discretionary exemption in no way compromises the integrity of the appeal process. It explains that during the course of mediation, it compared its exemption claims with a number of other similar IPC appeals it was involved in at the same time, and noted that other discretionary exemptions that it had claimed for those appeals also applied to this appeal. In order to ensure consistency and fairness for all requesters, it then claimed the exemption for this appeal as well.

[99] The city notes that the appellant has had the opportunity to make representations on all the issues and exemptions claimed by the city. It submits that he has not been prejudiced by the city's late raising of this discretionary exemption, but that the city would be prejudiced by a refusal to allow it. It submits that the appeal process is enhanced rather than diminished by allowing the late raising of the exemption.

[100] The appellant submits that the city in fact has not been consistent in its application of exemptions. He states that the late raising of a discretionary exemption is yet another attempt to avoid release of records to which the appellant, and all of the public, are entitled.

Analysis and findings

[101] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must balance the relative prejudice to the city and to the appellant.³⁸ The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.³⁹

[102] In this case, I accept that there has been no prejudice to the appellant as a result of the late raising of this exemption. He has had a full opportunity to be heard on the section 12 exemption claim for this record, has made representations on it, and the inquiry process was not delayed because of it. I have also taken into account the

³⁷ *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.).

³⁸ Order PO-1832.

³⁹ Orders PO-2113 and PO-2331.

important interests that section 12 seeks to protect. I will allow the city to raise it in this instance.

F: Does the discretionary exemption at section 12 (solicitor-client privilege) apply to the information withheld under that exemption? Did the city properly exercise its discretion under section 12?

[103] The city has withheld information on the basis of section 12 in records 42, 64, 91, and 124.

[104] The city has also claimed the section 12 discretionary exemption for a small piece of information in record 1, but did not do so until it issued its second revised decision. The parties have not made representations on this new exemption claim. The appellant is to notify me if he continues to seek access to this information. If he does, I will seek representations on it.

[105] I will now consider the application of section 12 to records 42, 64, 91, and 124.

[106] 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.

[107] 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.

Branch 1: common law privilege

[108] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The city claims the application of solicitor-client communication privilege.

[109] 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.⁴⁰ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁴¹ 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

⁴⁰ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁴¹ Orders PO-2441, MO-2166 and MO-1925.

keeping both informed so that advice can be sought and given.⁴²

[110] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁴³

[111] 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.⁴⁴ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁴⁵

Waiver

[112] 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.⁴⁶

[113] 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 finding of an implied or objective intention to waive it.⁴⁷

[114] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.⁴⁸ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.⁴⁹

Representations

[115] The city stresses that the Supreme Court of Canada has found that solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance, and that it is in the public interest that the free flow of legal advice be encouraged.

[116] The city submits that the records identified under this issue represent a continuum of communications between the City Solicitor and his clients, including the communication of specific legal advice on a matter concerning the city's legal rights and obligations.

⁴² *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁴³ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁴⁴ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁴⁵ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

⁴⁶ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁴⁷ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

⁴⁸ 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.).

⁴⁹ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

[117] The appellant points out that the investigator was hired as an independent investigator, not a solicitor. He submits with respect to record 42⁵⁰ that the City Solicitor was only copied on the email, which was authored by the investigator.

[118] With respect to record 64, the appellant notes that the communication includes senior city staff, the City Solicitor and the investigator. The appellant also submits that the investigator is not the client of the City Solicitor, so communications between them cannot be privileged.

[119] With respect to record 91, the appellant notes that the city's index described the record as including an outside party, and that on that basis, any privilege in the communication was lost through waiver.

[120] With respect to record 124, the appellant again questions whether there exists a solicitor-client relationship between sender and recipient.

[121] In reply, the city submits that it does not seek to apply section 12 with respect to the investigator's communications but only with respect to the city's solicitors working for the city in that capacity.

Analysis and findings

[122] Record 42 consists of an email from the investigator to the City Clerk, which the Clerk then forwarded to the City Solicitor. This is evident from the portions of the email that have been disclosed. What is withheld is the body of each email.

[123] As noted above, solicitor-client communication 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. From my review of the record, it clearly falls within this continuum of communications. I find, therefore, that this record is exempt under section 12 of the *Act*. Since the privilege applies to the whole record, I do not need to address the city's section 7(1) and 14(1) claims for some of the information.

[124] Record 64 is an email exchange among the City Solicitor, the City Clerk, the investigator and other city staff. The withheld portion consists of the body of the City Solicitor's email.

[125] I have reviewed the redacted information and I find that it contains legal advice. I find, therefore, that it is exempt under section 12.

[126] In making my finding, I have considered the appellant's submission to the effect that the investigator is an external party and that including him in the communication

⁵⁰ I am using the record numbers assigned by the city in its April 9, 2018 index, though the appellant's representations refer to the page numbers the city used in its original decision.

amounts to waiver. However, solicitor-client communication privilege covers confidential communications between a solicitor and the client or their agents. The investigator was retained by the city to investigate the allegations contained in the Auditor General's report. I am satisfied that the investigator was acting as the city's agent in the circumstances of the advice set out in record 64.

[127] The information withheld under section 12 in record 91 consists of an email exchange between the Auditor General and the City Solicitor, which was then forwarded to a detective at the Durham Regional Police Service. I agree with the appellant that whatever privilege may have attached to the communication was waived when the email was shared with an outside party. The city has not asserted that the common interest defence to waiver applies, and it is not evident that it would here. This information, therefore, is not exempt from disclosure under section 12. As the city has not claimed any other exemptions for this information and no mandatory exemptions apply, I will order it disclosed.

[128] Record 124 is a memorandum from the Auditor General's Office to council, containing that office's views on the investigator's final report. Most of the memorandum has now been released, but some information on page 10 of it has been withheld under section 12.⁵¹

[129] I have reviewed the information withheld under section 12, which consists of three discrete portions of the memorandum. Two portions of the memorandum consist of the recounting of legal advice previously given to the city. I find, therefore, that this information is subject to solicitor-client communication privilege and is exempt under section 12 on that basis.

[130] The third portion does not relate to the obtaining or giving of legal advice. The Auditor General and council were not in a solicitor-client relationship. This third portion is personal information relating to an affected party who consented to the disclosure of his information. I will, therefore, order that it be disclosed.

Exercise of discretion

[131] I have found that the discretionary exemption in section 12 applies to some of the withheld information in records 42, 64 and 124. The public interest override at section 16 cannot apply to information that is exempt under section 12.⁵² However, because the exemption is discretionary, the city could have chosen to disclose this

⁵¹ It is worth repeating that the exemptions I am addressing in this order are those claimed by the city to withhold the information in response to the appellant's access request. The exemptions relied on by the city to withhold information from its proactive disclosure are not before me.

⁵² Section 12 is not listed in section 16 as an exemption that can be subject to the public interest override. The Supreme Court of Canada upheld the constitutionality of the lack of a public interest override for this type of information in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

information, despite the application of the section 12 exemption. An institution must exercise its discretion.

[132] Having reviewed the parties' submissions on the city's exercise of discretion, I am prepared to uphold the city's exercise of discretion in this instance. There is no evidence that the city failed to take into account relevant considerations, took into account irrelevant ones or acted in bad faith when it decided to withhold the information that I have found is exempt under section 12.

G: Does the discretionary law enforcement exemption at section 8(1) apply to the information withheld under that exemption?

[133] The city has withheld information in record 91 on the basis of section 8(1)(g). The information consists of the body of an email from the City Clerk to a detective at the Durham Regional Police Service.

[134] Section 8(1)(g) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

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

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[136] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁵³

[137] It is not enough, however, for an institution to take the position that the harms under section 8(1) are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.⁵⁴ The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of

⁵³ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

⁵⁴ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁵⁵

[138] The term “intelligence information” means:

Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.⁵⁶

Representations

[139] The city submits that the information at issue identifies law enforcement intelligence gathering. The appellant submits that it is general public knowledge that the Durham Regional Police (the police) initiated preliminary enquiries into alleged improprieties as identified in the Auditor General’s report. He submits that the City Clerk sent an email to council informing them of the police’s request for a copy of the Auditor General’s report, and of her decision to withhold the confidential attachments from them. He submits that the police’s request and the Clerk’s response should not be considered “covert”.

[140] In reply, the city submits that it relies on the exemptions in sections 8(1)(a) and (i) as well, but does not elaborate on how they apply.⁵⁷

[141] I notified the police of this appeal and invited representations from them. The police did not provide representations.

Analysis and findings

[142] Having reviewed the information withheld under section 8(1)(g), I find that it does not qualify as “intelligence information” within the meaning of the definition set out above. Rather, it is information gathered by the police in respect of a specific occurrence. I also agree with the appellant that the information-gathering in this instance was not “covert”. As for the section 8(1)(a) and (i) exemptions, the city has

⁵⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁵⁶ Orders M-202, MO-1261, MO-1583 and PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

⁵⁷ These sections state:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- a. interfere with a law enforcement matter;
- i. endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure

not satisfied me that they apply, either. As the city did not claim any other exemption for this information and no mandatory exemptions apply, I will order it disclosed.

Issue H: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 7(1) and 14(1) exemptions?

[143] Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 9.1, 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.

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

[145] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.⁵⁸

Compelling public interest

[146] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act’s* central purpose of shedding light on the operations of government.⁵⁹ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.⁶⁰

[147] A public interest does not exist where the interests being advanced are essentially private in nature.⁶¹ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.⁶²

[148] A public interest is not automatically established where the requester is a

⁵⁸ Order P-244.

⁵⁹ Orders P-984 and PO-2607.

⁶⁰ Orders P-984 and PO-2556.

⁶¹ Orders P-12, P-347 and P-1439.

⁶² Order MO-1564.

member of the media.⁶³

[149] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.⁶⁴ Any public interest in *non*-disclosure that may exist also must be considered.⁶⁵ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.⁶⁶

[150] A compelling public interest has been found not to exist where, for example, a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;⁶⁷ where there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;⁶⁸ or where the records do not respond to the applicable public interest raised by appellant.⁶⁹

Purpose of the exemption

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

[152] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.⁷⁰

Representations

[153] The city submits that any public interest in disclosure of the information at issue is outweighed by the public interest in non-disclosure, and in particular, the need for council to receive free and frank advice and recommendations, and the need to protect the privacy rights of individuals. The city also submits that there is no public interest in the disclosure of information that is presumed to be an invasion of personal privacy under section 14(3); only the appellant has an interest in obtaining the information.

[154] The appellant argues that there continues to be much public and online debate over the purchase of property for the city’s operations depot, the allegations contained in the Auditor General’s report, and the validity of the investigator’s report. He argues that understanding the Auditor General’s findings in the confidential attachments to

⁶³ Orders M-773 and M-1074.

⁶⁴ Order P-984.

⁶⁵ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

⁶⁶ Orders PO-2072-F, PO-2098-R and PO-3197.

⁶⁷ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁶⁸ Order P-613.

⁶⁹ Orders MO-1994 and PO-2607.

⁷⁰ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

Report AG-13-09 would “inform or enlighten the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.” He argues that the citizens of Oshawa deserve to know whether or not the city spends their tax dollars wisely and with sufficient oversight.

[155] The city, in reply, states that despite an independent report on the allegations contained in the Auditor General’s Report AG-13-09, the appellant seeks to challenge the inherent validity of the investigator’s report itself, including attacks on the methods and qualifications of the investigator, a highly respected lawyer with over forty years’ experience, years after he rendered his final investigation report.

Deferral of the section 16 issue

[156] The parties made their representations on the public interest issue before the city proactively disclosed a large amount of information, some of which includes information that was at issue in this appeal, and all of which relates in some way to the land purchase in question.

[157] Given this development, I am deferring my findings on the public interest issue to give the appellant the opportunity to review the information disclosed as a result of this order, together with the information that the city has proactively disclosed. If the appellant continues to seek access to the exempt information at issue in this appeal, he is to advise me and I will seek representations from the parties on whether section 16 applies to this specific information. I also defer any consideration of whether the city properly exercised its discretion under section 7(1) pending further representations on that issue.

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

[158] 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 17.⁷¹ Where this office is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution’s decision. Otherwise, further searches may be ordered.⁷²

[159] 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, that is, records that are reasonably related to the request.⁷³ 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

⁷¹ Orders P-85, P-221 and PO-1954-I.

⁷² Order MO-2185.

⁷³ Orders P-624, PO-2554 and PO-2559.

request.⁷⁴

[160] 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.⁷⁵

[161] As with the public interest issue, the parties made their representations before the city's proactive disclosure, and the records that the city proactively disclosed may be relevant to the search issue in this appeal.

[162] I am therefore deferring my findings on the reasonableness of the city's search for records. If the appellant continues to take issue with the city's search, I will obtain further representations from the parties.

ORDER:

1. I uphold the city's decision on the application of the exemptions at sections 7(1), 12 and 14(1), in part, and order the city to disclose to the appellant the information that I have not found to be exempt under those sections. With the city's copy of this order is a copy of the relevant records, with the information to be disclosed highlighted.
2. I do not uphold the city's application of the exemptions at sections 8(1) or 10(1), and order the city to disclose the information withheld under those exemptions to the appellant. With the city's copy of this order is a copy of the relevant records, with the information to be disclosed highlighted.
3. I order the city, when disclosing the information, to disclose it in such a way that only the information that I have found to be exempt or for which a final determination has not been made is withheld. Information in the record that the city has already disclosed to the requester, or that it released in its proactive disclosure, is not to be severed. This disclosure is to take place by **April 20, 2020** but not before **April 15, 2020**.
4. I order the city to provide me with a copy of the information that it discloses to the appellant, at the same time that it discloses the information to the appellant.
5. I defer my determination on the issues of the application of section 12 to record 1, the application of the public interest override to the information that is exempt under sections 7(1) and 14(1), and reasonable search.

⁷⁴ Orders M-909, PO-2469 and PO-2592.

⁷⁵ Order MO-2246.

6. I remain seized of this appeal in order to address the issues described in order provision 5.

Original Signed by: _____

Gillian Shaw
Senior Adjudicator

March 11, 2020 _____