Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3980

Appeal MA18-128-2

City of Burlington

December 8, 2020

Summary: The City of Burlington (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to correspondence between named individuals. The city issued a decision granting partial access to the responsive records with severances under section 7(1) (advice or recommendations) of the *Act*. Information the city deemed not responsive to the request was also withheld. The requester, now the appellant, appealed the city's decision to this office. During mediation, the appellant claimed that there is a compelling public interest in disclosure of the records that the fee is excessive, and that additional records responsive to the request exist. In this order, the adjudicator reduces the search fee from $662.50 to $319.50, and upholds the rest of 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 7(1), 16, 17, and 45.

Orders Considered: Orders PO-2592 and MO-3446.

OVERVIEW:

[1] This order addresses the issue of access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to correspondence between City of Burlington (the city) employees, a city councillor, and individuals of a named company. The city received an access request for the following records:

> All records, including but not limited to, all electronic communication, email communication, text messages, and BBMs sent by and/or received

> by [named Chief Planner[1]] and/or [named City Manager] relating to [named company].
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> All records, including but not limited to, all electronic communications, email communication, text messages, and BBMs sent by and/or received by [named Chief Planner] between November 1, 2017 and January 26, 2018, between [named Chief Planner] and [named individual #1] or anyone else at [named company].
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> All records, including but not limited to, all electronic communications, email communication, text messages, and BBMs sent by and/or received by [named Chief Planner] between November 1, 2017 and January 26, 2018, between [named Chief Planner] and [named individual #2].
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> All records, including but not limited to, all electronic communications, email communication, text messages, and BBMs sent by and/or received by [named City Manager] between November 1, 2017 and January 26, 2018, between [named City Manager] and [named individual #1] or anyone else at [named company].
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> All records, including but not limited to, all electronic communication, email communication, text messages, and BBMs sent by and received by [named City Manager] between November 1, 2017 and January 26, 2018, between [named City Manager] and [named individual #2].
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> All records, including but not limited to, all electronic communications, email communication, text messages, and BBMs sent by and/or received by [named Chief Planner] between November 1, 2017 and January 26, 2018, between [named Chief Planner] and [named city councillor].

[2] The city issued an interim decision with a fee estimate of $733.30 pursuant to section 45(3) of the *Act*. The requester appealed the fee estimate to this office, but subsequently paid $366.65, the 50% fee deposit, and Appeal MA18-128, which had been opened to address the fee estimate, was closed.

[3] After the fee deposit was received, the city issued a final access decision, in which it confirmed that the appellant had narrowed the scope of the last part of her request to the following:

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[1] The individual specifically named was, at the time of the request, the city's Chief Planner and Director, although she held a different position by the time of the inquiry, Deputy City Manager. For ease of reference, I will refer to her as the former Chief Planner in this order.

> All records, including but not limited to, all electronic communication, email communication, text messages, and BBMs sent by and/or received by [named Chief Planner and Director] between November 1, 2017 and January 26, 2018, between [named Chief Planner] and [named city councillor] as related to planning matters, proposed and approved developmental projects, the Official Plan, council motions and all matters relating to any business of City Council dealing with planning and/or development matters excluding special event functions and calendar invites between November 1, 2017 and January 26, 2018.

[4] In that decision, the city claimed a final fee of $745.50 and granted partial access to the records it identified as responsive. The city denied access to the severed portions of the records pursuant to section 7(1) (advice or recommendations) of the *Act*. Some information was also withheld on the basis that it was not responsive to the request.

[5] The requester, now the appellant, appealed the city's decision, resulting in the present appeal, MA18-128-2, being opened.

[6] During mediation, the appellant confirmed she sought access to the information withheld under section 7(1) of the *Act* and challenged the withholding of information as not responsive to the request. Additionally, the appellant appealed the city's final fee because she claims it is excessive, and she believes that additional email records responsive to the request exist. The appellant further claimed that there is a compelling public interest in the disclosure of the information withheld under section 7(1) of the *Act*. As such, reasonable search, fee, and the application of public interest override at section 16 of the *Act* were all added as issues in this appeal.

[7] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence the inquiry by inviting representations from the city, initially. Representations from the city were received and shared with the appellant, who provided representations in response.

[8] In this order, I find that the city properly withheld portions of records 38 and 39 under section 7(1), and that the section 16 public interest override does not apply to these portions. I find that the city properly withheld the information that it claimed is not responsive to the request, because it falls outside the scope of the appellant's request. I also find that the city conducted a reasonable search for responsive records. However, I do not uphold the search component of the city's fee and order that it be reduced from $662.50 to $319.50. Accordingly, I allow the city to charge the appellant a total fee of $402.50 for access to the records.

RECORDS:

[9] The information at issue in this appeal consists of email correspondence between the named individuals in the appellant's request. Specifically at issue in relation to the issue of responsiveness are records 2, 8, 9, 11, 15-18, 20, 23, 25, 28, 29, 31, 34, 35, 38- 42, 44-46, and 49-53 as indicated in the city's Index of Records. Only records 38 and 39 are at issue in relation to section 7(1).

ISSUES:

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

B. Does the discretionary exemption at section 7(1) (advice or recommendations) apply to the information at issue?

C. Did the city exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

D. Is there a compelling public interest in disclosure of the information at issue that clearly outweighs the purpose of the section 7(1) exemption?

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

F. Should the fee be upheld?

DISCUSSION:

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

[10] The city withheld portions of records 2, 8, 9, 11, 15-18, 20, 23, 25, 28, 29, 31, 34, 35, 38-42, 44-46, and 49-53 on the basis that they are not responsive to the appellant's request. The appellant disputes this.

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

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

. . .

> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2]

[13] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

Representations of the city

[14] The city submits that it clarified the request with the appellant twice and offered assistance in narrowing the scope. The city submits that the request was specifically worded regarding individual staff members and a member of council, with a date range, requesting "all records", including but not limited to, electronic communication, email communication, text messages, sent by and/or received by the:

- Former Chief Planner[4] and/or City Manager relating to a named company;
- Former Chief Planner from November 1, 2017 to January 26, 2018 between her and individual #1 or anyone else at the named company;
- Former Chief Planner from November 1, 2017 to January 26, 2018 between her and individual #2;
- City Manager from November 1, 2017 to January 26, 2018, between him and individual #1 or anyone else at the named company;
- City Manager from November 1, 2017 to January 26, 2018 between him and individual #2; and
- Former Chief Planner from November 1, 2017 to January 26, 2018, between her and a named city councillor.

[15] The city submits that the broad wording "requesting all records" had the potential to capture a significant number of records because of the way it was worded.

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[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.
[4] The Deputy City Manager at the time the representations were submitted.

The city submits that the appellant was contacted to narrow the scope for a more efficient and cost-effective search. The city explains that to assist the appellant in narrowing the scope from "all records", it suggested providing a specific address or development. The city notes that the appellant clarified it was for "all records, as requested, no specific address".

[16] The city submits that after identifying a large number of records, the appellant was contacted again to see if she could narrow the scope regarding "all records" that could potentially exist regarding communications between the former Chief Planner and the named city councillor to eliminate certain ones that she might not be interested in that may have been beyond the scope of the request. The city notes that the requester narrowed the scope on one portion of the request:

> All records, including but not limited to, all electronic communication, email communication, text messages, and BBMs sent by and/or received by [named Chief Planner] between November 1, 2017 and January 26, 2018, between [named Chief Planner] and [named city councillor] as related to planning matters, proposed and approved developmental projects, the Official Plan, council motions and all matters relating to any business of City Council dealing with planning and/or development matters excluding special event functions and calendar invites between November 1, 2017 and January 26, 2018.

[17] The city submits that it worked diligently with the requester on two occasions to attempt to narrow the scope of the request but that the requester was reluctant to narrow her request and made only a small change that narrowed it in a minor way.

Representations of the appellant

[18] The appellant disputes the city's suggestion that her request was overly broad or that the city communicated a need to narrow the scope to reduce fees and search times. The appellant also does not accept that the city's effort to clarify whether her request was about a specific address indicates that the scope of her original request was broad and should be narrowed to allow a more efficient and effective search for records. The appellant argues that her request was not meant to reference a specific address or development, which is why she did not change it when asked. The appellant notes that her original request was for six different sets of records and the city's first clarification only mentioned two of the six sets.

[19] The appellant submits that the city's second effort to narrow her request was only in reference to one of the six sets of requested records and that she took the city's advice on both being more specific about the subject matter as well as asking to exclude "special event functions [and] calendar invites". The appellant submits that the city's summary of the revised portion of her request is accurate.

[20] The appellant disputes the city's position that her request for "all records" is

"very broad" because her request was for correspondence between specific individuals during a short specific timeframe. The appellant argues that her specificity should have narrowed the request considerably.

Analysis and findings

[21] After reviewing the representations of the parties and the records at issue, I find that the scope of the appellant's request is for:

- All records, including but not limited to, electronic communication, email communication, text messages, and BBMs sent by and/or received by the former Chief Planner and/or the City Manager relating to the named company.

- All records between November 1, 2017 to January 26, 2018, including but not limited to, electronic communication, email communication, text messages, and BBMs sent by and/or received by:

    - The former Chief Planner between her and individual #1 or anyone else at the named company;

    - The former Chief Planner between her and individual #2;

    - The City Manager between the him and individual #1 or anyone else at the named company; and

    - The City Manager from November 1, 2017 to January 26, 2018 between him and individual #2.

- All records between November 1, 2017 and January 26, 2018, including but not limited to, electronic communication, email communication, text messages, and BBMs sent by and/or received by the former Chief Planner and the city councillor as related to planning matters, proposed and approved developmental projects, the Official Plan, council motions and all matters relating to any business of City Council dealing with planning and/or development matters excluding special event functions and calendar invites between November 1, 2017 and January 26, 2018.

[22] The city's Index of Records identifies records 2, 8, 9, 11, 15-18, 20, 23, 25, 28, 29, 31, 34, 35, 38-42, 44-46, and 49-53 as containing portions that the city claims are not responsive to the appellant's request.

[23] After a review of these portions of the records, I find that the city has correctly claimed them as not responsive to the appellant's request. From my review of the records, I conclude that the portions that the city withheld as not responsive contain correspondence between individuals that the appellant did not identify in her request, or they pertain to matters unrelated to the appellant's request.

[24] As noted above, the appellant was very specific about which individuals' correspondence she wanted and the individuals were specifically named[5] in her request. The appellant was also very specific about what matters the records should relate to. While some portions of the records withheld by the city as non-responsive contain correspondence involving one of the named individuals the appellant specified in her request, these communications do not contain the specific combination of named individuals that the appellant sought in her request. Additionally, while some of the withheld portions of the records contain the specific combination of named individuals, they are not regarding matters reasonably related to her request. For example, there are emails between the former Chief Planner and the City Manager, but they are unrelated to the named company specified in the appellant's request.

[25] Based on all this, I find that those portions of records 2, 8, 9, 11, 15-18, 20, 23, 25, 28, 29, 31, 34, 35, 38-42, 44-46, and 49-53, which the city withheld as non-responsive, fall outside the scope of the appellant's request. Accordingly, I uphold the city's decision to withhold the information it identified as non-responsive to the appellant's request.

B. Does the discretionary exemption at section 7(1) (advice or recommendations) apply to the information at issue?

[26] The city submits that the withheld portions of records 38 and 39, duplicated copies of the same draft motion, are exempt under section 7(1). Section 7(1) states:

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

[27] 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.[6]

[28] "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.

[29] "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

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[5] The individuals' official titles were used in this order to avoid confusion.
[6] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

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.[7]

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

[31] 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.[8]

[32] 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.[9]

[33] 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 the deliberative process leading to a final decision and are protected by section 7(1).[10]

Representations of the city

[34] The city submits that the section 7(1) exemption applies to portions of records 38 and 39, the draft proposed motion. The city submits that the IPC has confirmed that the purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions can freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The city submits that the exemption also allows the decision maker to take actions and make decisions without unfair pressure.

[35] The city submits that the context of records 38 and 39 is important. The city explains that city staff had tabled for consideration a "draft new Official Plan document" for consideration by committee and council. The city notes that this was not the final

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[7] See above at paras. 26 and 47.
[8] Order P-1054
[9] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[10] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

version of the Official Plan that council would ultimately debate and adopt in April 2018, but an earlier version. The city submits that the councillor was seeking the advice and recommendations of staff in considering how he should proceed at the committee meeting.

[36] The city submits that the withheld portions of records 38 and 39 contain advice from a city staff member to a city councillor and that the withheld portions consist of a single draft proposed motion that recommends a course of action. The city argues that the disclosure of the withheld portions of the records would reveal the advice and recommended course of action proposed by staff for the committee and the council's consideration. The city argues that it needs to be able to receive advice and recommendations by its employees to deliberate on matters without unfair pressure.

[37] The city submits that the withheld portions of records 38 and 39 do not contain any information that would fit within the mandatory exemptions set out in section 7(2) of the *Act.* The city submits that the section 7(1) exemption has been properly applied in order to allow the councillor to freely ask staff for guidance on planning policy issues to be debated at future meetings and for staff to provide its best advice and recommendation to the councillor.

Representations of the appellant

[38] The appellant submits that the discretionary exemption at section 7(1) does not apply to the records. The appellant's representations do not elaborate on this submission and she does not make any other submission with respect to the city's application of the section 7(1) exemption to portions of the draft motion.

[39] In her representations, the appellant also notes that she is not a lawyer and she expresses concern that this is a substantial systemic disadvantage for her appeal against the city. While I acknowledge this concern, I note that my determinations in the appeal before me are based not only on the evidence provided by the parties, but on the provisions of the *Act* and the records, which speak for themselves.

Analysis and findings

[40] After reviewing the representations of the parties and the records at issue, I find that section 7(1) applies to the portions of the draft motion at records 38 and 39 that the city has withheld.

[41] I note that the withheld portions of records 38 and 39 are the same draft proposed motion related to amendments to the city's Official Plan included in two different emails. From my review, I find that the withheld portions of records 38 and 39 contain advice from a city staff member to the named councillor and the staff member's recommended changes to the draft proposed motion. The city submits that the withheld information in these records is exactly the type of information that is exempt under section 7(1). I accept this submission, because I am satisfied that the withheld

information consists of alternative courses of action that could be accepted or rejected in relation to a decision that is to be made, which fits within the definition of "advice" under section 7(1) of the *Act*. Therefore, I find that disclosure of the withheld portions of the records 38 and 39 would reveal information that is exempt under section 7(1) of the *Act*.

[42] 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. Having reviewed the portions of the draft proposed motion at issue, I accept the city's argument, and I find, that the withheld portions do not contain factual information that would fit within the mandatory exception to section 7(1) found in section 7(2)(a). I also find that none of the other mandatory exceptions listed in section 7(2) and (3) apply to the withheld portions of records 38 and 39.

[43] Accordingly, subject to my review of the city's exercise of discretion below, I find that the portions of the draft motion in records 38 and 39 that the city withheld under section 7(1) are exempt from disclosure.

C. Did the city exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

[44] The city submits that it properly exercised its discretion under section 7(1) to withhold portions of records 38 and 39.

[45] The section 7(1) 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.

[46] 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
- it fails to take into account relevant considerations.

[47] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] This office may not, however,

[11] Order MO-1573.

substitute its own discretion for that of the institution.[12]

[48] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[13]

- 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.

Representations of the parties

[49] The city submits that it took into consideration all relevant factors, when it exercised its discretion under section 7(1) to withhold portions of the draft motion at records 38 and 39. The city submits that it considered whether to disclose this

[12] Section 43(2).
[13] Orders P-344 and MO-1573.

information and concluded that it was in the best interest of the public to not disclose it.

[50] The city submits that it took into consideration the following factors:

- The proposed motion was drafted for the councillor's review and comments.
- Staff provided its advice and recommendations to the councillor.
- The proposed motion was drafted for the future deliberation by committee and council on the issue.
- The information being requested was not personal information of the appellant.
- There is no sympathetic or compelling need for the appellant to receive the information.
- The information contained in the records in dispute was, at the time of the request, current information. The request for the records was made before the Official Plan was formally adopted by council. The records are not records from years past, but rather related to a major policy decision that was under consideration and deliberation by the city council.
- The disclosure of these records would not increase public confidence in the operation of the institution as it was a draft motion for the councillor's consideration.

[51] The city submits that there was no improper purpose in exempting the proposed draft motion, and that the exemption was not applied in bad faith. The city further submits that it did not take into consideration any irrelevant factors in exercising its discretion.

[52] The appellant submits that the city did not properly exercise its discretion under section 7(1), but she does not elaborate or make any other submission with respect to the city's exercise of discretion.

Analysis and findings

[53] After considering the representations of the parties and the circumstances of this appeal, I find that the city did not err in its exercise of discretion with respect to its application of section 7(1) of the *Act*. I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. I am also satisfied that the city took into account relevant factors, including that the information being requested is not personal information of the appellant and that there is no sympathetic or compelling need for her to receive the information. I am also satisfied that the city did not take into account irrelevant factors in the exercise of its discretion.

[54] In particular, I am satisfied that the city properly considered the purpose of the

exemption and the rights sought to be protected under section 7(1), and whether the disclosure of the withheld portions of records 38 and 39 would increase public confidence. Accordingly, I see nothing improper in the city's exercise of discretion, and I uphold it.

D. Is there a compelling public interest in disclosure of the information at issue that clearly outweighs the purpose of the section 7(1) exemption?

[55] The appellant argues that there is a compelling public interest in disclosure of the withheld portions of the draft motion in records 38 and 39 that clearly outweighs the purpose of the section 7(1) exemption, while the city argues that there is not.

[56] Section 16 states:

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

[57] 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.

[58] 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.[14]

[59] 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.[15] 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.[16]

[60] The word "compelling" has been defined in previous orders as "rousing strong

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[14] Order P-244.
[15] Orders P-984 and PO-2607.
[16] Orders P-984 and PO-2556.

interest or attention".[17] 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.

[61] 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.[18]

Representations of the city

[62] The city submits that there is not a compelling public interest in favour of disclosing the draft motion that clearly outweighs the purpose of section 7(1). The city submits that the purpose of the section 7(1) exemption is to allow the public service the ability to freely provide advice and make recommendations.

[63] The city submits that the debate, deliberation, and vote on a new Official Plan is a public process with legislated public involvement where the merits of the policies are considered, and any motion put forward by an individual member of council must be explained, debated, and voted on publicly. The city further submits that the council cannot adopt a new Official Plan in a manner that is not transparent or open to the public because there are legislated requirements in the *Planning Act* that must be met with respect to the adoption of an Official Plan.

[64] The city submits that disclosing the draft motion would not serve the purpose of informing the public about the city's activities, and there is no public benefit to disclosing how a particular member of council came to his/her decision on the various policies of an Official Plan, because it would not shed light on the operations of the city. The city submits that there is a compelling public interest in non-disclosure, because disclosing the draft motion could lead to inaccurate conclusions as to the advice and recommendation provided.

Representations of the appellant

[65] The appellant submits that there is a public interest in disclosure of the records, because disclosure of the information requested would "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." The appellant submits that the potential involvement, intentional or not, between the named councillor, senior city staff and the development industry is relevant in the consideration of compelling

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[17] Order P-984.

[18] 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.).

public interest. The appellant further submits that concerns about ensuring the appropriate open, transparent, and accountable activities of the city's government and the citizens' knowledge of its proceedings form the basis of her request.

[66] The appellant submits that the records requested, and the records received show or could show a questionable relationship between developers, a sitting city councillor and senior city staff. The appellant submits that this puts the issue squarely in the realm of the "public interest" and that is why she has disputed the redactions that the city has made. The appellant submits that these records relate to a period of intense civic and political activity in the city where certain city staff and members of council appeared to rush the adoption of the city's new Official Plan to the perceived benefit of several development interests. The appellant submits that the regional government subsequently recognized the deficiencies of the adopted plan and rejected the Official Plan as non- conforming to the broader regional plan.

Analysis and findings

[67] After reviewing the representations of the parties, I find that the public interest override in section 16 does not apply to the information that is exempt under section 7(1) in the circumstances of this appeal.

[68] As stated above, in order for section 16 to apply, there are two requirements that must be met: there must be a compelling public interest in disclosure of the records, and this interest must clearly outweigh the purpose of the section 7(1) exemption.

[69] The appellant alleges that the disclosure of the information withheld under section 7(1) could show a questionable relationship between developers, a sitting city councillor and senior city staff, which the public would have a compelling interest in learning about. While I acknowledge that there could potentially be a public interest in this, the question is whether the public interest in disclosure of the specific information that I have found exempt is a compelling one, that is, whether it is the subject of "rousing strong interest or attention".[19]

[70] In answering this question, I considered the amount of information that has already been released to the appellant through this request, and the actual content of records 38 and 39. As noted above, I found that the withheld portions of these records contain advice regarding changes to a proposed motion, provided by a city staff member to a city councillor. I accept, and have considered, the city's evidence as to the public nature of its process for adopting new policy. Given this process, the amount of information already disclosed, and the actual content of the exempt portions of records

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[19] Order P-984.

38 and 39, I find that it has not been established that the public interest in this information is a compelling one under section 16. Based on the content of the exempt portions of records 38 and 39, and representations of the parties, I am not persuaded that disclosure of the exempt information would address the public interest identified by the appellant and thereby increase public confidence in the operations of the city with its disclosure; nor am I persuaded that its disclosure would help members of the public to express opinions or to make political choices in a more meaningful manner.

[71] As the appellant has not established a compelling public interest in the disclosure of the portions of records 38 and 39 that I found exempt under section 7(1), I find that the first part of the test for section 16 to apply has not been met. Accordingly, I find that the public interest override in section 16 does not apply, and I uphold the city's decision to withhold the portions of records 38 and 39 that I have found to be exempt under section 7(1).

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

[72] The appellant claims that further email records responsive to her request exist. Where a requester claims 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.[20] If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[73] 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 it has made a reasonable effort to identify and locate responsive records.[21] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[22]

[74] 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 such records exist.[23]

Representations of the city

[75] The city submits that it conducted a reasonable search for the records requested as it is required to do by the legislation, and that it has met its obligation under section

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[20] Orders P-85, P-221 and PO-1954-I.
[21] Orders P-624 and PO-2559.
[22] Orders M-909, PO-2469 and PO-2592.
[23] Order MO-2246.

17 of the *Act*.

[76] The city submits that staff are trained on a regular basis to ensure they understand how to search for records in response to an access request, including the locations that need to be searched, as well as the retention of records. The city submits that it has a decentralized records system, which means each department is responsible for the management and maintenance of its recordkeeping processes.

[77] The city submits that it clarified the request with the requester twice and offered assistance in narrowing the scope. The city notes that the request is for all records, including but not limited to, electronic communication, email communication, text messages, and BBMs. The city submits that the most knowledgeable and experienced staff did a thorough search of all file formats requested and locations where the responsive records were likely to be stored. The city submits that:

- emails are stored in Outlook mailboxes; stored in mailbox within the database;
- electronic records are stored on the Network Site/Server;
- cell phones can be city issued or staff participate in the Bring Your Own Device program using their own personal phones for work; and
- attachments on cell phones would be on devices stored locally.

[78] The city submits that all locations where the responsive records were most likely to be stored were searched, which includes electronic folders, Outlook email, cell phone devices, notebooks, and paper files.

[79] In support of its position that it conducted a reasonable search for the records, the city provided the following affidavit evidence from city staff who were engaged in undertaking the search:

- an affidavit from the City Manager who conducted the search for his own records;
- an affidavit from the former Chief Planner (now the Deputy City Manager) who conducted the search for her own records;
- an affidavit from the Network Analyst (Exchange Administrator) who conducted a search of corporate email servers; and
- an affidavit from a specified individual who conducted the search for the named councillor's records.

[80] The relevant portions of the City Manager’s affidavit are as follows:

- He has not had any communication with named individual #2. He has had almost no communication with the named company and its principals. He has had only a couple of emails from named individual #1. He specified that he has not had any other communication in any format.

- He searched his Outlook email account and found emails from named individual #1. All documents in response to the request were provided to the Records Assistant. He spent 20 minutes on his search.

[81] The relevant portions of the former Chief Planner's (now Deputy City Manager) affidavit are as follows:

- The former Chief Planner commenced her role on December 21, 2017. She was formerly the Chief Planner and Director, Department of City Building.

- She searched her corporate cellphone for text messages sent to/received from the specified individuals in the appellant's request, and all text messages found were provided.

- The "majority" of her search time was focused on email. Her email is sorted into sub-folders that contain further sub-folders. For example, she has a folder entitled "Ward Issues", which is further subdivided into six folders, one for each of the city's six wards. The relevant folders were all searched for emails that matched the appellant's request.

- She also reviewed her "Deleted Items Folder". She noted that this folder only contains the last two weeks of emails and all the emails were restored to her inbox and searched.

- After she completed her searches of the subfolders, she completed a search of her entire inbox to determine if there were any additional records and these emails were all provided to the city's records staff.

- She met with the Manager of Development Planning and requested that the manager "search her inbox for emails". She states that she provided all of the emails that the manager possessed that were no longer in her own possession to the city's records staff.

- She searched her calendar for records using the parameters set out in the request. She notes that where the meeting title was not clear, she checked further into the specific meeting to determine if it was responsive to the request. She notes that this was time consuming and all responsive calendar records were provided.

- She keeps handwritten notebooks that are meeting summaries/notes from meetings she attends. She notes that she attends between 15- 25 meetings per

week. She notes that she is not the official record keeper for meetings that she attends, but her notes reflect the general topics discussed and she uses them to identify items for specific follow- up. She reviewed one notebook of approximately 250 pages and all responsive records were provided.

- She states that she undertook a thorough search of her emails and calendar, and she checked with other staff for emails that she may have missed or overlooked. She says that she also requested Information Technology Services undertake a search of deleted emails from the city's back up system.

- She states that she has exhausted every avenue available to her to provide emails related to the request. She notes that she spent 20 hours to search for the responsive records.

[82] The relevant portions of the Network Analyst's (Exchange Administrator) affidavit are as follows:

- He searched all email servers, all mailbox databases and mailboxes (including deleted items) using the multi-mailbox search function in Exchange. He searched specifically for all emails to or from the former Chief Planner and/or the City Manager that were to or from specified email addresses of the named individuals or another principal of the named company; and contained any of a specified list of keywords.

- His spent 1 hour and 15 minutes on his search. He provided his search results to the DCM.

[83] The relevant portions from the affidavit of the councillor's assistant are as follows:

- She searched the councillor's Outlook email accounts and electronic folders for all records responsive to the request. She specified that the councillor did not keep any hard copy paper files.

- She provided the Records & Information Coordinator with all responsive records between the former Chief Planner and the councillor between November 1, 2017 and January 26, 2018.

[84] The city submits that, in this situation, no records were destroyed in accordance with the Records Retention By-Law, and that the Land Use Planning records have a permanent retention policy. The city acknowledges that emails can be deleted, but confirms that all deleted emails were searched through an Information Technology Services Corporate email scan.

Representations of the appellant

[85] The appellant raised many concerns about the city's search that were related to

search fee, not whether the city conducted a reasonable search for records. Therefore, I will not set out her search concerns related to fees fully here, but rather under the fee issue discussion below.

[86] The appellant submits that the city did not execute a reasonable search for records. The appellant further submits that there seems to be no protocol for how records should be searched, and different people conducted vastly different types of searches. The appellant further submits that four different people conducted searches using four completely different methods for her request, and there was a huge discrepancy in the time spent on the searches and what was searched. The appellant submits that the city's standard procedure of allowing the subject of a request, unsupervised and unmonitored, to do his/her own search, is neither independent nor transparent.

[87] The appellant submits that she takes issue with the statement that was made in the affidavits that "as the individual named in the request, I am the employee most knowledgeable and experienced to respond to this part of the request". The appellant submits that it is inefficient and argues that the high search times and fees are a direct result of this process.

[88] The appellant argues that the search conducted by a member of the "IT department" used excessively narrow parameters and very specific email addresses, and that these very limited parameters would have excluded a significant number of responsive records. The appellant submits that to ensure the integrity of the process, the "IT department" should do the searches using key words with guidance as required from the trained Freedom of Information (FOI) Coordinator. The appellant submits that she believes further email records responsive to her request exist.

Analysis and findings

[89] The review of the issue of whether the institution has conducted a reasonable search for records as required by section 17 arises where a requester claims additional records exist beyond those identified by the institution.[24] From my review of the appellant's representations, it appears that many of her concerns with respect to the city's search pertain to her belief that the fee she was charged for access to the records was excessive due the city not conducting a "reasonable search." I will deal with the appellant's concern with the search fee below.

[90] As noted above, while 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 such records exist. The appellant has three main

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[24] Orders P-85, P-221 and PO-1954-I.

concerns with respect to the city's search for responsive records. First, the appellant argues that the individuals who conducted the searches were not the most "knowledgeable and experienced" ones to respond to her request. Second, the appellant argues that the Network Analyst used excessively narrow parameters and very specific email addresses, and that these very limited parameters would have excluded a significant number of responsive records. Lastly, the appellant argues that the four individuals conducted "vastly different" searches.

[91] The appellant argues that the individuals named in the request conducted their own searches unsupervised and unmonitored, which she views as "neither independent nor transparent". The appellant also disputes that the individuals named in the request are the most knowledgeable and experienced to respond to the request. She argues that this process is inefficient. Under the *Act*, an institution must conduct a reasonable search for records, and a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[25] In Order PO-2592, Adjudicator Laurel Cropley wrote:

> Although the Co-ordinator may not have known where all of the records were located, she quite appropriately directed the requests to the various branches that might have records in order for those staff members most knowledgeable with respect to the types of records and their specific locations to conduct the actual searches. There is no requirement that these staff be experts in the Freedom of Information process. Rather, they must be knowledgeable insofar as the subject matter of the requests is concerned.

[92] I accept Adjudicator Cropley's approach and adopt it in this appeal. I accept that the city appropriately identified the individuals named in the request as the most knowledgeable and experienced in relation to the parts of the request where they are named. The named individuals would have first-hand knowledge of the information being requested, including what information existed and where it may be stored. In the case of the named councillor, I am satisfied that the assistant to the named councillor was an appropriate individual to conduct the search of his records.

[93] The appellant argues that the Network Analyst used excessively narrow parameters and very specific email addresses, and that these very limited parameters would have excluded a significant number of responsive records. From my review of the evidence, the Network Analyst used the emails of named individuals 1 and 2, and a third individual from the named company that the appellant specified in her request. The Network Analyst also used keywords from a specified list in his search. While I

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[25] Orders M-909, PO-2469 and PO-2592.

agree with the appellant that the Network Analyst used more narrow parameters than the rest of the individuals who conducted searches, I do not find his search unreasonable as a result. The Network Analyst was not an individual named in the request and, in my view, his search could not reasonably have been expected to capture all records responsive to the appellant's request. Therefore, I am satisfied that, even if responsive records were excluded by the Network Analyst's search, they should have been captured by the former Chief Planner's search, which his search was meant to supplement. Furthermore, for reasons that I have outlined in my fee discussion, there appears to have been some duplication of search efforts as a result of the Network Analyst's search.

[94] The appellant also argues that the four individuals conducted "vastly different" searches using four completely different methods for her request, and that there was a huge discrepancy in the time spent on the searches and what was searched. I acknowledge that there were differences in the searches conducted, with the searches conducted by the former Chief Planner standing out from the rest. However, all four searches were focused on email records between the individuals named in the appellant's request, and the search for these email records were conducted electronically. Even if the searches were "vastly different", there is no requirement for the individuals to conduct the same searches; the city must only establish that a reasonable search was conducted in accordance with the *Act*.

[95] I have reviewed the appellant's representations and I am not persuaded that she has established a reasonable basis for concluding that further responsive records exist. It is clear the appellant has strong opinions about how the search should have been conducted. However, the *Act* does not stipulate how a search should be undertaken, or what information should be included in an affidavit. Nor does the *Act* demand perfection. I must only be satisfied that sufficient evidence has been provided to establish that a reasonable search has been conducted. The city has provided affidavits of its search efforts in response to the appellant's request. The city has detailed the individuals involved in the search, where they searched, how they searched, and how long their total search for responsive records took. Except for the named councillor, the individuals that the appellant specified in her request conducted the searches of their own records. Based on my review of the information provided and the representations of the parties, and in the absence of persuasive evidence to the contrary, I am satisfied that the city's search for responsive records was reasonable.

F. Should the fee be upheld?

[96] The appellant argues that the city's fee should not be upheld, because it is excessive due to what she believes is disproportionate search time.

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

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

[98] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 823. Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.
>
> 7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
>
> (2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

Representations of the city

[99] The city submits that the fee is broken down as follows:

Search: 22 hours 5 minutes	@ $7.50/15 minutes	$662.50
Preparation: 1 hour 52 minutes	@ $7.50/15 minutes	$ 56.00
Photocopying: 135 pages	@ $.20/page	$ 27.00
	Total Fee	$745.50

[100] The city submits that the fee should be upheld. The city submits that the fee amount was the direct result of a substantial search for a very large request. The city submits that it attempted to narrow the search with the appellant twice by email to reduce the number of documents potentially captured by the request. The city submits that several staff were involved to manually search their own email and electronic records, which produced several records that required substantial redactions. The city submits that email streams are never just about the subject requested and frequently contain many different topics by different people tagging onto that email for different subjects, which require extensive review and redactions to remove non-responsive parts.

[101] The city submits that the search time was the actual time spent locating responsive records. The city submits that the City Manager spent 20 minutes on his search; the former Chief Planner spent 20 hours on her search; the Network Analyst spent 1 hour and 15 minutes on his search; and the Assistant to the Councillor spent 15 minutes searching for his records.

[102] A large part of the search time and the appellant's concern with the search fee focuses on the search conducted by the city's former Chief Planner, formerly the Chief Planner for the city. I set out relevant portions of her affidavit under the search issue above and will refer to them in my analysis below, but I will not reiterate them here.

[103] In preparation for disclosure, the city submits that each record is reviewed thoroughly to ensure required exemptions are applied in accordance with the *Act*. The city explains that Adobe Acrobat was used to redact the information exempt under section 7(1) and the content not responsive to the request. The city submits that the preparation fee is charged at 2 minutes per page, consistent with the IPC guidelines. The city submits that 56 pages were redacted at 2 minutes per page, which totaled 112

minutes.

[104] The city submits that the fee is based on actual work done at the time the estimate was provided and the deposit was based on the actual search time and the copying of the 354 pages that were retrieved before additional clarification was provided by the requester. The city submits that it reduced the photocopying charge to 135 copies after reviewing the records thoroughly and taking into consideration a slight modification because of an additional clarification from the requester.

[105] The city submits that outside of search, preparation and photocopying, no other costs were included in the fee.

Representations of the appellant

[106] The appellant submits that the fee is excessive and should not be upheld. The appellant specifies that the search time was excessive, which made the fee excessive. The appellant submits that the fact that the City Manager and the former Chief Planner did their own searches also increased the fees substantially, where "it would be much more efficient and cost-effective (and transparent) for them to direct an IT clerk or other designated FOI clerk to do the searches". The appellant questions how cost-effective it is to have the former Chief Planner spend 20 hours conducting a search for her own records, because she is a "highly compensated" public servant. The appellant notes that the councillor used his assistant to conduct his search, which she alleges is another discrepancy in process, but she acknowledges that it is at least more cost-effective than the alternative.

[107] The appellant argues that a basic principle of the *Act* is that public institutions should conduct their searches in the most cost-efficient and effective way to locate relevant records with a view to keeping costs and time down. The appellant further submits that the fee could have been reduced by offering her the opportunity to view the documents and only making copies of those she flagged. The appellant notes that she received many duplicate documents and many things that were outside the scope of what she requested.

[108] The appellant submits that her request was not overly broad considering that the records are computerized and computer searches can be done quickly and easily, especially by someone in the city's IT department. The appellant argues that this request should not have been considered onerous, overly time consuming, or overly expensive for a citizen.

[109] The appellant submits that after reading the four affidavits on how the searches were conducted, it appears that there is no standard search protocol and no attempt to minimize cost to the requester. The appellant submits that it is inefficient and argues that the high search times and fees are a direct result of this process.

Analysis and findings

[110] Based on my review of the evidence before me, especially the city's search affidavits, I partly uphold the city's fee decision. I will order that the city reduce the search fee charged to the appellant under section 45(1)(a) from $662.50 to $319.50 for the reasons below.

[111] The appellant's appeal of the fee focuses on two main points: she was charged for duplicate records and the search fee was excessive.

[112] In determining whether to uphold a fee, my responsibility under section 45 of the *Act* is to ensure the amount charged is reasonable. The burden of establishing the reasonableness of the fee rests with the city. To discharge this burden, the city must provide me with detailed information as to how the fee was calculated in accordance with the provisions of the *Act* and produce sufficient evidence to support its claim. The fee in this appeal is broken down into three main parts: section 45(1)(a) search, 45(1)(b) preparation, and 45(1)(c) photocopying.

Section 45(1)(a) - search

[113] With respect to the search portion of the fee under section 45(1)(a), the city charged the appellant $662.50 for 22 hours and 5 minutes of search time at the rate of $7.50 per quarter of an hour as prescribed by Regulation 823. The city argues that the fee amount was the direct result of a substantial search for a very large request. The appellant's main objection to the city's fee relates to her belief that the time spent to conduct the search was excessive due to its inefficiency.

[114] I note that combining the search times outlined in each of the city's four search affidavits results in a total search time of 21 hours and 50 minutes (20 minutes, 20 hours, 1 hour and 15 minutes, and 15 minutes). It is unclear to me how the city arrived at the 22 hours and 5 minutes that was charged to the appellant. Since the burden of establishing the reasonableness of the fee rests with city and it did not explain this discrepancy in its representations, I begin by reducing the search fee by this 15-minute discrepancy.

[115] The appellant argues that the fact that the City Manager and the (now) former Chief Planner did their own searches increased the fees substantially. The appellant further argues it was not cost-effective to have the former Chief Planner conduct a 20-hour search for her own records, because the former Chief Planner is a "highly compensated" individual. It appears that the appellant is implying that the cost of the former Chief Planner's search was inflated due to the compensation of the individual conducting the search. As noted above, the rate charged for a city staff member to conduct a manual search for responsive records is prescribed in Regulation 823. It is a flat rate of $7.50 per quarter of an hour spent manually searching for records and is not dependent on which individual is conducting the search. Having said that, I do find that the former Chief Planner's search time was excessive for the reasons that follow.

[116] The former Chief Planner was named in four of the six parts of the request (as the former Chief Planner), while the City Manager was named in three of the six parts of the request. The wording of all six parts of the request were very similar and some were identical. On the face of it, the former Chief Planner's total search time appears disproportionate to the other searches the city conducted in response to the appellant's request, even if the focus of the request is on her records.

[117] The Network Analyst's affidavit outlines the specific parameters and keywords he used to search "all email servers, all mailbox databases and mailboxes (including deleted items) using the multi-mailbox search function in Exchange" for records responsive to the request. The Network Analyst's search took 1 hour and 15 minutes. From my review of the request and the Network Analyst's affidavit, it appears that the specific parameters that he used were related to five of the six parts of the request. Furthermore, while the former Chief Planner's affidavit states that she only requested "the City's IT staff to undertake a search of the backup of our emails for any deleted emails [emphasis added]", the Network Analyst's affidavit states otherwise. On my review of the evidence provided, the Network Analyst did a more thorough search than suggested in the former Chief Planner's affidavit. Based on this, there appears to be some duplication of the city's search effort in locating the former Chief Planner's responsive email records.

[118] In her affidavit, the former Chief Planner notes that she met with the city's Manager of Development Planning and requested that the manager search for emails that the former Chief Planner no longer possessed. There are a few issues with this. First, it is unclear from the city's evidence why the former Chief Planner had the Manager of Development Planning search for responsive email records, and second, it is also unclear from the city's evidence if the time she spent meeting with the Manager of Development Planning was included as part of her total search time. This is important, because the *Act* does not allow the city to charge for coordinating a search for records.[26] Third, it is unclear if the Manager of Development Planning's search time was included in the Deputy City's Manager total search time. Lastly, it is unclear to me, and not explained in the city's evidence, why the Manager of Development Planning would have emails that the former Chief Planner would no longer have. Even if this were the case, these email records should have been captured by the former Chief Planner's search of her "Deleted Items Folder" or the Network Analyst's search of deleted emails in the city's backup system. This appears to be another duplication of search efforts for the former Chief Planner's responsive email records that is unexplained on the evidence before me.

[119] In the Notice of Inquiry sent to both parties, under the heading "Search – Section 45(1)(a)", the city was asked "[w]hat is the estimated or actual amount of time

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[26] Order PO-1943

involved in each action?". The Notice of Inquiry also indicated that "in all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[27]" In its representations and affidavit, the city did not provide a detailed breakdown of how long each part of the former Chief Planner's search took. Her affidavit only specified that her total search time was 20 hours. The city bears the burden of establishing the reasonableness of the fee, and I find that it has not discharged this burden. I find that the city provided insufficient details for me to discern how the fee for calculating the former Chief Planner's search for responsive records was calculated. Furthermore, on the face of it, the former Chief Planner's total search time appears disproportionate when compared to the other searches the city conducted. Therefore, I cannot accept that the fee charged by the city for the former Chief Planner's search is reasonable.

[120] Given my concerns with the fee charged by the city for searches conducted by the former Chief Planner relative to the other searches, including the ambiguity in what search actions were included in the former Chief Planner's total search time, and the apparent duplication of her search efforts by the Network Analyst and possibly the Manager of Development Planning, I find it reasonable to reduce the former Chief Planner's total search time by 50%. This results in a search time of 10 hours for the former Chief Planner and a total search time for this request of 11 hours and 50 minutes.

[121] As noted above, the appellant also argued that she was charged for duplicate records, mainly email records. Previous orders of this office have reduced the search fee to account for duplicated emails.[28] In Order MO-3446, the adjudicator addressed the issue of duplicated emails with respect to search fees, and stated:

> After all, the duplicative nature of email records exchanged between numerous individuals is, in my view, well-known. Further, the fee provisions of the *Act* allow institutions to charge a fee to conduct a record-by-record review to identify responsive information and duplication would be obvious at that point – a fact that the city could have drawn to the appellant's attention. There is precedent for reducing the allowable search fee to account for duplicated emails [6] and I will do so in this appeal by deducting 10% of the newly calculated search time. This results in 675 minutes of search time charged at $7.50 for each 15-minute period or less, which is $337.50.

[122] I agree with this approach and adopt it in this appeal. From my review of the records, I agree there are duplicated emails in the records released to the appellant.

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[27] Orders P-81 and MO-1614.
[28] Orders MO-3446, PO-2514 and PO-3480.

Based on the relative number of them, I find that it is reasonable to reduce the total search time by 10% to account for the duplication of these emails. This reduces the total search time from 11 hours and 50 minutes to 10 hours and 39 minutes. Applying the rate stipulated in section 6.3 of Regulation 823, I find that the total fee the city can charge under section 45(1)(a) for search time is $319.50.

Section 45(1)(b) – preparation for disclosure

[123] With respect to the preparation portion of the fee under section 45(1)(b), the city charged the appellant for 1 hour and 52 minutes spent by city staff severing the records for disclosure. As prescribed in section 6.4 of Regulation 823, the city may charge $7.50 per quarter of an hour for severing the records in accordance with the *Act* to prepare them for disclosure. Generally, this office has accepted that it takes two minutes per page to sever exempt information on pages requiring multiple severances.[29] Given that there were 56 pages of the records that required severing, I accept that the city's charge of $56 for the preparation portion of the fee is reasonable.

Section 45(1)(c) – computer and other costs incurred in locating, retrieving, processing and copying a record

[124] With respect to the photocopying portion of the fee, in its fee estimate the city originally estimated the number of photocopies to be 354. In the final fee, the city reduced the number of photocopies down to 135 after receiving additional clarification from the appellant. The city charged the appellant the photocopying rate allowed under section 6.1 of the Regulation 823, which is $.20 per page.

[125] I note that the appellant submits that she received duplicate copies of documents, which increased the cost of her request. The appellant did not specify how many duplicate copies she received in her representations. I agree that in an ideal situation the appellant would have only received single copies of the requested records. However, since the records consist predominantly of email correspondence, some duplication can be expected. Furthermore, I have already reduced the search fee above to account for the duplicated emails. Accordingly, I find that the city's photocopying charge of $27 for 135 photocopies is reasonable.

[126] After reviewing the representations of the parties, I find that the city has not provided me with sufficient evidence to support its position that the fee was calculated in accordance with the provisions of the *Act*. Therefore, I partially uphold the city's fee. I allow it to charge $56.00 for preparation time and $27.00 for photocopying, but reduce the allowable search fee from $662.50 to $319.50 resulting in a reduction of the total fee from $745.50 to $402.50.

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[29] Orders MO-1169, PO-1721, PO-1834 and PO-1990.

ORDER:

1. I uphold the city's fee for preparation and photocopying, but order that the search fee be reduced from $662.50 to $319.50. This results in a final fee of $402.50, leaving the appellant with a balance of $35.85 to pay, having already paid the $366.65 fee deposit.

2. I uphold the rest of the city's decision.

Original signed by: December 8, 2020

Anna Truong
Adjudicator