

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-4102-I

Appeal MA17-648

The Corporation of the City of Oshawa

September 21, 2021

**Summary:** The Corporation of the City of Oshawa received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to information and communications about a specific council direction to provide it with appraisals and assessed value of land identified in a specified report, including a copy of the final report. The city issued multiple decisions in which it disclosed some information, and subsequently disclosed yet more responsive information by way of proactive disclosure. Ultimately, the city's access decisions provided the appellant with partial access to responsive records, withholding information under the mandatory exemption at section 14(1) and the labour or employment relations exclusion at section 52(3) of the *Act*. In this interim order, the adjudicator does not uphold the city's exclusion claim under section 52(3) of the *Act*. She partially upholds the city's decision regarding the personal information withheld under section 14(1) and finds that the public interest override in section 16 does not apply. Finally, the adjudicator orders the city to conduct a further search for responsive records.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, sections 2(1) (definition of "personal information"), 14(1), 16 and 52(3).

### OVERVIEW:

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

All communications 1) between staff, 2) between staff and Council members, 3) between staff, Council members and the Mayor's office, from

March 20, 2013 and the release of any information, email, report or other communication in response to the March 20, 2013 direction of Council to provide Council with "a copy of all appraisals and assessed value for land identified in [a specified confidential report]" including the final report.

[2] As background, in 2013, the city purchased three different pieces of property to amass the land required to build the city's Consolidated Operations Depot (COD). At issue in this appeal are records related to this purchase and the appraisals and valuations of one of the properties.

[3] In its initial access decision, the city granted partial access to the responsive records. Access to some of the responsive records was denied pursuant to various exemptions, including the personal privacy exemption at section 14(1), and the exclusion for labour and employment records at 52(3) of the *Act*.

[4] The requester (now the appellant) appealed the city's decision to the Information and Privacy Commissioner (IPC).

[5] During mediation, the appellant confirmed his interest in pursuing full access to the requested records. The appellant also provided a written summary of his concerns and he consented to the mediator sharing the summary with the city.

[6] After further discussions between the mediator and the parties, the city issued a revised index to correct errors the appellant had identified. The city also added a description line that included further details regarding the records. The appellant confirmed his continued interest in pursuing full access to the withheld records.

[7] The city then issued a revised decision, which advised that it had posted additional responsive records to its website. Certain responsive records (or portions thereof) continued to be withheld pursuant to sections 12 and 14(1) of the *Act*.

[8] The city issued a further revised decision dated December 19, 2018, in which further partial access was granted to the responsive records. Some records were withheld, in part, pursuant to section 14(1) (personal privacy) and the labour relations or employment exclusion in section 52(3) of the *Act*. None of the other exemptions initially relied on by the city to withheld information are any longer at issue.

[9] The appellant advised the mediator that reasonable search continues to be an issue, as he believes that additional records exist, for example, attachments to emails, responses to emails, and a page that appears to be missing from an attachment to a report. With respect to the severed records, the appellant raised the possible application of the public interest override in section 16 of the *Act*. Finally, the appellant confirmed that he is not pursuing access to any of the withheld information contained within records 5, 12 and 14.

[10] As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the

*Act*. I sought and received representations from the city and the appellant. Representations were shared in accordance with this office's *Code of Procedure*.

[11] During the inquiry of this appeal, the city confirmed that it had published Record 2 (Business Case Consolidated Operations Depot) in full on its website in March 2019, therefore, Record 2 is no longer at issue in this appeal.

[12] While I will not be specifically referring to the confidential portions of the city's representations that met this office's confidentiality criteria set out in *Practice Direction 7*, I have considered those representations in reaching my decision.

[13] In this order, I partially uphold the city's access decision and order it to conduct a further search for responsive records. Specifically, I do not uphold the city's decision that section 52(3) applies to exclude Records 6, 10, and 25 from the scope of the *Act*. I find that the withheld personal information in Records 8 and 10 and some of the withheld information in Records 6 and 25 is exempt under section 14(1) and the public interest in section 16 does not apply to it. I find that some of the withheld information in Records 6 and 25 is not personal information, as defined in section 2(1) of the *Act* and therefore, this information is not exempt from disclosure under section 14(1) of the *Act*. I order the city to disclose all the information that I have found not to be exempt. Finally, I order the city to conduct a further search for responsive records.

## **RECORDS:**

[14] The remaining records at issue are comprised of memoranda and emails, as outlined in the chart below:

<b>Record Number</b>	<b>Description</b>	<b>Exclusion/Exemption claimed</b>
#6	Memorandum from Auditor General's Office dated March 21, 2013 re: Real Estate Acquisition Process for a specific address	Sections 52(3)3 and 14(1)
#8	Emails between the auditor general and city staff dated March 22, 2013 re: appraisal report for specific addresses, with attachments <sup>1</sup>	Section 14(1)
#10	Emails between the auditor general and city staff dated March 21-22, 2013, with	Sections 52(3)3 and 14(1)

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<sup>1</sup> This email references two attachments. However, as provided to this office, this record does not include any attachments. As per my finding below, I will order the city to search for these missing attachments. I note that one of the attachments, Report CM-12-32 is publicly available on the city's website.

	attachments <sup>2</sup>	
#25	Memorandum from city staff to auditor general dated April 22, 2013 re: material from auditor general on acquisition of specific addresses, with five attachments	Sections 52(3)3 and 14(1)

## ISSUES:

- A. Does the labour and employment exclusion at section 52(3) of the *Act* exclude records 6, 10 and 25 from the *Act*?
- B. Do records 6, 8, 10 and 25 contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?
- C. Does the mandatory personal privacy exemption at section 14(1) of the *Act* apply to the information in records 6, 8, 10 and 25?
- D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of section 14(1)?
- E. Did the city conduct a reasonable search for the requested records?

## DISCUSSION:

### **Issue A: Does the exclusion for labour or employment records at section 52(3) of the *Act* exclude records 6, 10 and 25 from the *Act*?**

[15] The city has claimed section 52(3) of the *Act* to withhold certain portions of records 6, 10, and 25. I will begin my analysis looking at this issue, given its potential to exclude these records from the application of the *Act* and therefore from scope of this appeal.

[16] Section 52(3)3 states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

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<sup>2</sup> This email references three attachments. However, as provided to this office, this record only includes two attachments, one of which appears to be incomplete. Should the appellant continue to seek access to these complete attachments, he should advise me accordingly.

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

[17] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) apply, the records are excluded from the scope of the *Act*.

[18] For the collection, preparation, maintenance or use of a record to be “in relation to” the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is “some connection” between them.<sup>3</sup> The “some connection” standard must involve a connection that is relevant to the statutory scheme and purpose, understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution’s expenditures on legal and other services in collective bargaining negotiations is not enough to meet the “some connection” standard.<sup>4</sup>

[19] The term “employment of a person” refers to the relationship between an employer and an employee. The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.<sup>5</sup>

[20] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.<sup>6</sup>

[21] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.<sup>7</sup>

***Section 52(3)3: Matters in which the institution has an interest***

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

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

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<sup>3</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

<sup>4</sup> Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner*, 2020 ONSC 4413.

<sup>5</sup> Order PO-2157.

<sup>6</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

<sup>7</sup> *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

### ***The city representations***

[23] The city submits that section 52(3)<sup>8</sup> applies to the withheld portions of records 6, 10 and 25. It submits that in the interests of transparency, it has made an effort to release as much information to the public as possible by only excluding discrete portions of the records, consistent with Order PO-1696. It submits that the withheld information in records 6, 10 and 25 was collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[24] The city submits that the information withheld in the records at issue was collected, prepared, maintained and used by it, through its auditor general, who was employed as a contractor to the city at the time the records were originally created. It submits that portions of the records at issue were prepared to form part of the auditor general's reports. Because of an investigation conducted by the auditor general, the withheld information includes employment-related matters of city staff, in the form of performance critiques concerning the purchase of the COD, which could have negative impacts on the "future employment prospects" of the individuals in question. In support of this, the city relies on Order MO-1913, where the adjudicator concluded that the preparation of records for the purpose of personnel evaluation could result in discipline proceedings or have a direct impact on the individual's future employment prospects, including career advancement.

[25] The city also submits that the information withheld in the records at issue was collected, prepared, maintained and used in relation to meetings, consultations, discussions or communications. It submits that, according to Order P-1223, the phrase "in relation to" in section 52(3) has been found to mean "for the purpose of, as a result of, or substantially connected to." The city submits that during the course of its contract with the auditor general, he was required to gather information and prepare reports based on meetings, consultations, discussions and communications with city staff. The city says that some of the information at issue is contained within email correspondence and memoranda, which are in essence "communications". With specific reference to the records at issue, the city submits that most of the records at issue were collected, prepared, maintained or used in relation to meetings, consultations, discussions and communications. It also submits that as only discrete portions of the records at issue

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<sup>8</sup> The city also appears to submit that section 52(3)1 applies to the withheld information, but the city made no submissions on its application and I will not consider it further.

are related to employment matters of identifiable individuals, the city has chosen to release almost all of the information contained in the responsive records to both the appellant, and the public at large.

[26] The city submitted, in confidential representations, that the information was collected, prepared, maintained and used for labour relations or employment-related matters in which it has an interest. I have considered these confidential representations.

[27] The city also submits that none of the exceptions listed in section 52(4) of the *Act* apply to the records at issue.

### ***The appellant's representations***

[28] The appellant submits that he is severely limited in his ability to respond to the city's representations as large portions have been withheld from him.

[29] Noting that the phrase "labour relations or employment-related matters" has been found not to apply in the context of an organization or operational review<sup>9</sup>, the appellant submits that the audit of the real estate department and process should be considered "an organizational or operational review".

[30] In addition, it is the appellant's position that the withheld portions of records 6, 10 and 25 relate to the actions of an employee, which are separate and distinct from employment-related matters.<sup>10</sup>

[31] The appellant also submits that there is nothing to indicate that the auditor general's communications were created or prepared as a result of the "terms and conditions of employment or human resources questions are (were) at issue" at the time.

[32] With reference to Order PO-2613, the appellant submits that it is unrealistic to suspect that the auditor general anticipated or expected the city to make employment-related decisions about staff, and therefore, the withheld portions of records 6, 10 and 25 were not created "in relation to" or "for the purpose of, as a result of or substantially connected to" the terms of employment of a particular city employee. He also submits that the role of the auditor general has nothing to do with human resources at the city.

[33] The appellant further submits that if the city is arguing that records 6, 10 and 25 are being used for a proceeding resulting in the termination of a particular city employee, this was not the purpose for which the records were created. It is the appellant's opinion that the focus of the auditor general's investigation in 2013 was not

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<sup>9</sup> MO-2925 at paragraph 31.

<sup>10</sup> MO-2925 at paragraph 32.

solely on the performance of a specific city employee but on the performance of all staff within the economic development services branch and other branches with regards to their roles in the acquisition of the property for the city's COD. He further submits that the auditor general conducted an investigation or audit into the real estate function in 2009 and his report or memorandum was in follow-up to that audit of the real estate function.

[34] The appellant did not make any representations with respect to the application of the exceptions in section 52(4) of the *Act*.

### ***Analysis and findings***

[35] For the reasons outlined below, I find that the section 52(3)3 exclusion does not apply to records 6, 10 and 25.

[36] This office has consistently taken the position that the exclusions at section 52(3) of the *Act* (and the equivalent section in the *Act's* provincial counterpart<sup>11</sup>) are record-specific and fact-specific. This means that in order to qualify for an exclusion, a record is examined as a whole. Accordingly, I will consider the application of the exclusion to records 6, 10 and 25 as a whole and not just the information withheld by the city.

[37] I am satisfied that a person employed by the city prepared the memoranda and emails, and that the city used the memoranda and emails for meetings, consultations, discussions and communications. Therefore, parts 1 and 2 of the section 52(3)3 test are met.

[38] However, I am not satisfied that each record, as a whole, relates to labour relations or employment matters in which the city has an interest. On my review of the contents of the memoranda and emails, and in consideration of the purpose of these records - to review the city's real estate acquisition process for specific addresses, including appraisal reports - I am not satisfied that the records qualify for the section 52(3)3 exclusion.

[39] As set out above, the type of records excluded from the *Act* by section 52(3)3 are documents related to matters in which the institution is acting as an employer, and where the terms and conditions of employment or human resources questions are at issue. In that regard, although the memoranda and emails contain performance critiques of certain city employees, the memoranda and emails relate to a review of the city's purchase of the COD, and are not in relation to employment-related matters in which the city has an interest. In my view, the employees' information withheld in records 6, 10 and 25 is only incidental to the purpose of the memoranda and emails, and does not change the nature of the record because the employment connection is

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<sup>11</sup> *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, section 65(6).



too minimal to meet the threshold of "some connection" to employment or labour relations.

[40] As the application of the 52(3)3 exclusion is record specific and fact specific, I conclude that records 6, 10 and 25 do not qualify for exclusion and they are subject to the *Act*.

[41] I will now go on to consider the application of the section 14(1) exemption claimed by the city to withhold portions of records 6, 10 and 25, in addition to Record 8.

**Issue B: Do records 6, 8, 10 and 25 contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?**

[42] In order to determine whether the personal privacy exemption in section 14(1) of the *Act* may apply, 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) as follows:

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

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

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

(c) any identifying number, symbol or other particular assigned to the individual,

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

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

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of 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;

[43] 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.<sup>12</sup>

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

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[45] 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.<sup>13</sup>

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

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

### ***The city's representations***

[48] The city submits that the withheld information in records 6, 8, 10 and 25 is personal information as defined in paragraphs (b), (g) and (h) of the definition of that term in section 2(1) of the *Act*.

[49] It submits that portions of the withheld information include the auditor general's opinion about the performance, employment history and personality traits of several

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<sup>12</sup> Order 11.

<sup>13</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>14</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>15</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

members of city staff, and as such, records 6, 8, 10 and 25 include the personal information of identifiable individuals consistent with "information relating to the...employment history of the individual", pursuant to paragraph (b) of the definition of that term in section 2(1) of the *Act*.

[50] Concerning the auditor general's opinions contained in records 6, 8, 10 and 25, the city agrees with the adjudicator's finding in Order MO-2386, where she concluded that the opinions and comments in an auditor's report qualified as personal information about the employees in question, as defined in paragraph (g) of the definition of that term in section 2(1) of the *Act*. Accordingly, the city submits that any opinions about identifiable individuals contained in the records created by the auditor general are the personal information of the identifiable individuals in question.

[51] The city also submits that the records contain the names of identifiable individuals, alongside other related information where the release of the name would reveal additional personal information about the individual, under paragraph (h) of the definition of that term in section 2(1) of the *Act*. This includes details of the views or opinions of the auditor general about other individuals and the personal opinions of former city staff.

[52] The city submits that past orders of the IPC have found that in some cases where information may relate to an individual in a "professional, official or business capacity", the same information may still reveal something of a personal nature about an individual.<sup>16</sup>

[53] The city submits that the auditor general's opinions in records 6, 8, 10 and 25, and the information he relied upon to form those opinions, would reveal something of a personal nature about identifiable individuals.

[54] The city also referred to Order MO-2374, where the adjudicator found the following to be true of employee information in an audit context:

Having regard to the representations of the parties and the records themselves, I am of the view that the only the portions of the records, if disclosed would reveal something of a personal nature about an individual employed by the City, is the information which refers to an individual's e-mail habits, vacation or lawyer or reveals the audit team's comments about some employees. [Emphasis by the city]

[55] Overall, the city submits that concerns and opinions about identifiable individuals contained within the records created by the auditor general are the personal information of the identifiable individuals in question.

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<sup>16</sup> Orders P-1409, P0-2225, R-980015.

### ***The appellant's representations***

[56] Without the benefit of knowing the actual content of the withheld portions of the records, the appellant submits that the withheld portions of the records do not constitute personal information under section 2(1) of the *Act*.

[57] The appellant disagrees with the city's representations characterizing the withheld information in the records at issue as "personal information" under section 2(1) of the *Act*. He submits that the auditor general uses a set of professional guidelines, standards or processes, which relate to the position and not the person.

[58] The appellant submits that any comments and information in the records are about the function of the real estate process or department and its professional or official positions. In support of this, the appellant quotes the mandate of the Auditor General at the city, as follows:

*The audit process is an independent, objective assurance activity designed to add value and improve an organization's operations. The audit process assists an organization to accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control and governance processes.*

*In carrying out its audit activities, the Auditor General's Office is independent of management and individual members of Council and has the authority to conduct financial, operational, compliance, information systems, forensic and other special reviews of all City departments, local boards, municipally-controlled corporations and grant recipients.*  
[Emphasis added by appellant]

[59] The appellant believes that the city's characterization of the information in the records as the auditor general's "personal" observations or opinions would discredit the professionalism of the auditor general.

[60] Overall, the appellant submits that any descriptions, comments, remarks or information provided by the auditor general were in review of the function or department of the city, and not personal to any individual in that department.

### ***Analysis and findings***

[61] I have reviewed all of the information for which the city claimed the personal privacy exemption at section 14(1) of the *Act* to determine whether such portions of the records contain personal information, as defined in section 2(1) of the *Act*. In general, and relevant to all the records, I find that the information relating to the views and opinions of the auditor general is not his personal information for the purposes of the *Act*. I find that the auditor general expressed these views and opinions in the context of his official duties. I will now consider whether the information relating to other individuals is their personal information.

*Record 6 - Memorandum from Auditor General's Office dated March 21, 2013 re: Real Estate Acquisition Process for a specific address*

[62] While the majority of this record has already been disclosed to the appellant, ten redactions applied to Record 6 are still at issue. The disclosed portions of this record reveal a memorandum from the auditor general to the city's commissioner of development services about the real estate acquisition process for the third parcel of land acquired for the operations depot.

[63] Except for three redactions explained below, I find the withheld information in this record qualifies as the personal information of city employees, within the meaning of paragraphs (b), (g) and (h) of the definition of personal information in section 2(1) of the *Act*. While this withheld information is the auditor general's opinion about city employees, I find that it consists of an evaluation of the employees' work experience and performance, in a context where their conduct has been called into question<sup>17</sup>. While the withheld information is about individuals in a professional capacity, I find that disclosure of the information would reveal something of a personal nature about these individuals. Therefore, I find that this withheld information is personal information.

[64] However, I do not find that the information withheld in the sixth redaction on page 3, the eighth redaction on page 4 and the tenth redaction on page 5 of the memorandum meet the definition of personal information in section 2(1) of the *Act*. The sixth redaction on page 3 of the memorandum relates to the actions of a city employee in a professional capacity at the time of the purchase. The eighth redaction on page 4 of the memorandum is a general job description of a city staff position and therefore, not *information about* an individual. The tenth redaction on page 5 of the memorandum is a recommendation of the auditor general about the integrity of the real estate negotiation process, and therefore, again, not *information about* an individual. As only personal information can be withheld under section 14(1), I find that the information withheld in these three redactions is not exempt from disclosure. As the city has not claimed any other exemptions for this information and no other mandatory exemptions apply, I will order this information disclosed to the appellant.<sup>18</sup> I note that this finding is consistent with the city's decision to release this or similar information in Record 25, which includes previous drafts of the memorandum in Record 6.

*Record 8 - Emails between the auditor general and city staff dated March 22, 2013 re: appraisal report for specific addresses*

[65] While the majority of this record has already been disclosed to the appellant, one redaction applied to Record 8 is still at issue. The disclosed portions of this record

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<sup>17</sup> 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).

<sup>18</sup> I will provide the city with a highlighted copy of Record 6 to show these portions.

reveal an email from the auditor general to various city staff members about providing appraisal reports to city council. I find that the withheld information qualifies as the personal information of a city employee, within the meaning of paragraphs (b), (g) and (h) of the definition of personal information in section 2(1) of the *Act*. While the withheld information is about the individual in a professional capacity, I find that the disclosure of this information would reveal something of a personal nature about this individual. Therefore, I find that this withheld information is personal information.

*Record 10 - Emails between the former auditor general and city staff dated March 21-22, 2013, with attachments*

[66] Remaining at issue in this record is one redaction applied to the second page of this record. The disclosed portions of this record reveal a chain of emails between the auditor general and a city staff member. I find that the withheld information qualifies as the personal information of a city employee, within the meaning of paragraphs (b), (g) and (h) of the definition of personal information in section 2(1) of the *Act*. While the withheld information is about the individual in a professional capacity, I find that the disclosure of this information would reveal something of a personal nature about this individual. Therefore, I find that this withheld information is personal information.

*Record 25 - Memorandum from city staff to auditor general dated April 22, 2013 re: material from auditor general on acquisition of specific addresses, with attachments*

[67] Record 25 contains a memorandum from the commissioner of development services to the auditor general (pages 1-4) in response to materials provided by the auditor general (included in five attachments from pages 5-33). I note that there are redactions on the following pages: 3, 7, 8, 11, 14, 15, 18, 24 – 26, 29, 30 and 32.

[68] The five attachments to this memorandum are emails from the auditor general to the commissioner of development services. I note that the email contained in Record 10 (considered above) is in attachment 5 on pages 31 to 33. Accordingly, similar to my finding for Record 10, I find that the withheld information on page 32 is personal information.

[69] I will start by looking at the memorandum from the commissioner of development services on pages 1 to 4, where redactions are only claimed for some portions on page 3. I find that the majority of the withheld information on this page is the personal information of city employees within the introductory wording of the definition of "personal information" in section 2(1) of the *Act* and paragraphs (b), (g) and (h) of that definition. While this withheld information is about identifiable individuals in a professional capacity, I find the disclosure of this information would reveal something of a personal nature about these individuals. Specifically, it would disclose information related to their employment history. Therefore, I find that this withheld information is personal information. However, I find that a portion of the withheld information on page 3 is not personal information, as it is not information about an identifiable individual. As only personal information can be exempt under section 14(1), I find that this information is not exempt. As the city has not claimed

other exemptions for this information and no other mandatory exemptions apply, I will order the city to disclose this information to the appellant.<sup>19</sup>

[70] Attachments 1, 2 and 3 (pages 5-29) are emails from the auditor general to the commissioner of development services, attaching draft versions of Record 6 and containing similar, if not, identical redactions to those applied to Record 6.

[71] Consistent with my findings on Record 6, above, I find that the information in Record 25 withheld on:

- pages 7 and 8, and the sixth bullet on page 11 in attachment 1;
- pages 14 and 15, and the fifth bullet on page 18 in attachment 2; and
- pages 25 and 26, and the fifth bullet on page 29 in attachment 3

relates to the auditor general's findings on the real estate acquisition process for a specific address by the city. The redacted information consists of the auditor general's evaluation of the work performance of city staff at the time of the purchase, in a context where their conduct has been called into question.<sup>20</sup> 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 of "personal information" in section 2(1) of the *Act*, in addition to paragraphs (b), (g) and (h) of that definition.

[72] I find that the remaining information redacted by the city in the draft versions of Record 6 contained in Record 25, namely:

- pages 9 and page 10, and the first bullet under "Other considerations" on page 11 in attachment 1;
- page 16, the sixth bullet on page 18 and the first bullet under "Other considerations" on page 18 in attachment 2; and
- page 27, the fourth bullet on page 29 and the first bullet under "Other considerations" on page 29 in attachment 3

is either not information *about an individual*, or is information about individuals in a professional capacity, and therefore, not "personal information" as defined in section 2(1) of the *Act*. As only personal information can be withheld under section 14(1) of the *Act*, I find that this information is not exempt under section 14(1) of the *Act*. As the city

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<sup>19</sup> I will provide the city with a highlighted copy of page 3 of Record 25 to show this portion.

<sup>20</sup> See order references above in note 17.

has not claimed any other exemptions for this information and no other mandatory exemptions apply, I will order this information disclosed to the appellant.<sup>21</sup>

[73] Lastly, I will look at the withheld information from the emails in attachment 3 on page 24 and attachment 4 on page 30. The disclosed portions of pages 24 and 30 reveal two emails from the auditor general to the city's commissioner of development services, providing him with an updated memorandum (a draft of Record 6) in the first email and then a second email, clarifying a comment made in the first email. With respect to the last sentences of the withheld information on pages 24 and 30, I find these are the auditor general's professional opinion about a city employee, and it consists of an evaluation of the employee's work experience and performance, in a context where their conduct has been called into question.<sup>22</sup> In the circumstances, I find that the two last sentences of the withheld information on pages 24 and 30 reveal something of a personal nature about this individual. Therefore, it constitutes the employee's personal information within the introductory wording of the definition of "personal information" in section 2(1) of the *Act*, in addition to paragraph (b), (g) and (h) of that definition.

[74] In addition, I find that the remaining withheld information on pages 24 and 30 is not personal information as defined in section 2(1) of the *Act*, as it is not information *about an individual* as it is the auditor general expressing his professional opinion. As only personal information can be withheld under section 14(1) of the *Act*, I will order the city to disclose to the appellant the remaining portions of the withheld information on pages 24 and 30<sup>23</sup>, as the city has not claimed any other exemptions for this information and no other mandatory exemptions apply.

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

[75] I will now consider the city's application of the mandatory exemption at section 14(1) to the withheld information that I have found to be personal information, as defined in section 2(1) of the *Act*, on the following pages of the records at issue: pages 1-2 and 4-5 of Record 6, page 1 of Record 8, page 2 of Record 10 and pages 3, 7-8, 11, 14-15, 18, 24, 25-26, 29-30 and 32 in Record 25.

[76] 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. In the circumstances, only paragraph (f) is relevant, which states:

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<sup>21</sup> I will provide the city with a highlighted copy of pages 9, 10, 11, 16, 18, 27 and 29 of Record 25 to show these portions.

<sup>22</sup> See note 17 above regarding previous decision from this office.

<sup>23</sup> I will provide the city with a highlighted copy of pages 24 and 30 of Record 25 to show these portions.



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

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

[77] Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, the personal information is not exempt from disclosure.

[78] 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 where disclosure would not be an unjustified invasion of personal privacy. In the circumstances, none of the exceptions in section 14(4) are relevant to this appeal.

[79] 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.<sup>24</sup>

[80] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).<sup>25</sup>

[81] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>26</sup> In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.<sup>27</sup>

[82] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).<sup>28</sup>

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<sup>24</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

<sup>25</sup> *John Doe*, cited above.

<sup>26</sup> Order P-239.

<sup>27</sup> Orders PO-2267 and PO-2733.

<sup>28</sup> Order P-99.

### ***Representations***

[83] The city submits that sections 14(3)(d) and (g) and 14(2)(g) and (i) are relevant to my determination as to whether disclosure of the personal information would be an unjustified invasion of personal privacy. The appellant submits that the factor favouring disclosure at section 14(2)(a) is relevant to my consideration. These sections state:

14(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all relevant circumstances including whether,

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

(g) the personal information is unlikely to be accurate or reliable;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

(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 education history;

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

### *The city's representations*

[84] The city submits that section 14(3)(d) is relevant because some of the withheld information in the record contains reference to staff performance and this means that the information at issue forms part of the employment history of identifiable individuals.

[85] Regarding the presumption at section 14(3)(g), the city submits that the IPC has concluded that the terms "personal evaluations" and "personnel evaluations" both refer to assessments made according to measurable standards.<sup>29</sup>

[86] On this point, the city considers the auditor general's opinions about identifiable individuals in the records to be analogous to "personnel evaluations", which would have been made in accordance with accepted audit principles and practices. In support of this, the city refers to Order MO-2374, where it submits that the IPC found that comments made by an audit team in support of recommendations made to a municipality reflect the views and/or opinions of the audit team about identifiable

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<sup>29</sup> Order PO-1756.

individuals.

[87] Regarding the factors in section 14(2), the city submits that section 14(2)(g) is intended to weigh against disclosure of personal information where the information is unlikely to be accurate or reliable, leading to potential negative consequences for the individual in question.<sup>30</sup> The city concludes that because some of the withheld information in the records contains the auditor general's opinions and evaluations, which are unusually critical of identifiable individuals' personality traits, the information therein is unlikely to be accurate or reliable.

[88] Regarding 14(2)(i), the city submits that the IPC has found that the application of this factor is not entirely dependent on whether the damage or harm is present or imminent but, rather upon whether the damage or harm would be inherently "unfair" to the individual involved.<sup>31</sup>

[89] The city also believes that disclosure of the concerns, opinions and employment information of former city staff could result in "unfair damage" to their reputation. The city submits that former city staff should not be penalized for communicating their concerns with current city staff.

[90] The city also submits that I should consider the unlisted factor of "ensuring public confidence in an institution". The city states:

In March 2019, the city released all of the relevant records related to this appeal, and the issue of the Consolidated Operations Depot, with only small portions of information being withheld.

Therefore, the city has taken steps to ensure public confidence in the institution by proactively releasing records and information online in a public forum.

The city believes that because the vast majority of information contained within the responsive records has been made available for public review on the city's website, the withheld personal information would add nothing of relevance to ongoing public conversation of the issue at hand.

### *The appellant's representations*

[91] The appellant submits that the presumptions in section 14(3) of the *Act* do not apply. With reference to 14(3)(g) of the *Act*, the appellant submits that the auditor general's role was to audit the process of the real estate function or department, not to conduct a personnel review. The appellant submits that the withheld information is

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<sup>30</sup> Order PO-2271.

<sup>31</sup> Order P-256.

neither a character reference nor a personnel evaluation, but related to the reporting relationship between the real estate manager and senior management.

[92] The appellant submits that section 14(2)(a) of the *Act* is relevant, as the withheld information may help with the public's understanding of the city's acquisition of property for the COD. The appellant references previous reports of the auditor general, AG-09-07, where the auditor general identified areas of concern during a review of the real estate function in 2009, and AG-13-09,<sup>32</sup> where it was concluded that the city spent taxpayer funds in excess of market value for a property related to the COD.

[93] The appellant submits that the public needs and deserves to know which management positions, practices and policies were involved in the real estate property transaction and the dynamics of the various management positions, practices, policies and reporting relationships provides an important component for proper public scrutiny.

[94] The appellant further submits that section 14(2)(i) of the *Act* does not apply because previous orders of this office state that the applicability of this clause is not dependent only on whether the damage or harm envisioned is present or foreseeable, but also whether this damage or harm would be unfair to the individual involved.

[95] Overall, the appellant submits that:

If the withheld information relates to a management position, practice or policy, which results in overspending municipal funds to the possible extent of \$2.6 Million, it would not be considered **unfairly** damaging [to] the reputation of any person referred to in the record, and so, Section 14(2)(i), presumed unjustified invasion of personal privacy does not apply. [**Emphasis** by the appellant]

### ***Analysis and findings***

[96] Based on my review of the withheld personal information in records 6, 8, 10 and 25, I find that the presumptions in section 14(3)(d) and (g) of the *Act* do not apply.

[97] I do not accept the city's argument that because some of the withheld personal information in the records contains references to staff performance, it is the employment history of individuals. Past orders of this office have addressed the application of section 14(3)(d) and have determined that, to qualify as "employment or educational history," the information must contain some significant part of the history of the person's employment or education. What is or is not significant must be determined based on the facts of each case.<sup>33</sup> These records consist of the opinions of the city's

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<sup>32</sup> <https://www.oshawa.ca/city-hall/resources/AG-13-09---Redacted-for-Release.pdf>.

<sup>33</sup> Order M-609, MO-1343.

auditor general and the response of the city's commissioner of development services, about city employees in an employment capacity. I am not satisfied that this information qualifies as a significant part of these individuals' employment in the circumstances of this case. Accordingly, I find that the presumption in section 14(3)(d) of the *Act* does not apply.

[98] I also do not accept the city's argument that the withheld information in the records is "personal evaluations" and "personnel evaluations", as required by section 14(3)(g) of the *Act*. The city has not provided me with sufficient evidence to establish that the withheld personal information consists of assessments made according to measurable standards. In fact, the city's submission on this point is somewhat at odds with its position under section 14(2)(g) that the auditor general's opinions are inaccurate or unreliable. In any event, I find the withheld personal information is the opinions, comments and responses of the auditor general and the city's commissioner of development services about other individuals, and does not consist of assessments made according to measurable standards within the meaning of section 14(3)(g).

[99] As I have found that the presumptions in section 14(3) do not apply, I will consider the factors in section 14(2).

[100] I find that the factor in section 14(2)(i) should be given some weight for the withheld personal information in Record 8. I accept that given the nature of the withheld personal information in this record, any damage to this individual's reputation would be unfair in the circumstances if this information were disclosed.

[101] Regarding the remaining withheld personal information in records 6, 10 and 25, I find that the city has not established that the factor in section 14(2)(i) applies, as I am not convinced that any damage to the reputation of the individuals involved would be unfair. However, I accept that given the comments and the context in which they were made, the information is unlikely to be accurate or reliable. Therefore, the factor in section 14(2)(g) should be given some weight against disclosure.

[102] The city asked that I consider "ensuring public confidence in the institution" as a factor weighing against disclosure. The city notes that it has disclosed almost all of the information related to the purchase of the COD and that disclosing the withheld personal information would add nothing to the ongoing public conversation about the issues surrounding the property purchased for the depot. I do not give this factor any weight. I find that the city has not provided me with sufficient evidence to determine that withholding the personal information would increase the public's confidence in the city.

[103] The appellant submits that I should consider section 14(2)(a) as a factor favouring disclosure of the withheld information. The appellant submits that disclosure of withheld personal information is necessary in order to subject the city's processes in purchasing the property for the depot to scrutiny. Given the specific nature of the withheld personal information, I find that disclosing would not serve the purpose of subjecting the city to public scrutiny and I give this factor little weight in my

determination.

[104] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the withheld information is exempt under section 14(1). While I have found that none of the presumptions in section 14(3) apply, I find the factors favouring non-disclosure of the personal information in sections 14(2)(g) and 14(2)(i) apply. Moreover, I have found that there are no factors favouring its disclosure. Accordingly, I find that the personal information at issue in records 6, 8, 10 and 25 is exempt under section 14(1).

[105] As the appellant has raised the possible application of section 16 to the information at issue, I will proceed to consider whether the information should be disclosed under the public interest override.

**Issue D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemptions in section 14(1)?**

[106] 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.

[107] 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.

[108] 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.<sup>34</sup>

***Compelling public interest***

[109] 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.<sup>35</sup> Previous orders

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<sup>34</sup> Order P-244.

<sup>35</sup> Orders P-984 and PO-2607.

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.<sup>36</sup>

[110] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.<sup>37</sup>

[111] Any public interest in *non*-disclosure that may exist also must be considered.<sup>38</sup> A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.<sup>39</sup>

[112] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation<sup>40</sup>
- the integrity of the criminal justice system has been called into question<sup>41</sup>
- public safety issues relating to the operation of nuclear facilities have been raised<sup>42</sup>
- disclosure would shed light on the safe operation of petrochemical facilities<sup>43</sup> or the province’s ability to prepare for a nuclear emergency<sup>44</sup>
- the records contain information about contributions to municipal election campaigns<sup>45</sup>

[113] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations<sup>46</sup>

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<sup>36</sup> Orders P-984 and PO-2556.

<sup>37</sup> Order P-984.

<sup>38</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

<sup>39</sup> Orders PO-2072-F, PO-2098-R and PO-3197.

<sup>40</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

<sup>41</sup> Order PO-1779.

<sup>42</sup> Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.

<sup>43</sup> Order P-1175.

<sup>44</sup> Order P-901.

<sup>45</sup> *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations<sup>47</sup>
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding<sup>48</sup>
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter<sup>49</sup>
- the records do not respond to the applicable public interest raised by appellant<sup>50</sup>

### ***Purpose of the exemption***

[114] 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.

[115] 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.<sup>51</sup>

### ***The city's representations***

[116] The city agrees with past IPC orders that have concluded that there is no compelling public interest where "a significant amount of information has already been disclosed and this is adequate to address any public interest considerations".<sup>52</sup> According to the city, the majority of the pages contained within the responsive records to the appellant's original request have been published on the city's website, with only a small percentage of information being withheld.

[117] With reference to Order P-568, the city points to Assistant Commissioner Glasberg's finding that the fundamental purpose of the mandatory exemption at section 21(1) (the provincial equivalent to section 14(1) of the *Act*) is to ensure the protection of the personal privacy of individuals except where "infringements on this interest are justified."

[118] The city submits that the proactive disclosure via its website is sufficient to

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<sup>46</sup> Orders P-123/124, P-391 and M-539.

<sup>47</sup> Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

<sup>48</sup> Orders M-249 and M-317.

<sup>49</sup> Order P-613.

<sup>50</sup> Orders MO-1994 and PO-2607.

<sup>51</sup> 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.).

<sup>52</sup> Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.



address any public interest considerations. It therefore submits that the public interest override at section 16 does not apply to the release of the personal information at issue in this appeal.

***The appellant's representations***

[119] The appellant submits that in the city's public release of documents, it provided an email string from the corporate lawyers that admits there is a compelling public interest and that this would suggest that the interest does indeed outweigh the purpose of the section 14(1) exemption.

[120] According to the appellant, continuing efforts by citizens of the city, including two police investigations, suggest that questions regarding the purchase of land for the COD is compelling to the public. Further, the appellant submits that an investigation of the Durham Regional Police Services ordered by the provincial legislature may include a review of the investigations by the police into the alleged fraud at the city in 2013<sup>53</sup>. He also submits that current plans for a new depot in the city demonstrates that this issue will continue to be on the public radar given the previous "atrociousness of overspending, poor planning, and misleading information as experienced in 2013". In addition, the appellant points to the auditor general filing an application for judicial review of the private investigator's report commissioned by the city in 2013, which he submits has renewed the public interest in matters relating to the purchase of land for the COD.

[121] According to the appellant, the "public interest is not only evident, but is severe".

***The city's reply representations***

[122] In reply, the city advises that in April 2018, on its own accord and in the interest of transparency and accountability, it undertook a project to release the electronic records related to the purchase of the COD and associated freedom of information requests. The city submits that this proactive release of records involved over 1500 hours of city clerk services staff time, involving considerable effort and city resources, including external resources to carry out the project.

[123] The city also provided me with detailed usage statistics from a third party vendor of the city's public website related to the COD, which show 23 unique visitors. According to the city, many of the 23 unique visitors were city staff testing the links to ensure that the upload was successfully completed. The city indicates that these statistics demonstrate the limited degree of public interest in this matter.

[124] The city maintains its position that there is no evident compelling public interest related to the disclosure of the records at issue that would clearly outweigh the purpose of the mandatory exemption in section 14 of the *Act*.

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<sup>53</sup> It appears that the police's investigation has since closed.

### ***The appellant's sur-reply representations***

[125] In response to the city, the appellant submits that the city was aware of the compelling public interest of the records in this appeal when it committed to 'proactively' release records related to the COD. He also believes that the city took this step to purposely delay responses to pending appeal files before this office and in a further attempt to frustrate those requesting records related to the COD. According to the appellant, this proactive release of records took place against the background of a separate ongoing appeal of a freedom of information request from 2015. He further submits that the city failed to meet its release deadline of August 2018 and did not release the records until March 2019, after a municipal election in October 2018. He also submits that the release of more than 6800 pages on the city's website merely buried the records. In addition, the appellant believes that citizens are increasingly uneasy attending council meetings or accessing websites because of the city's actions that he believes are intended to quell public participation.

[126] In response to the city's detailed usage statistics on its public website related to the COD, the appellant submits that it appears the metrics are only for the "User Guidelines" page, which would not necessarily show how many times individual documents were accessed or if anyone followed a link direct to download.

[127] The appellant further notes that there were 36 requests under the *Act* for records related to the purchase of a specific property as part of the COD, noting that five files were outstanding and before this office. The appellant argues that 36 requests to the city for one subject matter meet the criteria of "compelling public interest".

### ***Analysis and findings***

[128] As noted above, I have found the withheld personal information in records 8 and 10, and some portions of records 6 and 25 to be exempt under section 14(1) of the *Act*. Based on my review of the withheld personal information and the public interest identified by the appellant, I find that disclosure of the withheld information would not address the public interest identified by the appellant.

[129] I accept the appellant's position that there is a public interest in the city's actions about the purchase of property for the COD; however, I find the withheld personal information would not shed light on this identified public interest. Previous orders of this office 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.<sup>54</sup> I am unable to find that disclosure of the withheld

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<sup>54</sup> Orders P-984 and PO-2556.

personal information in records 6, 8, 10 and 25 would serve the purpose of informing or enlightening the public about the city's activities or decisions. The withheld personal information relates to specific individuals and in my view, disclosure of this information would not address the public interest identified by the appellant. Accordingly, I find that there is not a compelling public interest in the disclosure of the personal information withheld under section 14(1) of the *Act*. I find that section 16 does not apply and section 14(1) applies to the withheld personal information in records 6, 8, 10 and 25.

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

[130] 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.<sup>55</sup> If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[131] 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.<sup>56</sup> To be responsive, a record must be "reasonably related" to the request.<sup>57</sup>

[132] 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.<sup>58</sup>

[133] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>59</sup>

[134] 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.<sup>60</sup>

***The city's representations***

[135] The city submits that it expended every reasonable effort to identify, locate and provide records that are responsive to the appellant's request and provided a written summary of all steps taken in response to the appellant's request. The city says that it

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<sup>55</sup> Orders P-85, P-221 and PO-1954-I.

<sup>56</sup> Orders P-624 and PO-2559.

<sup>57</sup> Order PO-2554.

<sup>58</sup> Orders M-909, PO-2469 and PO-2592.

<sup>59</sup> Order MO-2185.

<sup>60</sup> Order MO-2246.

responded literally to the request because it was a well-constructed and narrow request.

[136] Prior to searching for responsive records, the city contacted the appellant by phone and email to clarify and narrow the request to include specific staff and/or departments for the search, establish a date range for the search and to confirm the location and/or form of the requested records. The city provided me with a copy of this email chain to demonstrate the effort it expended to confirm the details of the request prior to searching for responsive records.

[137] After receiving clarification on the scope of the original request, the city advises that it proceeded to conduct a search for responsive records using the following parameters:

Copy of all communications between staff and Council including any communications in response to the March 20, 2013 direction of Council to provide Council with a copy of the appraisals and assessed value of land identified in report CM-12-29 from March 20, 2013 to the date of purchase of the property at [a specific address], including a copy of the final report CM-13-29.

[138] The city says that staff asked to search for responsive records were encouraged to reach out to city clerk services with any questions to facilitate a more effective search and provided with "keywords" in order to conduct a search of their email inboxes. The city also says that these search request parameters were circulated to several city departments. It explains that several departments did not produce records as the bulk of the records on the requested issue were already in the custody of city clerk services by the time the request was received, as per Council direction of May 21, 2013, resolution number 308.

[139] In support of its search efforts, the city submitted several affidavits, which provide details of the individual search results of each staff member who responded to the search request.

[140] The city submits that the appellant seems to want to draw a line from the amount of records produced to the record keeping processes at the city. However, it makes reference to Order MO-2246, where I concluded that:

While the appellant may have lingering doubts as to the record keeping abilities of the city and its building inspectors, the appellant has not provided me with the reasonable basis needed to conclude that additional records exist.

[141] The city reiterates that a reasonable search is considered to be 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. In conclusion, it submits that it conducted a reasonable search for records in response to

the appellant's request.

***The appellant's representations***

[142] The appellant notes the city's "long and documented history of failure to conduct reasonable searches" and "history of deleting files", in support of his position that the city has not conducted a reasonable search in response to his request in this appeal.

[143] In response to the city affidavits, the appellant used publicly available information to argue that the affiants are not experienced or knowledgeable employees in the subject matter of his request, including an affiant who was not employed by the city in 2013, and affiants with legal, budget or accounts payable/purchasing experience being asked to locate records related to a real estate transaction. He also notes that some affiants only searched their own records and did not indicate whether a search of archived records was completed, including searching records of a department or of employees who were employed by the city in 2013 and involved in the 2013 land acquisition. He also notes that a particular affiant did not clarify on behalf of which city manager she conducted a search and the affidavits do not specify when the searches were conducted. Finally, he notes that there is no affidavit from IT services indicating that a search of the city's server environment was completed, nor is there an affidavit from the clerk services department which would have been responsible for monitoring and supplying the information to city council on the motion to receive the valuation reports (other than an affidavit from an administrative assistant in this department).

[144] Generally, the appellant raises the fact that, for the most part, the affidavits are identically worded including the search terms, which suggests to the appellant that each affiant was instructed or coerced into completing affidavits for the city's representations. According to the appellant, the number of affidavits and employees that were clearly not associated with the request or the subject matter of the request, shows that the city has failed to identify experienced employees knowledgeable in the subject matter. Specifically, he states:

These affidavits serve no other purpose than to attempt to placate this Commission and the Appellant, and provide little or no substance to the issue at hand.

[145] Overall, the appellant submits that the city has failed to conduct a reasonable search.

***The city's reply representations***

[146] In response to the appellant's representations, the city reiterates that it has expended a reasonable effort to respond to the original request at issue in this appeal, as well as subsequent concerns raised by the appellant.

[147] The city submits that it is inappropriate for the appellant to refer to the LinkedIn profiles of various members of city staff and to attempt to judge city staff based on

LinkedIn. According to the city, the social media information relating to city staff is not relevant to the issues in this appeal.

[148] The city makes reference to Order MO-3668-I, where the adjudicator concluded that, like the affiants who conducted searches for the city in the current appeal, assistants or clerks may be considered experienced employees and subject-matter experts, when she found the following:

Having regard to the submissions of the parties, I am satisfied that the searches conducted by the city were completed by employees knowledgeable in the subject matter of the request.<sup>61</sup>

[149] The city further submits that the elapsed time between the issue of concern and the submission of the appellant's request would have made the search for the requested records difficult to coordinate. Despite this, the affiants who conducted the search had direct access to the records of the original records holders, and as such, are considered by the city to be "experienced employee[s] of the institution," as per section 17(1)(b) of the *Act*.

### ***The appellant's sur-reply representations***

[150] In light of the city's statement in its March 29, 2019 news release that its proactive disclosure included "all available electronic records...on the City Clerk Services corporate file server", the appellant submits that the city has not completed a reasonable records search.

[151] The appellant disputes that he is judging staff qualifications based on their LinkedIn profiles. The appellant states that he used such data to determine the length of tenure of the affiants, believing that length of tenure of staff is an important determinant in staff's knowledge of the issue of this appeal, as opposed to their qualifications.

[152] In response to the city's submission that the affiants had direct access to the records of the original records holders, the appellant submits that these newer employees may not be familiar or experienced with those inherited records. According to the appellant, "experienced" means more than qualified and being the holder of records. With reference to section 17(1)(b) of the *Act*, the appellant highlights "experienced employee *of the institution*" to support his assertion that tenure is important, especially when looking at an issue that took place six years ago, and in which the institution admits most of the involved staff are no longer employed by the city.

[153] In response to the city's reliance on MO-3668-I, the appellant draws my

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<sup>61</sup> MO-3668-I at para. 25.

attention to Adjudicator James' words: "experienced employees knowledgeable in the subject matter of the request."

[154] The appellant directs my attention to the following language in the city's reply representations:

The City believes that it has made reasonable efforts to assist the appellant by providing **as many of** the responsive records as possible while remaining true to the spirit of the Act. [**Emphasis** added by the appellant]

### ***Analysis and findings***

[155] I find that the city's search was not reasonable, and I will order it to conduct a new search.

[156] I requested a written summary of all steps taken to conduct its search in response to the appellant's request. The city's representations outline the steps it took to obtain clarification of the request from the appellant. The city's affidavits provide some details about the searches conducted by city staff, including who conducted the search, which city department they work for, which search parameters were used, what types of files were searched and whether records were found. I note that the city advised the appellant of the departments that would be asked to conduct searches, when clarifying his request. The city provided an affidavit from an employee of each of these departments.

[157] While the appellant submits that there is not an affidavit from the clerk services department, other than an affidavit from an administrative assistant in this department, I note that the city provided an affidavit from a records information analyst from this department. In addition, while the appellant notes that an affiant does not specify which city manager on behalf of whom she conducted a search, I note that the affiant states that she conducted a search "On behalf of the Office of the City Manager".

[158] While I find that the city's representations and affidavits provide details about its searches, I find that they do not address the following, which were raised in the appellant's representations:

- whether the affiants only searched their own records (given that affiants state "I searched my hardcopy files, computer drives, and emails...");

- whether the affiants also conducted a search for records for their department and/or for employees who were employed by the city in 2013 and involved in the 2013 land acquisition;<sup>62</sup>
- when the searches were conducted; and
- whether the city's IT group conducted a search of the city's server environment.

[159] In addition, my review of the records themselves reveals that some records are incomplete. For example, Record 10 indicates that there are three documents attached to the email, including the draft appraisal report, the final appraisal report and an email between an appraiser and a city employee. However, the city only provided this office with the second page of the two-page email attachment and a copy of the draft appraisal report. Therefore, it appears that there are pages missing in Record 10. There also appears to be missing pages in Record 8, which references two attachments, despite the record provided to the IPC having no attachments.

[160] In light of these discrepancies, I find that the city has not established that it conducted a reasonable search and that there exists a reasonable basis for concluding that other responsive records may exist beyond those that have been identified and located by the city, including those that might reasonably exist in the archived records of the city.

[161] Lastly, regarding the parties' representations on the experience level of the individuals who conducted the searches and provided the affidavits in support of the search, I am satisfied that the individuals identified were experienced in the subject matter of the request. The shortcoming was not in their level of experience but in the fact that it is not clear that they searched in all the relevant areas.

[162] Accordingly, I find that the city has not conducted a reasonable search in accordance with the requirements of the *Act* and I will order it to conduct a further search.

## **ORDER:**

1. I order the city to disclose the withheld information in Records 6 and 25, namely, portions of pages 3, 4 and 5 of Record 6 and portions of pages 3, 9, 10, 11, 16, 18, 24, 27, 29 and 30 of Record 25, that I have found not to be exempt, by providing the appellant with a copy of these portions of the records by **October 26, 2021** and not before **October 21, 2021**. I have attached a highlighted copy of Records 6 and 25 with the city's copy of the order, indicating the

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<sup>62</sup> I note that the city's reply representations indicate that the affiants who conducted the search had direct access to the records of the original records holders; however, the affidavits do not reflect this.



information that should be released. To be clear, the city should disclose the highlighted information.

2. I uphold the city's decision to withhold the personal information in Records 8 and 10, on pages 1, 2, 4 and 5 of Record 6 (other than those portions on pages 4 and 5 highlighted in the copy of Record 6 provided to the city for order provision 1), and pages 3, 7, 8, 11, 14, 15, 18, 24, 25, 26, 29, 30, 32 of Record 25 (other than those portions on pages 3, 11, 18, 24, 29 and 30 highlighted in the copy of Record 25 provided to the city for order provision 1).
3. I order the city to conduct a further search in response to the appellant's request, which ensures that the city's archived records and server environment have been searched. This search should include a search for the missing attachments set out in paragraph 159 of this order. I also order the city to confirm when the search(es) was(were) conducted and to provide information about the nature and location of the search(es) conducted.
4. I order the city to provide me with an affidavit(s) sworn by the individual(s) who conduct(s) the further searches by **October 21, 2021**, describing its search efforts. The affidavit(s) should include the following information:
  - a. the names and positions of the individuals who conducted the searches;
  - b. information about the types of files searched, the nature and location of the search(es) and the steps taken in conducting the search(es); and
  - c. the results of the search(es).
5. The information should be provided by way of representations with the affidavit(s) that may be shared with the appellant, unless there is an overriding confidentiality concern.
6. If the city locates additional responsive records because of its further search(es), I order the city to issue an access decision to the appellant in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.
7. I reserve the right to require the city to provide me with a copy of the information it disclosed to the appellant in accordance with this order.
8. I remain seized of this appeal in order to address the matters arising out of order provisions 3, 4 and 5.

Original Signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

September 21, 2021  
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