

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4305

Appeal MA20-00436

City of Toronto

December 20, 2022

**Summary:** The City of Toronto (the city) received a request under the *Act* for access to records related to a specified property. The city issued a decision granting partial access to the responsive records withholding information under sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario. During mediation, the issue of reasonable search was raised by the appellant and it was added to scope of the appeal. In this order, the adjudicator upholds the city's decision. She also finds that the city conducted a reasonable search for records.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 14(1) and 17.

**Orders Considered:** Orders PO-3836, PO-3811 and PO-3856.

### OVERVIEW:

[1] In 2017, the City of Toronto (the city) commenced enforcement activities concerning municipal by-laws with respect to a specified property. These enforcement activities continued in 2019 and resulted in the laying of seven charges against the property and the property owner under the *Provincial Offences Act*.

[2] Subsequently, the city received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for any Municipal Licensing and

Standards (MLS) division records regarding the enforcement and charges laid against the property and the property owner, including the following:

1. The names of the four MLS inspectors.
2. All instructions, communications, notes and records made prior to, during, and following the August 28, 2019 inspection by the 4 ML&S inspectors.

The appellant specified a time period of April 1, 2019 to the date of the request.

3. A copy of all charges laid against all other property owners in Toronto, along with the property addresses, that have been charged with any or all of the 7 charges [cited charges] that were laid against [numbered Ontario company] on August 28, 2019.

The appellant specified a time period of January 1, 2018 to September 1, 2019.

[3] In February 2020, the city issued a decision granting partial access to the requested information. In this decision (the first decision), the city provided the names of the four MLS inspectors, fulfilling item 1 of the request.

[4] In respect of items 2 and 3, the city granted access to 218 pages of records, but withheld parts of some pages, and 71 pages in full, based on the exemptions at sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*.

[5] The appellant then made another request to the city, this time for:

All instructions, communications, notes and records made prior to, during and following the August 28, 2019 inspection by [named MLS inspectors] from April 1, 2019 to December 17, 2019.

[6] In April 2020, the city responded to the new request. In this decision (the second decision), the city granted access to a further 140 pages of records. The city withheld 24 pages in full on the basis of solicitor-client privilege (section 12).

[7] The appellant then made a third request to the city, for the following information:

1. The [building] evaluation report produced by [one of the four MLS inspectors identified by the city in response to item 1 of the appellant's first request];
2. The notes from the four MLS officers identified in item 1 of the appellant's first request; and
3. The "digital fingerprint" of photos that the city had already provided to the appellant.

[8] In August 2020, the city responded to the third request. In this decision (the third decision), the city granted full access to items 1 and 2 of the third request.

[9] In respect of item 3, the city advised that MLS staff had conducted a thorough search but were unable to locate any responsive records.

[10] The appellant was dissatisfied with the city's decisions, and appealed them to the Information and Privacy Commissioner of Ontario (IPC). Specifically, the appellant pursues access to all the information withheld by the city, and he believes that other responsive records should exist.

[11] Mediation was not possible, and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[12] The adjudicator initially assigned to this appeal invited the city and the appellant to provide representations on the issues in this appeal. She received representations from both parties. This appeal was subsequently transferred to me to continue the adjudication. I have reviewed the parties' representations<sup>1</sup> and have decided that I do not require further submissions before making my decision.

[13] In this order, I uphold the city's decision. I also uphold the city's search as reasonable and dismiss the appeal.

## **RECORDS:**

[14] The records at issue in this appeal consist of emails and attachments to emails. Some of the email chains contain "duplicative content" where the substantive content is reproduced identically within multiple emails, although other portions may differ.

[15] The city has withheld these records, in full or in part, on the basis of sections 12 and 14(1).

[16] The record at page 57 is the only record in which the city is relying on section 14(1).<sup>2</sup> It is titled "Synopsis" and dated April 6, 2018. There is a duplicate of this record at page 212.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

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<sup>1</sup> The appellant's representations consist of his emails dated April 22, 23 and 25, 2022.

<sup>2</sup> I will refer to this record as Record 57.

- B. Does the discretionary personal privacy exemption at section 14(1) apply to the information at issue?
- C. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the records?
- D. Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?
- E. Did the city conduct a reasonable search for records?

## **DISCUSSION:**

### **A: Do the records contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?**

[17] In order to decide whether section 14(1) applies, I must first decide whether the records contain “personal information,” and if so, to whom this personal information relates.

[18] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.” Recorded information is information recorded in any format, including paper and electronic records.<sup>3</sup>

[19] Information is “about” the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official, or business capacity is not considered to be “about” the individual if it does not reveal something of a personal nature about them.<sup>4</sup>

[20] Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.<sup>5</sup>

[21] Section 2(1) of the *Act* gives a list of examples of personal information. The examples that are relevant to this appeal are set out below:

“personal information” means recorded information about an identifiable individual, including,

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<sup>3</sup> The definition of “records” in section 2(1) includes paper records, electronic records, digital photographs, videos and maps. The record before me is a paper record located by searching a police database.

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>5</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

(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,

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

(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.

[22] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."<sup>6</sup>

[23] It is important to know whose personal information is in the records. If the records contain the requester's own personal information, their access rights are greater than if it does not.<sup>7</sup> Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.<sup>8</sup>

### ***Representations***

[24] The city submits that record 57 contains personal information of an identifiable individual. Specifically, it submits that it contains information such as the tenant's name and their tenancy details.

[25] The city also submits that the records do not contain the appellant's personal information. It submits that this is a request for records held by it concerning its by-law enforcement in relation to a specified property, which was owned by corporate entities and operated in a commercial/business manner.

[26] The appellant's representations do not address whether the records at issue contain personal information.

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

[27] Based on my review of the records and the representations of the parties, I find

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<sup>6</sup> Order 11.

<sup>7</sup> Under sections 36(1) and 28 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

<sup>8</sup> See sections 14(1) and 38(b).

that only record 57 contains the personal information of an identifiable individual (an affected party) such as their financial transactions, their views or opinions, and their name along with other information, which fits within paragraphs (b), (e), and (h) of the definition of “personal information” in section 2(1) of the *Act*.

[28] I do not find that the records contain “personal information” of the appellant. Any information pertaining to the appellant in the records relates to him in a professional and business, not personal capacity.

[29] Having found that record 57 contains the personal information of an affected party, I will now determine whether the withheld personal information is exempt from disclosure under the mandatory personal privacy exemption at section 14(1) of the *Act*.

**B: Does the discretionary personal privacy exemption at section 14(1) apply to the information at issue?**

[30] Section 14(1) of the *Act* creates a general rule that an institution cannot disclose personal information about another individual to a requester. This general rule is subject to a number of exceptions.

[31] The section 14(1)(a) to (e) exceptions are relatively straightforward. If any of the five exceptions covered in sections 14(1)(a) to (e) exist, the institution must disclose the information.

[32] The section 14(1)(f) exception is more complicated. It requires the institution to disclose another individual’s personal information to a requester only if this would not be an “unjustified invasion of personal privacy.” Other parts of section 14 must be looked at to decide whether disclosure of the other individual’s personal information would be an unjustified invasion of personal privacy.

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

[34] Sections 14(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy.

[35] Sections 14(3)(a) to (h) should generally be considered first.<sup>9</sup> These sections outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy. A presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the

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<sup>9</sup> If any of the section 14(3) presumptions are found to apply, they cannot be rebutted by the factors in section 14(2) for the purposes of deciding whether the section 14(1) exemption has been established.

“public interest override” at section 16 applies.<sup>10</sup>

***Representations, analysis and findings***

[36] The city submits that none of the exceptions at sections 14(1)(a) to (e) are applicable in the present circumstances. I agree that the withheld personal information does not fit within these exceptions. As such, I will turn to discuss whether any of the factors or presumptions under sections 14(2) and (3) apply.

[37] The appellant’s representations do not address the section 14(1) personal privacy exemption.

[38] The city submits that the presumptions at sections 14(3)(b) and (f) are applicable in this appeal. These sections state:

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

(b) was compiled and is identified as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(f) describes an individual’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

[39] With respect to section 14(3)(b), the city explains that the withheld personal information was collected and compiled as part of the MLS investigation into potential violations of various municipal by-laws applicable to the specified property.

[40] Based on my review of the withheld personal information, I am satisfied that it was compiled and is identifiable as part of investigations into a possible violation of law. The withheld personal information at issue appears in an investigation record into municipal by-law violations. As noted above, these investigations resulted in convictions. However, even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>11</sup> The presumption can apply to a variety of investigations, including those relating to by-law enforcement.<sup>12</sup> Therefore, I find that section 14(3)(b) applies to the withheld personal information at issue in this appeal, and that its disclosure is presumed to be an unjustified invasion of the personal privacy of the affected party.

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<sup>10</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

<sup>11</sup> Orders P-242 and MO-2235.

<sup>12</sup> Order MO-2147.

[41] With respect to section 14(3)(f), the city explains that the some of the withheld personal information pertains to personal information of an individual's financial transactions.

[42] Based on the plain language of section 14(3)(f), I find that the tenancy information of the affected party falls within this presumption and weighs against disclosure.

[43] As noted above, in reviewing the mandatory personal privacy exemption in section 14(1), once a section 14(3) presumption has been 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. I have found that the sections 14(3)(b) and (f) presumptions apply to the withheld personal information. The parties did not argue that any of the exceptions in section 14(4) apply, and I find that none of them apply in the circumstances of this appeal. The parties also did not argue that the "public interest override" at section 16 applies to the withheld personal information at issue, and I am satisfied that it does not. Therefore, I find that the mandatory personal privacy exemption at section 14(1) applies to the withheld personal information and it is exempt from disclosure.

**C: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the records?**

[44] The city claims the application of section 12 exemption to various records, mainly emails, more particularly described below.

[45] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

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

[46] Section 12 contains two different exemptions, referred to in previous IPC decisions as "branches." The first branch ("subject to solicitor-client privilege") is based on common law. The second branch ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies. Because I find below that the common law (i.e., first branch) solicitor-client communication privilege applies, I will not set out or address the city's arguments that the second branch also applies.

**Branch 1: common law privilege**

[47] At common law, solicitor-client privilege encompasses two types of privilege:



- solicitor-client communication privilege, and
- litigation privilege.

### ***Common law solicitor-client communication privilege***

[48] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.<sup>13</sup> This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.<sup>14</sup> The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.<sup>15</sup>

[49] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.<sup>16</sup>

[50] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>17</sup> The privilege does not cover communications between a lawyer and a party on the other side of a transaction.<sup>18</sup>

[51] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.<sup>19</sup> An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.<sup>20</sup> Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.<sup>21</sup> However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.<sup>22</sup>

### ***Representations***

[52] The city submits that section 12 applies to approximately 17 records (collectively,

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<sup>13</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>14</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>15</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

<sup>16</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>17</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>18</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

<sup>19</sup> *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

<sup>20</sup> *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

<sup>21</sup> J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

<sup>22</sup> *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

referred to as the "legal advice records"), which consist of:

- A. -emails to and from members of the City's Legal Services Division (LSD) to MLS staff; and
  - attachments to these emails, which consist of:
    - I. various documents presented for the purposes of being reviewed by the city's LSD so that staff could provide legal advice in relation to the city's investigation and enforcement of municipal by-laws, or issues relating to the combination of the city's investigation and enforcement of municipal by-laws and the transfer of ownership of the specified property;
    - II. documents prepared or commented upon by solicitors for use in relation to the investigation and enforcement of municipal by-laws; or, issues relating to the combination of the city's investigation and enforcement of municipal by-laws and the transfer of ownership of the specified property and,
- B. -email or other correspondence documents which do not involve members of the city's LSD, but are documents between city staff that reproduce or summarize the contents of solicitor-client communications.

[53] The city submits that the legal advice records consist largely of communications and associated attachments between MLS staff and city's lawyers related to the seeking and provision of legal advice. The city submits that these types of records are at the "core" of the interests sought to be protected by section 12. The city submits that the legal advice records reflect solicitor-client communications within the continuum of communications or documents in which a variety of legal advice, opinions, and suggestions were either requested or provided.

[54] The city submits that while some of the legal advice records (category B above) do not explicitly include the city's lawyers as parties to the communication, these records contain communications between other city staff, which either reproduce, reference, or summarize the content of solicitor-client communications. The city submits that communicating the contents of solicitor-client communications from the city's lawyers to other city staff does not constitute a basis to set the privilege aside.

[55] The city submits that no parties outside of the solicitor-client relationship were involved in the discussions contained in the legal advice records, and that privilege has not been waived in relation to any of these records.

[56] The appellant's representations do not address the application of the solicitor-client privilege exemption to the records.

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

[57] After reviewing the records and the representations of the parties, including the confidential representations of the city, I find that the legal advice records are exempt under the section 12 common law solicitor-client communication privilege.

[58] The legal advice records can be divided into two groups:

- Group A: communication involving MLS staff directly to and from the city's lawyers including attachments; and,
- Group B: communications between MLS staff that does not directly include city's lawyers, but would directly or indirectly reveal the content of solicitor-client communications including attachments.

[59] The Group A records consist of email chains and attachments relating to the investigation and enforcement (prosecution) of municipal by-law regulations in relation to the specified property. The recipients of these emails include MLS staff and the city's lawyers. Based on my review, I am satisfied that these records either contain a response from the city's lawyers, or they were created to keep both MLS staff and the city's lawyers informed so that legal advice may be sought and provided as required on the issues of the investigation and enforcement. I find that these records contain confidential communications between the city's lawyers and their client regarding legal matters, and therefore fall within the ambit of the solicitor-client communication privilege in Branch 1 of section 12 of the *Act*.

[60] With respect to the Group B records which did not include the city's lawyers, past IPC orders have recognized that email exchanges between non-legal staff can form a part of the "continuum of communication" covered by solicitor-client privilege.<sup>23</sup> This includes where disclosure would "indirectly reveal information exchanged between the [counsel] and [client] for the purpose of keeping both [...] informed so that legal advice may be sought and given as required,"<sup>24</sup> and where emails between non-legal staff refer to the need for the communications to be sent to legal counsel.<sup>25</sup>

[61] Based on my review of the Group B records, I am satisfied that they contain information that would reveal the content of discussions between MLS staff and the city's lawyers. I am also satisfied that disclosure of these records would indirectly reveal information exchanged between the city's lawyers and MLS staff for the purpose of keeping both informed so that legal advice may be sought and given as required. Having regard to the content of these pages in the context of the records as a whole, I find that they form part of the "continuum of communication" which falls within Branch 1 of the solicitor-client privilege exemption at section 12 of the *Act*.

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<sup>23</sup> Orders P-1409, P-1663, and PO-2624.

<sup>24</sup> Order MO-2789.

<sup>25</sup> Order PO-2624.

[62] With respect to waiver, the city submits that no parties outside of the solicitor-client relationship were involved in the discussions contained in the legal advice records, and that privilege has not been waived in relation to any of these records. As there is no evidence before me to suggest that waiver has occurred, I find that there has not been a waiver of solicitor-client privilege in relation to the legal advice records.

[63] I will now turn to the city's exercise of discretion in withholding the legal advice records that are covered by the section 12 exemption.

**D: Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?**

[64] The section 12 exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[65] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[66] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>26</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>27</sup>

[67] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:<sup>28</sup>

- the purposes of the *Act*, including the principles that:
  - information should be available to the public,
  - individuals should have a right of access to their own personal information,
  - exemptions from the right of access should be limited and specific, and
  - the privacy of individuals should be protected.

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<sup>26</sup> Order MO-1573.

<sup>27</sup> Section 43(2).

<sup>28</sup> Orders P-344 and MO-1573.

- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their 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, and
- the historic practice of the institution with respect to similar information.

### ***Representations***

[68] The city submits that it properly exercised its discretion. It points out that the head consulted with staff knowledgeable with the relevant issues. The city submits that the head exercised his discretion in good faith and took into account all of the relevant considerations with respect to the application of section 12, including the following:

- the purposes and principles of the *Act*, including that the information should be available to the public;
- exemptions to access should reflect the specific and limited circumstances where non-disclosure is necessary for the proper operation of municipal institutions;
- the wording of the relevant exemptions;
- the fundamental importance to Canadian society of the interest sought to be protected by the section 12 exemption;
- the fact that none of the information can be considered to be the appellant's personal information;
- the lack of any sympathetic or compelling need to receive the specific information withheld;
- disclosure will not have any impact on increasing public confidence in the operations of the city;

- the requested information is of a highly sensitive nature; and
- the recent nature of the requested information.

[69] The city finally submits that there is a public interest in the non-disclosure of the information relating to solicitor-client communications.

[70] The appellant's representations do not address the city's exercise of its discretion.

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

[71] Based on my review of the parties' representations and the nature and content of the exempt information, I find that the city properly exercised its discretion to withhold the exempt information under section 12 of the *Act*. I note that the city took into account the above noted considerations, such as the purposes and principles of the *Act*, the wording of the exemption and the interests it seeks to protect, and the lack of any compelling need to receive the specific information withheld. I am satisfied that it did not act in bad faith or for an improper purpose. Accordingly, I uphold the city's exercise of discretion in deciding to withhold the exempt information pursuant to the section 12 exemption.

### **E: Did the city conduct a reasonable search for records?**

[72] The appellant claims that further records responsive to his request should 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.<sup>29</sup> 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.<sup>30</sup> 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 (responsive) to the request.<sup>31</sup>

[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.<sup>32</sup>

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<sup>29</sup> Orders P-85, P-221 and PO-1954-I.

<sup>30</sup> Orders P-624 and PO-2559.

<sup>31</sup> Orders M-909, PO-2469 and PO-2592.

<sup>32</sup> Order MO-2246.

### ***Representations***

[75] In its representations, the city asserts that it conducted a reasonable search for responsive records. In support of its assertion, the city provided a sworn affidavit by the access and privacy manager. She explained that the assigned access and privacy officer (assigned APO) who conducted the search is currently on an extended leave. However, she explained that she is familiar with this appeal and the actions taken by the assigned APO.

[76] The affiant states that the assigned APO determined that responsive records would be held within the MLS division. As a result, searches were performed by MLS staff and records were retrieved and sent to the access and privacy unit (APU) for review.

[77] The affiant states that after the city issued its decision in February 2020, the appellant indicated that he wished to expand the scope of his access request. As such, the expanded scope was sent to the MLS division for search and retrieval then they were sent to the APU for review.

[78] After the city issued its decision in March 2020, the appellant indicated that he wished to expand the scope of his access request once again. As such, the further expanded scope was sent to the MLS division for search and retrieval then they were sent to the APU for review. Subsequently, the city issued a decision in August 2020 concerning access to these records.

[79] The affiant also states that she believes all record searches were conducted by experienced MLS staff who conducted searches in the responsive MLS staff's email boxes, the physical paper file related to the subject matter of the request, and the MLS system integrated business management system.

[80] The city submits that it allowed the appellant to amend his request without limit and conducted additional searches in response to the multiple expansions to the request. It also submits that it took a broad and expansive interpretation of the wording provided by the appellant.

[81] The appellant submits that he is interested in obtaining the name of person who physically inserted the evaluation numbers into the building evaluation report of August 2019 for the specified property.

[82] The appellant also submits that he believes the city is withholding responsive records as he already has possession of them. He explains that the city has omitted large quantities of responsive records that would be damaging to it if produced. The appellant further explains that to conceal these records, the city omitted to identify the people who have produced these damaging records, besides destroying them.

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

[83] As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the city has conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the city's searches for responsive records were reasonable in the circumstances, the decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[84] In the circumstances, I am satisfied that the multiple searches by the city for records responsive to the request were reasonable. I make this finding based on a number of reasons.

[85] As previously explained, 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 that are reasonably related to the request. In the circumstances of this appeal, I find that the city has provided sufficient evidence to demonstrate that it made a reasonable effort to identify and locate responsive records within its custody and control. I accept that these searches were conducted by experienced employees who were knowledgeable in the subject matter and they expended a reasonable effort to locate any responsive records.

[86] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, he must still provide a reasonable basis for concluding that such records exist.

[87] In this case, the appellant asserts that further responsive records exist as he already has possession of them. However, he does not provide any evidence to support this assertion. I acknowledge that he provided, attached to his email of April 22, 2022, the following documents:

- investigation notes for August 29, 2019
- email chain
- building evaluation report of August 28, 2019 for the specified property

[88] From my review of the appellant's representations and the attached documents, he is looking for confirmation that a named evaluator physically inserted the evaluation numbers into the building evaluation report of August 2019. I note that the first item in his third request was for this type of record. I also note that the city granted him full access to records responsive to this item. In my view, the appellant believes additional records exist because he is looking for a building evaluation report which contains the name of the evaluator who inserted the evaluation numbers. It does not appear that the city's building evaluation report (form) requires the name of the evaluator to be listed on the form. However, I am not prepared to find the city's search to be



unreasonable because the records identified by the city do not include the name of the evaluator.

[89] Accordingly, I find that the appellant has not established a reasonable basis that additional responsive records exist and I find that city's search for responsive records was reasonable and dismiss the appeal.

**ORDER:**

I uphold the city's decision and its search for records and dismiss the appeal.

Original Signed By: \_\_\_\_\_  
Lan An  
Adjudicator

December 20, 2022 \_\_\_\_\_