

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4472

Appeals MA22-00029 and MA22-00099

City of Thunder Bay

December 15, 2023

Summary: The requester sought access under the *Act* to records about a specific residential property in the City of Thunder Bay (the city). The city issued a decision denying access to some of the responsive records pursuant to section 12 (solicitor-client privilege) and some information under section 14(1) (personal privacy) of the *Act*. The city stated that it was charging a fee. The requester and the owners of the property appealed the city's decision. The requester also appealed the city's fee and claimed that the city had not conducted a reasonable search for responsive records.

In this order, the adjudicator partially upholds the application of section 14(1). She upholds the application of section 12. She does not uphold the fee. Finally, she orders the city to conduct another search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1), (definition of "personal information"), 12, 14(1), 17.

Orders Considered: Orders PO-3279 and PO-3656.

OVERVIEW:

[1] The requester sought access to records about a specific residential property. They made an access request to the City of Thunder Bay (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*), for the following:

For the period from January 1, 2021, to and including August 12, 2021, all copies or recordings or electronic records in the possession of the City of Thunder Bay and its staff concerning Committee of Adjustment File [#] and Ontario Land Tribunal File [#]. This would include all communications (in person, email, texts, letters, documents) between all involved City personnel and the applicants [the owners of the property (the affected persons)], their agent [name], as well as all communications between any involved City personnel (including but not limited to [three named City employees] or other City employees) regarding both of the above file numbers and any building permit application(s) which resulted in City's issuance of Building Permit [#] on [date].

The information sought would include pre-consultation notes, preliminary sketches, emails, texts, planner's notes of meetings, conversations and phone calls, notes of any changes from the [date] submission of the Minor Variance application to the hearing date of [date].

[2] After notifying the owners of the property (the affected persons), the city issued a decision denying access to some of the responsive records pursuant to section 12 (solicitor-client privilege) and some information in the records under section 14(1) (personal privacy) of the *Act*. The city also advised that it was charging a fee of \$272.50 for access to the records. The requester appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC) and Appeal MA22-00029 was opened.

[3] The affected persons also appealed the city's decision to provide the requester with partial access to records. Appeal MA22-00099 was opened.

[4] A mediator was assigned to attempt a resolution of both appeals. During mediation, the requester confirmed that in addition to appealing the city's decision to grant partial access to the responsive records they objected to the fee and the city's denial of their request for a fee waiver. The requester also stated that they believe additional responsive records should exist. The issue of reasonable search was added to the appeals.

[5] The affected persons confirmed that they were appealing the city's decision to grant the requester partial access to records containing their personal information and argued the records should be withheld in their entirety pursuant to section 14(1) of the *Act*.

[6] The city confirmed that it was maintaining its decision.

[7] As a mediated resolution was not reached, the appeals were moved to the adjudication stage, where an adjudicator may conduct an inquiry. I decided to conduct a joint inquiry into both appeals and I sought representations from the city, the affected persons, and the requester. These representations were shared among the parties in

accordance with the IPC's *Practice Direction 7*.

[8] In this order, I partially uphold the city's decision. I partially uphold its application of section 14(1). I uphold its application of section 12. I do not uphold the fee. Finally, I order the city to conduct another search for responsive records.

RECORDS:

[9] The records at issue include 210 pages of emails exchanged between the affected persons and the city that have been partially withheld pursuant to the personal privacy exemption at section 14(1). The requester seeks access to these records in full, whereas the affected persons seek to have these records withheld in their entirety.

[10] Also at issue are 17 pages of records fully withheld pursuant to section 12 of the *Act*. The requester seeks access to these records in their entirety.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it? Is the information exempt under section 14(1) (personal privacy)?
- B. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the records at issue?
- C. Should the IPC uphold the city's fee?
- D. Did the city conduct a reasonable search for records?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it? Is the information exempt under section 14(1) (personal privacy)?

[11] The city claims that section 14(1) applies to some of the information in the records. For section 14(1) to apply, the record must contain "personal information."

[12] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

[13] "Recorded information" is information recorded in any format, such as paper

records, electronic records, digital photographs, videos, or maps.¹

[14] Information is “about” the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official, or business capacity is not considered to be “about” the individual.²

[15] In some situations, even if information relates to an individual in a professional, official, or business capacity, it may still be “personal information” if it reveals something of a personal nature about the individual.³

[16] 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.⁴

[17] Section 2(1) of the *Act* gives a list of examples of personal information:

“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,

¹ See the definition of “record” in section 2(1).

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

See also sections 2(2.1) and (2.2), which 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.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

(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.

[18] 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."⁵

Representations

[19] The city has withheld the following information from the 210 pages of emails under the personal privacy exemption in section 14(1)

- the affected persons' names, birthdates, family status information, how title is held on their home, email addresses, property tax information, credit card information, and
- the affected persons' agent's name and email address.

[20] In their representations, the requester confirmed that they do not want access to the information that the city has withheld under section 14(1). Accordingly, this type of information is no longer at issue, and it will not be disclosed to the requester.

[21] The requester advised, however, that they continue to seek access to the information that remains in these records.

[22] As the affected persons have appealed the city's decision to disclose any of the information in these records on the basis that they are subject to the personal privacy exemption at section 14(1), I must first consider whether this remaining information is "personal information."

[23] The information that remains at issue consists of the information found in the body of the emails that make up the 210 pages of records. These records have been categorized by the city as two types of records:

⁵ Order 11.

1. Committee of Adjustment (COA) File records; and,
2. Correspondence with and between City Departments.

[24] The city states that both types of records were created or received as part of the COA process which is a public process which invites members of the public to comment on specific public matters. It states:

The contents of any emails of support or dissention for the project that were submitted to the COA were released with the exception of the redaction of basic personal information, such as names, email addresses and home addresses. This type of information would also be redacted during the COA process in order to protect the privacy of individuals as well as personal information.

[25] The affected persons submit that all information pertaining to building permits issued to their address for the house that is registered to them is identifying information. They also submit that the emails pertaining to the COA would identify them to the requester since the requester requested the COA documents and then requested the Ontario Land Tribunal (OLT) process against them.

[26] The requester relies on section 2(2) of the *Act*, submitting that the information at issue is not personal information as it is information that identifies the affected persons in a business capacity, because they carry out their business responsibilities from their dwelling.⁶ They state:

The contractor lives at the address where the construction was to take place. Building permits must be placed in an area where the public can see what changes have been permitted to occur on this property. A photograph of the building permit was taken [on date], when it was placed in the front window.

Findings

[27] Firstly, based on my review of the records for which section 14(1) has been claimed, I disagree with the requester that the affected persons were acting in a business capacity when interacting with the city in these emails or that they relate to a business that they were conducting from their home.

⁶ Sections 2(2.1) and (2.2) 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.

[28] It is clear from the records at issue that the affected persons were interacting with the city in a personal capacity regarding their own personal residential home. The records are about the affected persons seeking to have modifications made to their home. The emails at issue concern the exchange of information about these proposed modifications between the affected persons and the city's planning and building departments and the city's COA.

[29] I acknowledge that even without their names being disclosed, the affected persons are identifiable as the requester sought records about their home and named them in the request along with their address. Nevertheless, I find that remaining information in the records at issue is not personal information but information about the affected persons' home.

[30] In Order PO-3656, the adjudicator determined that if information is about a property, then it is not about an identifiable individual and is not personal information. He determined that the guiding principle in distinguishing personal information from information about a property is whether the information in the record reveals something of a personal nature about an individual, or, put another way, whether the information has a personal dimension to it.

[31] In Order PO-3279, the adjudicator found that the fact that the information in the records was associated with a fire at a specific address does not automatically result in all the information being personal information. He found that while the records before him contained some personal information, other information, even though associated with a fire at a specified address, was about the property rather than about the property owner and disclosing it would not reveal anything of a personal nature about him.

[32] From my review of the information remaining at issue in the 210 pages of emails, I find that this information is about the affected persons' property and does not have a personal dimension to it. It does not contain the personal information of the affected persons or any other individual.

[33] Therefore, the personal privacy exemption in section 14(1) cannot apply to the information remaining at issue in the 210 pages of emails as it is information about a property. Since no other exemption has been claimed for this information that I have found is not personal information, I will order that this information be disclosed to the requester. This is in keeping with the city's decision with respect to the disclosure of the information in these records.

[34] As noted above, the requester does not seek access to the information that the city claimed to be exempt under section 14(1). Accordingly, the city is to withhold from the requester, in accordance with its access decision, the following information from 210 pages of emails:

- the affected persons' names (including their signatures), birthdates, family status information, how title is held on their home, email addresses, property tax information, credit card information, and
- the affected persons' agent's name and email address.

[35] As I have found that the information remaining at issue in the 210 pages of emails is not personal information as that term is defined in section 2(1) of the *Act*, the personal privacy exemption in section 14(1) does not apply to this information and it is unnecessary for me to consider its application in this order.

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

[36] 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.

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

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

[38] 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.

Representations

[39] In its representations, the city relies on both branches of section 12 to withhold the records it claims are subject to solicitor-client privilege. The city asserts that the records are protected from disclosure by the common law principle of solicitor-client privilege, in particular, common law solicitor-client communication privilege, as well as the statutory head of privilege, as they were prepared by legal counsel employed by the city "for use in giving legal advice".

[40] The city did not provide the IPC with a copy of the records for which it has claimed section 12. In the Notice of Inquiry, I advised the city that if it did not provide the records

then it should provide a detailed affidavit describing the records.

[41] In its representations, the city advised that the records which it claims are subject to section 12 are eight emails and one set of handwritten notes dated between May 14 and August 5, 2021, as set out in the following chart of the city:

RECORD	DATE	NATURE OF DOCUMENT	REASON FOR PRIVILEGE EXEMPTION
1	2021/May/14	Handwritten notes of employee of the city from meeting with the city's solicitors	Created by the Corporation's employee for the purpose of obtaining legal advice.
2 - 4	2021/May/14	Three emails between employee(s) of the city and its solicitors	Solicitor-Client communication for the purpose of giving or receiving legal advice.
5	2021/Jul/14	Email between employee(s) of the city and its solicitors	Solicitor-Client communication for the purpose of giving or receiving legal advice.
6	2021/Jul/20	Email between employee(s) of the city and its solicitors	Solicitor-Client communication for the purpose of giving or receiving legal advice.
7	2021/Jul/21	Email between employee(s) of the city and its solicitors	Solicitor-Client communication for the purpose of giving or receiving legal advice.
8	2021/Jul/27	Email between employee(s) of the city and its solicitors	Solicitor-Client communication for the purpose of giving or receiving legal advice.
9	2021/Aug/05	Email between employee(s) of the city and its solicitors	Solicitor-Client communication for the purpose of giving or receiving legal advice.

[42] In reviewing the city's evidence on the application of section 12, I noted that the section 12 records were described, in the Mediator's Report, as comprising approximately 75 pages, however, in the city's representations, they were described in the above chart and in its representations as being "... significantly less pages in that category withheld."

[43] I also noted that the records in the chart did not cover the time span set out in the original request: from January 1, 2021, to and including August 12, 2021.

[44] I advised the city that I was not satisfied with the evidence it had provided thus far on the application of section 12 and reiterated my earlier request to receive a copy of the section 12 records or, in their absence, to be provided with more information about the records in compliance with the *IPC Protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC*.⁷

[45] In response, the city provided further representations and a supplementary affidavit in support of its section 12 claim.

[46] In its supplementary representations and affidavit, the city states that, with the exception of the handwritten notes from meeting of city employees with the city's solicitors, the records for which it claims section 12 are clearly identified as being between emails exchanges between employees of the city and the city's solicitors only and the city did not waive its privilege over these communications. It states that these records concern an appeal of a COA decision and the legal advice surrounding that appeal as well as general legal advice regarding COA appeals.

[47] The city states that it cannot speak to why the Mediator's Report indicated that there were 75 pages of privileged documents. It speculates that the three appeals (the two appeals that are the subject of this order and an earlier deemed refusal appeal), which were all mediated by the same mediator and the estimate may have been based on the initial document count (i.e., prior to the city's response to the request). In any event, it submits that the Mediator's Report does not constitute evidence.

[48] The city confirmed that the chart it provided with its initial representations lists all the section 12 records that it identified as responsive to the request and that they are all internal communications between its staff as the client and the city lawyer. It adds that these nine records comprise 17 pages.

[49] In response, the requester states that the 75-page count in the Mediator's Report was provided to the mediator by the city after the partial release of documents by the city.

[50] Responding to the requester's reply, the city states that the page count provided by the mediator in the Mediator's Report is not something it can speak to with any authority. It states that at the time of review of the gathered documents and city's final decision with respect to the release of the responding documents, only 17 pages constituted the number of pages withheld because of solicitor-client privilege.

⁷ <https://www.ipc.on.ca/wp-content/uploads/2020/06/2020-06-19-ipc-protocol-cases-involving-privilege-claims.pdf>

Findings

[51] The city has claimed that both the solicitor-client privilege at common law (specifically, common law solicitor-client communication privilege) and the statutory privilege branch of section 12 apply to the 17 pages of records for which section 12 has been claimed. I will consider first whether the common law solicitor-client communication privilege in branch 1 ("subject to solicitor-client privilege") applies to these records.

[52] If common law solicitor-client communication privilege in branch 1 applies, it is unnecessary for me to also consider whether the statutory privilege at branch 2 also applies. This is because to establish that information is exempt under section 12, it is only necessary to establish one type of privilege.

[53] 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. 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. 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.

[54] 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. The privilege does not cover communications between a lawyer and a party on the other side of a transaction.

[55] Having reviewed the city's representations and its affidavits, I find that the 17 pages of records for which section 12 has been claimed, a set of meeting notes and emails, contain legal advice being sought in a confidential manner from counsel by city staff related to a COA hearing. The emails would also contain communications between the lawyers and staff aimed at keeping both informed so that the advice can be sought and given.

[56] I am satisfied these 17 pages of records are subject to branch 1 solicitor-client communication privilege, as they all contain information that, if disclosed, would reveal the legal advice sought or provided by counsel to city staff.

[57] Considering the evidence provided by the city about the records at issue, I have no reasonable basis to conclude that privilege has been lost through waiver.

[58] Therefore, I find that all 17 pages of records for which section 12 have been claimed are exempt by reason of that exemption, as they contain solicitor-client communication privileged information.

[59] Based on my review of the city's representations, I find that the city has provided sufficient evidence that the records it has withheld under section 12 comprise only 17

pages, not the 75 pages listed in the Mediators' Report. I find that these 17 pages withheld under that section 12 are exempt. There is no evidence that the city expressly or implied waiver of privilege over these records.

[60] In addition, based on my review of the entirety of the city's representations, I find that the city exercised its discretion in a proper manner in denying access to the 17 pages of section 12 records, taking into account relevant considerations in its exercise of discretion. I am satisfied that the city balanced the appellant's interest in the disclosure of the records with the importance of the solicitor-client privilege exemption.

[61] Therefore, I find that the 17 pages of section 12 records are exempt by reason of that exemption.

Issue C: Should the IPC uphold the city's fee of \$272.50?

[62] Institutions are required to charge fees for requests for information under the *Act*. Section 45 governs fees charged by institutions to process requests.

[63] Under section 45(3), an institution must provide a fee estimate where the fee is more than \$25. The purpose of the fee estimate is to give the requester enough information to make an informed decision on whether or not to pay the fee and pursue access.⁸ The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.⁹

[64] The institution can require the requester to pay the fee before giving them access to the record.¹⁰ If the estimate is \$100 or more, the institution may require the person to pay a deposit of 50 per cent of the estimate before it takes steps to process the request.¹¹

[65] Where the fee is \$100 or more, the fee estimate can be based on either:

- the actual work done by the institution to respond to the request; or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.¹²

[66] In all cases, the institution must include:

- a detailed breakdown of the fee; and

⁸ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁹ Order MO-1520-I.

¹⁰ Regulation 823, section 9.

¹¹ Regulation 823, section 7(1).

¹² Order MO-1699.

- a detailed statement as to how the fee was calculated.¹³

[67] The IPC can review an institution's fee and can decide whether it complies with the *Act* and regulations.

[68] Section 45(1) sets out the items for which an institution is required to charge a fee:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[69] More specific fee provisions are found in section 6 of Regulation 823 (the regulation) regarding general access requests:

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.

¹³ Orders P-81 and MO-1614.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Representations

[70] In its decision, the city indicated that it was charging a fee of \$272.50. It also provided a breakdown of the fee, explaining that \$232.50 was for 7 hours and 45 minutes of search time at a rate of \$7.50/15 minutes, \$30 was for 1 hour of processing at a rate of \$30/hour and \$10 was to provide the records to the requester in electronic format on CD.

[71] In its representations, the city reiterated that record searches were undertaken by six city staff members for a total of 7 hours, 45 minutes and that the final fee included 1 hour for processing time and the \$10 cost for a CD of the records. It provided the following table describing the breakdown of the fee:

Reason	Fee	Estimate
Search Time	\$7.50/15 minutes	7 hours 45 minutes = \$232.50
Processing Time	\$7.50/15 minutes	1 hour = \$30.00
Photocopies	\$10.00 electronic copy	\$10.00
	Total	\$272.50

[72] The requester questions the amount of the fee. In particular, they question whether this fee includes a charge for searching and processing 75 pages of records for which solicitor-client privilege was claimed, when the city now takes the position that it only located 17 pages of these records. They state that the city's interim access and fee estimate decision should have had an indication of what exemptions the city would rely on, a description of the record, an estimate to what extent access was likely to be granted i.e., degree of disclosure or number of pages and the location of the records i.e., departments legal or otherwise.

Findings

[73] I find that the city has not provided sufficient evidence to support a finding that either its search or processing fee is reasonable.

[74] In the Notice of Inquiry (the NOI), the city was asked to provide representations in response to several questions about its fee.

[75] Regarding its search fee the city was asked to explain:

- How are the requested records kept and maintained?
- What actions are necessary to locate the requested records? What is the estimated or actual amount of time involved in each action?

[76] Regarding time taken to prepare the records for disclosure the city was asked to explain:

- What actions are required to prepare the records for disclosure?
- What amount of time is involved in each action?

[77] The city was also advised of actions that the IPC has previously found institutions are entitled to charge fees for,¹⁴ as well as a number of actions for which it cannot charge fees, including those stipulated in section 45(1)(e).¹⁵

[78] Other than providing a global figure of \$272.50, and the limited breakdown of \$232.50 for the search fee, \$30 for the processing fee and \$10 for an electronic version of the records the city did not provide the requested details about how it arrived at its fee.

[79] Regarding its fee of \$232.20 for search, the city has not provided any information about how the records are kept and maintained. It has not explained what actions were undertaken to locate them, or why it took six staff members 7 hours and 45 minutes to

¹⁴ For example, an institution can charge for time spent severing (redacting) a record. See Order P-4.

¹⁵ Section 45(1)(e) does not allow an institution to charge for:

- time for responding to the requester;¹⁵
- time for responding to the IPC during the course of an appeal;¹⁵
- legal costs associated with the request;¹⁵
- comparing records in a request with those in another request for consistency;¹⁵
- GST;¹⁵
- costs, even if invoiced, that would not be recoverable had the request been processed by the institution's staff;¹⁵ or
- coordinating a search for records.¹⁵

search for and locate records that consist of emails and one set of handwritten notes. The city has also not explained how its search fee is affected by the reduced number pages for which it claims section 12.

[80] In the NOI, the city was advised that section 45(1)(e) of the *Act* is intended to cover general administrative costs when responding to a request.¹⁶

[81] The city did not explain if there were such costs under section 45(1)(e). As a result, I have no indication from the city what it means by "processing time."

[82] As well, the city has charged the requester a \$30 processing fee and has not explained what this fee pertains to or even under what subsection of section 45(1) it has charged this fee. Nor can I ascertain from the city's representations what actions this "processing" fee pertains to.

[83] Accordingly, as the city has not provided sufficient evidence to explain its search fee of \$232.50 and its processing fee of \$30, I will not allow the city to charge the requester these fees.

[84] The city has also charged the requester a \$10 fee to provide him with electronic copies of the records on CD, which is the allowable amount under the regulation. The requester has not challenged this fee and has not asked for it to be waived. Therefore, it is not necessary for me to consider whether this \$10 fee should be waived under section 45(4).

[85] The requester has already paid the city the fee of \$272.50. As I have only upheld the \$10 CD fee, I will order the city to refund the amount of \$262.50 to the requester.

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

[86] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.¹⁷ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[87] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.¹⁸

[88] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has

¹⁶ Order MO-1380.

¹⁷ Orders P-85, P-221 and PO-1954-I.

¹⁸ Order MO-2246.

made a reasonable effort to identify and locate responsive records;¹⁹ that is, records that are "reasonably related" to the request.²⁰

[89] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.²¹ The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²²

Representations

[90] The city provided representations, in the form of an affidavit, describing its search for responsive records. The city states that for this request, it did not contact the requester to clarify the request and chose to respond literally to the request. It states that the request was clearly written and did not require clarification.

[91] The city states that individual staff members, who are well versed in how to search thoroughly, searched their own email accounts and files for the responsive records. The city submits that the following people, in particular, were asked to search for responsive records:

- Acting Secretary-Treasurer, Committee of Adjustment Development & Emergency Services Department Planning Services,
- Supervisor of Planning Services,
- Former Planning Director, and
- Senior Planner.

[92] The city further explains that the Supervisor of Planning Services, who coordinated the search of the Planning Department, suggested three other employees who might also have relevant documents. He states that each of these employees were asked to undertake a search for relevant records.

[93] The requester submits that the city's representations do not address certain gaps in the records. They also submit that the city did not locate records dated from June 2, 2021, to July 8, 2021, about the OLT appeal, the date that the notice of hearing scheduled for August 12, 2021, was received for this OLT hearing by the city planners.

[94] The requester also is concerned that there are no meeting notes or emails in response to a high priority Planning Department email of July 8, 2021, or records

¹⁹ Orders P-624 and PO-2559.

²⁰ Order PO-2554.

²¹ Orders M-909, PO-2469 and PO-2592.

²² Order MO-2185.

discussing preparations or meetings planned from July 8, 2021, to August 12, 2021, regarding the OLT hearing.

[95] The requester further submits that the change in the number of pages identified as solicitor-client privileged from 75 pages identified at the mediation stage to 17 pages referred to at the inquiry stage causes him to doubt the city's search results. They also point out that the 17 pages of records for which section 12 has been claimed are dated from May 14, 2021, to August 5, 2021, while in his request he sought access to records from January 1, 2021, to and including August 12, 2021.

[96] The requester submits that there should be additional records for April 2021, given the COA proceedings at that time. The requester also submits that there should be records from the City Solicitor's office dated before May 14, 2021, generated before the COA hearing of April 21, 2021, and generated before April 1, 2021, when an application for 2 minor variances was accepted. They note that during this time one of these variances was to change the meaning of the word "Attached" in the city bylaws which should have had a legal opinion about the wording of the change before being proposed to the COA of the City of Thunder Bay.

[97] The city did not respond to the requester's questions about why the records that it identified as being solicitor-client privileged cover the time period of May 14 and August 5, 2021, when in his request he seeks access to records from January 1, 2021, to and including August 12, 2021.

Findings

[98] For the reasons that follow, I find that the city did not conduct a reasonable search for responsive records.

[99] In his request, it is clear that the requester seeks access to records dated between January 1, 2021, and August 12, 2021, concerning a specific Committee of Adjustment file and a specific Ontario Land Tribunal file, and any building permit application(s) which resulted in the city's issuance of a specific building permit. There are two types of records were identified as responsive to the request, records related to the affected persons' interaction with the city (the 210 pages of emails) and internal city records (the 17 records for which section 12 has been claimed).

[100] Regarding the emails, the requester specifically claims that the city has not located records dated from June 2, 2021, to July 8, 2021. I have reviewed the 210 pages of email records located by the city and they appear to me to contain the missing information requested by the requester about the OLT file that is dated from June 2, 2021, to July 8, 2021. Accordingly, I find that the city has conducted a reasonable search for these types of records.

[101] Regarding the records that the city claims are subject to solicitor-client privilege section 12, the requester's request covers the period from, January 1, 2021, to and

including August 12, 2021. However, the records that the city has identified as solicitor-client privilege are for the period of time between May 14, 2021, and August 5, 2021. The city does not address why it did not locate any records of this type from January 1, 2021, to May 13, 2021, or August 6, 2021, to August 12, 2021.

[102] I note that the city has not indicated that it conducted searches of its City Solicitor & Corporate Counsel department's record holdings. None of the individuals who the city states conducted searches appear to me to be lawyers or staff from this department.

[103] I find that the requester has provided a reasonable basis for me to conclude that additional responsive records should exist in the record holdings of its City Solicitor & Corporate Counsel department. I do agree with the requester that there should be additional records involving the city's legal counsel's department, in particular records dated in April 2021 related to the COA hearing. Although some of the information in the records in the City Solicitor & Corporate Counsel department may be subject to the section 12 exemption, the city still has an obligation to search for these records and issue an access decision on them.

[104] Accordingly, I will order the city to conduct a search of the records holdings of its City Solicitor & Corporate Counsel department and issue an access decision to the requester.

ORDER:

1. I order the city to disclose the 210 pages of emails to the requester, with severances made to the:
 - affected persons' names (including their signatures), birthdates, family status information, how title is held on their home, email addresses, property tax information, credit card information, and
 - affected persons' agent's name and email address.

by January 26, 2024 but not before January 22, 2024. For ease of reference, I am providing the city with a highlighted copy of these 210 pages of records highlighting or redacting the information that should NOT be disclosed to the requester.
2. I uphold the city's decision to deny access to the 17 pages of records for which section 12 has been claimed.
3. I do not uphold the city's search and processing fee of \$262.50 and I order the city to refund the amount of \$262.50 to the requester.

4. I order the city to conduct a search for records responsive to the appellant's request in the City Solicitor & Corporate Counsel department.
5. If records are located during the city's search as ordered in order provision 4, I order the city to issue the appellant with an access decision or interim access decision and fee estimate for any responsive records located in the City Solicitor & Corporate Counsel department, treating the date of this order as the date of the request for administrative purposes, in accordance with all applicable provisions of the *Act*.
6. In order to verify compliance with order provision 1, I reserve the right to require the city to provide me with a copy of the records provided to the requester in accordance with that order provision.

Original signed by: _____
Diane Smith
Adjudicator

December 15, 2023 _____