Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3067

Appeals MA11-402 and MA13-229

City of Greater Sudbury

July 2, 2014

Summary: The City of Greater Sudbury (the city) received an access request submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) by a community organization for records related to the construction of a home and an airplane hangar. The city issued a decision granting partial access to emails and other records, while denying access to the undisclosed information under sections 8(1)(i) (endanger security of a building), 10(1) (third party information) and 14(1) (personal privacy). The appellant appealed the decision to this office, challenging both the exemption claims and the adequacy of the city's search for responsive records. In this order, the adjudicator finds that some records, or portions of them, are not responsive to the request. The exemptions claimed do not apply to the remaining responsive records and the adjudicator orders them disclosed. Finally, the adjudicator finds that the city's search was reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 8(1)(i), 10(1)(a), (b) & (c), 17.

Orders Considered: Orders 23, M-493, MO-2081, MO-2181, MO-2476, MO-2735 and MO-3032.

OVERVIEW:

[1] This order addresses the issues raised by the decision of the City of Greater Sudbury (the city) in response to a request under the *Municipal Freedom of Information*

and Protection of Privacy Act (the *Act*) from a community organization for access to records related to the construction of a building and garage/airport hangar on a specific property. The request stated:

> Please provide all information regarding the building/new construction of home (Permit [specified number]) on the property known as [a specified municipal address].
>
> Please include all documentation regarding the construction of the garage /aircraft hangar on the same property.
>
> Information to include but not restricted to supplying all applicable by laws, building standards (including height restrictions), applicable set backs from water, sewage/septic field bed requirements, survey documents, check lists used by city officials, all notes by city employees including all emails etc. that are applied to this property by the homeowner and city officials, from the application for the building permit to present. To include all drawings associated with these two projects noted.
>
> Names of all city officials/contractors (eg Health Unit employees) with the titles and contact information of those who worked/approved this construction.
>
> To include any "variances" applied and/or granted to this project during or prior to a permit being granted.
>
> Do not duplicate information contained in previous FOI 2011-91.[1]

[2] In response, the city issued a decision letter, dated August 19, 2011. Regarding information about the construction and build of the home, the city stated: "All information was provided in the previous FOI 2011-91 request. Please note building plans are released to the current home owner only." Regarding the construction of the garage/aircraft hangar on the same property, the city advised that "We have no documentation on the construction of the garage/aircraft hangar building as this is a matter of federal jurisdiction."

[3] With reference to the third part of the request for information related to bylaws, building standards, surveys, drawings and other documents created by city officials, the city again advised that "All information was provided in the previous FOI 2011-91 request. The applicable by-laws for the most part are the Zoning By-law 2010-100Z and the Ontario Building Code[. B]oth are available on our web sites and the Ontario

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[1] The city assigned a file number for this new, second, request of FOI 2011-99.

building code available through our link to the Ontario Provincial Ministry of Municipal Affairs and Housing."

[4] The city also directed the requester to the Sudbury and District Health Unit for information about the septic system and overall construction of the hangar, including "names, titles and contact information of those who worked/approved the construction" because it was a matter within federal, not municipal, jurisdiction.

[5] With respect to the portion of the request related to "variances applied and/or granted to this project during or prior to a permit being granted," the city stated that there were no responsive records. Finally, the city advised the requester that the only records considered "new" for this request, compared to the initial one submitted regarding the same property, would be emails between the city and the property owner. However, according to the city, there were no responsive records of this type.

[6] The requester, now the appellant, appealed the city's August 2011 decision to this office. During this office's initial review of the appeal, the city conducted a follow-up search and identified additional responsive records. The city wrote to the appellant on November 14, 2011, advising him about the newly identified records, as well as the necessity of notifying several third parties whose interests might be affected by disclosure (the affected parties), pursuant to section 21(1) of the *Act*.[2] After receiving the affected parties' input, the city issued a supplemental decision dated December 12, 2011, denying access to those records under sections 10 and 14. The appellant appealed that decision.

[7] Next, this office appointed a mediator to explore resolution of the appeal. Following discussions between the mediator, the appellant and the city, the city agreed to revise its decision and issued another supplemental decision dated May 25, 2012, indicating that it would disclose two surveyor's real property reports. The city's denial of access to the records identified as responsive to that point was clarified in that decision as being based on sections 8(1)(i) (security of the building), 10(1) (third party information) and 14(1) (personal privacy).

[8] In subsequent conversations with the mediator, however, two of the affected parties – the property owner and the surveyor - advised the mediator that they objected to the city's decision to disclose the two real property reports.[3] Upon being informed by the mediator of the two affected parties' objection to disclosure of the

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[2] Section 21(1) of the *Act* states: A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record, (a) that the head has reason to believe might contain information referred to in subsection 10(1) that affects the interest of a person other than the person requesting information; or (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 14(1)(f).

[3] While the two individuals indicated a desire to appeal the city's supplemental decision of May 25, 2012, separate appeals to address the third parties' appeals of the city's decision were not opened at that time.

surveys, the city decided not to disclose these records.

[9] The appellant remained dissatisfied with the disclosures and with the adequacy of the city's searches for responsive records. The concerns itemized by the appellant regarding the city's response to his request related mainly to the third part of the request. While the appellant acknowledges that by-laws and the Ontario Building Code are available online, he maintains that the city should confirm, in writing, what specific by-laws or parts of the Ontario Building Code were applied to this project. Further, although the appellant acknowledged that construction of the airplane hangar is a federal matter and accepts that the Sudbury and District Health Unit has jurisdiction over the septic beds, he disputes the city's position that no communications between the city and the Health Unit exist concerning these matters. The appellant also believes that city employees must have approved the construction of the hangar and that some records identifying these city staff must exist. Finally, the appellant maintains that variances were, in fact, granted and must, therefore, be documented.

[10] After these concerns were relayed to the city, a new search for email communications was conducted and several additional records were identified. These new emails were addressed in a July 16, 2012 letter, in which the city advised that it had located the additional records, but first needed to consult several affected parties prior to making a decision on disclosure. After consulting several affected parties, the city issued a decision on October 18, 2012, granting partial access to the five emails, but withholding portions of them under section 14 of the *Act.*

[11] Upon receiving the October 18, 2012 decision letter, the appellant advised that he does not object to the personal information being removed from the emails that had been disclosed to that point. As a result, the withheld portions of the email records are no longer at issue. However, the appellant still believes that many additional emails records should exist and the adequacy of the city's search remains at issue in this appeal. The appellant also continues to seek access to the building permit records.

[12] Since it was not possible to resolve the appeal fully through mediation, it was transferred to the adjudication stage and assigned to me to conduct an inquiry.

[13] I started my inquiry by sending a Notice of Inquiry, outlining the facts and issues, to the city, initially.[4] The city submitted representations.[5] At the same time, the

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[4] I decided to incorporate the objection of the two affected parties to the disclosure of the real property surveys into Appeal MA11-402 because third party appeals of the city's May 25, 2012 supplemental decision had not been opened. At my request, the city advised the appellant of this aspect in a February 15, 2013 letter, which was copied to this office.

[5] The city's submissions contained written representations (44 pages) with 36 attachments, accompanied by copies of IPC orders or cases cited in IPC orders. There were two sworn affidavits provided by the city's Deputy City Clerk and its Director of Building Services and Chief Building Official.

city advised that it intended to disclose additional email records[6] and sent another revised decision letter on April 8, 2013 to the appellant, indicating that notification of four individuals would be necessary. I wrote to the appellant on April 12, 2013 to advise him that the four individuals who had been notified were entitled to appeal the city's decision to this office within a 30-day time period. Given the potential for the filing of new third party appeals related to Appeal MA11-402, I put the appeal on hold pending the expiry of the 30-day appeal period. One of individuals notified of the city's April 8, 2013 revised decision appealed to this office and Appeal MA13-229 was opened to address the proposed disclosure of that email (record 7). Appeal MA13-229 was streamed directly to the adjudication stage and joined with my inquiry into Appeal MA11-402.

[14] Next, I sent Notices of Inquiry to the new third party appellant in Appeal MA13-229 and the two affected parties in Appeal MA11-402 who had previously expressed opposition to disclosure of records, inviting submissions on the issues.

[15] In Appeal MA13-229, I received representations from the third party appellant who opposes disclosure of the one-page email relating to him. The issues in that appeal are the possible application of the personal privacy exemption and whether or not the record identified by the city is even responsive ("reasonably related") to the request. In Appeal MA11-402, the two other affected parties did not submit representations, in spite of several attempts to follow up by staff assisting me with this appeal.[7]

[16] I sent a modified Notice of Inquiry to the appellant, along with the non-confidential and relevant portions of the city's representations,[8] to seek his representations. In due course, I received submissions from the appellant and provided them, in their entirety, to the city for the purpose of seeking reply representations on the search issue. Once I received the city's reply representations, I sent them to the appellant in order to seek his further comments on the search issue in sur-reply. The appellant did not submit sur-reply representations.

[17] In this order, I address Appeals MA11-402 and MA13-229 together. I uphold the third party appellant's appeal in Appeal MA13-229 because I find that record 7 is not responsive to the request and must not be disclosed. Respecting Appeal MA11-402, I find that the building permit records do not contain "personal information" according to the definition in section 2(1) of the *Act*, but that the email records do contain personal information. However, I find that record 7 is not responsive to this request and that records 3, 13, 16 and 18 are removed from the scope of the appeal because the

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[6] These records consisted of the previously identified email records, as well as two additional records located in the course of preparing the city's representations.

[7] Although the property owner did not respond at the inquiry stage of this appeal, he did provide submissions to the city (through legal counsel) in November 2011 during the initial notification stage after the city received the request. The surveyor also only provided input in November 2011.

[8] The attachments to the city's representations were not sent to the appellant.

withheld personal information in those email records has been removed from the scope of the appeal by the appellant. Next, I find that sections 10(1) and 8(1)(i) do not apply and that records 1, 2, 4, 5, and 6 must be disclosed to the appellant. Finally, I find that the city's search for responsive records was reasonable, and I uphold it.

RECORDS:

[18] The records at issue in this order consist of single family home drawings (14 pages, record 1), surveyor's real property reports (2 plans, record 2), correspondence (1 page, record 3), foundation drawings (2 pages, record 4), COR-FLOR slab drawings (2 pages, record 5), beam drawings (37 pages, record 6) and emails (11 pages, records 7, 9, 13, 16 & 18).

ISSUES:

A. Is record 7 responsive to the request?

B. Is there an issue with the public availability of certain records?

C. Do the records contain "personal information" as defined in section 2(1) of the *Act*?

D. Does the mandatory exemption at section 10 apply to the records?

E. Could disclosure of record 1 reasonably be expected to endanger the security of a building as contemplated by section 8(1)(i)?

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

DISCUSSION:

A. Is record 7 responsive to the request?

[19] The issue of responsiveness of record 7 arose during the adjudication stage of Appeal MA11-402, following the April 8, 2013 access decision issued by the city respecting several emails written by the notified affected parties. As noted previously, Appeal MA13-229 was opened as a third party appeal of the city's April 8, 2013 decision to disclose one of those records - a one-page email written by that individual to the city, now described as record 7.

[20] Section 17 imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. Of particular relevance here is section 17(1)(b), which requires "a person seeking access to a record … [to] provide sufficient detail to enable an experienced employee of the institution, upon a

reasonable effort, to identify the record." Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, any ambiguity in the request should be resolved in the requester's favour.[9] To be considered responsive to the request, records must "reasonably relate" to the request.[10]

[21] According to the city, the "request appeared straightforward" and there was no reason to seek clarification since the deputy clerk had already spoken to the appellant. Regarding the responsiveness of the email record, the third party appellant refers to the request and submits that it is clear from the wording of it that the requester was seeking documents associated with two projects on the identified property, namely the "home" and "garage/aircraft hangar." The third party appellant states that since the record is not related to either of the projects, it is "not even relevant to this FOI request and therefore should not be released to the requester."

[22] Although the appellant did not directly address this issue, he did state:

> The city … [has] run the gamut of excuses why the most basic items requested … have not been released. This includes trying to bury you and us with paper work and unnecessary, if not farcical, releases of "records" over the past two years. Some have nothing to do with the property in question.

[23] As I stated above, information must be reasonably related to the request in order to be considered responsive to it. Based on the plain wording of the request, I agree with the third party appellant that record 7 is not responsive to the request. This November 2006 email does not relate to, or mention, the building or garage/aircraft hangar identified in the request. The request in Appeal MA11-402 cites a specific building permit number that, based on its prefix, was issued in 2010, which is four years after the email was written.

[24] Based on the totality of the information before me regarding the request, I find that the email identified as record 7, which the city proposed to disclose to the requester in Appeal MA11-402, is not responsive to the request. Therefore, I uphold the third party appellant's appeal of the city's April 8, 2013 access decision, and I order the city not to disclose this record.

[25] Given my finding that the third party appellant's November 2006 email falls outside the scope of the request, I will not review it further in this order. No further issues need to be addressed for Appeal MA13-229.

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[9] Orders P-134 and P-880.
[10] Orders P-880 and PO-2661.

B. Is there an issue with the public availability of certain records?

[26] During the adjudication stage of the appeal, an issue arose respecting the city's claim that the By-laws and *Building Code* provisions the appellant was requesting were publicly available. The appellant had concerns about their availability. In the Notice of Inquiry sent to the city, I noted that the city had not claimed section 15(a) of the *Act* to the by-laws and *Ontario Building Code* provisions that would be considered responsive to the appellant's request and I pointed out that:

> It may be useful to provide additional explanation to the appellant through these representations regarding relevant by-laws or *Code* provisions. Regardless, in my view, the online availability of these documents is an issue that would more usefully have been addressed during mediation in an effort to remove it from the scope of the inquiry. Access to the relevant by-laws and *Ontario Building Code* provisions still appears to be the subject of dispute that is not yet resolved.

[27] I asked the city to comment on the possible relevance of section 15(a) of the *Act,* after addressing the principles grounding this office's 35-day discretionary exemption claim policy.[11]

[28] In response to my request for clarification, the city submits that "[t]he discretionary exemption at section 15(a) was raised implicitly" in its initial decision letter. According to the city, its "conduct reflects its intention to exempt the records by providing the requester with an alternative form of access and not proceed further with providing a fee estimate for those records which were publicly available." The city states that it had understood the appellant no longer disputed the public availability of the by-laws and *Building Code* and expressed concern about it being raised during adjudication because doing so "would compromise the integrity of the mediation and appeals process [by] disregarding[ing] the understanding arrived at through mediation at the adjudication stage." The city also provided representations on section 15(a), which I have considered.

[29] The appellant's response to the city's submissions on this issue suggests that, in fact, he did not entirely agree with the city's assessment that the "publicly available" issue had been resolved at the mediation stage. He expresses exasperation and states

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[11] The *IPC Code of Procedure* (the Code) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the Code addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states: In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

that "there are hundreds, if not thousands of building code bylaws. ... It all comes down to which bylaws were applied to this residence? Only the city knows. The rest of us can only guess."

[30] In reply, the city reiterates a point it made respecting its searches for responsive records (considered below), which is that the by-law and *Code* provisions applied to the construction at the property had been identified in response to the earlier access request made by the same community association.

[31] Section 15(a) provides that an institution may "refuse to disclose a record if, the record or the information contained in the record has been published or is currently available to the public." This discretionary exemption is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access.[12] Past orders have established that in order for this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.[13]

[32] I accept the city's representations on section 15(a). Although this exemption was never expressly claimed by the city, I would have found that there is a regularized system of access for the by-laws and *Building Code* provisions of relevance here. More importantly, I agree that the public availability of the by-laws and the *Building Code* provisions was never seriously disputed by the appellant. Rather, the appellant's challenge to the city's decision in respect of the by-laws and *Code* provisions appears to have arisen more from his sense that the city should have provided more specific itemization of the relevant parts of the residential by-law and *Building Code* provisions.

[33] The two requests filed by the same community association with the city about construction on the same property inevitably led to overlap in the identification of responsive records between the two of them. The city's narrative about the identification of the relevant by-laws and *Code* provisions in response to the earlier request provides a satisfactory explanation of that situation. The second request – the one at issue in this appeal - clearly excluded records identified as responsive in the first request. This includes the by-laws and *Building Code* provisions. In sum, I am satisfied that there is no live or ongoing issue with section 15(a) of the *Act* or the related late raising of that discretionary exemption.

[34] I accept the city's position that the relevant records had previously been provided to the appellant. Nevertheless, I would remind the city that when it also intends to rely on the public availability of a source of information to answer a request, section 15(a) should be expressly cited in its written access decision.

[12] Orders P-327, P-1114 and MO-2280.
[13] Orders P-327, P-1387 and MO-1881.

C. Do the records contain "personal information" as defined in section 2(1) of the *Act*?

[35] The city claims that section 14(1) applies to records 1, 3-6, 9, 13, 16 and 18. Therefore, in order to determine if section 14 applies, I must first decide whether the record contains "personal information" since the personal privacy exemption can only apply to *personal* information. Furthermore, the appellant suggested that he did not seek access to personal information so if I make a finding that the information qualifies as personal information, it is no longer at issue.

[36] The city had also initially claimed the exemption in relation to record 2, the surveyor's real property reports, but revised that access decision during the appeal to disclose the surveys, in their entirety. As stated, however, the reports were never disclosed to the appellant because the affected parties objected to their disclosure. Therefore, I will include record 2 in my analysis of this issue for the sake of completeness.

[37] The term "personal information" is defined in section 2(1) of the *Act* 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 where 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;

[38] 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.[14]

[39] 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.[15] 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.[16]

[40] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[17]

[41] The city submits that the records contain information fitting within paragraphs (d), (e), and (f) of the definition in section 2(1) of the *Act.* This information includes the names and email addresses of individuals and their views and opinions about the identified property. The city also suggests that the plans and drawings contain the affected party's name and other information about him that may fit within paragraph (h) of the definition.

[42] The affected party (property owner) did not provide representations during the inquiry and the submissions made on his behalf at the notification stage do not address the personal information or personal privacy issues.

[43] As noted above, the appellant had indicated during the appeal process that he was not interested in seeking access to the personal information of other individuals.[18]

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[14] Order 11.
[15] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[16] Orders P-1409, R-980015, PO-2225 and MO-2344.
[17] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[18] Following his review of the July 16, 2012 revised decision.

In particular, he did not object to the removal of personal information or "identifiers" from the first set of emails identified as responsive to his request. Accordingly, when I sought his submissions in this appeal, I asked him to confirm his intentions with respect to personal information that may be contained in the building permit records and the other emails remaining at issue. If he did not seek access to "personal information," certain information would be removed from the scope of the appeal, thereby narrowing the issues for determination. As stated above, the appellant did not provide representations on this issue.

Analysis and Findings

[44] There are two categories of records for me to review regarding whether they contain personal information: the building permit records[19] and the emails.

[45] To decide whether the building permit records related to the construction of the affected party's home contain "personal information" as defined by section 2(1) of the *Act*, I must determine whether the information is recorded information about an identifiable individual. In Order 23, former Commissioner Sidney B. Linden distinguished between "personal information" and information concerning residential properties and concluded that the building plan at issue in that appeal was information about a property and not an identifiable individual. In Order MO-2081, where survey, site plan, elevation and lot grading documents were at issue, Adjudicator Catherine Corban adopted the reasoning of the former Commissioner in Order 23 and found that none of the information contained in building permit drawings qualified as "personal information." Orders 23 and MO-2081 have been followed in many subsequent orders because building permit information of this nature is not considered to be *about* an individual and does not, therefore, constitute "personal information" under section 2(1) of the *Act*.[20]

[46] Some of the building plan records before me contain the affected party's name: records 1 and 4-6, which are drawings for the affected party's home, including foundation, slab and beam drawings. Record 2, the surveys, do not. This raises the possible relevance of paragraph (h) of the definition of "personal information" which refers to an individual's name if it appears with other personal information. Faced with similar facts in Order 23, former Commissioner Linden stated:

> The institution's argument that the requested information becomes personal information about an identifiable individual with the addition of the names of the owners of the property would appear to raise the potential application of subparagraph (h) of the definition of "personal information".

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[19] The "building permit records" are those set out under the heading "Records," above, numbered 1-6.
[20] Orders MO-2053, MO-2695, MO-2792 and MO-2916.

> Subparagraph (h) provides that an individual's name becomes "personal information" where it " … appears with other personal information relating to the individual or where the disclosure of the name would reveal other information about the individual" (emphasis added). In the circumstances of these appeals, it should be emphasized that the appellants did not ask for the names of property owners, and the release of these names was never at issue. However, even if the names were otherwise determined and added to the request information, in my view, the individual's name could not be said to "appear with other personal information relating to the individual" or "reveal other personal information about the individual", and therefore subparagraph (h) would not apply in the circumstances of these appeals.

[47] I agree with the former Commissioner. In this appeal, with regard for the content of the records and the representations provided, I find that the building permit records, whether or not they contain the affected party's surname, do not contain "personal information" about him within the meaning of section 2(1) of the *Act*. As only "personal information" can qualify for exemption under section 14(1) as an unjustified invasion of personal privacy, section 14(1) has no application to the information contained in the building plans and surveys that comprise records 1, 2, 4, 5 or 6.

[48] In the city's original index of records for this appeal, the exemption identified for record 2, the two real property reports, was section 14. I have found that section 14 cannot apply to the surveys because they do not contain personal information. However, I note that the city submits in its representations that it "initially claimed section 10 on this record." Although the city would have disclosed the surveys in its May 25, 2012 revised access decision, the affected parties (property owner and surveyor) objected to the disclosure. Given the lack of clarity around the basis for the exemption of record 2, I will include it in my analysis of the possible application of section 10(1) to records 1, 4, 5 and 6.

[49] The exception to my finding that the building permit records do not contain personal information is record 3, a letter from a building supply company. The city's access decision respecting this letter was to disclose all but part of one line. The withheld information refers to an identifiable individual's training. I find that this information qualifies as "personal information" under paragraph (h) of the definition in section 2(1).

[50] Additionally, I find that the email records (9, 13, 16 and 18) contain personal information about identifiable individuals that fits within paragraphs (d), (e), (f) and (h) of section 2(1). I also find that records 13, 16 and 18 contain personal information about the appellant fitting into paragraphs (d), (e) and (h). In the city's revised access decision of April 8, 2013, these emails were almost fully disclosed. In particular, I note that the city disclosed the appellant's own personal information to him, with the likely

inadvertent exception of one part of record 13 that contains his name. I also note that the appellant is an identified recipient of emails contained in records 16 and 18, from which slightly more content was withheld.

[51] The next issue to be addressed would have been the possible application of section 14 or 38(b) to records 3, 9, 13, 16 and 18. However, I have concluded that no useful purpose would be served by conducting this analysis. As stated previously, the appellant did not clarify whether he sought access to the limited information withheld from the emails or other records in his representations. However, based on his earlier decision not to challenge the minor severances for personal information made to the email records initially identified, I am satisfied that he does not wish to seek access to similar, minor severances for personal information in records 3, 9, 13, 16 and 18. Accordingly, since the limited personal information withheld from records 3, 9, 13, 16 and 18 are no longer at issue, I find that these records are removed from the scope of the appeal. Therefore, it is not necessary to review the possible application of the personal privacy exemption to these records.

[52] In the next section of this order, I will consider whether section 10(1) applies to records 1, 2, 4, 5 and 6.

D. Does the mandatory exemption at section 10 apply to the records?

[53] The city relies on sections 10(1)(a) and (c) to deny access to records 1 and 4 to 6. From the affected party's representations which were provided earlier in the appeal process, it appears that he is relying on paragraphs (a), (b) and (c) of section 10(1). Furthermore as stated earlier, the affected parties also oppose disclosure of record 2.

[54] Section 10(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

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

…

[55] Section 10(1) of the *Act* recognizes that in the course of carrying out public responsibilities, institutions sometimes receive information about the activities of private businesses. Section 10(1) is designed to protect the confidential "informational assets" of such businesses or other organizations.[21] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[22]

[56] For section 10(1) to apply, the city or the affected parties opposing disclosure must provide sufficient evidence to satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[57] Section 42 of the *Act* provides that the burden of proof that a record falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third parties who rely on the exemption provided by section 10(1) of the *Act* share the onus of proving that this exemption applies.[23] For the reasons set out below, I find that section 10(1) of the *Act* does not apply.

Part 1: type of information

[58] The city notes that records 1, 4, 5 and 6 consist of building plans and specifications relating to the construction of a single family dwelling, which were prepared by licensed professional engineers or a qualified designer. The affected party submits that the records contain "trade secrets and confidential information" in the form of "revolutionary and innovative home energy systems, construction net 'zero energy' dwellings."

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[21] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).
[22] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[23] Order P-203.

[59] The definitions of the different types of information listed in section 10(1) have been established in prior orders. Relevant in this appeal is the definition of technical information, which states:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[24]

[60] I adopt this definition in the circumstances of this appeal. I have reviewed the drawings and plans at issue. I am satisfied that they contain information that qualifies as technical information belonging to an organized field of knowledge in the applied sciences or mechanical arts, namely engineering and architecture. As the records contain technical information that satisfies the first part of the test in section 10(1), it is not necessary for me to determine whether they also contain trade secrets.[25]

Part 2: supplied in confidence

Supplied

[61] In order for me to find that the second part of the test under section 10(1) has been met, I must be satisfied by the evidence that the affected party "supplied" the information at issue to the city in confidence, either implicitly or explicitly.

[62] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[26] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[27]

[63] The city submits that records 1, 4, 5 and 6 were required to be provided to the city in compliance with the *Building Code Act* to open a building permit, for inspections to be conducted and for the building permit to be closed upon construction of the building "so as to ensure compliance with the provincial Building Code."

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[24] Order PO-2010.

[25] In Order PO-2010, trade secret was established to mean information including, but not limited to, a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which (i) is, or may be used in a trade or business, (ii) is not generally known in that trade or business, (iii) has economic value from not being generally known, and (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[26] Order MO-1706.

[27] Orders PO-2020 and PO-2043.

[64] According to the affected party, the building plans were submitted to the city's Building Services department with the express understanding that the information supplied would only be used "in the administration and enforcement of the *Building Code Act, 1992.*"

[65] I am satisfied that the plans and drawings were supplied to the city's Building Services department by the affected party in support of his application for a building permit. I find that these records were "supplied" to the city for the purpose of part two of the test for exemption under section 10(1).

In Confidence

[66] In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that at the time the information was provided, the supplier of the information had a reasonable expectation of confidentiality, either implicit or explicit. This expectation must have an objective basis.[28]

[67] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; or
- prepared for a purpose that would not entail disclosure.[29]

[68] The city maintains that the records have been treated as "confidential documents." According to the city:

> the records were submitted by the property owner and property owner's agents under the understanding that building permit files are not accessible to the public as a matter of routine disclosure and with the understanding that only the current property owner may access the records. This is Building Services' policy.

[28] Order PO-2020.
[29] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct.).

[69] The affected party submits that disclosure of the records to third parties would violate the "express and implied condition that the information would only be disclosed and used for legitimate, good faith *Building Code* purposes."

[70] Based on my review of the building permit records, I note that none of them are stamped "Confidential" or otherwise noted as having been provided in confidence. However, upon consideration of the circumstances, I am satisfied that the affected party had a reasonable expectation of confidentiality when he submitted these records to the city. Of particular relevance is the city's evidence that its practice is that building plans are not made available to the public upon request. In my view, such a practice supports the affected party's contention that he had a reasonable and objective expectation of confidentiality that the building permit records would not be disclosed for purposes unrelated to the application.[30]

[71] Therefore, I find that the building permit records meet part 2 of the test for exemption under section 10(1). I will now consider whether disclosure of this information could reasonably be expected to result in one or more of the harms specified in sections 10(1)(a), (b) or (c).

Part 3: harms

[72] To discharge the burden of proof under the third part of the test under section 10(1), the parties opposing disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed.[31] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[32]

[73] The affected party submits that the requested records disclose the "full particulars" of his "revolutionary and innovative home energy systems, construction net 'zero energy' dwellings," including insulation values. Further, the affected party submits that disclosure of the building permit records would cause him to lose the competitive advantage he "now has in this new marketing area" because:

> The efficient building envelope, the solar systems, the thermal storage system, in conjunction with the geo-thermal heating system, all of which

[30] Orders MO-2476, MO-1823 and MO-1225.
[31] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* 1998 CanLII 7154 (ON CA), (1998), 41 O.R. (3d) 464 (C.A.).
[32] Order PO-2020.

> creates a dwelling that will exceed even the new Energuide standards, all of which constitute a new and innovative global energy approach to new home construction, is unique to [my] business and as such is valuable, confidential, proprietary business information.

[74] The affected party argues that his business plan includes marketing this new home energy efficiency solution and public disclosure of the drawings and plans would "harm [my] business prospects in this new field of business before they had a fair chance to be fully developed and realized."

[75] Respecting the harm in section 10(1)(b), the affected party's submissions refer to the construction drawings and engineering details relating to the airplane hangar, which as he points out, is a "federal undertaking." The affected party submits that although he has volunteered to provide these to the city, he has no legal obligation to do so and likely wouldn't, if he couldn't be assured that they would not be "needlessly released to persons who have shown little but negativity towards" him.

[76] The affected party property surveyor's correspondence[33] merely conveys his decision not to consent to the disclosure of the property surveys he prepared for the property owner. In a telephone call with staff from this office during the inquiry, he added that it was his understanding that these types of records are not shared with the public.

[77] The city's submissions on this part of the test essentially reiterate the representations of the affected party; namely that the design and specifications for construction of this particular single family dwelling reflect the approach the affected party intends to use for his net zero energy dwelling business. The city indicates that it decided that competitive harm to the new business of the property owner could potentially result from disclosure of records 1, 4, 5 and 6 and this merited the claim of section 10(1) to deny access to these records, in their entirety. The city also submits that the affected party's submissions led it to conclude that the release of the records could "result in undue loss of the financial gains to be made by breaking into the business of net zero energy dwellings." Regarding the affected party's submissions on section 10(1)(b), the city states that although there were discussions about the affected party providing the airplane hangar construction plans, none were provided.

[78] Having had the opportunity to review the affected parties' and city's comments, the appellant responded briefly. The appellant's submissions do not directly address the test for exemption under section 10(1) of the *Act*; rather, he expresses skepticism that disclosure of the records at issue could possibly harm the affected party's "so-called patents," as claimed.

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[33] Sent to the city following notification of the request.

Analysis and findings

[79] Many past orders have found that building permit documents are not exempt under section 10(1). However, before I continue with my analysis of the exemption, I will address the suggestion that access under the *Act* amounts to "needless release" to the appellant, as suggested. In Order MO-3032, I addressed a similar argument from counsel for a developer in response to an access request made to the Sault Ste. Marie Region Conservation Authority for building permit records, as follows:

> Section 4(1) of the *Act* states, in part: "Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless …". Section 4(1) creates an express and unambiguous right of access to records "in the custody or under the control" of an institution, such as the Sault Ste. Marie Region Conservation Authority.[34] In reviewing the decision of an institution, I must give effect to the clear access rights of the appellant under the *Act*, subject to the exemptions in sections 6 through 15 and section 38. These exemptions are applied on a case-by-case basis, and in accordance with the requirements of the particular exemption.[35]
>
> In this context, I reject the assertion that there is anything improper about the appellant, or other opponents of the development, obtaining access to the information at issue under the *Act*, **if it is not exempt** [emphasis added]. Access to information legislation exists to ensure government accountability and to facilitate democracy.[36] In Order MO-1924, former Senior Adjudicator John Higgins observed that "requesters may also seek information … to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions." I agree. Furthermore, past orders confirm that the fact that an appellant may publicly disclose the content of records, if granted access to them, does not mean that his or her reasons for using the access scheme under the *Act* are not legitimate.[37]

[80] Assistant Commissioner Brian Beamish commented in Order MO-2735 that the general practice of seeking the property owner's permission prior to granting access "seems a prudent one." In the very next paragraph of Order MO-2735, Assistant Commissioner Beamish also stated:

> However, where the property owner does not consent to the disclosure of the building plans to a third party, the municipality could consider

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[34] Orders PO-2520 and PO-2599.
[35] See, for example, Order PO-3176.
[36] *Dagg v. Canada* (Minister of Finance), [1997] 2 S.C.R. 403.
[37] See, for example, Orders M-1154 and PO-3325-I.

> processing the request as a formal request under the *Act.* This would involve a determination of whether any of the exemptions in the *Act* apply to the requested building plans.

[81] The question to be asked is whether the city or the affected party has provided sufficiently detailed and convincing evidence to satisfy the third part of the test for exemption under section 10(1). Evidence amounting to speculation of possible harm is not sufficient. Further, parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[38]

[82] Based on my review of the records and the representations provided, I find that I have not been provided with the requisite evidence.

[83] I begin with section 10(1)(b). Since the affected party did not provide the airplane hangar construction plans to the city, the harm under section 10(1)(b) suggested by the affected party is not a possibility in the circumstances. Furthermore, since the building plans and drawings are required to be submitted under the *Building Code Act, 1992* for a building permit to be approved, I find that there is no reasonable expectation that disclosure of the information would result in similar information no longer being supplied to the city for the purpose of section 10(1)(b). Section 10(1)(b) is not intended to address reluctance, or a lack of inclination, on the part of a third party, to provide information to an institution because it could be disclosed under the *Act*. The exemption refers to such information "no longer being supplied." Concerns of the nature expressed are not persuasive evidence of a reasonable expectation of harm under section 10(1)(b) in situations where information is provided to the institution pursuant to statutory compulsion.[39]

[84] I have considered the possible harms under sections 10(1)(a) and (c) together, given the arguments provided by the affected party on the harm to competitive position and the implied consequence of undue loss, even though his submissions did not directly address that part of the exemption. Based on the submissions provided, I find I have not been provided with evidence to support a reasonable expectation that disclosure of the record could reasonably be expected to prejudice the affected party's competitive position for the purpose of section 10(1)(a) or result in undue loss or gain under section 10(1)(c).

[85] As I noted above, many past orders have found that building permit documents are not exempt under section 10(1). One exception is Order MO-2476, where Adjudicator Steven Faughnan upheld the application of section 10(1)(a) to building plans for a hog barn. That order is distinguishable, however, based on the quality and cogency of the evidence provided by the affected party about the unique design and features of the structure in question, which was "a facility specific to a specialized link in

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[38] Order PO-2435.
[39] Order P-314.

the hog production chain". Adjudicator Faughnan noted that the affected party had provided three specific examples of the "subtle differences" in design that afforded the facility its "distinct advantage." In this appeal, the affected party refers to insulation values of the home as proprietary in nature and claims that such details are contained in the records. However, there is no greater specificity to these submissions – and the other related submissions as to the "new and innovative global energy approach to new home construction" – that would allow me to make the connection between these claims and the actual content of these records.

[86] Aside from there not being "detailed and convincing" evidence from the parties opposing disclosure, I cannot form the connection between the harm suggested and my own review of the drawings and plans. In addition, even if the details of these purported energy efficiencies of the home were readily apparent upon review of the records, I find the position taken on the harm with disclosure of them to be speculative in nature. In particular, I am not satisfied that disclosure of the drawings and plans could reasonably be expected to harm the affected party's "business prospects in this new field of business," regarding which no evidence was provided beyond general statements.

[87] The mandatory exemption for confidential third party information in section 10(1) is not intended to be wielded as a shield to protect third parties from competition in the market place, but rather, from a reasonable expectation of significant prejudice to the party's competitive position.[40] In sum, I find that neither the city nor the affected party has provided sufficient evidence to satisfy me that the disclosure of the records could reasonably be expected to significantly prejudice the affected party's competitive position.

[88] Given my conclusion that disclosure of the records could not reasonably be expected to result in the harms contemplated by section 10(1)(a) to (c), I find that part three of the test under section 10(1) is not met. As all three parts of the test under section 10(1) must be met in order for the exemption to apply, I find that section 10(1) does not apply to the building permit records (1, 2, 4, 5 or 6) and that they cannot be withheld on this basis.

[89] Since I have found that neither of the exemptions claimed for records 2, 4, 5 or 6 apply, I will order them disclosed to the appellant. I will now review whether section 8(1)(i) applies to the single family home drawings in record 1.

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[40] Order PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct.); see also Orders PO-2780, PO-3055 and PO-3256.

E. Could disclosure of record 1 reasonably be expected to endanger the security of a building as contemplated by section 8(1)(i)??

[90] To deny access to record 1, identified in the index of records as single family home drawings, the city relies on section 8(1)(i) of the *Act*. This exemption is part of the law enforcement exemption and provides that:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

[91] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[41] Furthermore, although section 8(1)(i) is found in a section of the *Act* dealing specifically with law enforcement matters, its application is not restricted to law enforcement situations but can be extended to any building, vehicle or system which reasonably requires protection.[42]

[92] The use of the words "could reasonably be expected to" in section 8(1)(i) require that there be "detailed and convincing" evidence to establish a "reasonable expectation of harm" with disclosure of the information. Evidence amounting to speculation of possible harm is not sufficient.[43]

Representations

[93] The city acknowledges the orders of this office that have held that residential buildings by their nature do not usually give rise to a "reasonable basis for believing that endangerment could result from disclosure," but suggests that these orders have also found the relationship between the parties to be relevant.[44] The city notes that in this situation, there is "documented evidence" of animosity between the parties that has led to police involvement. The city submits that the affected party has advised that he is wary of providing information to the city due to his concerns about the conduct of other individuals towards him. Further, the city submits that:

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[41] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[42] Orders P-900 and PO-2461.
[43] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[44] The city specifically refers to Orders MO-2074 and MO-2181.

> In the case of the building permit records, it is unfortunate for the property owner that by abiding by the law in providing documents as required for the city to enforce the *Building Code* that the property's owner's residential security is put in any risk. As such, the city takes the position that in applying this exemption the exemption was approached in a sensitive manner respectful of the animosity between the parties and with the understanding that the risk to the parties in this case is difficult to predict. It is not for the city to sit in judgment as to whether the property owner … has been wronged in this situation but the city feels an obligation not to exacerbate a bad situation by providing information about the property owner's residence which could be used to endanger the property or the property owner.

[94] The city sums up its position on choosing to exercise its discretion to apply section 8(1)(i) as being sensitive to the "matter of the security of someone's private residence in a time of tension in the neighbourhood."

[95] The appellant refutes the city's suggestion that disclosure of the records could pose a risk to the property owner. He submits that his community association's actions have not resulted in the involvement of police and "any other claim by the city or others is false."

Analysis and findings

[96] To establish that section 8(1)(i) applies, the city was required to provide sufficient evidence to satisfy me that disclosure of record 1 could reasonably be expected to endanger the security of a building, vehicle, system or procedure established for the protection of items and, further, that such protection is reasonably required.

[97] Order 188 articulates the principle that establishing one of the exemptions in section 8 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason.[45] This requirement that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure of the actual records and the potential harm which the institution seeks to avoid by applying the exemption.[46]

[98] The city was not required to prove that the disclosure of the record would actually result in the alleged harm[47] or that the expectation of harm was dependent on the identity of the requester. I mention this latter point because both the city and the

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[45] See also Orders PO-2099 and MO-2986.
[46] Orders 188 and P-948.
[47] Order P-557.

appellant referred to the relationship between the affected party and the community organization the appellant represents, with slightly different perspectives on the relevance of this point. Past orders have reviewed the relevance of the identity of the requester in determining the application of section 8(1)(i) and the consensus seems to be that "it depends." The requester's identity has been found to be relevant in the determination where the affected party had obtained a restraining order against that individual (Order MO-2074), but not relevant in other appeals (MO-2353), notwithstanding what might be considered poor relations between the parties. These decisions also seem to have taken the motivation of the requester in seeking the information into consideration.[48]

[99] In Order MO-2181, Assistant Commissioner Brian Beamish noted that: "residential structures, by their very nature, do not establish a reasonable basis for believing that the harms set out in section 8(1)(i) could reasonably be expected to result from the disclosure of their building plans." However, the case-by-case basis of these determinations is worth emphasizing.

[100] I find that the city has failed to provide the requisite detailed and convincing evidence of the harm section 8(1)(i) seeks to prevent. Accordingly, I am not persuaded that there is a reasonable expectation that disclosure of record 1 could reasonably be expected to endanger the security of the property owner's residence. In particular, I find that the city has not provided evidence to support the assertion that "the property's owner's residential security is put in any risk" by either providing the records to the city or by their disclosure, beyond mere speculation. This speculation is apparently based on the acrimonious relationship between the property owner and the community association the appellant represents. In the circumstances of this appeal, I am not satisfied that this building is one that reasonably requires protection. Not being satisfied that disclosure of record 1 could reasonably be expected to result in endangerment or serious compromise to the protection of the building for the purpose of section 8(1)(i), I find that it does not apply.

[101] In light of my finding that none of the exemptions claimed by the city apply to record 1, I will order it disclosed to the appellant, along with the other building permit records.

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

[102] The appellant maintains that many additional records, particularly emails, ought to exist.

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[48] See, for example, Order MO-2353, where Adjudicator Faughnan accepted that the requester intended to assert a proprietary interest over the building plans, but did not uphold the institution's denial of access under section 8(1)(i). See also Order MO-2986 for a different result on the application of section 8(1)(i) to building plans.

[103] Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17. If I am satisfied by the evidence before me that the search carried out was reasonable in the circumstances, this ends the matter. However, if I am not satisfied, I may order the city to carry out further searches.

[104] The *Act* does not require the city to prove with absolute certainty that further records do not exist, but the city must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[49] To be responsive, a record must be "reasonably related" to the request.[50] Similarly, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.

Representations

[105] Regarding the scope of this request and the records that would be identified as responsive to it, the city submits that because it had already processed the related, earlier request by another individual associated with the community organization and had spoken with the appellant, the Deputy Clerk did not think it was necessary to seek clarification. The city notes that the request in this matter sought the building plans for the identified property and expressly excluded records that were identified as responsive to the earlier request.

[106] The city grouped the responsive records into four categories for the building permit, the hangar construction, the septic beds, and the *Building Code* and zoning By-laws and advised the appellant that no further records existed because (in order of category): they had already been disclosed through the first request; the hangar construction was a federal matter; regulation of septic systems falls within the jurisdiction of the Sudbury and District Health Unit; and the relevant *Building Code* and By-law provisions were available on the city’s website.

[107] The city submits that in searching for responsive records, all Building Services files were searched by knowledgeable and experienced staff. Further, after the appellant expressed concern during mediation about the limited number of emails identified as responsive to the request, a further search was conducted by staff and additional emails were identified. Yet another search of the Building Services files was conducted during the preparation of the city’s representations in this appeal and no further records were located. The city claims that these multiple searches were conducted “in order to satisfy the requester’s insistence that additional records exist.” The city acknowledges the appellant’s concern about the number of responsive email

[49] Order P-624 and PO-2559.
[50] Order PO-2554.

records identified. In affidavit evidence, the Director of Building Services admits that at the time of the *earlier* request regarding the same property, it was not the practice of Building Services to print emails associated with a building permit file and as such no emails were produced in response to that earlier request. That practice appears to have changed by the time of the request leading to this appeal.

[108] With specific reference to the emails the appellant believes ought to exist that relate to the airplane hangar and septic beds, the city points out that the appellant maintains this belief in spite of the fact that he agrees that the city lacks jurisdiction over those matters. The city submits that the appellant has been unable to provide evidence to support his belief that such records should exist in the city's custody or control.

[109] Regarding the appellant's concerns about the identification of relevant and specific By-laws and *Building Code* provisions that were used by the city for the construction at the affected party's property, the city states that it provided sections from those documents to the community organization in the earlier request and did not wish to duplicate the access provided. The city refers to Part 6 of the City of Greater Sudbury Zoning By-law 2010-100Z and Part III of 95-500Z as the records disclosed through the earlier request and it states that both of these parts apply to residential zones. The city also provides additional information about how the appellant might access the *Building Code* and By-laws online at the city's own website, as well as through the Ministry of Municipal Affairs and Housing's website. Additionally, the city disputes the suggestion that the issue with providing the relevant By-laws or *Code* provisions is truly a search issue. According to the city, no single document exists that lists which By-laws or parts of the *Building Code* were applied to the construction at the affected party's property and the city is not required to create one.

[110] Finally, with respect to variances that the appellant believes must have been granted to the property owner (and related records), the city submits that there were no minor variances granted for that property and the only major variance related to an application for the severance of the property.[51]

[111] After reviewing the city's representations, the appellant continued to express concern about the number of emails produced in response to the request. He states: "... We have not seen anything from By-Law enforcement, Fire Department etc. yet in conversation with them they have been to the property. ... In our one major meeting with the city, attended by over one hundred stewardship members, our MP and MPP and several city department heads, the city claims not to have exchanged any emails prior to attending, or after the meeting."

[51] The city apparently disclosed the property severance records to the appellant, even though they would appear not to be responsive to this request.

[112] With respect to there being no responsive records identified by the city dealing with the septic bed issue, the appellant questions why the city would not have any such records when "the Health Unit files approval documents with the city after reviewing the field bed drawings. This was confirmed by the Health Unit."

[113] Next, respecting his concern that the city had not identified the particular by-laws applied to the new home being built on the property, the appellant submits that:

> There are hundreds, if not thousands of building code bylaws. We have spent hours reviewing these bylaws, online and with a disc supplied by the city. We have spoken to experts who compile the document necessary to obtain city building permits, and they say the same thing. It all comes down to which bylaws were applied to this residence? Only the city knows. The rest of us can only guess.

[114] In reply, the city maintains its position that a lack of jurisdiction over the approvals for the airplane hangar and the septic beds means that it is reasonable that the city would not have records. The city also reiterates that the wording of the appellant's request specifically directed the city not to duplicate information contained in the earlier access request. The city refers to Sudbury and District Health Unit records which formed part of the city's response to the earlier request, namely a sewage system permit and an email from a Health Unit inspector.

[115] Regarding By-law 95-500Z, the city reiterates that the applicable sections of the by-law formed part of the responsive records for the earlier request. The city also notes that the building permit application, which was disclosed in the earlier request, listed the applicable sections of the *Building Code*.

[116] Finally, in response to the appellant's concern about the absence of emails from "By-Law enforcement, Fire Department etc.," the city refers to the following part of the request: "all notes by City Employees including emails etc. that are applied to this property by the homeowner and city officials, from the application for the building permit to present." The city takes the position that Building Services Department records were thoroughly searched, but that records held by these other departments were not searched because the city considered them to be outside the scope of the request.

Analysis and findings

[117] As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must

still be provided.[52] The *Act* does not require an institution to prove with absolute certainty that further records do not exist.[53]

[118] A number of past orders have established the principle that 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.[54] The expectation created by the wording of section 17 of the *Act* is that the individual or individuals conducting the search must be familiar with the subject matter to which the records relate and have a detailed knowledge of the institution's information management systems. There is no particular, or corresponding, requirement that the employees conducting the search be knowledgeable in the *Act* or even in access-to-information matters more generally.[55]

[119] Based on the evidence provided to me in this appeal, I accept that the city conducted reasonable searches for responsive records.

[120] I am satisfied that the terms of the request were appropriately directed to the Building Services Department, the city department that would most reasonably have the records responsive to the request. The staff members in Building Services would be most knowledgeable with respect to the types of records and their specific locations, to conduct the actual searches.

[121] Given the differing jurisdiction over certain aspects of the subject matter of this request, I am also satisfied that the city has provided a reasonable explanation for why additional septic system records - in addition to those identified as responsive to the earlier request - might not exist and for why the city may not have records related to the airplane hangar in its custody or control.

[122] I also accept the city's explanation of the identification of the relevant By-laws and *Building Code* provisions. This office has previously stated that government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed.[56] Regarding the extent to which an institution must respond to questions asked by a requester, former Senior Adjudicator John Higgins stated the following in Order M-493:

> In my view, when such a request is received, the [institution] is obliged to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked. …

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[52] Orders P-624, PO-2388 and MO-2076.
[53] Order PO-1954.
[54] Orders M-909, MO-2433, PO-2469, PO-2592 and PO-2831-F.
[55] See Order PO-2592.
[56] See also Orders PO-2904, MO-2630 and MO-2808.

[123] I agree, and I accept the city's submission that the *Act* does not require institutions to create a record where one does not exist, including a composite document of the nature suggested by the appellant's submissions. I am satisfied by the city's explanation as to the identification of relevant by-law sections and *Building Code* provisions in the related request. In this appeal, therefore, I am satisfied that the city met its obligations under section 17 of the *Act* respecting the request for information related to the applicable *Building Code* and By-law provisions.

[124] Respecting the appellant's concern that there ought to be more emails responsive to his request, I accept the city's evidence that it conducted reasonable searches with respect to responsive emails within the Building Services Department. I note that after the Director of Building Services/Chief Building Official was informed by the Deputy Clerk that the request contemplated "all email records" relating to the identified address, that city official conducted another search of his email records and identified the additional records that were disclosed to the appellant. Regarding Building Services Department emails, I accept that the "multi-jurisdictional" context in which potentially responsive records were created, and the newer practice (at that time) of the city with respect to printing emails associated with a building permit file, could reasonably account for there not being as many responsive emails as the appellant would have expected.

[125] Past orders have held that although an appellant may be reluctant to accept the explanation provided about the identification of responsive records, this does not, by itself, provide a reasonable basis upon which the adjudicator could conclude that additional responsive records might exist elsewhere in the institution's record holdings.[57]

[126] In summary, based on the evidence before me, I am satisfied that the city made adequate and reasonable efforts to identify and locate any existing responsive records within its record-holdings. I accept that relevant city staff knowledgeable about the subject matter of the request conducted searches aware of the possible types of records that would be responsive to the appellant's request. Furthermore, I accept the evidence of the city that the additional email records the appellant seeks simply may not exist. As stated above, the city is not required to to prove with absolute certainty that further records do not exist.

[127] Accordingly, I find that the city's search for responsive records was reasonable, and I dismiss this aspect of the appeal.

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[57] See, for example, Order PO-3131; upheld in *Whitney v Ontario Lottery and Gaming Corporation and Information and Privacy Commissioner,* 2013 ONSC 7665 (Div. Ct.).

ORDER:

1. Given my finding that record 7 is not responsive to the request, the city is ordered <u>not</u> to disclose it.

2. As I removed the severances of personal information from the scope of the appeal, the city's decision respecting records 9, 13, 16 and 18 is upheld.

3. I order the city to disclose records 1, 2, 4, 5 and 6 to the appellant by **August 7, 2014** but not before **August 1, 2014**.

4. I uphold the city's search as reasonable.

5. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

Original Signed By: July 2, 2014
Daphne Loukidelis
Adjudicator