Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3157-I

Appeal MA12-321-2

City of Toronto

February 2, 2015

Summary: The requester, a former employee of the City of Toronto, filed a request for copies of emails related to his employment with the city. The requester appealed the city's decision to grant partial access to responsive records. The requester also claims that additional records exist. This order upholds the city's decision to exclude certain records from the scope of the *Act* under section 52(3) and upholds the city's decision to exempt records under section 7(1)(advice and recommendations) and 14(1)(personal privacy). The adjudicator orders the city to disclose the information it claims qualifies for exemption under section 11(c) and partially upholds the city's search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss.2(1) definition of "personal information", 7(1), 11(c), 14(1), 17 and 52(3).

OVERVIEW:

[1] An individual submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the City of Toronto (the city) for copies of emails with certain search parameters identified by the requester. The requester is a former employee who is the co-developer of a software program used by the city.

[2] The city located records responsive to the request and sent a decision letter (the first decision) to the requester granting partial access to the records. The city withheld parts of the remaining records under the discretionary exemptions in sections 7(1) (advice or recommendations), 11(c) (economic and other interests) and the mandatory exemption in section 14(1) (personal privacy).

[3] The requester (now appellant) appealed the city's first decision to this office and a mediator was assigned to the appeal.

[4] During mediation, the appellant questioned the reasonableness of the city's search. In response, the city conducted a further search, located additional responsive records and issued a second decision letter to the appellant granting him access to 58 pages of the records. However, the city denied the appellant access to another 70 records it identified in its legal file, claiming that these records were excluded from the scope of the *Act* under section 52(3) (labour relations and employment records). In the alternative, the city submits that these records contain solicitor-client privileged information and are exempt under section 12.

[5] At the end of mediation, the appellant advised the mediator that he is also appealing the city's second decision. In addition, the appellant confirmed that he continues to believe that additional records exist.

[6] This appeal was not resolved during mediation and was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry stage, the parties exchanged the non-confidential portions of their representations and the city provided reply representations to this office.

[7] Also during the inquiry stage, the city conducted a third search for records and located records not previously identified in the course of its two prior searches. The city issued a third decision letter granting the appellant partial access to the newly located records. The city claims that some of the withheld records are excluded from the *Act* under section 52(3)3 (labour relations and employment records). The city also claims that the withheld records qualify for exemption under the discretionary exemptions in sections 7(1) (advice or recommendations), 11(c) (economic and other interests), 12 (solicitor-client privilege) and the mandatory exemption in section 14(1) (personal privacy).

[8] The appeal file was subsequently transferred to me to issue a decision.

[9] Based on my review of the appeal file, it appears that appellant has concerns about the reasonableness of the city's third search. However, it is not clear whether the appellant also wishes to appeal the application of the exemptions to the third group of withheld records. In any event, this office did not request that the city provide

copies of the third batch of withheld records at the time the city issued its third decision letter. Accordingly, I do not have sufficient information to conduct an inquiry into whether portions of these records are excluded under section 52(3)3 or are exempt under sections 7(1), 11(c), 12 or 14(1). Having regard to the above, I have decided to grant the appellant 30 days from his receipt of this order to file an appeal of the city's third decision to this office, if he chooses to do so.

[10] This order will only review the city's first and second decisions. In this order, I uphold the city's decision regarding its application of the exclusion at section 52(3)3 and exemptions at sections 7(1) and 14(1). With respect to the city's search efforts, I order the city to conduct an additional search for records not related to the appellant's employment and/or termination from the city.

RECORDS:

[11] The records at issue in this appeal consist of:

1. Seven withheld emails; and
2. A bundle of 70 documents from the city's legal file.

ISSUES:

A. Did the city conduct a reasonable search?

B. Are the records from the city's legal file excluded from the scope of the *Act* on the basis of section 52(3)?

C. Do the emails contain "personal information" as defined in section 2(1)?

D. Do the emails at pages 30, 63, 64, 65 and 66 contain advice and recommendations under section 7(1)?

E. Does the email at page 50 qualify for exemption under section 11(c)?

F. Would disclosure of the "personal information" in the emails at pages 30 and 68 constitute an unjustified invasion of personal privacy under section 14(1)?

G. Did the city exercise its discretion in applying the discretionary exemption at section 7(1)?

DISCUSSION:

A. Did the city conduct a reasonable search?

[12] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[13] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[14] 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.[4]

[15] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

[16] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[6]

[17] The appellant's request sought access to:

> [a] copy (electronic copy if possible) of all emails and other Groupwise items (eg. calendar appointments) sent to/from [three named individuals] containing the word [name of a software program] or the [the appellant's first name] in the subject, body or attachment of the email/ Groupwise item since November 1, 2011.

[18] The appellant takes the position that additional records responsive to the request exist beyond those identified by the city. The city submits that it conducted a reasonable search for responsive records. The city states that the appellant:

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

> … is a former employee who is seeking documents created or received by his former supervisors concerning the issue of the termination of his employment. It appears that the documents responsive to his request relate to matters in which the City was acting as an employer, and as such are not subject to MFIPPA. As such, MFIPPA imposes no requirement for the City to conduct a search for records that are excluded from the operation of MFIPPA.
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> As it does not seem to be in dispute, the City conducted a review of [the appellant's] employment status, and in doing so obtained advice and input from the City Solicitor's Office and the Office of the City's Auditor General. The City has undertaken numerous searches for records. The documents in question relate to matters of employment, and as such are excluded from MFIPPA. [The appellant] is seeking documents held by the City relating to his dismissal – these are documents to which MFIPPA does not apply.

[19] The city refers to the Divisional Court in *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*[7] and argues that "any order for the City to conduct further searches for records relating to the review of a former employee's employment with the City, and decision to terminate this employment, would defeat the purpose of the s.52(3) exclusion which removes the documents of this type from the operation of MFIPPA".

[20] Despite the city's position that it was not required to conduct a search for the type of records which would respond to the appellant's request, the city provided an affidavit and submissions in support of its position that a reasonable search for records was conducted. In particular, the city submits that upon receipt of the request it contacted city staff members who it determined would have access to the information responsive to the request and directed these individuals to conduct a search for the records.

[21] In response, the appellant's representations state:

> Although it is expected that a number of the requested records directly relates to the City's review of my employment at the time, it is also expected that a number of these records relate to the operation of [named operation of the city] which can be of significant public interest. In fact, a number of these records released by the City have to do with the operations [related to the software program] and/or me.

[7] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

…

Although I have an interest in information that relates to the City's review of [my] employment matter, I am interested in information that relates to the operations of the [program area], and decision in its regard, in relation to the [software] and me. This information does not necessarily have to do with matters concerning my employment with the City.

[22] The appellant's representations also raise questions as to:

- whether the city's search for records include records from one of the supervisors named in the request given that this individual has retired;
- whether the city's Information and Technology (IT) department should have conducted the search for records related to the retired supervisor;
- whether the city's IT department should have been involved in the city's search given that the records reside in a repository managed by IT; and
- whether the city's further search was reasonable taking into consideration the fact that the city located additional records after its original search.

[23] Further, the appellant raised concerns as to whether the individuals conducting the searches were in a conflict of interest, given that they were his former supervisors. Finally, the appellant questioned whether the city's IT department could have conducted the searches faster than the individuals who conducted them. In my view, the issue of search time is not relevant in determining whether the city conducted a reasonable search for responsive records in the circumstance of this appeal. The appellant was not billed for search time pursuant to section 45(1)(a). Further, the individuals who conducted the search work within the department which maintains the records responsive to the appellant's request. Accordingly, I will not refer to these issues further in this order again.

[24] The appellant also raised a number of concerns about the veracity of information contained in the affidavit accompanying the city's representations. In response, the city's reply representations contained a revised affidavit which corrected some of the dates which were referred to in the original affidavit. Having had the benefit of reviewing the original and revised affidavit, I am satisfied that the errors were purely administrative. Accordingly, I will not refer to this issue in this order again.

[25] Finally, the appellant provided confidential representations in support of his position that additional records should exist. Having had the benefit of reviewing the appellant's evidence along with the records, I find that the appellant's confidential representations fail to establish reasons to support his position that additional records must exist.

[26] Included with the city's reply representations are two additional affidavits prepared by the two supervisors who conducted the original and subsequent searches. One of these individuals is the Director of the specific program area. In his affidavit, the Director states that he has the ability to access the electronic records of the retired supervisor.

[27] The city's reply representations also include an explanation as to why its subsequent third search located additional records. The city advises that there was an oversight with respect to the archiving of certain documents and that its program area staff had "believed that all records responsive to the request had been transitioned to the SilverDane service from GroupWise. However, it appears that many, but not all documents had been so transitioned". Accordingly, the city's subsequent search located responsive records that had not been transferred to the SilverDane archives, but remained misfiled in the GroupWise archives.

[28] The city states that "regardless of any errors made, [it] did complete reasonable searches for responsive records, and that [the appellant's] allegations do not raise a sufficient basis to conclude otherwise. Where errors with respect to the assumptions concerning the method and locations of responsive records have been discovered, the City undertook steps to correct these errors".

[29] I have carefully reviewed the wording of the appellant's request along with the city's evidence regarding the search parameters the supervisors entered to retrieve documents from the SilverDane and GroupWise archives and am satisfied that the city conducted a reasonable search for records related to the appellant's employment with the city. In addition, I am satisfied that the search parameters the appellant's former supervisors advise were used to retrieve documents in the city's archived SilverDane and GroupWise messages demonstrates that the searches were conducted and directed by individuals having knowledge about the subject-matter of the request and the city's record holdings.

[30] However, based on the city's evidence, it appears that the city narrowed the scope of the appellant's request to include only "documents created or received by his former supervisors concerning the issue of the termination of his employment". The appellant does not dispute that his request sought access to records concerning the termination of his employment. However, the appellant states that he is also "interested in information that relates to the operations of the [program area], and decisions in its regard, in relation to the [software program] and me". I also note that

the request form completed by the appellant indicates that the request is not restricted to records containing his personal information, but also seeks access to general records.

[31] Having regard to the above, I find that the city unilaterally narrowed the scope of the appellant's request and, as a result, there is a possibility that additional records responsive to the portion of the appellant's request for general records containing the name of the software program, along with the appellant's name exists. However, I am satisfied that that the city conducted a reasonable search for responsive records relating to the termination of the appellant's employment. As a result, I will not order the city to conduct additional searches to locate records related to the appellant's employment and termination of employment. Accordingly, it is not necessary that I also make a decision whether this office has the authority to order institutions to conduct a further search for records which may be excluded under the *Act.*

[32] Having regard to the above, I will order the city to conduct a further search to locate additional records sent or received from the three named supervisors which contain the name of the software program or the appellant's first name.

B. Are the records from the city's legal file excluded from the scope of the *Act* on the basis of section 52(3)?

[33] Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

[35] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[8]

[36] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[9]

[37] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[10]

[38] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[11]

[39] Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.[12]

[40] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.[13]

[41] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[14]

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[8] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[9] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[10] Order PO-2157.
[11] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[12] Orders P-1560 and PO-2106.
[13] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[14] *Ministry of Correctional Services*, cited above.

[42] I will commence my discussion on whether the records from the city's legal file are excluded from the operation of the *Act* by virtue of section 52(3)3. For section 52(3)3 to apply, the institution must establish that:

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

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[43] The City submits that the 70 records from its legal file are excluded from the scope of the *Act* by virtue of section 52(3)3. In particular, the city submits that these records are a collection of documents held by the city concerning the following:

- the conduct of the appellant as a former employee;

- meetings held to discuss the appellant's conduct as an employee;

- decisions made as the appellant's employer with respect to the appropriate actions to be taken in response of the appellant's conduct; and

- information and advice received with respect to decisions to be made regarding employment matters arising from the appellant's conduct.

Part 1: collected, prepared, maintained or used

[44] The records at issue consist of 70 documents consisting of emails and correspondence exchanged between city staff and/or its solicitors. I have reviewed these records and am satisfied that they have been collected, prepared, maintained or used by the city. Accordingly, I conclude that the first part of the three-part test has been met.

Part 2: meetings, consultations, discussions or communications

[45] Part two of the three part test in section 52(3)3 asks whether the records were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communication. The Divisional Court in *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner* instructs that the words

"in relation to" in section 52(3) require that it must be reasonable to conclude that there is "some connection".[15]

[46] The city also states that "[e]ach one of the documents is something that related to – or was in itself a communication or discussions concerning – [the appellant's] employment with the city".

[47] The city submits that its collection, preparation, maintenance and usage of the 70 documents were in relation to meetings, consultations, discussions or communications concerning the "review and termination of [the appellant's] employment with the City". Given the actual content of the records at issue, I am satisfied that they were collected, prepared, maintained or used in relation to the city's meetings, consultants, discussions or communications with its staff and solicitors. Accordingly, I find that the second part of the three-part test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[48] The phrase "labour relations or employment-related matters" has been found to apply in the context of an employee's dismissal.[16] The city advises that, in response, as a result of meetings it held to review the appellant's conduct as an employee, the appellant was subsequently terminated. The city also advises that the appellant objected to both the city's decision to terminate his employment, and the manner in which the city's decision was reached.

[49] The records collected, prepared, maintained or used by the institution … are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[17]

[50] Having regard to the actual content of the records, I am satisfied that the records were used in meetings, consultations, discussions or communications about labour relations or employment-related matters in which the city has an interest.

[51] Accordingly, I find that the third part of the three-part test has been met. I am also satisfied that none of the exceptions in section 52(4) apply. Therefore, I find that the 70 documents are excluded from the scope of the *Act* by virtue of section 52(3)3.

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[15] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[16] Order MO-1654-I.
[17] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

Given my finding, it is not necessary that I also determine whether the records are also excluded from the scope of the *Act* by virtue of section 52(3)1 and 52(3)2.

C. Do the emails contain "personal information" as defined in section 2(1)?

[52] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[53] 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.[18]

[54] 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.[19]

[55] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[20]

[56] The city claims that the records contain the personal information of two employees, including information about an individual's education or employment history and identifying numbers assigned to an individual. 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.[21] 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.[22]

[57] Accordingly, I must determine whether the information contained in the emails reveals something of a personal nature about them. Following the analysis set forth in Order PO-2225, the first question I must ask is: "*In what context does the name of the individual appear?*" The second question I must ask is: "*Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about this individual?*"

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[18] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[19] Orders P-1409, R-980015, PO-2225 and MO-2344.
[20] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[21] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[22] Orders P-1409, R-980015, PO-2225 and MO-2344.

[58] With respect to the first question, I am satisfied that the information contained in the emails relate to the individuals in a professional, official or business context. With respect to the second question, I have carefully reviewed the emails and am satisfied that pages 30 and 68 contain the personal information of two identifiable individuals. In particular, the email at page 30 contains information relating to one individual's educational or employment history [paragraph (b) of the definition of "personal information" in section 2(1)]. I also find that the email at page 68 contains information regarding the telephone access code and identifying number assigned to another individual [paragraph (c)], along with their name which appears with other personal information relating to them [paragraph (h)].

[59] However, one of the severances made by the city on page 68 does not appear to contain personal information or relate to any identifiable individual. The city's representations did not specifically address why this information was withheld. I find that this portion of the email does not contain the personal information of any identifiable individual. As this portion of the email does not contain "personal information", the mandatory personal privacy exemption cannot apply to it. As the city has not claimed that any other exemption applies to this information, I will order it to disclose this portion of the withheld record to the appellant.

[60] With respect to the information I found constitutes "personal information", I will go on to determine whether disclosure of this information would constitute an unjustified invasion of personal privacy under section 14(1).

D. Would disclosure of the "personal information" in the emails at pages 30 and 68 constitute an unjustified invasion of personal privacy under section 14(1)?

[61] In the circumstances of this appeal, it must be determined whether disclosing the personal information of the affected parties would constitute an unjustified invasion of their personal privacy under section 14(1).

[62] Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

[63] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 14(1). Given that the affected parties have not consented to the release of their information, the only exception that could apply is section 14(1)(f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except if the disclosure does not constitute an unjustified invasion of personal privacy.

[64] The city claims that the presumption at section 14(3)(d) applies to the personal information at issue in this appeal.

14(3)(d): employment or educational history

[65] In its representations, the city states that the personal information at issue describes the employment and educational histories of one of the affected parties. I have carefully reviewed the email at page 30 and am satisfied that the information withheld under section 14(1) contains the type of information normally included in resumes. In particular, the withheld information describes the employment and educational history of one of the affected parties. Previous decisions from this order found that information contained in resumes[23] and work histories[24] falls within the scope of the presumption in section 14(3)(d).

[66] Having regard to the above, I find that the personal information withheld on page 30 falls within the presumption in section 14(3)(d) and qualifies for exemption under section 14(1) as its disclosure would result in an unjustified invasion of personal privacy. Accordingly, I uphold the city's decision to withhold this information from the appellant.

[67] The remaining personal information at issue consists of an individual's username and access code on page 68. In my view, this information does not constitute the individual's employment or educational history. Accordingly, the presumption at section 14(3)(d) does not apply. I will go on to determine whether one of the factors at section 14(2) applies to this information.

Do any of the section 14(2) factors apply?

[68] The remaining personal information at issue consists of an individual's username and access code. In order to find that disclosure of this information does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[25]

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[23] Orders M-7, M-319 and M-1084.
[24] Orders M-1084 and MO-1257.
[25] Orders PO-2267 and PO-2733.

[69] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[26]

[70] In its representations, the city states:

> The City submits that a review of the factors articulated under section 14(2) of MFIPPA also supports the finding that the release of the personal information, such as personal passwords would constitute an unjustified invasion of personal privacy. The City submits that there is no basis to suggest that the disclosure of the personal information in these documents will promote public health and safety, or an informed choice in the purchase of goods and services. The City submits that the disclosure of the records in question would not lead to the ability for the public to expose the operations of government to increased public scrutiny. Due to the age of *some* of the information, it is unlikely to be accurate or reliable – while other information would remain reliable. Disclosure of this information will expose individuals to a loss of privacy concerning their personal affairs, which cannot be justified. With respect to the issue of whether the Requester is seeking to obtain the disclosure of the personal information in these records for the purpose of obtaining a fair determination of the Requester's rights – there has no position advanced … on how the specific personal information of third parties in particular would be utilized for the determination of the [appellant's] right. Therefore, the City submits that the s.14(2) factors also support non-disclosure of this information.

[71] The appellant did not make submissions addressing whether any of the factors favouring disclosure at section 14(2) apply to personal information remaining at issue and I am satisfied that none apply having regard to the nature of the personal information at issue. In my view, disclosure of the username and access code of the affected party would not give rise to one of the situations favouring disclosure in sections 14(2)(a), (b), (c) or (d). In fact, given the nature of the information at issue taking along with the circumstances of this appeal, I find that it is reasonable to expect that the username and access code information are no longer accurate or reliable. Accordingly, I find that the factor favouring non-disclosure at section 14(2)(g) applies to this information.

[72] Given the application of the factor at section 14(2)(g) and the fact that no factors in favour of disclosure were claimed or otherwise established, I am satisfied that disclosure of an identifiable individual's username and access code would constitute an unjustified invasion of personal privacy under section 14(1).

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[26] Order P-99.

E. Do the emails at pages 30, 63, 64, 65 and 66 contain advice and recommendations under section 7(1)?

[73] The information the city claims qualifies for exemption under section 7(1) is located on pages 30, 63, 64, 65 and 66. Pages 63 to 66 are part of an email chain in which the withheld information is duplicated.

[74] Section 7(1) states:

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

[75] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[27]

[76] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[77] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [28]

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

[79] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[29]

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[27] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[28] See above at paras. 26 and 47.
[29] Order P-1054

[80] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations.

[81] With respect to the information withheld under section 7(1) in the email found on page 30, the city submits:

> … the redacted document set out a suggested course of action made by a manager to determine a solution to the issue of a lack of cross-training on [the software program], and the reason why this decision was made. It also contains a suggestion with respect to another course of action and provides a basis for why this other course should be taken. [Section 7(1)] has been claimed for these certain portions of the documents which contain factual information, and list options or courses of action which may be undertaken. The City recognizes that such information is not entirely advice subject directly to the [section 7(1)] exemption; however, the City submits that where [section 7(1)] has been claimed for these types of content, the relationship between the factual information/options and the advice, is such that to disclose these portions would disclose the advice provided.

[82] The city also submits that the withheld portion of the email chain found on pages 63, 64, 65 and 66 refer to a suggested course of conduct regarding the city's actions "concerning the employment issues arising from [the appellant]".

[83] The appellant's representations did not specifically address this issue.

[84] I have carefully reviewed the records and am satisfied that the emails at page 30, 63, 64, 65 and 66 contain advice or recommendations. In making my decision, I note that the portion of the email on page 30 disclosed to the appellant identifies the issue the city refers to in its representations. The withheld portion of the email refers to previous discussions between the manager and staff person and identifies the staff person's recommended course of action to his or her manager.

[85] With respect to the information withheld in the email chain found on pages 63, 64, 65 and 66, I note that the portion of the email disclosed to the appellant indicates that a decision was made regarding the appellant's employment. The disclosed portions of the email also indicate that the decision was made at a meeting involving the manager and the email recipients. I have carefully reviewed the emails and am satisfied that the withheld portions identify a recommended course of action which was communicated to the email recipients.

[86] Having regard to the above, I am satisfied that the withheld portions of the email and email chains on pages 30, 63, 64, 65 and 66 contain advice or recommendations and thus qualify for exemption under section 7(1). I further find that none of the

exceptions in section 7(2) have any application. Accordingly, I uphold the city's decision to withhold this information from the appellant.

F. Does the email at page 50 qualify for exemption under section 11(c)?

[87] Section 11 states:

> A head may refuse to disclose a record that contains information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[88] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[30]

[89] For section 11(c) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[31]

[90] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[32]

[91] The email at page 50 was sent by one of the city's managers to two non-legal city staff members. In its representations, the city states that disclosure of the withheld information in the email could reasonably be expected to prejudice its "economic/competitive interests or be injurious to its competitive position in negotiating resolutions to this issue". The city also provided confidential representations in support of its position.

[92] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a

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[30] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.
[31] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[32] Order MO-2363.

reasonable expectation of prejudice to these economic interests or competitive positions.[33]

[93] In the confidential portions of its representations, the city identifies a harm it argues will prejudice its economic interests or competitive interest if the email is disclosed. However, in my opinion, the harm identified by the city does not relate to an interest the city may have in earning money or competing for business with other entities. Accordingly, I find the city's evidence fails to establish that disclosure of the withheld information could reasonably be expected to prejudice the city's economic interests or competitive position.

[94] As the city has not claimed that any other discretionary exemption applies to this information and I am satisfied that none of the mandatory exemptions apply, I will order the city to disclose the email at page 50.

G. Did the city properly exercise its discretion in applying the discretionary exemption at section 7(1)?

[95] The section 7(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[96] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[97] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[34] This office may not, however, substitute its own discretion for that of the institution.[35]

[98] The city submits that it properly exercised its discretion to withhold the information I found exempt under section 7(1) (advice or recommendations). In support of its position, the city states that it took into consideration:

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[33] Orders P-1190 and MO-2233.
[34] Order MO-1573.
[35] Section 43(2).

- the purposes and principles of the *Act*, including that information should be available to the public and that exemptions from the right of access should be limited and specific; and

- the wording of the section 7(1) exemption and the interests it seeks to protect

[99] The city also submits that it considers the withheld information "highly sensitive" and of a "relatively recent nature". Finally, the city submits that "no sympathetic or compelling need for [the appellant] to receive the [withheld] information has been presented".

[100] The appellant's representations did not specifically address this issue.

[101] In my view, the city's evidence demonstrates that it properly exercised its discretion and in doing so took into account relevant considerations such as the sensitive nature of the information and whether there was evidence of a sympathetic or compelling need for the appellant to receive the withheld information. I am satisfied that the city did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into consideration irrelevant considerations.

[102] In making my decision, I also took note that the city considered that one of the purposes of the *Act* includes that information should be available to the public and that the withheld information in the email on page 50 was limited to two sentences. Finally, I took into consideration that the purpose of section 7(1) exemption is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[36]

[103] Having regard to the above, I find that the city properly exercised its discretion to withhold the information I found exempt under section 7(1).

ORDER:

1. I uphold the city's decision to exclude the 70 documents from the city's legal file from the scope of the *Act* by virtue of section 52(3)3.

2. I order the city to disclose the withheld information in the email found at page 50 which I found did not qualify for exemption under section 11(c) to the appellant by **March 5, 2015**.

[36] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

3. I order the city to disclose the withheld information in the email found at page 68 which I found does not contain "personal information" as defined in section 2(1) to the appellant by **March 5, 2015**. For the sake of clarity, in the copy of the email at page 68 enclosed with the city's order, I have highlighted the portions of the email which **should not** be disclosed to the appellant.

4. I order the city to conduct a new search for records responsive to appellant's request for general records that do not relate to his or her employment and termination from the city. The city is to send representations on the results of its new search that it carries out to locate additional records and to provide me, by **March 5, 2015**, an affidavit outlining the following:

   (a) the names and positions of the individuals who conducted the searches;

   (b) information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search; and

   (c) the results of the search.

5. I order the city to issue an access decision to the appellant regarding access to any additional records located as a result of the search ordered in provision 4, in accordance with the *Act*, treating the date of this order as the date of the request.

6. The city's representations prepared in compliance with order provision 4 may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's Practice Direction Number 7, which is available on the IPC's website. The city should indicate whether it consents to the sharing of its representations with the appellant.

7. If the appellant wishes to appeal the city's third decision letter, dated January 31, 2014, the appellant must do so **in writing** by sending a letter to my attention no later than **30 days** of his or her receipt of this order.

8. I remain seized of this appeal in order to deal with any other outstanding issues arising from this interim order. In order to verify compliance with order provisions 2 and 3, I reserve the right to require a copy of the records disclosed by the city to be provided to me.

Original Signed By: February 2, 2015
Jennifer James
Adjudicator