Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3313

Appeal MA13-82

City of Vaughan

May 19, 2016

Summary: The city received a request under the *Act* for records relating to the construction of a new hospital. The city issued an interim access decision with a fee estimate to search for the responsive records and prepare them for disclosure. The appellant paid the requisite deposit and the city issued a final access decision granting partial access to the records. Portions of the records were withheld pursuant to the discretionary solicitor-client exemption at section 12 and the mandatory personal privacy exemption at section 14(1). The appellant appealed the city's decision to withhold portions of the records, as well as the fee charged. The appellant also questioned the reasonableness of the city's search for responsive records. In this order, the Adjudicator upholds the city's decision to withhold portions of the records, upholds the city's search, and partially upholds the city's fee. The Adjudicator orders the city to reduce the fee to reflect the fact that some of the records contain the appellant's own personal information.

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"), 12, 14(1), 17, 38(a) and 45(1); *Regulation 823,* ss. 6.1.

Orders and Investigation Reports Considered: Orders M-514, MO-1285, MO-1338, MO-2528 and PO-3154.

OVERVIEW:

[1] The City of Vaughan (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> …[C]opies of all emails and letter correspondence between Vaughan Health Campus of Care, Vaughan Health Care Foundation, and specifically, [two named individuals] to and from all council members, and [three named individuals] between June 2010 and December 1, 2010.

[2] The city identified the records and issued an interim access decision with a fee estimate to search for and prepare them for disclosure. The requester provided the city with a deposit of 50% of the fee estimate and the city issued a final access decision granting partial access to the records. Portions of the records were withheld pursuant to the discretionary exemption at section 12 (solicitor-client privilege) and the mandatory exemption at section 14(1) (personal privacy) of the *Act*. The city provided the appellant with an index that describes each document and identifies whether access was denied in full or in part pursuant to which exemption.

[3] The appellant appealed the city's decision.

[4] During mediation, the appellant advised that she is appealing the fee charged by the city as, in her view, a portion of the responsive records contain her own personal information and she should not have been charged search or preparation fees for those records. She also advised that, in her view, the search time is excessive.

[5] The appellant also advised that she is of the view that many additional records should exist. She states that as the records relate to the construction of a new hospital, more correspondence related to the matter should exist. As a result, the reasonableness of the city's search for responsive records is at issue in this appeal.

[6] Finally, the appellant advised that she is seeking access to the portions of the records that the city has withheld pursuant to sections 12 and 14(1).

[7] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. As the adjudicator assigned to the appeal, I noted that the records for which section 12 has been claimed might contain the personal information of the appellant. As a result, I have included section 38(a), read in conjunction with section 12, as an issue in this appeal.

[8] I began my inquiry into this appeal by sending a Notice of Inquiry to the city and received representations in return. In its representations, the city advised that it had revised its position with respect to record 18 for which it had originally claimed portions were exempt pursuant to section 14(1). The city explained that it now took the position that record 18, in its entirety, is not responsive to the appellant's request. Portions of record 18 have already been disclosed to the appellant.

[9] From my review, on its face record 18 appears as if it may not be responsive to the appellant's request. Nevertheless, as portions of the record have already been disclosed to the appellant and the city has provided representations on how the severed portions fall within the mandatory personal privacy exemption at section 14(1), I will

not remove the issue of the potential application of section 14(1) to the remaining portions of record 18 from the scope of this appeal. Therefore, I will not address whether record 18 is responsive to the request but I will discuss below whether section 14(1) applies to exempt portions of record 18 from disclosure.

[10] In accordance with the confidentiality criteria set out in this office's *Practice Direction 7*, I enclosed the portions of the city's representations with the Notice of Inquiry that I sent to the appellant. Although the appellant communicated with this office and advised that she was of the view that the city's affidavits addressing their search were misrepresentations, she did not submit representations on the issues. Subsequently, I sought additional information from the city on records 15 and 16 and the city provided a response.

[11] In this order I uphold the city's decision in part. Specifically:

- I order the city to reduce its fee by the percentage of responsive records that contain the appellant's personal information,
- I uphold the city's search for responsive records as reasonable; and,
- I uphold the city's decision to sever portions of the records at issue under either section 14(1) or section 38(a), read in conjunction with section 12.

RECORDS:

[12] The city identified 21 responsive records, consisting of 83 pages. Most of these records were disclosed to the appellant.

[13] The records that remain at issue are records 15 and 16, in their entirety, which are emails with attachments, and record 18, in part, which is also an email.

ISSUES:

A. Should the fee be upheld?

B. Did the city conduct a reasonable search for responsive records?

C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

D. Does the mandatory exemption at section 14(1) apply to the information at issue?

E. Does the exemption at section 38(a), read in conjunction with the exemption at section 12, apply to the information at issue?

DISCUSSION:

A. Should the fee be upheld?

[14] An institution must advise the requester of the applicable fee where the fee is $25 or less. Where the fee exceeds $25, the institution must provide the requester with a fee estimate [Section 45(2)]. Where the fee is $100 or more, the fee estimate may be based on either:

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.[1]

[15] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[2] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[3]

[16] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[4] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[17] Section 45(1) requires and institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[18] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of

[1] Order MO-1699.
[2] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[3] Order MO-1520-I.
[4] Orders P-81 and MO-1614.

Regulation 823. Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.
>
> 6.1 The following are the fees that should be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.
>
> 7.(1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
>
> (2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

Representations

[19] In its decision letter, the city advised the appellant that it estimated a fee of $167.70 for access to the records responsive to her request. The city provided a breakdown of the fee estimate identifying the amounts charged for search, preparation, and photocopying, as follows:

SEARCH:		
Members of Council – 9 offices at 15min/office	135min @ $7.50/15min	$67.50
City Manager	60min @ $7.50/15min	$30.00
Commissioner of Legal Services	15min @ $7.50/15min	$7.50
City Clerk	75min @ $7.50/15min	$37.50
COPIES:		
Members of Council	16 @ $.20/copy	$3.20
City Manager	100 @ $.20/copy	$20.00
City Clerk	10 @ $.20/copy	$2.00
	TOTAL:	**$167.70**

[20] In its final decision, the city detailed the actual fee as follows:

SEARCH	
285min @ $7.50/15min	$142.50
COPIES	
71 @ $.20/pg	$14.20
SUBTOTAL	**$156.70**
DEPOSIT – Jan 30/13	**$83.85**
BALANCE	**$72.85**

[21] During mediation, the appellant took the position that as a portion of the responsive records contain her personal information there should be no charge for search or preparation fees in relation to those records. Additionally, she takes the position that the search time is excessive.

[22] The city takes the position that the fee estimate and fee were fair, reasonable, and accurate, and should be upheld. It submits that the request specified 12 locations that were to be searched for responsive records within a specified date range and that

the estimated time it took for those individuals or offices to search for the records was calculated. It submits that the fee estimate did not provide for any time spent preparing records for disclosure and did not charge for preparation time. The city explains that the estimate relates to search time and copies and submits that the estimate was provided by the same staff that conducted the searches or was based on information they received from knowledgeable staff within their departments.

[23] With respect to the fee identified in the final access decision, the city explains that the actual number of responsive records that were to be disclosed to the appellant amounted to 71 pages, as opposed to the 126 pages of responsive records identified in the estimate, which brought the total fee down $11.00 to a total of $156.70.

[24] With respect to the fact that some of the records contain the appellant's personal information the city submits that the search for records was for communications exchanged between city staff and officials and other individuals and that it was not a request for the appellant's own personal information. It submits that despite the fact that some of the responsive records contain the personal information of the appellant the request was not for her own personal information but for records relating to a project in which the appellant was involved. The city acknowledges that search fees are not to be charged for personal information; however, it submits that the request was for other information and it was unable to determine what portion of the search fee could be extracted to apply to the personal information that was found in some of the responsive records.

Analysis and findings

[25] Having reviewed the fee and having considered the representations of the city, I am prepared to uphold the fee, in part.

[26] As set out above, the city has charged the appellant a photocopying fee and a search fee. Although the appellant does not take issue with the fee charged for photocopying, I have reviewed it and I find that it has been calculated in accordance with the provisions of the *Act* and Regulation 823. Therefore, I uphold the city's photocopying fee.

[27] The appellant specifically disputes the search fee charged, stating not only that she believes that it is excessive but also that as some of the records contain her personal information, the city is not entitled to charge search fees for those records. The city takes the position that even though the responsive records incidentally contain some of the appellant's personal information, as the request itself cannot be characterized as being for personal information, it should be entitled to charge search time as set out in section 6 of Regulation 823. I disagree with the city's approach which, in my view, runs contrary to previous orders issued by this office as well as to the legislature's intent in differentiating between fees to be charged for access to general records versus for access to records containing a requester's own personal information.

[28] As noted above, section 6 of Regulation 823 sets out the fees that an institution must charge for providing a requester with access to *general records* and requires an institution to charge fees for manually searching for such records. Section 6.1 of Regulation 823 sets out the fees that an institution must charge for providing a requester access to their own *personal information*. It does not allow an institution to charge a fee for searching for records containing a requester's personal information.

[29] Section 6.1 does not stipulate that the subject matter of the request itself has to be able to be characterized as specifically for the individual's personal information. The section simply identifies the fees to be charged for "access to personal information about the individual making the request for access." Additionally, in differentiating between the fees that can be charged for the processing of general government records as opposed those which contain the personal information of the requester, in my view, the intent of the legislature is to ensure that a requester is charged lower fees to exercise their right of access to their own personal information.

[30] In Order MO-1285, Adjudicator Laurel Cropley addressed a situation where the requester sought access to records from 15 different program areas of the City of Toronto and each area produced information, some of which pertained to him. The appellant's personal information was intertwined with the general information in the records. Adjudicator Cropley found that as a result of section 6.1 of Regulation 823, the City of Toronto could not charge the appellant for search and preparation time. She stated:

> [A]lthough the Act clearly contemplates that requesters pay for the records for which they have requested, the inclusion of section 6.1 of Regulation 823 recognizes the higher right to access to one's own personal information in the custody or control of government institution as set out in section 1 of the Act. Where there is doubt as to how the fees should be applied, in my view, the balance must weigh in favour of the appellant.
>
> Therefore, I find that the city should have calculated its fee is accordance with section 6.1 of Regulation 823. […]

[31] In my view the approach taken by Adjudicator Cropley in Order MO-1285 is of assistance in my determination of the fees that the city can charge in the present appeal and I will apply it below.

[32] In terms of how an institution should determine whether a requester should be charged fees, it has been established that it must employ a record-by-record approach. This was first established by former Senior Adjudicator John Higgins in Order M-514. In that order, the relevant provision of the *Act* was section 45(2) which prohibited an institution from requiring an individual to pay a fee for access to their own personal information. Section 45(2) was repealed in 1996. Presently, section 6.1 of Regulation 823, as outlined above, permits an institution to charge a requester limited fees for access to their own personal information, but not search and preparation fees.

[33] In Order MO-2528, Adjudicator Colin Bhattacharjee reviewed the approach taken by Senior Adjudicator Higgins in Order M-514 and stated that:

> Notwithstanding these amendments, the record-by-record approach continues to be the one that must be applied by institutions in determining whether a requester should be charged fees for both general records and records containing a requester's own personal information.

[34] In Order MO-2528, Adjudicator Bhattacharjee applied the record-by-record approach and stated that "if a record contains the personal information of the appellant or his children, the board cannot charge the appellant a fee for manually searching for these general records and preparing them for disclosure."

[35] I accept that the record-by-record approach to the charging of fees set out in Order M-514, and followed in Order MO-2528, is appropriate and should be applied to the circumstances of this appeal. Also, as set out in Order MO-1285, the city is not entitled to charge the appellant search fees for manually searching for records that contain her own personal information.

[36] The responsive records in this appeal consist of 21 records. In my view, an appropriate way to establish the percentage of search time that should be attributed to the appellant's own personal information is to establish the percentage of those responsive records that can be characterized as containing the appellant's personal information and, therefore, ineligible for search charges. Once that percentage is established, the search fee should be reduced by that amount. This approach of basing the search fee on the percentage of responsive records that do not contain the requester's personal information has been taken in previous orders that have reviewed search fees in situations where some of the responsive records contain personal information and some of them do not.[5]

[37] From my review of the 21 records that were identified as responsive to the appellant's request, only three (records 15, 16, and 19) contain information that qualifies as the personal information of the appellant. In taking a record-by-record approach, this amounts to 14% of the total records. Accordingly, I will order the city to decrease their original search fee of $142.50 by 14% (or $19.95), which results in a revised search fee of $122.55 for the percentage of responsive records that do not contain the appellant's personal information. In my view, this amount is not excessive in the circumstances, given the number of responsive records and the number of locations that were searched.

[38] Accordingly, I uphold the city's fee charged for photocopying the records and I uphold the portion of its search fee that amounts to the percentage of responsive records that do not contain the personal information of the appellant. I do not uphold the city's search fee for the 14% of records that contain the appellant's own personal information and order the city to reduce its search fee to $122.55.

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[5] Order MO-2528.

[39] As the appellant has paid a deposit of $83.85, taking into account the reduction in search fees for the portion of records that contain her own personal information, I find that the balance that the appellant owes to the city for the processing of her access request comes to $52.90.

B. Did the city conduct a reasonable search for responsive records?

[40] 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.[6] 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.

[41] 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.[7] To be responsive, a record must be "reasonably related" to the request.[8]

[42] 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.[9]

[43] 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.[10]

[44] 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.[11]

Representations

[45] The city submits that it conducted a search for records responsive to the request from all of the staff members and all of the offices identified by the appellant in her original request. It submits that these searches were conducted by either the individuals identified in the request or "by knowledgeable staff within their departments."

[46] In support of its position that it conducted a reasonable search, the city submits 8 affidavits sworn by individuals who conducted searches for responsive records including, the City Clerk, the Records Management Supervisor, the Director of Legal Services, the Administrative & Special Projects Assistant in the Office of the City

[6] Orders P-85, P-221 and PO-1954-I.
[7] Orders P-624 and PO-2559.
[8] Order PO-2554.
[9] Orders M-909, PO-2469 and PO-2592.
[10] Order MO-2185.
[11] Order MO-2246.

Manager, and four elected councillors. These affidavits detail their respective searches and identify the records that were located as a result.

[47] The city states that although the appellant believes that many additional records responsive to her request relating to the construction of a new hospital must exist, it explains that her request is for records created over a specific six-month period that spanned the summer period of a municipal election year. The city submits that "business of Council declines during both the summer months and during a municipal election year" and confirms its position that its search for records was reasonable.

[48] During mediation, the appellant explained that given that the records relate to the construction of a new hospital, she believes that more correspondence related to the hospital should exist. During the inquiry into this appeal, although she did not submit formal representations, she requested that city be ordered to conduct another search and disclose additional responsive records. She also stated that "the sworn affidavits are clearly misrepresentation." The appellant provided no other explanation as to why she believes that additional responsive records should exist.

Analysis and finding

[49] In the circumstances of this appeal, based on the information that is before me, I accept that the city conducted a reasonable search for records responsive to the appellant's request. I accept that a number of different experienced employees, in different areas of the city, expended reasonable efforts to locate records reasonably related to those sought by the appellant. I accept that these individuals were familiar with the subject matter to which the records relate, as well as with the city's management systems and, note that in some instances, they consulted the city's records management or information and technology staff when conducting the searches.

[50] As previously stated, in appeals involving a claim that additional records exist, the *Act* does not require the institution to prove with absolute certainty that further records do not exist, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In the circumstances of this appeal, having considered the evidence of the city regarding the searches conducted, I accept that the efforts taken were reasonable.

[51] I acknowledge the appellant's position that the construction of a new hospital should reasonably be expected to generate a large number of records. However, I also acknowledge the city's explanation that in her request, the appellant specifically stated that she sought records created during the period between June 2010 and December 2010, which encompassed both summer and an election year, periods of time where the city's focus might have been elsewhere. As explained above, 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. In the absence of substantive representations in support of the appellant's position that additional records should exist, I find that I have not been

provided with sufficient evidence to refute the reasonableness of the city's search for records.

[52] With respect to the appellant's claim that the affidavits provided by the city with its representations on its search are "clearly misrepresentations," I find that I have not been provided with sufficient evidence to conclude that the facts set out in the sworn affidavits that were provided to me cannot be relied upon to support the reasonableness of the city's search.

[53] For the reasons set out above, I accept that the city's search for records responsive to the appellant's request was reasonable, and I uphold it.

C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[54] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.[12] Where the records contain the requester's own personal information, access to the records is addressed under Part II of the Act and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester, access to the records is addressed under Part I of the Act and the mandatory exemption at section 14(1) may apply.

[55] Accordingly, 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. That term is defined in section 2(1) of the *Act*:

> "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,

[12] Order M-352.

> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[56] 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.[13]

[57] To qualify as personal information, it must be reasonable to expect that an individual maybe identified if the information is disclosed.[14]

Representations

[58] The city submits that records 15 and 16 contain the personal information of the appellant. It explains that these records are draft communications between legal counsel for the Vaughan Health Campus of Care (VHCC) and the city's legal counsel in response to emails written by the appellant. It submits that they set out in point form, the opinions of the appellant regarding matters relating to the Vaughan hospital project.

[59] With respect to record 18, the city submits that the severed portions contain the personal information of an identifiable individual other than the appellant, specifically, their name and email address.

Analysis and finding

[60] Having reviewed records 15 and 16, I accept the city's position that they contain the personal information of the appellant. Specifically, these records relate to correspondence sent by the appellant that is implicitly of a private or confidential nature. I accept that its disclosure would reveal the contents of the appellant's original correspondence as contemplated by paragraph (f) of the section 2(1) definition of "personal information."

[61] I also accept the city's position that record 18 contains the personal information

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[13] Order 11.
[14] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

of an identifiable individual other than the appellant within the meaning of the definition in section 2(1) of the *Act*. Specifically, this information includes an identifiable individual's email address (paragraph (c) or (d)) as well as the individual's name, where the disclosure would reveal other personal information about that individual (paragraph (h)). Additionally, I am satisfied that record 18 does not contain the personal information of the appellant.

[62] Accordingly, as record 18 contains the personal information of an identifiable individual other than the appellant and does not contain the personal information of the appellant, Part I of the *Act* applies and I must consider whether the personal information is properly exempt pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*. For records 15 and 16 however, as the personal information contained therein belongs to the appellant, Part II of the *Act* applies and I must determine whether the discretionary exemption at section 38(a) applies, read in conjunction with the solicitor-client privilege exemption at section 12, as claimed by the city.

D. Does the mandatory exemption at section 14(1) apply to the information at issue?

[63] Although the city originally claimed that section 14(1) applies to exempt a small portion of record 18, as explained above, in its representations it revisited its position and now argues that record 18 is not responsive to the request, in its entirety. Nevertheless, as record 18 has already been partially disclosed to the appellant and the city has provided representations on how the mandatory exemption at section 14(1) applies to the severances that have been made to that record, I will consider its application in this order.

[64] Where a requester seeks the personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[65] If the information fits within any paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. In the circumstances, it appears that the only exception that could apply is paragraph (f). Section 14(1)(f) reads:

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

[66] Sections 14(2) to (4) are considered in determining whether disclosure of the personal information would or would not result in an unjustified invasion of personal privacy in section 14(1)(f).

[67] If any of the paragraphs in section 14(4) apply, disclosure is not an unjustified

invasion of personal privacy and the information is not exempt under section 14. In the circumstances of this appeal, none of the exceptions at section 14(4) apply.

[68] If any of the paragraphs in section 14(3) apply, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.[15] In the circumstances of this appeal, none of the presumptions at section 14(3) apply.

[69] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[16] The list of factors under section 14(2) is not exhaustive. The city must consider any circumstances that are relevant, even if they are not listed under section 14(2).[17] In order to find that a disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[18]

[70] The personal information that has been severed from record 18 is the name and personal email address of an identifiable individual. There is no evidence before me to suggest that any of the factors listed in section 14(2) or any unlisted factors favouring disclosure apply. Additionally, on the face of the record, no such factors seem to apply. The only factor that, in my view, might apply is at paragraph (h). Section 14(2)(h) is a factor weighing against disclosure that applies if the personal information was supplied by the individual to whom it relates in confidence. Given the nature of the email, I accept that it would be reasonable for the individual who supplied the information to the city to presume that the city would not disclose their name and personal email to another member of the public.

[71] In the absence of any factor or circumstance weighing in favour of the disclosure of the information that was severed from record 18, I find that the exception at section 14(1)(f) is not established and the mandatory exemption at section 14(1) applies. Accordingly, I uphold the city's decision to withhold the name and email address of the identifiable individual who authored the email that is record 18.

D. Does the exemption at section 38(a), read in conjunction with the exemption at section 12, apply to the information at issue?

[72] Section 38(a) reads:

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[15] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).
[16] Order P-239.
[17] Order P-99.
[18] Orders PO-2267 and PO-2733.

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13, or 15 would apply to the disclosure of that personal information. [emphasis added]

[73] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access their own personal information.[19]

[74] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her own personal information.

[75] In this case, the city relies on section 38(a), read in conjunction with section 12, to deny access to records 15 and 16, in their entirety. Section 12 reads:

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

[76] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[77] Branch 2 is a statutory privilege. It is applied where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons.

[78] For section 12 to apply, the institution must establish that one or the other (or both) branches apply. In the circumstances, the city submits that Branch 1 applies.

Branch 1: Solicitor-client communication privilege

[79] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining of giving legal advice.[20]

[80] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[21]

[81] The privilege applies to "a continuum of communications" between a solicitor and

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[19] Order M-352.
[20] *Descôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).
[21] Orders MO-1925. MO-2166 and PO-2441.

client:

> …Where information is passed by the solicitor or client to the other as part of continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[22]

[82] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[23]

[83] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[24]

Branch 1: Litigation privilege

[84] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[25] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[26] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[27] The litigation must be ongoing or reasonably contemplated.[28]

Loss of privilege – waiver and termination of litigation

[85] Under Branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[86] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of privilege, and
- voluntarily evinces an intention to waive the privilege.[29]

[87] Generally, disclosure to outsiders of privileged information constitutes waiver of

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[22] *Balabel v. Air India* [1998] 2 WLR 1036 at 1046 (Eng CA).
[23] *Susan Hosiery Ltd. v. Minister of National Revenue* [1969] 2 Ex CR 27.
[24] *General Accident Assurance Co. v. Chrusz* (1999) 45 OR (3d) 321 (CA).
[25] *Blank v. Canada (Minister of Justice)* [2006] SCJ No. 39.
[26] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002) 62 OR (3d) 167 (CA).
[27] *Ontario (Ministry of Correctional Service) v. Goodis,* 2008 CanLII 2603 (ON SCDC).
[28] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above.
[29] *S & K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983) 45 BCLR 218 (SC).

privilege.[30] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[31] Parties may have a common interest even if they do not have identical interests. The possibility that parties might, at some point in time, become adverse in interest is insufficient in denying common interest at present.[32]

[88] Common law litigation privilege generally comes to an end with the termination of litigation.[33]

Representations

[89] The city submits that section 38(a), read in conjunction with section 12, applies to records 15 and 16 as it is subject to common law solicitor-client privilege under Branch 1. The city explains that the records are communications between legal counsel for the VHCC and legal counsel for the city for the purposes of addressing the appellant's allegations. It submits that the records form part of a "continuum of communications" between a solicitor and a client.

[90] In its representations, the city submits that privilege has not been waived. It submits that a common interest privilege exists between the VHCC and the city. The city explains:

> The circulation of the final response to the appellant (see Document 19) advises of impending litigation if the appellant refuses to cease and desist and retract the allegations contained in the original emails.
>
> The common interest exception has been found to apply where, for example, the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [Order MO-1678].

[91] On my initial review of the records, the identities of the sender and the recipient of the cover emails to records 15 and 16, as well as the identities of the individuals copied on the emails, were not evident to me. Additionally, I was of the view that I required further information from the city regarding how the common interest privilege exception applied between the VHCC and the city with respect to the subject matter of the emails. As a result, I sought and received additional information from the city on the possible application of the solicitor-client privilege exemption to records 15 and 16, specifically directing them to respond to questions related to the above-mentioned two issues.

[92] In its response to my request for additional information, the city identifies the

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[30] J. Sopinka et al., *The Law of Evidence in Canada* at p 669; see also *Wellman v. General Crane Industries Ltd.* (1986) 20 OAC 384 (CA); *R. v. Kotapski* (1981) 66 CCC (2d) 78 (Que SC).
[31] *General Accident Assurance Co. v. Chrusz*, cited above.
[32] *CC & L Dedicated Enterprise Fund (trustee of) v. Fisherman,* [2001] O.J. No. 637 (SCJ).
[33] *Blank v. Canada (Minister of Justice)*, cited above.

sender of the emails as a director of the board of the VHCC and the recipient as legal counsel for the VHCC. It explains that the purpose of the communications was for the VHCC to draft a response, with the input of legal advice, to various allegations made by the appellant in two separate emails regarding the construction of the new hospital. The city states that the records were exchanged between the VHCC and its legal counsel to review and confirm the accuracy of the information. The city further states that the draft was prepared in order to refute the claims of the appellant, and to advise the appellant that her claims may prompt future litigation if they were not retracted.

[93] The city identifies the individuals who are copied on the emails as either individuals associated with the VHCC or individuals employed at the VHCC legal counsel's office. The city also states that a copy of records 15 and 16 were provided to the city manager. I will discuss this below.

[94] The city submits records 15 and 16 fall within a "continuum of communications" between a lawyer and a client as they are direct exchanges between the VHCC (the client) and its lawyer. It submits that the records were not widely distributed or made public and specifically, that privilege has not been waived as all individuals who were copied on the email were connected either to the VHCC or the lawyer's office. It explains that the subject matter relates directly to VHCC business and the individuals who were copied were included in the exchange to be kept informed to ensure that the necessary advice would be sought and given as required. The city also reiterates that the purpose behind the creation and circulation of the emails and their attachment was to prepare a response in contemplation of litigation.

[95] With respect to the existence of a common interest privilege between the VHCC and the city, the city submits that the allegations made by the appellant were against both the city and the VHCC and that, as a result, their interests are intertwined. It acknowledges that the VHCC and the city are separate entities but explains that they share an interest in the building and financing of the new hospital and that any future litigation arising from the appellant's allegations would involve both of them. Additionally, they state that it is reasonable to assume that the same legal counsel could represent both parties.

[96] The city explains that one of the emails sent by the appellant that gave rise to the creation of the draft responses in records 15 and 16 was specifically addressed to "members of council" and the content addresses both the city and VHCC on the same issues. The city also explains that records 15 and 16 were provided to the city manager as they relate to contemplated litigation that would involve the city, as well as the VHCC, based on the common interests that they share against a shared adversary.

[97] Finally, the city submits that the product of the advice sought and received in records 15 and 16 ultimately resulted in a final response letter that was sent to the appellant by VHCC's legal counsel. The city confirms that in that letter the appellant was advised that further unsubstantiated claims would result in their initiation of legal proceedings. The city submits that a copy of this letter, with attachments, was disclosed to the appellant as part of the responsive records for the access request that gave rise

to this appeal.

Analysis and finding

[98] The city takes the position that records 15 and 16 are subject to common law solicitor-client privilege as they relate to a "continuum of communications" between a solicitor and a client. The records themselves are both emails, with attachments. The emails are addressed to legal counsel, from the VHCC. The city argues that, notwithstanding the primary recipient of the legal advice provided in the email exchanges is the VHCC and it has been shared with the city, solicitor-client privilege has not been waived. It submits that despite the fact that the city and the VHCC are two distinct entities, a common interest with respect to the subject matter at issue, the response to allegations made by the appellant with respect to the building of the new hospital, exists between them.

[99] Common interest privilege has been discussed at length by the courts and also has been previously addressed in orders issued by this office. In Order PO-3154, Adjudicator Steven Faughnan reviewed how the privilege has been treated in previous decisions issued by the courts as well as orders issued by this office. He then articulated a test to apply to establish the existence of common interest privilege:

> …the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:
>
> > (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under Branch 1 of [the provincial equivalent of section 12] of the Act, and
> >
> > (b) the parties who share that information must have a "common interest," but not necessarily identical interest.

[100] Recent orders have applied this common interest test articulated by Adjudicator Faughnan.[34]

[101] In Order PO-3154, Adjudicator Faughnan examined records related to the restructuring of General Motors Canada Limited (GMCL) that were prepared by counsel for GMCL and provided to counsel for the Ministry of Economic Development and Innovation (the ministry) to provide ministry counsel with the ability to provide legal advice to their client. The ministry claimed that the parties shared a common interest in the records at issue, which was sufficient to withstand any waiver of privilege. Adjudicator Faughnan disagreed. In applying the first part of his test, he found that the shared communications were not solicitor-client privileged. He stated:

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[34] Orders MO-3253-I and MO-3274-I.

> …[A]s set out in the first condition for the recognition of the common interest exception to waiver of privilege above, a communication between a third party and counsel that does not originate in privilege cannot be cloaked in privilege by the existence of a common interest, even if the latter existed. It is only a communication that originated in privilege that would be subject to the common interest exception to waiver of that privilege (e.g. a privileged opinion shared with another party with a common interest). Otherwise, routine communications among counsel for various parties to a transaction advancing some position would be cloaked in common interest privilege. In my view, that is the type of routine communication that is at issue in the information remaining at issue here.

[102] Accordingly, in Order PO-3154, Adjudicator Faughnan found that the first component of his two-part test had not been established.

[103] In contrast with the circumstances that were before Adjudicator Faughnan, I find that in considering the circumstances surrounding the creation of records 15 and 16, the first part of the test articulated in Order PO-3154 has been satisfied. I accept that the emails and attachments that make up records 15 and 16 are communications of the type that he refers to above: communications between a third party and counsel that originate in privilege. They are communications between a lawyer and a client that were created for the purpose of giving or receiving legal advice. In my view, records 15 and 16 fall squarely within the definition of records that can be described as forming part of the continuum of communications required of records that meet the definition of common law solicitor-client communication privilege. As such, I find that they meet the requirement of part one of the test in Order PO-3154 as information that is inherently privileged in such a way that meets the definition of solicitor-client privilege under Branch 1.

[104] As the client of the lawyer involved in the communications in records 15 and 16, the VHCC is the holder of the privilege. However, it has shared these records with another party, the city, with which the city submits it shares a common interest. The question that remains to be determined is whether, by sharing records 15 and 16 with the city, the VHCC has waived its privilege or whether, due to the existence of a common interest, such disclosure results in an exception to the prima facie waiver of its privilege. Accordingly, I will now consider the second part of the test articulated by Adjudicator Faughnan in Order PO-3154, which examines whether such common interest exists.

[105] In Order MO-3253-I, Adjudicator Gillian Shaw applied the test set out by Adjudicator Faughnan in Order PO-3154. In that order, she considered whether the common interest privilege applied to an email attaching a legal opinion, as well as an email referring to that legal opinion. The legal opinion was prepared by the Ontario Public School Boards Association (the OPSBA), which is not an institution under the *Act*, and was subsequently forwarded to trustees and employees of an Ontario School Board, which is an institution under the *Act.* After determining that the legal opinion

and related emails, which were addressed to only one party, the OPSBA (as mentioned, not an institution under the *Act*), were subject to solicitor-client communication privilege under Branch 1 thereby meeting the first requirement of the test articulated in Order PO-3154, she went on to consider the second requirement: whether the OPSBA and the school board had a common interest in the information contained in the opinion. She found that they did. Following a discussion of the role of the OPSBA as an organization which provides information and advice to Public School Boards throughout Ontario, Adjudicator Shaw stated:

> Given the role of the OPSBA, I find that it shares a common interest with its member school boards in having a common understanding of the state of the law on the particular matter discussed in the legal opinion. The only reason that the opinion was shared with the member school boards was because of their common interest with the OPSBA in the subject matter of the legal opinion.

[106] In coming to the conclusion that the parties shared a common interest privilege in the records before her, Adjudicator Shaw also referred to *Pitney Bowes of Canada Ltd. v. Canada*[35] where the Court found that common interest privilege existed in an opinion that was for the benefit of multiple parties, even though it was prepared for a single client.

[107] I agree with the analysis undertaken by Adjudicator Shaw in Order MO-3253-I and find that it is relevant to my determination of whether a common interest exists between the VHCC (a non-institution) and the city (an institution).

[108] Considering records 15 and 16, I accept that the VHCC and the city have a common interest in the information that those records contain, and that the second part of the test articulated in Order PO-3154 has been satisfied.

[109] The content of records 15 and 16 address allegations made by the appellant in two emails (one of which was addressed to the city), regarding circumstances surrounding the building of a new hospital. Although many of the allegations set out in the emails to which records 15 and 16 respond address the status of and actions taken by the VHCC with respect to the hospital project, they are inextricably interwoven with allegations regarding the city's obligations and actions taken with respect to the same project. The records contain legal advice with respect to how to respond to the allegations and address the VHCC and city's common interest in ensuring the accuracy of statements and facts addressing the building of the new hospital. Accordingly, I accept that although the opinion was prepared for a single client, the VHCC, its content is for the benefit of both the city and the VHCC.

[110] Moreover, I accept the city's submissions that the allegations made by the appellant could ultimately have resulted in litigation by the VHCC and the city against a common adversary. I also accept that as the subject matter of that potential litigation

[35] [2003] F.C.J. No.311(T.D.).

could have involved both the VHCC and the city on matters of common interest, it is reasonable to assume that the same counsel could represent both parties.

[111] Therefore, I accept that the VHCC and the city share a common interest in the solicitor-client privileged information contained in records 15 and 16 thereby satisfying the second component of the test articulated in Order PO-3154 to establish the existence of common interest privilege exception to waiver.

[112] For the reasons set out above, I conclude that the disclosure of records 15 and 16 by the VHCC to the city did not constitute a waiver or loss of the privilege that existed in those records due to the application of the common interest privilege exception to waiver. As such, they remain subject to solicitor-client communication privilege under Branch 1, exempt from disclosure under section 12. Accordingly, I find that records 15 and 16 are, subject to my exercise of discretion outlined below, exempt from disclosure under section 38(a), read in conjunction with section 12.

Exercise of Discretion

[113] The exemption at section 38(a) is discretionary. It 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.

[114] 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.

[115] In any of these cases, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[36] This office may not, however, substitute its own discretion for that of the institutions.[37]

[116] The city submits that records 15 and 16 contain the personal opinions of the appellant that amount to her personal information but that they also contain information that is subject to solicitor-client privilege under section 12.

[117] Considering the nature of the information contained in records 15 and 16, I am satisfied that the city exercised its discretion to withhold the information at issue under section 38(a) in good faith and for a proper purpose taking into account all relevant factors. The information can be properly characterized as solicitor-client communication privileged information and I accept that the city did not err in exercising its discretion to

[36] Order MO-1573
[37] Section 43(2).

deny the appellant access to this information.

ORDER:

1. I order the city to decrease its search fee by $19.95. The city is to provide the appellant with a revised fee decision setting out the fees that I have upheld and the balance that is owed by the appellant.

2. I uphold the city's decision to sever portions of the records at issue under either section 14(1) and section 38(a), read in conjunction with section 12.

Original Signed By: May 19, 2016

Catherine Corban
Adjudicator