Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3446

Appeal MA13-85

City of Vaughan

May 24, 2017

Summary: The City of Vaughan received an access request for records related to a named individual, a specified surname and certain businesses over a five-year period. Once clarification was obtained from the requester and the fee deposit was paid, the city proceeded with searches. In the city's final decision, the city advised the appellant that it was reducing the fee and withholding certain records under the personal privacy exemption in section 14(1) and the labour relations and employment exclusion in section 52(3) of the *Act*. The requester paid the fee in full when she picked up the records, but after reviewing them, she appealed to this office. She claimed that the fee ought to be fully refunded based on her belief that the disclosed records were not responsive to her request. During mediation, the appellant withdrew her appeal of section 14(1) and narrowed the scope of her request to specific records related to the individual named in the request. In this order, the adjudicator partly upholds the city's fee decision, but orders a fee reduction and corresponding refund to the appellant based on reductions of the search and preparation fees charged by the city. The adjudicator upholds the city's claim that the records responsive to the appellant's narrowed request, if they exist, would be excluded from the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 45(1), 52(3) and 52(4); Regulation 823, section 6.

Orders and Investigation Reports Considered: Orders PO-2577, PO-3035, PO-3480 and MO-3340.

OVERVIEW:

[1] This order addresses the issues raised by the decision of the City of Vaughan (the city or Vaughan) in response to the following access request submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

[2] After emails were exchanged between the requester and the city to clarify the scope of the request, the city outlined it in the interim decision letter and requested a 50% deposit on the $1135.50 fee estimate prior to processing the request. The city conducted the searches once the requester paid the deposit. On February 13, 2013, the city issued a decision letter granting partial access to the records, but denying access to others under section 14(1) (personal privacy) or on the basis that they are excluded from the *Act* under section 52(3) (labour relations and employment records). The appellant paid the balance of the fee when she picked up the disclosed records the following week.

[3] However, based on the records disclosed and the access granted, the requester, now the appellant, appealed the city's decision to this office. A mediator was appointed to explore resolution of the issues. The appellant challenged the calculation of the fee, claiming that many of the records disclosed to her were non-responsive and that the overall search time is excessive, generally. The appellant asked for a full refund of the fees she paid. The city declined to adjust or refund the fee, claiming that it had conveyed the intended scope of the searches to the appellant prior to them being conducted.

[4] Subsequently, the appellant narrowed her request to certain records; namely, a copy of a specific settlement-related cheque issued to the named individual and several related records. The appellant indicated that she was not pursuing access to information withheld under section 14(1), which removed the personal privacy exemption as an issue under appeal. Vaughan's response to this narrowed scope was to advise that if records responsive to the narrowed request existed, they would be excluded from the scope of the *Act* under section 52(3). A supplemental decision was issued accordingly.[1]

[5] Since it was not possible to achieve a mediated resolution of the appeal, it was transferred to the adjudication stage for an inquiry. I sent a Notice of Inquiry to the city, in order to seek representations on the issues. Before representations were provided, however, the appeal was placed on hold at the appellant's request for a period of time. After the reactivation of the appeal, the city provided representations on the fee issue and its claim of section 52(3) of the *Act*. Next, I sought supplementary submissions from the city on another issue related to the same records that Vaughan

[1] November 1, 2013.

had withheld under section 52(3) – the possible application of section 14(5).[2] Once I received the city's supplementary representations, I shared non-confidential versions of the city's initial and supplementary representations with the appellant to invite her submissions in response. The appellant decided not to submit representations.

[6] In this order, I partially uphold the city's fee, but order it to issue a refund to the appellant for the components of the fee that I did not allow. I find that the records responsive to the appellant's narrowed request would be excluded from the *Act* by virtue of section 52(3)3, if they exist. Finally, in light of my conclusion on section 52(3), I do not need to review section 14(5).

ISSUES:

A. Should Vaughan's fee decision be upheld?

B. Would the records, if they exist, be excluded from the *Act* by section 52(3)?

DISCUSSION:

A. Should Vaughan's fee decision be upheld?

[7] Under section 45(1) of the *Act*, the city is required to charge fees for processing access requests according to the following framework:

[8] Other relevant fee provisions are found in section 6 of Regulation 823 made under the *MFIPPA*:

[9] Please accept this letter as a freedom of information request filed under *MFIPPA* for copies of all emails, letters, invoices, to and from [D][3] Developments, [D] construction, [specified individual], [named business] or any cheques, invoices issued to or received from [D] Development, [D] Construction, [specified individual], [named business], from 2008 until the present.

[10] Please include any and all iterations and variations and combinations of [D] in the search.

[11] 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,

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[2] Under section 14(5), an institution may refuse to confirm or deny the existence of records on the basis that confirming or denying their existence would itself constitute an unjustified invasion of an individual's privacy.

[3] D represents the first initial of the surname specified in the request.

[12] (a) the costs of every hour of manual search required to locate a record;

[13] (b) the costs of preparing the record for disclosure;

[14] (c) computer and other costs incurred in locating, retrieving, processing and copying a record;

[15] (d) shipping costs; and

[16] (e) any other costs incurred in responding to a request for access to a record.

[17] 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:

[18] 1. For photocopies and computer printouts, 20 cents per page.

[19] 2. For records provided on CD-ROMs, $10 for each CD-ROM.

[20] 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

[21] 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

[22] 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.

[23] 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.

[24] Please confirm this request covers:

[25] a) emails, letters, invoices or cheques relating to [D] Developments, [D] Construction, [specified individual], [named business related to that individual] from January 1, 2008 to December 6, 2012

[26] b) records with no specific subject matter beyond being sent to or received from any of the above

[27] c) search to be conducted in the following departments/sections:

[28] 1) Accounts Payable

[29] 2) former Commissioner of Legal Services …

[30] 3) Office of the City Manager

[31] 4) Transportation section of the Engineering Department

[32] 5) Office of [named individual]

[33] 6) former Commissioner of Engineering …

[34] 7) former Councillors [three named individuals]

[35] … In Order MO-2577, Adjudicator Diane Smith upheld the fee charged by the Municipal Property Assessment Corporation for photocopies under section 6 of the regulation... Adjudicator Smith concluded that scanning paper records in order to provide the information on CD was a necessary component of producing the paper records in the CD format requested by the appellant. As I interpret the decision in Order MO-2577 and other orders considering the issue, such as Orders MO-2530 and PO-2424, the permissibility of charging photocopying fees for scanning records depends on the current format of the records. In this appeal, … the (now) responsive records are currently available in electronic format; therefore, it is to be expected that the ministry may simply copy them directly to CDs for disclosure, without the need to charge photocopying fees to the appellant.

[36] 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:

[37] 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.

[38] 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.

[39] 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[40] There are only a few records that I want and they are: copy of the cheque issued to [D] for the second settlement. I want the emails where this second cheque was agreed to, and the authorizations attached to the cheque.

[41] "Please include any and all iterations and variations and combinations of [stated surname] in the search."

[42] "any and all iterations/variations/combinations"

[43] "include [specified surname] and any combinations of the [specified] surname."

[44] On appeal, this office may review an institution's fee and determine whether it complies with the fee provisions in the *MFIPPA* and Regulation 823.

Background and representations

[45] The city's fee estimate of $1135.50 was reduced to a final fee of $932.10. The final fee included a charge for search of $705.00 (23.5 hours), a preparation fee of $168.50 (337 minutes), $20.00 for two CDs, and a photocopying fee of $38.60 (193 pages). As I understand it, once the appellant paid the fee in full and reviewed the records disclosed to her, she quickly expressed concerns about paying for duplicated emails and records she believes are not responsive to her request.

[46] The appellant's dispute of the fee charged by the city is based on the fact that many of the released records relate to another individual with the same surname as the individual identified in her request. She is not interested in records relating to this other individual. The appellant believes that she should not have to pay the search fees related to those records and also asserts that the overall search time is excessive. As also noted, she seeks a full refund of the fees she paid.

[47] In seeking Vaughan's representations during the inquiry, I asked the city to specifically address the appellant's concern that it had incorrectly charged her fees for the records related to another individual with the same surname as that specified in the request. In response to this direction, Vaughan set out the terms of the original request, placing emphasis on certain parts of it, particularly the phrase: Vaughan submits that it also sought to clarify the scope of the request by writing to the appellant with the following outline of its understanding of the request:

[48] The city notes that its clarification did not include the words, of the specified surname; however, the appellant responded by concurring with the outline of the request, except that she added The city submits that it proceeded with the searches on this basis and that the appellant was clear in both her original request and responses to clarification efforts that "she wanted the search to cover both the '[D] Construction' and 'the name [D] and any and all iterations, variations and combinations of that name'." Vaughan submits, therefore, that the searches specified by the appellant led to it identifying and disclosing numerous records relating to "A.[D] Construction Co. Ltd."

[49] As for the quantum of the fee, the city submits that its fee was based on the actual work undertaken. In particular, the city states that:

- the records identified were held in the offices identified in the request and confirmed by the appellant;
- each department tracked and conveyed the time spent and the number of copies made; and
- records are kept and maintained based on their format, such that
    - emails are searched within the Outlook platform by entering the names and combinations/variations identified by the appellant

- invoices and cheques relating to the names and businesses identified were searched through the city's accounting software and, once located as a line item, retrieved by a manual search through the relevant paper records.

[50] Vaughan submits that despite asking her to do so, the appellant would not provide a specific subject matter for the request apart from the description in paragraph a) of the request. Further, a search for any letters or other documents that may contain reference to the specified names and businesses, including the stated requirement for variations on the specific surname, required the participation of a staff member with sufficient knowledge of the named areas to identify subject matter files that could contain records.

[51] The city does not dispute that the appellant received duplicate records, but explains that this was due to the breadth of her request, including seeking emails from five individuals and the Transportation section of the Engineering Department. The city argues that since the appellant is an experienced requester, she would realize that such a broad request would result in some degree of duplication. As for the appellant's concerns about individuals and businesses being "incorrectly" caught by the searches, Vaughan reiterates its position that the records were identified based on the terms specified by the appellant herself; "the fact that the appellant was not 'interested' in records relating to 'A. [D] Construction' does not make them non-responsive."

[52] As stated, the appellant did not submit representations in response to the Notice of Inquiry sent to her.

Analysis and findings

[53] Based on my review of the evidence available to me, including Vaughan's representations and the communications between the city and the appellant on this issue,[4] I will partly uphold the city's fee decision. I have reduced the fees the city may charge the appellant for search and preparation under sections 45(1)(a) and (b) in accordance to the reasons given below.

[54] The appellant's appeal of the fee centres on two main points: there are inappropriate charges for duplicate records and there are excessive search charges, generally, including for records that were not responsive to her request.

[55] I begin by addressing the appellant's concerns about the scope of the city's search and the identification of "non-responsive" records. On the face of it, the request submitted by the appellant in this matter was wide-ranging: it sought a significant

[4] This includes the email exchange between the city and the appellant on December 11, 2012, the city's fee estimate of December 21, 2012 and the final fee communicated to the appellant in the February 13, 2013 decision letter.

volume of records from seven different areas of the city over a time period of close to five years. The appellant's request was qualified only by the words in paragraph a): "emails letters, invoices or cheques relating to [D] Developments, [D] Construction, [specified individual], [named business related to that individual]." Beyond that, the appellant did not impose any limitations on the subject matter of the email communications or other documents sought from the areas listed in paragraph c). Further, in providing clarification, the appellant advised that she wanted the city to include in the searches "[the specified surname] and any combinations of the [specified] surname." In these circumstances, I conclude that it was reasonable for the city to proceed as it did by searching for records that fit within these broad parameters. Past orders have affirmed that where a request is broad and involves records that are likely to be dispersed through an institution, high search and preparation fees may apply.[5]

[56] By extension, therefore, the city would be entitled to charge the appellant the fee permitted by the *Act* and Regulation 823 in doing so – the breadth of the request is a significant factor in determining the amount of the fee charged for processing the request. In this appeal, however, the city's evidence regarding the details and methods of calculating its fees is so limited as to be unhelpful to its position. Vaughan claims that the fee is based on actual work undertaken. However, although the work required to conduct the searches is described generally, no detail is provided about what staff participated (for example, their position titles and where they worked) or how much time the staff in the various departments spent individually on each component of the searches done. In providing evidence on such matters, institutions must not assume that vague descriptions without further qualification or quantification are sufficient to support the fees levied.

Search – section 45(1)(a)

[57] The search time charged to the appellant under section 45(1)(a) of the *Act* was $705.00 or 23.5 hours @ $7.50/15 min. As stated, Vaughan provided no explanation of the breakdown of this fee. I can look to the interim fee estimate for some indication of that, however. It refers to an estimate of 375 minutes to search emails (5 email accounts X 15 min/year X 5 years), 600 minutes to search the offices (8 offices X 15 min/year X 5 years), 410 minutes to search for invoices (45 accounts receivable and 160 accounts payable, or 205 transactions); and, finally, 410 minutes to search for cheques (using the same formula as for the invoices). The estimated search time of 1795 minutes, or approximately 30 hours, was reduced to 23.5 hours in the final fee. However, even if I were to apportion the final search fee using a similar method as was adopted in the fee estimate, I find that this amount of search time for locating emails, "letters, etc.," invoices and cheques is simply not supported by the evidence Vaughan provided.

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[5] Orders PO-3375, PO-3379 and PO-3592.

[58] I am not persuaded that there is a reasonable basis for factoring the number of years this request spanned into the time for searching emails. This is a computer-based search and the city says that it carried it out by entering the "names and combinations/variations of names" into the Outlook search function. The results given by this method would not have distinguished between emails generated in 2008 from those created in 2012. In this context, I find that charging the appellant for this factor is not supported by the evidence. I will permit the city to charge 30 minutes of search time for each of the five email accounts for a total of 150 minutes.

[59] With respect to the component of the final fee attributable to searching the eight offices, I also find that it is not supported by the city's representations. The method described in the fee estimate is not substantiated and to the extent Vaughan may have relied on it in arriving at an apportionment for this part of the search, I find the fee excessive. Vaughan's representations asserting that "any other letters etc." that may have contained the relevant search terms required the participation of knowledgeable staff members in the individual offices or departments is, without more, insufficient to establish the amount of time required to search and locate records in those offices. The city's evidence does not specify whether paper or electronic files were searched; nor does it specify how many hours were spent by the responsible staff in each of these departments or offices. In the circumstances, I find that it would have been reasonable to expect these eight "knowledgeable" staff to spend one hour each searching for responsive records for a total of 480 minutes.

[60] I reach a similar conclusion about the fees for searching invoices and cheques as I did with the email search fee. As the city describes it, this was also a computer-based search at the start; upon identification of a responsive line item in the accounting spreadsheet, staff performed a manual search to pull the relevant paper records. Although the city's fee estimate refers to 205 transactions and 205 cheques, there is no evidence to support those numbers for the final fee. I have not been provided with evidence of how many cheques were actually identified as responsive. Only one – with redactions required – is identified by the city's index of records sent with the final decision. Moreover, records relating to invoices or cheques are all financial records presumably sourced from the Accounts Payable (or Finance) Department identified in part c) 1 of the request. As Adjudicator Gillian Shaw suggested in Order MO-3340, it would be "reasonable to expect that the city's record keeping is such that financial records relating to specified years and [names] should be relatively simple to locate." As in that appeal, the request here is for records dating from 2008 to 2012, which are records of relatively recent origin. As Commissioner Beamish also noted in Order PO-3035, financial records of relatively recent origin should be kept in a consistent and easily searchable manner. Once identified by the city's accounting software, responsive invoices and cheques ought to have been relatively straightforward to search. Accordingly, I conclude that a reasonable amount of time to spend searching for the requested invoices and cheques would be 120 minutes: one hour for review of the accounting program and one hour for the manual searches of any files.

[61] I am satisfied that the calculation of the search fee outlined above fairly reflects the required searches: 150 for searching emails in Outlook, 480 for searching the 8 offices, and 120 for searching for invoices and cheques adds up to 750 minutes.

[62] I have also considered the issue of duplication in the emails identified as responsive. The city suggests that because the appellant is an experienced requester, she ought to have known that there would be duplicate records since her search parameters included five specified people and the "Transportation section of the Engineering Department." While this may be true, the city could also have been expected to be aware of this contingency. After all, the duplicative nature of email records exchanged between numerous individuals is, in my view, well-known. Further, the fee provisions of the *Act* allow institutions to charge a fee to conduct a record-by-record review to identify responsive information and duplication would be obvious at that point – a fact that the city could have drawn to the appellant's attention. There is precedent for reducing the allowable search fee to account for duplicated emails[6] and I will do so in this appeal by deducting 10% of the newly calculated search time. This results in 675 minutes of search time charged at $7.50 for each 15-minute period or less, which is $337.50.

Preparation – section 45(1)(b)

[63] With respect to section 45(1)(b), Vaughan charged $168.50 for what it describes as "Scanning – 337 min @ $7.50/15 min." The city's representations do not otherwise describe what actions these preparation charges entailed or how they calculated the 337-minute figure. In Order MO-3340, Adjudicator Gillian Shaw reviewed charges levied by the City of Vaughan in that appeal for "scanning," paper records for the purpose of putting them on a CD to disclose the appellant, as was ostensibly done here. However, in Order MO-3340, this fee represented 190 minutes that Vaughan claimed to scan approximately 1,890 pages of paper records, and the adjudicator upheld $95 of the $97.50 fee claimed. There being no explanation of the "scanning" fee here, I find Vaughan's approaches in these two appeals impossible to reconcile. Based on the insufficient evidence, there is no reasonable basis for me to uphold a "scanning" fee of $168.50 in this appeal, where only 193 pages were disclosed.

[64] Moreover, on my review of the index of records, I note that most of these records – 176 pages – appear to be emails, which are, by definition, in electronic format. This raises another issue, one I discussed in Order PO-3480. Section 45(1)(b) does not include time for photocopying,[7] since that cost is accounted for in section 45(1)(c). That is, *when the records are already in electronic format,* it is not held to be necessary to scan them for the purpose of putting them on a CD (or other electronic media storage device) for disclosure. As I said in Order PO-3480,

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[6] See, for example, Order MO-3404.
[7] Orders P-184 and P-890.

[65] Given the absence of evidence to support the city's fee of $168.50 for "scanning" records under section 45(1)(b), I am applying the approach in Order PO-3480 in disallowing the city's "scanning" fee for all records that appear to have been in electronic format originally. In my view, they too could simply have been transferred to the two CDs the city was using to disclose records without scanning them. For the 176 of 193 disclosed pages that appear to have been in electronic format, I will permit the city to charge "scanning" fees for the remaining 17 pages only. Past orders have applied a formula by which one minute is allowed for each 10 pages to be scanned, and I will permit the city to charge for two minutes, which is $7.50 for the portion of one 15-minute period or less.

[66] I note that the fee estimate advised the appellant that the city "estimate[s] redactions to be minimal." Indeed, from the final decision, it appears as though only pages 180-181 and one cheque (scanned on to a CD) required severance under section 14(1) prior to disclosure.[8] That amounts to three pages requiring severance. It appears, however, that the city did not charge the appellant for preparing the three pages, although it was entitled to do so. Given the simple and straightforward nature of the severances, one minute per page – and not two minutes - is a reasonable fee and has been applied in past orders.[9] I will allow the city to charge $7.50.

[67] In total, therefore, I reduce the city's preparation fee under section 45(1)(b) from $168.50 to $15.00.

Section 45(1)(c) – computer and other costs for processing and copying

[68] Section 45(1)(c) includes the cost of photocopies at 20 cents per page and CDs at $10. The appellant challenges neither of these parts of the city's fee. I uphold the $20 fee for the CDs. Regarding the $38.60 fee for photocopies, I observe here what I noted above under the discussion of the city's preparation fee, which is that instead of making paper copies of records that appear to already have been in electronic format, the city could have saved the 176 pages of emails on to the CDs, thereby obviating the need for a photocopying charge. However, while I could reduce the permissible fee for photocopying by $35.20 to $3.40, I will not interfere with it, given the reductions I have already ordered to both the search and preparation fees. In the circumstances, I permit the city to charge $38.60 for the photocopying that was done.

[69] Past orders have affirmed that while it is up to institutions to determine their own internal policies and procedures, with occasional guidance from this office, institutions should explore the most efficient and cost-effective methods available to

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[8] All other records were released in full, with the exception of 36 pages of emails withheld in their entirety under section 14(1); since the appellant withdrew her appeal of information withheld under section 14(1), these records are not at issue in this appeal.
[9] See Orders MO-3437, MO-3340 and PO-3610.

process and disclose records, while also minimizing chargeable costs to appellants.[10]

Summary – allowed fee

[70] In conclusion, I am reducing the city's permissible search and preparation fees. I will permit the city to charge the appellant $411.10, which represents $337.50 for search under section 45(1)(a), $15.00 for preparation under section 45(1)(b), and $38.60 for photocopies and $20 for the two CDs produced, both under section 45(1)(c). Based on my understanding that the appellant has already paid the final fee of $932.10 in full, I will order the city to refund the appellant $521.00.

B. Would the records, if they exist, be excluded from the *Act* under section 52(3)?

[71] When the appellant narrowed the scope of her request during the mediation stage of the appeal, the city issued a supplemental decision to her advising that such records, if they existed, would be excluded from the *Act* pursuant to section 52(3).

[72] Employment-related records are one of several classes of records excluded from *MFIPPA* by section 52. Section 52(3) differs from the exemptions found in section 6 to 15 of the *Act* because if it 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*. The Commissioner does not have the jurisdiction to make any order concerning the disclosure or non-disclosure of records to which the *Act* does not apply.

[73] Since section 52(3) of the *Act* pertains directly to the issue of my jurisdiction, I must review its possible application.

[74] Section 52(3) states:

[75] 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*.

[76] 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.[11]

[77] 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

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[10] Orders PO-2514 and PO-3480; see also BC IPC Order F09-05.
[11] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.) (*Toronto Star*).

restricted to employer-employee relationships.[12] 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.[13]

[78] 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]

Representations

[79] Although the appellant did not submit representations during the inquiry stage of the appeal, she describes the records sought through her narrowed request as follows:

[80] Again, although the appellant did not submit representations during the inquiry stage, I have had the benefit of reviewing the materials submitted by her previously in this appeal.

[81] The city asserted confidentiality over the portions of its representations containing the most specific arguments in support of the application of section 52(3). I accepted that position and, accordingly, withheld those portions of Vaughan's representations from the appellant pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7* when I sought her reply. My explanation of the city's position in my review of section 52(3), below, is necessarily limited by this confidentiality.

[82] In its non-confidential representations, the city refers to the clarification given by the appellant respecting the subject matter of the settlement agreement, which related to a complaint made by the named individual against the city to a specified tribunal that raised certain allegations against the city and a member of its staff. The city notes that the appellant does not seek a copy of the settlement agreement, itself, but does seek access to a copy of the cheque paid to the specified individual and any correspondence related to that agreement and payment. According to the city, if these records exist, they are ones to which section 52(3) would apply. It is at this point that my description of the city's representations on section 52(3) yields to confidentiality.

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[12] *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.
[13] Order PO-2157.
[14] *Ministry of Correctional Services*, cited above.

Analysis and findings

[83] Vaughan does not cite the application of any specific paragraph of the exclusion in section 52(3). However, based on my consideration of the nature of the records to which Vaughan claims section 52(3), and the content of its confidential representations, paragraph 3 appears to be the most relevant.

[84] In order for me to find that the records responsive to the appellant's narrowed request are excluded from the operation of the *Act* under section 52(3)3, I must be satisfied 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.

Part 1: collected, prepared, maintained or used

[85] The records to which Vaughan claims section 52(3) are a copy of a cheque issued to an identified individual respecting a settlement between that person and the city and any associated authorizations or email communications. These records, if they exist, are ones that would have been collected, prepared, maintained or used by employees of the City of Vaughan. Accordingly, I am satisfied that records of this nature would have been collected, prepared, maintained or used by the city for the purpose of part 1 of the test under section 52(3)3, and I find that the first part for exclusion is met.

Part 2: meetings, consultations, discussions or communications

[86] Part 2 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 communications. In the circumstances of this appeal and given the nature of the records specifically identified by the appellant in her narrowed request, I am satisfied that the records, if they exist, would have been collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications with, or between, Vaughan's employees. I find, therefore, part 2 of the test in section 52(3)3 is met.

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

[87] Finally, I must decide whether the subject matter of any meetings, consultations,

discussions or communications in part 2, above, would have been about labour relations or employment-related matters in which Vaughan had an interest.

[88] As noted above, 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.[15] In this situation, I am satisfied that there is, or would have been, "some connection"[16] between the records described by the appellant, if they exist, and an employment-related matter. I accept that the city's Legal and/or Human Resources Department would have collected, prepared, maintained or used such records "in relation to" these employment matters. Next, and as noted above, 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] The individual named in the narrowed request had an employment relationship with the city at one point and in this context, I am satisfied that the city's meetings, consultations, discussions or communications would have been about labour relations or employment matters "in which the city has an interest."

[89] I conclude, therefore, that the third part of the test under section 52(3)3 has been met and that the records, if they exist, would be excluded from the *Act.*

[90] I also considered whether any of the exceptions to section 52(3) that are found in section 52(4) could apply in the circumstances.[18] The city addressed this point in its confidential representations. The types of records that tend to fall under the exceptions are documents that reflect the conclusion of the meetings, consultations, discussions or communications covered by section 52(3). The intent is to offer protection for the confidentiality of the processes described in section 52(3), while still giving effect to the transparency purpose of *MFIPPA* by bringing those records described in section 52(4) back under the *Act.*[19] With consideration given to the types of records that the appellant describes in her narrowed request, which expressly excludes the "settlement agreement," I conclude that the records described, if they exist, would not fit within any of the exceptions in section 52(4). Accordingly, section 52(3)3 applies.

[91] There is no temporal limit on section 52(3). If it applies at the time a record was

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[15] Order PO-2157.
[16] See *Toronto Star,* cited above and Order MO-2589.
[17] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[18] In particular, I considered paragraphs 2 and 3 of section 52(4), which provide that the *Act* "applies to the following records: 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment related matters. 3. An agreement between an institution and one or more employees resulting from negotiations about employment related matters between the institution and the employee or employees.
[19] See Order PO-2497 at page 28, upheld in upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

collected, prepared, maintained or used, it does not cease to apply at a later date.[20]

[92] Given my conclusion that the records responsive to the appellant's narrowed request would be excluded from the *Act* under section 52(3)3, if they exist, I do not need to consider the alternate claim that section 14(5) would apply to the same records.

ORDER:

1. I uphold the city's fee decision, in part, but order the city to refund the appellant $521.00.

2. I uphold the city's claim that the records responsive to the appellant's narrowed request would, if any exist, be excluded from the *Act* pursuant to section 52(3).

Original Signed by: May 24, 2017
Daphne Loukidelis
Adjudicator

[20] *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.