Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3599-I

Appeal MA14-106-2

The Corporation of the City of Cambridge

April 26, 2018

Summary: The Corporation of the City of Cambridge (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information pertaining to a specified property. The city claimed that certain records were excluded from the *Act* under section 52(2.1) (ongoing prosecution), or qualified for exemption under section 12 (solicitor-client privilege) or were non-responsive to the request. The city also claimed that a number of exemptions applied to the remaining records. In the course of mediation, a number of additional issues were raised. In this order, the adjudicator finds that the exclusion in section 52(2.1) does not apply and defers a determination on the records that the city claims are subject to section 12. He finds that certain information falls outside the scope of the request or is not sought by the appellant and that certain information is subject to exemption under section 7 either alone, or in conjunction with section 38(a), but that the city has failed to establish that the balance of the information qualifies for exemption. He orders that this information be disclosed to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) "definition of personal information", 6(1)(a), 6(1)(b), 7(1), 9(1)(a), 9(1)(b), 10(1), 11(a), 11(c), 11(d), 11(e), 11(g), 12, 17, 38(a), 42 and 52(2.1).

Order considered: PO-1791.

OVERVIEW:

[1] The Corporation of the City of Cambridge (the city) received a request under the

Municipal Freedom of Information and Protection of Privacy Act (the *Act* or *MFIPPA*) for access to information pertaining to a specified property. In particular, the request indicated that the requester sought access to the following information in relation to the property:

- notes related to septic system complaints and permits
- building permit records since 1998
- by-law enforcement records since 1998
- all legal documents
- all emails, correspondence and reports pertaining to [the specified property] (including all by-laws) and all council decisions pertaining to [the specified property] from 1999, 2005, 2009

[2] In its first decision letter, the city advised the appellant that all of its by-law and council decisions could be found on its website and that the requested information may qualify for exemption under sections 12 (solicitor-client privilege) and 14 (personal privacy) of the *Act*. In the course of processing the request, the city notified certain parties whose interests may be affected by disclosure of the requested information who sent the city a letter objecting to disclosure. The letter provided as follows:

> Please accept this letter as notification to the City of Cambridge not to release any information or documents pertaining to property owned by [identified company] on [specified location].
>
> Also do not release any information on [two named individuals] …

[3] The city then issued a decision letter disclosing certain records to the appellant, withholding others. The appellant appealed the city's decision and Appeal file MA14-106 was opened to deal with that decision. As set out in the Revised Mediator's Report for Appeal file MA14-106, in response to the appeal, the city grouped the records it provided to this office under Appendices C, F, G and H. The mediator noted in her report that some of these records appear to be duplicates of records which the city provided to this office in two other related appeals involving the appellant and the city.

[4] As set out in the Revised Mediator's Report for Appeal file MA14-106:

> The city subsequently disclosed to the appellant records relating to By-Laws that are contained in Appendix F of this appeal. The city advised that the records in appendix C are also By-Laws which were already disclosed to the appellant in a previous request. The mediator relayed this information to the appellant. The appellant indicated that she is not pursuing the By-Laws in appendices C and F of this appeal. Accordingly,

> the records contained in appendices C and F are not at issue in this appeal.

[5] As mediation did not resolve appeal MA14-106 it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. Appeal file MA14-106 was closed during adjudication as a result of a procedural issue. However, during the adjudication stage of Appeal MA14-106, the city issued a second decision relating to the appellant's request. The within appeal (MA14-106-2) was opened to deal with the issues arising out of that second decision. As set out in its decision letter, the city disclosed to the appellant "all public by-laws" relating to the specified property and explained the difficulties it said it faced in searching for emails responsive to the appellant's request. The letter set out an estimated fee for processing the request in the sum of $11,840.00. The letter also claimed that the requested information may qualify for exemption under sections 10(1) (third party information), 11 (economic and other interests), 12 and 14(1) of the *Act*. This appeal file (MA14-106-2) then moved to mediation.

[6] At mediation of the within appeal, the appellant advised the mediator that she is not seeking access to information that may qualify as personal information under the *Act* or to banking information such as bank account and cheque numbers. However, the appellant took the position that some information that the city asserted was personal information did not qualify as personal information because it related to an individual who was acting in a professional or official capacity. Accordingly, that information remains at issue. Also at mediation, the city claimed that if certain records are not found to be excluded from the *Act* under section 52(2.1) (ongoing prosecution), then they would qualify for exemption under section 12 (solicitor–client privilege) or in the alternative would not be responsive to the request. In addition, the city confirmed that its position was that the balance of the information at issue qualified for exemption under sections 6(1) (draft by-law or closed meeting), 7(1) (advice or recommendations), 10(1), 11 and 14(1) (invasion of privacy). As some of the pages of the records at issue appeared to contain the appellant's personal information the possible application of sections 38(a) (requester's own information) and 38(b) (personal privacy) was added as issues in the appeal. Finally, the city agreed to reduce its fee for search and/or access to records relating to this request and two others involving the appellant and the city. The city agreed that a fee of $300.00 would be allocated to the request at issue in this appeal and the request at issue in Appeal MA14-108-2, one of two other related appeals involving the city and the appellant, for a total of $600.00.

[7] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[8] I commenced my inquiry by sending a Notice of Inquiry to the city setting out the facts and issues in the appeal. In the Notice of Inquiry, I asked the city to list each record that it claimed to qualify for exemption as well as the exemption(s) that it claims are applicable to each record. The city provided responding representations along with

an index setting out the page numbers of records at issue along with the exemptions it claimed were applicable and associated notations describing the information it says is at issue. The city also made handwritten notations on some of the records at issue. In the index, the city claimed that the mandatory exemptions at sections 9(1)(a) and 9(1)(b) of the *Act* (relations with other governments) applied to certain information. The city asked that portions of the materials it provided be withheld due to confidentiality concerns.

[9] Based on my review of the city's representations, the index and the records at issue, I determined that a number of parties whose interests may be affected by disclosure should be notified of the appeal and be invited to provide representations. Accordingly, I sent Notices of Inquiry to these affected parties. Two of the affected parties, Innovation, Science and Economic Development Canada and Transport Canada had no objection to the release of the information relating to them.

[10] I then sent a Notice of Inquiry to the appellant along with a copy of the city's non-confidential representations. The appellant provided responding representations, which I then sent to the city for reply. One of the positions taken by the appellant in her representations is that this appeal was settled at mediation and that, accordingly, there should be no inquiry. This is addressed below. The city provided reply representations.

[11] In this interim order, I find that the exclusion in section 52(2.1) does not apply and I defer a determination on the records that the city claims are subject to section 12. I find that certain information falls outside the scope of the request or is not sought by the appellant and that certain information is subject to exemption under section 7 either alone, or in conjunction with section 38(a), but that the city has failed to establish that the balance of the information qualifies for exemption. I order that this information be disclosed to the appellant.

RECORDS:

[12] Remaining at issue in this appeal are various records as described in the city's index, which include emails, correspondence, agreements, memoranda and other documents as well as records that the city claims to pertain to a litigation matter (the city describes these records as consisting of documents, emails, notes, reports and files). [1]

[1] The city had grouped the records it provided to this office under appendices G and H and the index follows that grouping. The city did not provide the records it claimed to pertain to a litigation matter.

BURDEN OF PROOF:

[13] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

ISSUES:

A. What is the scope of the request? What records are responsive to the request?

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

C. Do sections 6(1), 7(1), 9(1)(a), 9(1)(b), 10(1) or 11, either alone, or in conjunction with the section 38(a) exemption, apply to the information at issue?

D. Does section 10(1) apply to the records?

E. Do sections 11(a), (c), (d), (e) and/or (g) apply to the records?

DISCUSSION:

First Preliminary Issue - was the appeal settled at mediation?

[14] As set out above, this is one of three related appeals involving the appellant and city[2]. They are all at the adjudication stage. The appellant takes the position that the access requests at issue in the appeals, including the one at issue in this appeal, were all settled by agreement at mediation.

[15] In particular, the appellant alleges that the city agreed at mediation to give to the appellant all the records that are in the control and in possession of the Information and Privacy Commissioner office (IPC) in return for a fee of $600.00 and her "stopping" all other Freedom of Information requests and "closing" all appeal files. The appellant explains that the $600.00 fee consists of a fee of $300.00 for the records at issue in this appeal and $300.00 for the records at issue in Appeal MA14-108-2. As a result, she says, access to the records, as well as the fee for access, are no longer at issue. She submits that once she "receives all the records from the city she will confirm with the IPC each and every record in the IPC possession to confirm that the city has declared all records to [the appellant] under their statutory duty as agreed to in the mediation stage."

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[2] The within appeal and Appeals MA14-107-2 and MA14-108-2.

[16] In reply, the city states:

> To be clear the city never agreed at any time to disclose the records in question to [the appellant], through any process including mediation; this is why we are in the appeal process through the IPC.

[17] The city also states that the fee is "not a negotiating item" and is related to the processing of the requests.

Analysis and finding

[18] I am not satisfied that any settlement of this appeal, or the other appeals, took place at mediation. I have reviewed the various notes and decision letters in the appeal files and find that the city initially claimed a large fee estimate for processing the appellant's requests but at mediation agreed to reduce it to the sum of $600.00 to be allocated equally between Appeals MA14-106-2 and MA14-108-2. Appeal MA14-107-2 did not have a fee associated with it. Based on my review of the materials, I am satisfied that there was no agreement to full disclosure of the withheld information upon payment of the reduced fee and, as confirmed in the Mediator's Report, access to the undisclosed information remained at issue at the close of mediation. As a result, I find that while a number of issues were resolved at mediation, access to the information at issue in this appeal was not. I pause to note that, as a practical matter, had the mediation resolved the appeal the Mediator would have closed the appeal file and it would not have moved to the adjudication stage.

Second Preliminary Issue - Solicitor-Client Privileged Records (section 12) – Ongoing Prosecution (section 52(2.1))

[19] Section 12 states as follows:

> 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.

[20] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[21] Section 52(2.1) states:

> This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[22] The purposes of section 52(2.1) include maintaining the integrity of the criminal

justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.[3]

The representations

[23] Throughout the course of the appeal, the city took the position that certain records were subject to the application of the section 52(2.1) exclusion, or qualified for exemption under section 12 or were non-responsive to the request.

[24] The city's initial representations on the possible application of section 12 and/or 52(2.1) of the *Act* consist of the following:

> The request for all legal documentation is protected under solicitor-client privilege, section 12 of the *Act* and section 52. It is the city's position that there are solicitor-client privileged records that constitute legal interaction between the city and its solicitors and as such are withheld under the provisions of solicitor-client privilege as described and supported by the Supreme Court of Canada in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44. Under this Supreme Court decision, the city is withholding any solicitor/client privileged information in the possession of our solicitors and will not be releasing it to the IPC as per the Supreme Court case mentioned above.
>
> Under this Supreme Court decision the city is withholding any solicitor-client privileged information in the possession of our solicitors and will not be including it in the index sent to you.

[25] With respect to section 52(2.1), although the city did not withdraw its reliance on that exclusion, the city provided no evidence of an ongoing prosecution and provided no support for the application of section 52(2.1) in its representations. With respect to section 12, as described in the Mediator's Report and as acknowledged by the city, the city did not provide copies of the records that it claimed were subject to solicitor-client privilege. Furthermore, the city did not provide a list or detailed description of these records.

[26] After recounting what the appellant characterized as a settlement made in the course of mediation, as discussed above, the appellant submits that records were not confidential or solicitor-client privileged "because anyone at City Hall including all staff, officers and council have seen these records by virtue in [sic] their possession between two corporations and their activities".

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[3] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

[27] In reply, the city submits that:

> [The appellant] has requested legal dealings the city has had with [named individual], which our legal Counsel has denied as it would go against their ethics and professional responsibility.

Analysis and finding

[28] I am not satisfied that the city has provided sufficient evidence to establish the application of the section 52(2.1) exclusion and I find that it does not apply. However, without the opportunity to review the actual records that the city claims are subject to section 12, or a more detailed description of the records, I do not have sufficient materials or evidence to make a finding with respect to the application of section 12 or a determination whether these records are responsive to the request. Accordingly, I will defer any determination on the possible application of section 12 to these records, and and/or their responsiveness, after I have sought further representations on these issues.

Issue A: What is the scope of the request? What records are responsive to the request?

[29] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[30] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[4]

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[4] Orders P-134 and P-880.

Non-responsive information

[31] The request is clear and the city provides no representations on the issue of responsiveness except to say that if the records that they claim to be subject to solicitor-client privilege are not excluded from the *Act* then they are either non-responsive or subject to section 12. However, on the index of records associated with pages 19, 20 and 24 of Appendix H, there is a notation that the pages contain "[t]hird party information not part of the FOI request". The copies of certain pages of records that the city provided to this office have handwritten notations thereon indicating that the information is "not part of FOI".

[32] I have reviewed the pages identified in the index as well as those containing hand-written notations and find that certain information on pages 12, 13, 14, 15, 18, 22 and 23 of Appendix H does not fall within the scope of the request and is, accordingly, non-responsive to it. Accordingly, I will not order that this information be disclosed to the appellant. I have highlighted this information in green on a copy of the pages of records that I have provided to the city along with a copy of this order.

Records relating to a litigation matter

[33] It appears that the issue of the scope of the appeal may, in part, be related to the content of the records that the city says pertain to a litigation matter consisting of documents, e-mails, notes, reports and files which the city claimed was excluded from the scope of the *Act* by operation of section 52(2.1). I found above that section 52(2.1) does not apply. The city claims in the alternative that those records are non-responsive or fall within section 12 of the *Act*. As set out above, I have deferred my determination on that issue.

Banking information

[34] As set out above, in the course of mediation, the appellant advised the mediator that she is not seeking access to banking information such as bank account and cheque numbers. Accordingly, this information does not fall within the scope of the request. This information appears on pages 6 and 11 of Appendix G of the records and I will not order that this information be disclosed to the appellant.

Personal information

[35] In the course of mediation, the appellant advised the mediator that she is not seeking access to information that may qualify as personal information under the *Act*. However, the appellant took the position that some information that the city asserted was personal information did not qualify as personal information because it related to an individual who was acting in a business, professional or official capacity. This is addressed below.

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

[36] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except 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;

[37] 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.[5]

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[5] Order 11.

[38] Sections 2(2.1) and 2(2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[39] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[6] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[7] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[8]

[40] As set out above, in the course of mediation, the appellant advised the mediator that she is not seeking access to information that may qualify as personal information under the *Act*. However, the appellant took the position that some information that the city asserted was personal information did not qualify as personal information because it related to an individual who was acting in a professional or official capacity.

[41] The city provided no initial representations on this issue. However, its index indicates that section 14 is claimed to apply to certain pages of the records at issue. Associated notations on the index indicate that the information is "[p]ersonal information related to financial transactions", "[s]ection 2 see definitions" and "[p]ersonal information and third-party information - consent is required to be provided before disclosure, consent has not been obtained". None of the notified affected parties provided representations on this issue.

[42] The appellant submits in her representations that she is not seeking access to personal information but rather corporate records between the city and an identified company and all records of an individual acting in a corporate business capacity.

[43] The appellant submits:

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

> … These records are of public record submitted/disclosed from one corporation [identified company] to another corporation the municipal Corporation of the City of Cambridge or vice versa with respect to government decision making or advice made in good faith.
>
> …
>
> There is no personal information related to a "personal transaction" but rather the information is between two commercial enterprises making commercial transactions that are not protected by [the *Act*]. The advice outlined in the documents involving recommendations by staff, committee and council for the purpose of commercial enterprise and all future decisions would amount to commercial decision making, not personal.

[44] In reply, after setting out that it believes to be the basis and motivation for the appellant's request, the city refers to the letter objecting to disclosure that the city received at the request stage.

Analysis and findings

[45] Based on my review of the information remaining at issue in the records that I have not found to fall outside the scope of the request, I find that pages 9 to 12 of Appendix H contain the personal information of the appellant that falls within the scope of the definition of personal information set out at section 2(1) of the *Act*.

[46] I also find that, with one exception, being a telephone number on page 17 of Appendix G, the information remaining at issue in the records that I have not found to fall outside the scope of the request does not constitute "personal information" under the definition in section 2(1) because it falls within the scope of section 2(2.1) of the *Act.* Section 2(2.1) provides that the "name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity" does not constitute personal information for the purposes of the *Act*. While it is possible for information provided by individuals in a professional or business context to cross the threshold from business or professional to personal information, this is not one of those situations. As the appellant does not seek access to information that qualifies as "personal information" I will not order that the telephone number be disclosed to the appellant. This information is highlighted in green on a copy of the page that I have provided to the city along with a copy of this order.

Issue C: Do the exemptions at sections 6(1), 7(1), 9(1)(a), 9(1)(b), 10(1) or 11, either alone, or in conjunction with the section 38(a) exemption, apply to the information at issue?

Introduction

[47] I found above that pages 9 to 12 of Appendix H contain the personal information

of the appellant that falls within the scope of the definition of personal information set out at section 2(1) of the *Act*. The city claims that sections 6(1), 7(1), 10(1) and/or 11 apply to these pages.

[48] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[49] Section 38(a) reads:

> 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.

[50] 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 to their personal information.[9]

[51] I will therefore consider whether the information on pages 9 to 12 of Appendix H qualifies for exemption under section 38(a) in conjunction with the sections claimed. I will consider whether the balance of the records at issue simply fall within the scope of the exemptions as claimed.

Sections 6(1)(a) and 6(1)(b)

[52] Sections 6(1)(a) and (b) read:

> A head may refuse to disclose a record,
>
> > (a) that contains a draft of a by-law or a draft of a private bill;
> >
> > (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[53] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.[10]

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[9] Order M-352.
[10] Order MO-1344.

[54] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.[11]

[55] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?[12]

[56] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[13]

[57] The city did not provide specific representations on the application of sections 6(1)(a) or (b). Its index indicates that section 6(1) is claimed to apply to page 7 of the records in Appendix G and pages 8 to 28 of the records in Appendix H. Associated notations on the index indicate the "[i]nformation also involves draft information pertaining to future decisions", [t]here is advice outlined in the documentation involving recommendations by staff" and "[t]here is also information that discloses deliberations of a committee". The appellant provides no representations on this issue.

Analysis and finding

[58] In this appeal, the city provided no evidence to support a finding that the information at issue that it claims to be subject to section 6(1)(a) or 6(1)(b) falls within the scope of those sections. I have reviewed the records at issue and I find that they do not support a finding that sections 6(1)(a) or 6(1)(b) apply. In the circumstances, I find that the city has failed to provide sufficient evidence to support the application of sections 6(1)(a) or 6(1)(b). Accordingly, I find that they do not apply.

Section 7(1)

[59] Section 7(1) states:

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

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[11] Order M-102.
[12] *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).
[13] Orders MO-1344, MO-2389 and MO-2499-I.

[60] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[14]

[61] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [15]

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

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[16]

[64] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[17]

[65] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).[18]

[66] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

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[14] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[15] See above at paras. 26 and 47.
[16] Order P-1054.
[17] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[18] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

- factual or background information[19]
- a supervisor's direction to staff on how to conduct an investigation[20]
- information prepared for public dissemination[21]
- Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7.

[67] Again, the city provides no specific representations on the application of section 7(1) of the *Act*. Its index indicates that section 7(1) is claimed to apply to page 7 of the records in Appendix G and pages 8 to 28 of the records in Appendix H. There is an associated notation on the index that "[t]here is advice outlined in the documentation involving recommendations by staff". The appellant provides no representations on this issue.

Analysis and finding

[68] The city provides no evidence or submissions other than a notation in the index to support the application of section 7(1). Accordingly, in the absence of any supporting evidence or submissions I have reviewed the records.

[69] Page 7 of Appendix G is a copy of a handwritten document. In the absence of any evidence or submissions, it is not clear to me what these notes are for, or what disclosing them would reveal. I find that the city has failed to provide me with sufficient evidence to establish that section 7(1) applies to this page.

[70] Pages 8 to 11 of Appendix H consist of an email exchange. From my review of the mail exchange I am satisfied that a discrete portion of the emails falls within the scope of section 7(1). I have highlighted that portion in green on a copy of page 8 that I have provided to the city along with a copy of this order. In the absence of any additional evidence or submissions, I am not satisfied that the city has provided me with sufficient evidence to establish that section 7(1) applies to the balance of these pages.

[71] Pages 12 to 15 of Appendix H consist of an email exchange. I am satisfied that a discrete portion of the emails falls within the scope of section 7(1). I have highlighted that portion in green on a copy of page 12 that I have provided to the city along with a copy of this order. In the absence of any additional evidence or submissions, I am not satisfied that the city has provided me with sufficient evidence to establish that section

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[19] Order PO-3315.
[20] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[21] Order PO-2677.

7(1) applies to the balance of these pages.

[72] Pages 16 to 17 of Appendix H consist of an email exchange. I am satisfied that a discrete portion of the emails falls within the scope of section 7(1). I have also highlighted that portion in green on a copy of page 16 that I have provided to the city along with a copy of this order. In the absence of any additional evidence or submissions, I am not satisfied that the city has provided me with sufficient evidence to establish that section 7(1) applies to the balance of these pages.

[73] Pages 18 to 21 of Appendix H consist of an email with attachments. In the absence of any additional evidence or submissions, in my view the information sought to be withheld is of a factual nature and I am not satisfied that the city has provided me with sufficient evidence to establish that section 7(1) applies to the balance of these pages.

[74] Page 22 of Appendix H is a stand alone email. Pages 23 to 24 of Appendix H consist of an email exchange. In the absence of any additional evidence or submissions, in my view the information sought to be withheld appears to be more of a factual nature and/or a decision than advice or recommendation and I am not satisfied that the city has provided me with sufficient evidence to establish that section 7(1) applies to the balance of these pages.

[75] Pages 25 to 26 of Appendix H is an email containing comments. Pages 27 to 28 of Appendix H is a document containing comments. In the absence of any additional evidence or submissions, in my view the information sought to be withheld appears to be more of a factual nature and/or a decision than advice or recommendation and I am not satisfied that the city has provided me with sufficient evidence to establish that section 7(1) applies to the balance of these pages.

[76] I therefore find that, with the exception of the portions that I have highlighted in green on a copy of the pages of records that I have sent to the city along with a copy of this order, the city has failed to provide sufficient evidence to establish the application of section 7(1) of the *Act* to the pages for which it was claimed. Accordingly, only the highlighted information qualifies for exemption under section 7(1) either alone, or in conjunction with section 38(a).

[77] I am also satisfied that, in all the circumstances, the city properly exercised its discretion not to disclose to the appellant the highlighted information that I have found to be subject to section 7(1) either alone, or in conjunction with section 38(a), as the case may be.

Section 9

[78] Section 9 states:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c); or
>
> (e) an international organization of states or a body of such an organization.
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

[79] The purpose of this exemption is to ensure that governments under the jurisdiction of the *Act* continue to obtain records which other governments might otherwise be unwilling to supply without having this protection from disclosure.[22] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.[23]

[80] For a record to qualify for this exemption, the institution must establish that:

1. disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section; and

2. the information was received by the institution in confidence.[24]

[81] The focus of this exemption is to protect the interests of the supplier of information, and not the recipient. Generally, if the supplier indicates that it has no concerns about disclosure or vice versa, this can be a significant consideration in determining whether the information was received in confidence.[25]

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[22] Order M-912.
[23] Order P-1552.
[24] Orders MO-1581, MO-1896 and MO-2314.
[25] Orders M-844 and MO-2032-F.

[82] The city provided no specific representations on the application of sections 9(1) or 9(2) of the *Act*. Its index indicates that sections 9(1)(a) and (b) apply to pages 12 to 19 of the records in Appendix G and pages 16 to 20 of the records in Appendix H. There are notations on the index that the associated page "[c]ontains instructions and information from MTO and Transport Canada", "[c]ontains instructions and information from Industry Canada" and "[c]ontains instructions and information from MTO". The appellant provides no representations on this issue.

[83] In the course of adjudication, I sought representations from the Ontario Ministry of Transportation, Transport Canada, Nav Canada and Industry Canada on the possible application of sections 9(1)(a) and 9(1)(b). Only Innovation, Science and Economic Development Canada, the successor to Industry Canada, and Transport Canada responded. They had no objection to the release of information pertaining to them.

[84] In this appeal, the city provided no evidence to support a finding that the information at issue was provided in confidence. I have reviewed the records at issue and I find them of no assistance in this regard. Innovation, Science and Economic Development Canada and Transport Canada had no objection to the release of information pertaining to them. In the circumstances, I find that the city has failed to provide sufficient evidence to support the application of sections 9(1)(a) or 9(1)(b). Accordingly, I find that they do not apply.

Issue D: Does section 10(1) apply to the records?

[85] Sections 10(1)(a), (b) and (c) read:

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

[86] Section 10(1) is designed to protect the confidential "informational assets" of

businesses or other organizations that provide information to government institutions.[26] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[27]

[87] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

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

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

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

[88] The city submits in its reply representations that it is "very cautious to not disclose information that would divulge any business dealings with the city, as we feel this would be taken in bad faith". Its index indicates that section 10(1)(a), (b) and/or (c) is claimed to apply to pages 2 to 4, 6 to 10, 12 to 22 and 29 to 85 of the records in Appendix G and pages 1 to 7, 12 to 21 and 23 to 24 of the records in Appendix H. Notations on the index indicate that the associated page "[c]ontains third party information regarding potential negotiation - disclosure could result in undue loss" "[c]ontains third party information regarding potential negotiation - disclosure could result in undue loss (economic development)", "Personal information and Third Party information - consent is required to be provided before disclosure, consent has not been obtained", "Third Party - prejudice to competitive position", "Third Party section 10" and "Third Party information deals with distribution of money and pricing practices and costs". The notation on the index relating to the application of section 10(1) to page 4 states that the page contains information that "[w]as obtained and gathered for the purpose of collecting a tax". As set out above, at the request stage the city received a letter objecting to disclosure. None of the affected parties notified during the course of adjudication provided any responding representations.

[89] The appellant submits that:

> All potential negotiations should be done in good faith by the city and in effect no undue loss should never be found unless the city acted in bad

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

> faith. Ministry of Transportation records are of public record when dealing with commercial enterprises.

[90] In this appeal it is not necessary for me to consider the first and second part of the section 10(1) three-part test as there is no evidence of harm. The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[28] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[29]

[91] In Order PO-1791, an appeal addressing the provincial equivalent of section 10(1) this office discussed the impact on an appeal of this nature, of the failure by an affected party to submit representations:

> … As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a)(b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.
>
> In the circumstances, I am unable to find that the submissions of MBS provide the "detailed and convincing evidence" which is required to support the application of section 17(1)(a) to this case.

[92] These comments have even more relevance to this appeal, where all I have before me from any affected party is the content of a letter the city received at the request stage, the city's representations are limited to a statement and notations on an index and no other representations were received on the application of section 10(1) during the course of adjudication. In the absence of any substantive representations, I am similarly left without any evidence on the issue of reasonable expectation of harm from disclosure with respect to the information at issue. I have also reviewed the information that the city claims is subject to section 10(1) that remains at issue and find

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[28] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[29] Order PO-2435.

nothing in it that would allow me to infer a reasonable expectation of harm from disclosure. As a result, I am unable to conclude that the harms described in section 10(1) could reasonably be expected to result from disclosure of the information. As all parts of the three-part test for exemption under section 10(1) must be satisfied, I find that this exemption does not apply.

Issue E: Do sections 11(a), (c), (d), (e) and/or (g) apply to the records?

[93] Sections 11(a), (c), (d), (e) and (g) of the *Act* state:

> A head may refuse to disclose a record that contains,
>
> > (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
> >
> > (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
> >
> > (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
> >
> > (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;
> >
> > (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

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

[95] The city submits in its reply representations that it is "very cautious to not disclose information that would divulge any business dealings with the city, as we feel this would be taken in bad faith". Its index indicates that sections 11(a), (c), (d), (e) and/or (g) are claimed to apply to pages 2 to 4, 6, 8 to 9, 12 to 22, and 29 to 85 of the records in Appendix G and pages 1 to 7, and 12 to 21 of the records in Appendix H. The

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[30] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

associated notations on the index relating to the section 11(1) exemption claims states that the page "[c]ontains third party financial interests section 11", "[d]eals with distribution of money and pricing practices and costs", "[c]ontains instruction and negotiations on boundaries", "[c]ontains instructions and information from MTO and Transport Canada", "[c]ontains instructions and information from Industry Canada", "[c]ontains instructions and information from MTO", "[c]ontains information pertaining to plans, financial interest secrets and potential monetary values" and "[c]ontains information pertaining to plan, financial interest secrets, and potential monetary values and policies eg. Tree Management".

Section 11(a): information that belongs to government

[96] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;

2. belongs to an institution; and

3. has monetary value or potential monetary value.

[97] For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,[31] customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.[32]

[98] To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.[33] The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section.[34] Nor does the

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[31] Order P-636.
[32] Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.
[33] Orders M-654 and PO-2226.
[34] Orders P-1281 and PO-2166.

fact, on its own, that the information has been kept confidential.[35]

[99] It is not necessary to address the first part of the test, as the city provided no evidence as to how the information "belongs to" the city or what it asserts is the monetary value or potential monetary value of the information. The notations provided by the city on its index are not sufficient. I have reviewed the records at issue and I find them of no assistance in determining whether section 11(a) applies.

[100] In my view, the city has failed to provide sufficient evidence to establish either the second or third parts of the section 11(a) test. As all three parts of the test must be established, I find that section 11(a) does not apply.

Sections 11(c), (d) and (g)

[101] For sections 11(c), (d) or (g) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[36] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[37]

[102] The city has not provided any evidence to support its allegations of harm. The notations provided by the city on its index are not sufficient. Accordingly, I have a lack of evidence on the issues raised by sections 11(c), (d) and (g), from the party which is in the best position to offer it. I have reviewed the records at issue that the city claims to be subject to sections 11(c), (d) and/or (g) and I find them of no assistance in this regard. In the circumstances, I find that the city has failed to provide sufficient evidence to establish the application of section 11(a), (d) and/or (g). Accordingly, I find that sections 11(a), (d) and/or (g) do not apply.

Section 11(e)

[103] In order for section 11(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

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[35] Order PO-2724.
[36] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[37] Order MO-2363.

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of an institution.[38]

[104] The terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action. In order for this exemption to apply, there must be some evidence of an organized structure or definition to the course of action.[39] This office has adopted the dictionary definition of "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme".[40] The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations but rather simply reflects mandatory steps to follow.[41]

[105] The city provided no evidence to support the application of this section. For example, there is no evidence to support the existence of an organized structure or definition to any alleged course of action. The notations provided by the city on its index are not sufficient. I have reviewed the records at issue that the city claims to be subject to section 11(e) and I find them of no assistance in this regard. In the circumstances, I find that the city has failed to provide sufficient evidence to establish the application of section 11(e).

Conclusion

[106] I have concluded that only section 7, either alone or in conjunction with section 38(a), applies to certain information but that no other exemptions apply to the remaining responsive information at issue in the appeal that the city does not claim to be subject to section 12. Accordingly, I will order that the remaining non-exempt responsive information that falls within the scope of the appeal be disclosed to the appellant.

[107] As noted, with respect to the records for which the city claims are subject to section 12, in the absence of having an opportunity to review the actual records that the city claims are subject to section 12 of the *Act*, or being provided a more detailed description of the records, I do not have sufficient materials or evidence to make a finding with respect to the application of section 12. Accordingly, I will defer the determination of the possible application of section 12 after I have sought further representations on the issue.

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[38] Order PO-2064.
[39] Orders PO-2034 and PO-2598.
[40] Orders P-348 and PO-2536.
[41] Order PO-2034.

ORDER:

1. Except for the information the city claims is subject to section 12, pages 6 and 11 of Appendix G and the information that I have highlighted in green on a copy of page 17 of Appendix G and pages 8, 12 to 16, 18, 22 and 23 of Appendix H of the records provided to the city along with a copy of this order, I order the city to disclose the balance of the information at issue in this appeal to the appellant, by sending it to her by **June 1, 2018**, but not before **May 28, 2018**.

2. In order to ensure compliance with paragraph 1, I reserve the right to require the city to send me a copy of the pages of records as disclosed to the appellant.

Original Signed by: April 26, 2018

Steven Faughnan
Adjudicator