Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3614-I

Appeal MA14-108-2

The Corporation of the City of Cambridge

May 28, 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 general information as well as 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 also finds that certain information is not sought by the appellant, and orders that information withheld, 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), 8(1)(c), 8(2)(a), 9(1)(a), 9(1)(b), 10(1)(a), 10(1)(c), 11(a), 11(d), 11(e), 11(g), 12, 38(a) and 52(2.1).

Orders considered: MO-3599-I, MO-3610-I and PO-1791.

OVERVIEW:

[1] The Corporation of the City of Cambridge (the city) received a multi-part request

under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to information pertaining to city by-law enforcement and temporary use permits, as well as requesting answers to certain questions.

[2] In the course of processing the request, the city notified certain parties whose interests may be affected by disclosure of the requested information and 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] In its decision letter, the city provided its responses to certain questions and relied on a variety of sections of the *Act* to deny access to any responsive records.

[4] As mediation did not resolve appeal MA14-108, it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. Appeal file MA14-108 was closed during adjudication as a result of a procedural issue. However, during the adjudication stage of Appeal MA14-108, the city issued a second decision relating to the appellant's request. The within appeal (MA14-108-2) was opened to deal with the issues arising out of that second decision. As set out in its decision letter, the city explained the difficulties it said it faced in searching for emails responsive to the appellant's request. The letter also set out an estimated fee for processing the request in the sum of $11,840.00 and claimed that a number of exemptions applied to the responsive information.

[5] At mediation of the within appeal, the appellant narrowed the scope of her request and confirmed that she is no longer seeking access to certain information. She also 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 8(1)(c) (investigative techniques and procedures), 8(2)(a) (law enforcement report), 10(1)(a) and (c) (third party information), 11 (economic and other interests) and 14(1) (invasion of privacy). 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 MA14-106-2 (which was the subject of Interim Order MO-3599-I), one of two other related appeals involving the city and the appellant, for a total of $600.00.

[6] 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*.

[7] 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. In the index, the city claimed that the exemptions at section 6(1) (draft by-law) and 7(1) (advice or recommendations) and 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.

[8] Based on my review of the city's representations, the index and the records at issue, I determined that a company and the Ontario Ministry of Transportation should be notified of the appeal and be invited to provide representations. Accordingly, I sent Notices of Inquiry to these affected parties. Neither of the notified affected parties provided responding representations.

[9] 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.

[10] 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 is not sought by the appellant, and order that information withheld, but also find 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:

[11] Remaining at issue in this appeal are various records as described in the city's index, which include polices about by-law enforcement, an agreement, emails, pictures

and printouts as well as records that the city claims to pertain to a litigation matter.[1]

BURDEN OF PROOF:

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

B. Do the exemptions at sections 6(1) or 7(1), in conjunction with section 38(a), apply to the information at issue?

C. Do sections 8(1)(c) or 8(2)(a) apply to the information at issue?

D. Do sections 9(1)(a) and/or 9(1)(b) apply to the information at issue?

E. Do sections 10(1)(a) and/or 10(1)(c) apply to the information at issue?

F. Do sections 11(a), (d), (e) and/or (g) apply to the information at issue?

DISCUSSION:

First Preliminary Issue - was the appeal settled at mediation?

[13] As set out above, this is one of three related appeals involving the appellant and city[2]. 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.

[14] 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 (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 MA14-106-2 (which

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

[2] The within appeal and Appeal MA14-106-2 (which was the subject of Interim Order MO-3599-I) and MA14-107-2 (which was the subject of Interim Order MO-3610-I).

was the subject of Interim Order MO-3599-I). 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."

[15] 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.

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

Analysis and finding

[17] In Interim Order MO-3599-I, I explained that I had reviewed the various notes and decision letters in the three appeal files and determined that no settlement of any of the appeals, including this one, took place at mediation. Based on my review of the materials, I was satisfied that there was no agreement to full disclosure of the withheld information upon payment of a reduced fee of $600.00 to be allocated equally between Appeals MA14-106-2 and this appeal, and, as confirmed in the Mediator's Report, access to the undisclosed information at issue in this appeal 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. Again, 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))

[18] As the city did in Appeals MA14-106-2 (which was the subject of Interim Order MO-3599-I) and MA14-107-2 (which was the subject of Interim Order MO-3610-I), throughout the course of this appeal, the city also 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.

[19] 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.

[20] 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.

[21] 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".

[22] 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

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

[24] 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;

[25] 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.[3]

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[3] Order 11.

[26] 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.

[27] 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.[4] 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.[5] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

[28] 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.

[29] 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 – section 2 see definitions".

[30] 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.

[31] The appellant submits:

> … These records are of public record submitted/disclosed from one corporation [identified company] to another corporation the municipal

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

> 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.

[32] In reply, after setting out what 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

[33] Based on my review of the records remaining at issue, I find that only the record comprising pages 75 and 76 of Appendix C contains 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*.

[34] I also find that, with one exception, being a telephone number on page 75 of Appendix C, the information remaining at issue in the records 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. As there is no other personal information currently at issue in the appeal, it is not necessary for me to consider whether section 14(1) applies.

Issue B: Do the exemptions at sections 6(1) or 7(1), in conjunction with section 38(a), apply to the information at issue?

[35] I found above that the record comprising pages 75 and 76 of Appendix C 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) and/or 7(1) apply to these pages.

[36] 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.

[37] 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.

[38] 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.[7]

[39] I will therefore consider whether the information on the record comprising pages 75 and 76 of Appendix C qualifies for exemption under section 38(a) in conjunction with the sections claimed.

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

[40] 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.

[41] 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.[8]

[42] 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*.[9]

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[7] Order M-352.
[8] Order MO-1344.
[9] Order M-102.

[43] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, the question is: "was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?"[10]

[44] 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.[11]

[45] 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 the record comprising pages 75 and 76 of Appendix C. The associated notation on the index indicate, "[t]here is advice outlined in the documentation involving recommendations by staff" and the "[i]nformation also involves draft information pertaining to future decisions". The appellant provides no representations on this issue.

Analysis and finding

[46] 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 information at issue and I find that it does 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)

[47] 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.

[48] 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

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

decision-making and policy-making.[12]

[49] "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. [13]

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

[51] 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.[14]

[52] 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 the record comprising pages 75 and 76 of Appendix C. 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

[53] 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 7(1) falls within the scope of that section. I have reviewed the information at issue and I find that it does not support a finding that section 7(1) applies. In the circumstances, I find that the city has failed to provide sufficient evidence to support the application of section 7(1). Accordingly, I find that it does not apply.

Conclusion

[54] In light of the above, I find that the city has failed to establish the application of section 38(a) in conjunction with sections 6(1)(a), 6(1)(b) and/or 7(1).

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

Issue C: Do sections 8(1)(c) and/or 8(2)(a) apply to the information at issue?

General principles

[55] Sections 8(1)(c) and 8(2)(a) state:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (2) A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[56] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
> >
> > (c) the conduct of proceedings referred to in clause (b)

[57] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[15]

[58] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[16] 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

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[15] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[16] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

consequences.[17]

Section 8(1)(c): investigative techniques and procedures

[59] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[18] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[19]

Section 8(2)(a): law enforcement report

[60] In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[20]

[61] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[21] The title of a document does not determine whether it is a report, although it may be relevant to the issue.[22]

[62] An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous.[23]

Section 8(4) exception to the exemption

[63] Section 8(4) states:

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[17] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[18] Orders MO-2347-I, P-170, P-1487 and PO-2751.
[19] Orders P-1340 and PO-2034.
[20] Orders P-200 and P-324.
[21] Orders P-200, MO-1238 and MO-1337-I.
[22] Order MO-1337-I.
[23] Order MO-1238.

> Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario.

[64] The section 8(4) exception is designed to ensure public scrutiny of material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.[24] Generally, "complaint driven" inspections are not "routine inspections".[25] The existence of a discretion to inspect or not to inspect is a factor in deciding whether an inspection is "routine".[26]

Analysis and findings

[65] The city provided no specific representations on the application of sections 8(1)(c) or 8(2)(a) of the *Act*. Its index indicates that section 8(1)(c) applies to pages 1 to 17, 24 to 34, 58 to 74 and 77 to 102 of the records in Appendix C and that 8(2)(a) applies to pages 3 to 17, 24 to 34, 58 to 74, and 77 to 102 of Appendix C.

[66] There are notations on the index that the associated pages "[r]eveals departmental/division procedures currently in use" and "[r]eveals routine inspection reports". The appellant provides no representations on this issue.

[67] In this appeal, the city provided no evidence to support a finding that disclosing any technique or procedure that may appear in the records to the public could reasonably be expected to hinder or compromise its effective utilization. Nor did the city provide any evidence to support a finding that any of the information meets the definition of a "report" under section 8(2)(a). I pause to note that section 8(4) is an exception to the exemption and provides for the disclosure of a report prepared in the course of routine inspections, if the records were law enforcement reports in the first instance.

[68] In the circumstances, I find that the city has failed to provide sufficient evidence to support the application of sections 8(1)(c) and/or 8(2)(a) of the *Act*. Accordingly, I find that they do not apply.

Issue D: Do sections 9(1)(a) and/or 9(1)(b) apply to the information at issue?

[69] Section 9 states:

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[24] Order PO-1988.
[25] Orders P-136 and PO-1988.
[26] Orders P-1120 and PO-1988.

> (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.

[70] 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.[27] 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.[28]

[71] 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.[29]

[72] 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.[30]

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[27] Order M-912.
[28] Order P-1552.
[29] Orders MO-1581, MO-1896 and MO-2314.
[30] Orders M-844 and MO-2032-F.

[73] 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 35 to 57 of the records in Appendix C. There are notations on the index that the record "[c]ontains instructions and information from MTO". The appellant provides no representations on this issue.

[74] In the course of adjudication, I sought representations from the Ontario Ministry of Transportation on the possible application of sections 9(1)(a) and 9(1)(b). It did not respond.

[75] 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 record at issue which is simply an agreement. 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 E: Does sections 10(1)(a) and/or (c) apply to the information at issue?

[76] Sections 10(1)(a) 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;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; …

[77] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[31] 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.[32]

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

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[31] *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.*).
[32] Orders MO-1706, PO-1805, PO-2018 and PO-2184.

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) and/or (c) of section 10(1) will occur.

[79] 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 10(1)(a) and/or (c) are claimed to apply to pages 35 to 57, 58 to 74 and 77 to 102 of Appendix C. The record at pages 35 to 57 of Appendix C is an agreement. The records at pages 58 to 74 and 77 to 102 are screen shots and photographs. Notations on the index indicate that the associated pages "[c]ontains third party information regarding potential negotiation - disclosure could result in undue loss (economic development)", "[t]hird Party section 10" and "[t]hird Party - prejudice to competitive position". 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.

[80] 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 faith. Ministry of Transportation records are of public record when dealing with commercial enterprises.

[81] 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.[33] 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

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

proven simply by repeating the description of harms in the *Act*.[34]

[82] 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.

[83] These comments have even more relevance to this appeal, where all I have before me 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 sections 10(1)(a) and/or 10(1)(c) that remains at issue and find 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)(a) and/or (c) could reasonably be expected to result from disclosure of the information at issue. As all parts of the three-part test for exemption under section 10(1) must be satisfied, I find that sections 10(1)(a) and/or 10(1)(c) do not apply.

Issue F: Do sections 11(a), (d), (e) and/or (g) apply to the information at issue?

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

> A head may refuse to disclose a record that contains,

[34] Order PO-2435.

> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (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;

[85] 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*.[35]

[86] 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), (d), (e) and/or (g) are claimed to apply to pages 35 to 57, 58 to 74, and 77 to 102 of the records in Appendix C. The associated notations on the index relating to the section 11(1) exemption claims states that the page "[c]ontains third party information regarding potential negotiation – disclosure could result in undue loss (economic development)", "[r]eveals departmental/division procedures currently in use" and "[t]hird party – prejudice to competitive position". The appellant provides no specific representations on the application of sections 11(a), (d), (e) or (g).

Section 11(a): information that belongs to government

[87] 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.

[88] For information to "belong to" an institution, the institution must have some

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[35] *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.

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,[36] 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.[37]

[89] 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.[38] 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.[39] Nor does the fact, on its own, that the information has been kept confidential.[40]

[90] 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 pages at issue and I find them of no assistance in determining whether section 11(a) applies.

[91] 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(d) and (g)

[92] For sections 11(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.[41] The

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[36] Order P-636.
[37] 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.
[38] Orders M-654 and PO-2226.
[39] Orders P-1281 and PO-2166.
[40] Order PO-2724.
[41] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

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*.[42]

[93] 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(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(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(d) and/or (g). Accordingly, I find that sections 11(d) and/or (g) do not apply.

Section 11(e)

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

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

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.[43]

[95] 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.[44] 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".[45] 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.[46]

[96] 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

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[42] Order MO-2363.
[43] Order PO-2064.
[44] Orders PO-2034 and PO-2598.
[45] Orders P-348 and PO-2536.
[46] Order PO-2034.

index are not sufficient. I have reviewed the pages 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

[97] I have concluded that none of the claimed exemptions apply to the remaining 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 be disclosed to the appellant.

[98] 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.

ORDER:

1. Except for the information the city claims is subject to section 12 and the information that I have highlighted in green on a copy of page 75 of the records in Appendix C that I have 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 **July 3, 2018**, but not before **June 27, 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: May 28, 2018

Steven Faughnan
Adjudicator