

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-4009-I

Appeal MA17-647

The Corporation of the City of Oshawa

February 10, 2021

**Summary:** The Corporation of the City of Oshawa received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to communications between the city clerk services and a named individual between two specified dates relating to the submission of the individual's draft final report (including the draft final report). The city subsequently issued multiple decisions, disclosing further information, and subsequently disclosed yet more information by way of proactive disclosure. Ultimately, the city provided the appellant with partial access to responsive records, withholding information under the mandatory exemptions at sections 10(1) and 14(1) and the labour or employment relations exclusion at section 52(3) of the *Act*. In this interim order, the adjudicator does not uphold the city's exclusion claim under section 52(3) or the exemption claim at section 10(1). She partially upholds the city's decision regarding the personal information withheld under section 14(1) and finds that the public interest override in section 16 does not apply. Finally, the adjudicator orders the city to conduct a further search for responsive records.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, sections 2(1) (definition of "personal information"), 10(1), 14(1), 16 and 52(3).

### OVERVIEW:

[1] The appellant made a request to the Corporation of the City of Oshawa (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All communications between [city] Clerk Services and [a named individual] between [two specified dates], relating to the submission of [the named individual's] draft final report, including his draft final report.

[2] As background, in 2013 the city purchased property to house its Consolidated Operations Depot. Following the purchase, the city's Auditor General issued a report, Report AG-13-09, on May 16, 2013, in which he was critical of the process leading to the purchase. Report AG-13-09 was made public, as were some attachments to the report, but certain "confidential attachments" (designated as such by the Auditor General) were not.

[3] On May 21, 2013, the city then appointed an investigator (the individual named in the access request cited above) to investigate the allegations contained in the Auditor General's report. The investigator conducted an investigation and issued a report on September 3, 2013. Following the issuance of the investigator's report, the city's Auditor General subsequently issued a memorandum in response to it on September 3, 2013.

[4] The city issued an interim access decision and fee estimate. After issuing a notice of time extension pursuant to section 20 of the *Act*, the city issued a final decision granting partial access to the responsive records with access to some of the responsive records denied pursuant to various exemptions.

[5] The requester (now the appellant) appealed the city's decision.

[6] During mediation, the city issued several revised decisions and the appellant raised the possible application of section 16, the public interest override, to any information that was withheld. The appellant also raised the issue of whether the city had sufficiently searched for responsive records, which added the reasonableness of the city's search to the scope of the appeal. At the end of mediation, access to the information withheld under section 10(1), 14(1) and the exclusion in section 52(3) remained at issue.

[7] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*. I began my inquiry by initially sending a Notice of Inquiry, setting out the facts and issues on appeal, and seeking representations from the city and the individual named in the request (the investigator), the affected person.

[8] The city filed representations while the affected person confirmed he would not be making representations in this appeal. I then sent the Notice of Inquiry to the appellant, along with a copy of the non-confidential portions of the city's representations, and sought and received representations from the appellant. I also sought reply and sur-reply representations from the city and the appellant, and received representations from both.

[9] Finally, before concluding my inquiry, I sought representations from an additional affected party about information in the records that may contain his personal information. I did not receive representations from him.

[10] While I will not be specifically referring to the confidential portions of the city's representations that met this office's confidentiality criteria set out in *Practice Direction 7*, I have considered those representations in coming to my conclusions.

[11] In this order, I partially uphold the city's access decision and order it to conduct a further search for responsive records. Specifically, I do not uphold the city's decision that section 52(3) applies to exclude Record 21 from the scope of the *Act* or that section 10(1) applies to withhold portions of Record 6. I find that the withheld personal information in Record 3 and some of the withheld information in Record 21 is exempt under section 14(1) and the public interest override in section 16 does not apply to it. I find that some of the withheld information in records 10 and 21 is not personal information, as defined in section 2(1) of the *Act* and therefore, this information is not exempt from disclosure under section 14(1) of the *Act*. I order the city to disclose all the information that I have found not to be exempt.

## RECORDS:

[12] The remaining records at issue are comprised of email correspondence, meeting reports, and memoranda, as outlined in the chart below.

<b>Record Number</b>	<b>Description</b>	<b>Section Claimed</b>
#3	Email from City Clerk Services staff to the investigator, dated August 16, 2013 re: a former employee	section 14(1)
#6	Email from the investigator to City Clerk Services staff, dated August 21, 2013 re: a second interim account	section 10(1)
#10 (pages I8-1, I8-2, and I10-1 <sup>1</sup> )	Emails from City Clerk Services staff to investigator, dated August 26, 2013 and from the auditor general to City Clerk Services staff, dated August 16, 2013, with attachments, including	section14(1)

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<sup>1</sup> No redactions have been applied to page I10-1 in record 10, however, I note that this email references two attachments related to report AG-11-05, which were not provided to this office. Should the appellant continue to seek access to these attachments, he should advise me accordingly. I note that report AG-11-05 is publicly available on the city's website.

	email chain between auditor general and city solicitor, dated March 19 and 22, 2011 (pages I8-1 and I8-2)	
#21	Emails from City Clerk Services staff to city staff and investigator, and from the auditor general to City Clerk Services, dated September 3, 2013, attaching "Memorandum re: Investigation of Report AG-13-09, Independence of the Auditor General".	sections 14(1), 52(3)

**ISSUES:**

- A. Does section 52(3) of the *Act* exclude Record 21 from the *Act*?
- B. Does the mandatory exemption at section 10(1) of the *Act* apply to the information in Record 6?
- C. Do records 3, 10 and 21 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the mandatory exemption at section 14(1) of the *Act* apply to the information in records 3, 10 and 21?
- E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of section 14(1)?
- F. Did the city conduct a reasonable search for the requested records?

**DISCUSSION:**

**Issue A: Does section 52(3) of the *Act* exclude Record 21 from the *Act*?**

[13] The city has claimed the application of section 52(3) of the *Act* for certain portions of Record 21, which is an email and attached memorandum between city clerk services' staff and the auditor general. The redacted information is in the memorandum. I will begin my analysis looking at this issue, given its potential to exclude Record 21 from the *Act*.

[14] Section 52(3)3 states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

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

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

[16] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.<sup>2</sup> The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose, understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations is not enough to meet the "some connection" standard.<sup>3</sup>

[17] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.<sup>4</sup>

[18] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.<sup>5</sup>

[19] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.<sup>6</sup>

***Section 52(3)3: Matters in which the institution has an interest***

[20] For section 52(3)3 to apply, the institution must establish that:

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

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<sup>2</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

<sup>3</sup> Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner*, 2020 ONSC 4413.

<sup>4</sup> Order PO-2157.

<sup>5</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

<sup>6</sup> *Ministry of Correctional Services*, cited above.

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

***The city's representations***

[21] The city submits that section 52(3)<sup>7</sup> applies to the withheld portions of Record 21. It submits that in the interests of transparency, it has made an effort to release as much information to the public as possible by only excluding discrete portions of the records, consistent with Order PO-1696. It submits that the withheld information in Record 21 was collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[22] The city submits that the information withheld in Record 21 was collected, prepared, maintained and used by the city, through its auditor general and its investigator, who were both employed as contractors to the city at the time the records were originally created. As a result of an investigation conducted by the auditor general, portions of Record 21 include performance critiques concerning the purchase of the Consolidated Operations Depot, which could have negative impacts on the "future employment prospects" of the individuals in question. In support of this, the city relies on Order MO-1913, where the adjudicator concluded that the preparation of records for the purpose of personnel evaluation could result in discipline proceedings or have a direct impact on the individual's future employment prospects, including career advancement.

[23] The city also submits that the information in Record 21 was collected, prepared, maintained and used in relation to meetings, consultations, discussions or communications. It submits that, according to Order P-1223, the phrase "in relation to" in section 52(3) has been found to mean "for the purpose of, as a result of, or substantially connected to." The city submits that during the course of its respective contracts with the auditor general and municipal investigator, they were required to gather information and prepare reports based on meetings, consultations, discussions and communications with city staff. With specific reference to the record at issue, it submits that most of the record at issue was collected, prepared, maintained or used in relation to meetings, consultations, discussions and communications. It also submits that as only discrete portions of Record 21 are related to employment matters of identifiable individuals, the city has chosen to release almost all of the information

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<sup>7</sup> The city also appears to submit that section 52(3)1 applies to the withheld information but, the city made no submissions on its application and I will not consider it further.

contained in the responsive record to both the appellant, and the public at large.

[24] The city submitted, in confidential representations, that the information was collected, prepared, maintained and used for labour relations or employment-related matters in which it has an interest. I have considered these confidential representations.

[25] The city also submits that none of the exceptions listed in section 52(4) of the *Act* apply to the record at issue.

***The appellant's representations***

[26] The appellant submits that he is severely limited in his ability to respond to the city's representations as large portions have been withheld from him.

[27] Noting that the phrase "labour relations or employment-related matters has been found not to apply in the context of an organization or operational review"<sup>8</sup>, the appellant submits that the audit of the real estate department and process should be considered "an organizational or operational review".

[28] In addition, it is the appellant's position that the portions of Record 21 being withheld relate to the actions of an employee, which are separate and distinct from employment-related matters.<sup>9</sup>

[29] In addition, the appellant submits that there is nothing to indicate that the auditor general's communications were created or prepared as a result of the "terms and conditions of employment or human resources questions are (were) at issue" at the time.

[30] With reference to Order PO-2613, the appellant submits that it is unrealistic to suspect that the auditor general anticipated or expected the city to make employment-related decisions about staff, and therefore, the withheld portions of Record 21 were not created "in relation to" or "for the purpose of, as a result of or substantially connected to" the terms of employment of a particular city employee. He also submits that the role of the auditor general has nothing to do with human resources at the city.

[31] The appellant further submits that if the city is arguing that Record 21 is being used for a proceeding resulting in the termination of a particular city employee, this was not the purpose for which the auditor general created the record. It is the appellant's opinion that the focus of the auditor general's investigation in 2013 was not solely on the performance of a specific city employee but on the performance of all staff within

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<sup>8</sup> MO-2925 at paragraph 31.

<sup>9</sup> MO-2925 at paragraph 32.

the economic development services branch and other branches with regards to their roles in the acquisition of the property for the city's operations depot.

[32] According to the appellant, the information in the record being sought is related to the investigation by an external investigator into the allegations of Report AG-13-09<sup>10</sup>, entitled "Independence of the Auditor General". The purpose of the report is listed as "To propose a number of changes to support the independence of the Auditor General, improve accountability and transparency and to bring the City into full compliance with the *Municipal Act*, 2001."

[33] The appellant submits that the principle of section 52(3) relates to employment, which was never the real thrust of AG-13-09 or the mandate provided by council to the investigator. At the May 21, 2013 meeting of Council, the motion to hire an investigator was replaced and later approved, in part, as follows:

Whereas the City's Auditor General has made serious allegations about both individual employees and City departments in Report AG-13-09; and,

Whereas these concerns include issues from 2007 to 2013; and,

Whereas it is critical that these allegations be immediately investigated;

Therefore be it resolved that a full investigation be undertaken by an independent expert authority with the direction that a comprehensive report be prepared clearly outlining the findings, conclusions and any recommended actions judged necessary in the best interest of the Corporation and the citizens of Oshawa; and,

That the inquiry report be presented as soon as possible in an open session of Council, subject to applicable law, thereby enabling full public disclosure of findings and recommended actions; and<sup>11</sup>

[34] The appellant submits that there is nothing that makes this an investigation of labour relations or employment, unless the city is now suggesting that was a clandestine objective of the council of the day. The Auditor General was seeking to bolster the independence of the position of Auditor General and only asked for a minor extension of his contract to complete existing projects.

[35] The appellant did not make any representations with respect to the application of the exceptions in section 52(4) of the *Act*.

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<sup>10</sup> <https://www.oshawa.ca/city-hall/resources/AG-13-09---Redacted-for-Release.pdf>

<sup>11</sup> <http://app.oshawa.ca/aqendas/City Council/2013/2013 Council Minutes/2013 05 21 Council Minutes Regular.pdf> page 244



### ***Analysis and finding***

[36] For the reasons outlined below, I find that the section 52(3) exclusion does not apply to Record 21.

[37] This office has consistently taken the position that the section 52(3) exclusion (and the equivalent section in the *Act's* provincial counterpart<sup>12</sup>) is record-specific and fact-specific. This means that in order to qualify for an exclusion, a record is examined as a whole. Accordingly, I will consider the application of the exclusion to Record 21 as a whole and not just the information withheld by the city.

[38] I am satisfied that a person employed by the city prepared the memorandum and that the city used the memorandum for meetings, consultations, discussions and communications. Therefore, parts 1 and 2 of the section 52(3)3 test are met.

[39] On my review of the memorandum's contents and in consideration of the purpose of the memorandum - to provide a response to an investigation report - I am not satisfied that the record qualifies for the section 52(3)3 exclusion.

[40] As set out above, the type of records excluded from the *Act* by section 52(3)3 are documents related to matters in which the institution is acting as an employer and when terms and conditions of employment or human resources questions are at issue. In that regard, although parts of the memorandum contain performance critiques of certain city employees, the memorandum, on the whole, relates to the purchase of the Consolidated Operations Depot and was not in relation to employment-related matters in which the city has an interest. In my view, the employees' information withheld in Record 21 is only incidental to the memorandum's purpose and does not change the nature of the record because the employment connection is too minimal to meet the threshold of "some connection" to employment or labour relations.

[41] As the application of the 52(3) exclusion is record specific and fact-specific, I conclude that Record 21 does not qualify for exclusion and is subject to the *Act*.

[42] I will go on to consider the application of the section 14(1) exemption claimed by the city to withhold portions of Record 21 below under Issues C and D.

### **Issue B: Does the mandatory exemption at section 10(1) of the *Act* apply to the information in Record 6?**

[43] Record 6 is the only record where the city has claimed the mandatory exemption at section 10(1) of the *Act*. The city describes it as an email between the investigator and City Clerk Services staff regarding a second interim account. While the majority of

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<sup>12</sup> *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, section 65(6).

the record has been disclosed, three small portions of the record have been withheld.

[44] Section 10(1) states, in part:

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; or

[45] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>13</sup> 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.<sup>14</sup>

[46] For section 10(1) to apply, the city and/or the affected person 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, financial or labour relations 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), (c) and/or (d) of section 10(1) will occur.

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<sup>13</sup> *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.*).

<sup>14</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

***Part 1: type of information***

[47] The types of information listed in section 10(1) have been discussed in prior orders:

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.<sup>15</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>16</sup>

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>17</sup>

***Part 2: supplied in confidence***

*Supplied*

[48] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.<sup>18</sup>

[49] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.<sup>19</sup>

*In confidence*

[50] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.<sup>20</sup>

[51] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was

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<sup>15</sup> Order PO-2010.

<sup>16</sup> Order P-1621.

<sup>17</sup> Order PO-2010.

<sup>18</sup> Order MO-1706.

<sup>19</sup> Orders PO-2020 and PO-2043.

<sup>20</sup> Order PO-2020.

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure<sup>21</sup>

### ***Part 3: Harms***

[52] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.<sup>22</sup>

[53] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>23</sup> The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or 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*.<sup>24</sup>

### ***The city's representations***

[54] According to the city, it is obligated to deny a portion of Record 6 under the mandatory exemption at section 10(1) of the *Act*.

[55] With respect to the first part of the test, the city submits that the only redaction at issue contains financial information and is an amount classified in the record as for the following disbursement, including "personal automobile, rental automobile, GO-Train, taxicabs in Oshawa and Toronto [redacted amount] per trip."

[56] With respect to the second part of the test, the city believes that the record at issue was supplied in confidence to city clerk services staff, and therefore, meets part

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<sup>21</sup> Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

<sup>22</sup> *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>23</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>24</sup> Order PO-2435.

two of the three-part test under section 10(1) of the *Act*. With respect to the “supplied” portion of the second part of the test, the city explains that this record was emailed directly to city staff from the affected person and signed with their email signature. The city believes that the redacted amount was supplied to the city by the affected person in order to seek payment for “professional services rendered”. In support of this, the city references Order PO-2020, where it was held that information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.<sup>25</sup>

[57] With respect to the “in confidence” portion of the second part of the test, the city submits that itemized fees of contractors and/or consultants to the city are not released to the public, and such amounts are subject to an implied confidence, and treated consistently in such a manner. Again, the city makes references to Order PO-2020, where it was held that “in order to satisfy the ‘in confidence’ component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided.”

[58] With respect to the third part of the test, the city submits that the investigator (the affected party) would be in a better position to describe the harms specified in section 10(1) of the *Act*. As stated above, the affected party indicated that he would not be submitting representations in this appeal.

### ***The appellant’s representations***

[59] It is the appellant’s position that the exemption in section 10(1) does not apply to the withheld information in Record 6.

[60] With respect to the first part of the test, the appellant submits that Record 6 is an email communication between the affected party and the city clerk and represents an invoice for services. He submits that nothing within the invoice would support the city’s assertion that it contains the financial information of a third party. According to the appellant, Record 6 does not contain banking or financial information other than a rate of services and the number of times that service was provided, which is not the same as a “pricing strategies” or “pricing practices”, which is referenced as an example of financial information in Order PO-2010.

[61] With respect to the second part of the test, the appellant acknowledges that the affected party supplied the information to the city. However, he believes the city has not established the “in confidence” portion of the test, as required by Order PO-2020.

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<sup>25</sup> Order PO-2020.

Finally, the appellant indicates that the harms part of the test has not been made out by the city or the affected party.

***Analysis and findings***

[62] For the reasons outlined below, I find that the mandatory exemption at section 10(1) of the *Act* does not apply to the withheld information in Record 6.

[63] While I am prepared to find that part 1 of the test is made out, I find that I do not have sufficient information to establish parts 2 and 3 of the test for the application of section 10(1). I find that the city has not established the "in confidence" portion of the part 2 analysis and I do not have any evidence to establish the harm that could reasonably be expected to result in disclosure of the information.

[64] Accordingly, I find that the withheld information in Record 6 is not exempt under section 10(1) of the *Act*. Given that no other exemptions were claimed for this information and no other mandatory exemptions apply, I will order the city to disclose the withheld information in Record 6.

**Issue C: Do records 3, 10 and 21 contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?**

[65] The city withheld information in three of the records, namely, records 3, 10 and 21 based on the mandatory personal privacy exemption found at section 14(1) of the *Act*.

[66] Because the section 14(1) exemption only applies to information that is "personal information", 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) of the *Act* 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;

[67] The list of examples of personal information under section 2(1) of the *Act* is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>26</sup>

[68] Sections (2.1) and (2.2) of the *Act* 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.

[69] 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.<sup>27</sup>

[70] 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

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<sup>26</sup> Order 11.

<sup>27</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

of a personal nature about the individual.<sup>28</sup>

[71] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>29</sup>

***The city's representations***

[72] The city submits that the withheld information in records 3, 10 and 21 is personal information as defined in paragraphs (b), (e), (g) and (h) of the definition of that term in section 2(1) of the *Act*.

[73] It submits that portions of the withheld information includes the opinion of the Auditor General about the performance, employment history and personality traits of several members of the city's staff. As such, records 10 and 21 include the personal information of identifiable individuals consistent with "information relating to the employment history of the individual" pursuant to paragraph (b) of the definition of that term in section 2(1) of the *Act*.

[74] Concerning the opinions of the Auditor General contained in records 10 and 21, the city agrees with the adjudicator's finding in Order MO-2368, where she concluded that the opinions and comments in an auditor's report qualified as personal information about the employees in question, as defined in paragraph (g) of the definition of that term in section 2(1) of the *Act*. Accordingly, the city submits that any opinions about identifiable individuals contained in the records created by the auditor general are the personal information of the identifiable individuals in question.

[75] Further, the city submits that some of the records contain the personal opinions and concerns of former city staff and these withheld portions would be the personal information of those individuals under paragraph (e) of the definition of that term in section 2(1) of the *Act*.

[76] The city also submits that the records at issue contain the names of identifiable individuals, alongside other related information, where the release of the name would reveal additional personal information about the individual, under paragraph (h) of the definition of that term in section 2(1) of the *Act*. This includes details of the employment history of former city staff, the view or opinions of the auditor general about other individuals and the personal opinions of former city staff.

[77] The city submits that past orders of the IPC have found that in some cases where information may relate to an individual in a "professional, official or business

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<sup>28</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>29</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).



capacity”, the same information may still reveal something of a personal nature about an individual.<sup>30</sup>

[78] The city submits that the opinions of the auditor general in records 10 and 21, and the information he relied upon to form those opinions, would reveal something of a personal nature about identifiable individuals.

[79] The city also referred to Order MO-2374, where the adjudicator found the following to be true of employee information in an audit context:

Having regard to the representations of the parties and the records themselves, I am of the view that the [*sic*] only the portions of the records, if disclosed would reveal something of a personal nature about an individual employed by the City, is the information which refers to an individual's e- mail habits, vacation or lawyer or reveals the audit team's comments about some employees. [Emphasis by the city]

[80] With respect to Record 3, the city takes a similar position to that of the City of Vaughan in Order MO-3549, where the adjudicator concluded the following about emails containing the personal concerns and opinions communicated to city staff in confidence:

The bulk of the records contains the personal information of the affected party, including statements concerning an incident which she was involved in. I find that this statement contains the views and opinions about the incident and is personal information, rather than professional... Further, I find that the record contains correspondence sent to the city by the affected party that is implicitly or explicitly of a private or confidential nature, since it is referencing particular orders to comply and speaks to the behaviour of a specified city employee.

[81] The city submits that concerns and opinions of identifiable individuals regardless of their former or current employment status with the city should not be disclosed, as such information could reveal something of a personal nature about the individuals.

### ***The appellant's representations***

[82] The appellant disagrees with the city's representations characterizing the withheld information in the records at issue as "personal information" under section 2(1) of the *Act* and its characterization of MO-2386. He submits that the auditor general uses a set of professional guidelines, standards or processes, which relate to the position and not the person.

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<sup>30</sup> Orders P-1409, P0-2225, R-980015.

[83] The appellant submits that any comments and information in the Record 21 memorandum are about the function of the real estate process or department and its professional or official positions. In support of this, the appellant quotes the mandate of the Auditor General at the city, as follows:

*The audit process is an independent, objective assurance activity designed to add value and improve an organization's operations. The audit process assists an organization to accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control and governance processes.*

In carrying out its audit activities, the Auditor General's Office is *independent of management and individual members of Council* and has the *authority to conduct financial, operational, compliance, information systems, forensic and other special reviews of all City departments, local boards, municipally-controlled corporations and grant recipients.* [Emphasis added by appellant]

[84] The appellant points out that the city has already released the personal opinions or views of the investigator, including those related to other city staff, as seen in Record 21 on page 12 and on page 46 of his final report. According to the appellant, it would be unethical for the city to treat the same exemption in two opposite manners, especially within the same document.

[85] Overall, the appellant submits that any descriptions, comments, remarks or information provided by the auditor general were in review of the function or department of the city, and not personal to any individual in that department.

### ***Analysis and findings***

[86] I have reviewed all of the information for which the city claimed the personal privacy exemption at section 14(1), and which remains at issue, to determine whether such portions of the records contain personal information, as defined in section 2(1) of the *Act*.

*Record 3 - Email from City Clerk Services staff to investigator, dated August 16, 2013 re: a former employee*

[87] While the majority of this record has already been disclosed to the appellant, two redactions applied to it are still at issue. The disclosed portions of this record reveal an email from a city clerk services staff to the investigator about a telephone discussion between a city clerk services staff and the former city employee about the auditor general.

[88] I find the withheld information qualifies as the personal information about a former city employee within the meaning of paragraphs (e) and (h) of the definition of

personal information in section 2(1).

[89] While the withheld information is about the individual in a professional capacity, I find that disclosure of the information would reveal something of a personal nature about this individual. Therefore, it is personal information.

*Record 10 - Emails from City Clerk Services staff to investigator, dated August 26, 2013 and from auditor general to City Clerk Services staff, dated August 16, 2013, with attachments, including email chain between auditor general and city solicitor, dated March 19 and 22, 2011 (pages I8-1 and I8-2)*

[90] As noted above, I provided the affected party whose information is at issue in Record 10 and sought his representations on whether the information relating to him is "personal information". He did not provide representations.

[91] Remaining at issue in this record are two redactions applied to one of two pages, I8-1. The disclosed portions of this page reveal a chain of emails between the auditor general and a city solicitor about the auditor general's meeting with the city's mayor, as well as a statement by the auditor general about how his office was treated at work.

[92] I have reviewed the withheld information on this page. The first redaction relates to the auditor general in his employment capacity and statements made about his performance. I find that the comments would not disclose anything of a personal nature about the auditor general and cannot be characterized as his personal information. As only personal information can be withheld under section 14(1), I find that this information is not exempt from disclosure. As the city has not claimed any other exemptions for this information and no other mandatory exemptions apply, I will order this information disclosed to the appellant.

[93] The second redaction is a statement from the auditor general about how his office was treated by staff in an employment context. Accordingly, I find that this is not information *about an individual* and therefore, not personal information, as defined in section 2(1) of the *Act*. As only personal information can be withheld under section 14(1), I find that this information is not exempt under section 14(1). As the city has not claimed any other exemptions for this information and no other mandatory exemptions apply, I will order this information disclosed to the appellant.

*Record 21 - Emails from City Clerk Services staff to city staff and investigator, and from the auditor general to City Clerk Services, dated September 3, 2013, attaching "Memorandum re: Investigation of Report AG-13-09, Independence of the Auditor General"*

[94] The three redacted portions of this record are contained in a memorandum from the auditor general's office to the mayor and city council in response to an investigation into his previous report AG-13-09. There is one redaction applied to page five and two redactions applied to page 10 of the memorandum.

[95] The first redaction on page five contains the auditor general's findings from his own report about the city staff. While the redaction relates to the auditor general providing his opinion in an employment capacity, it consists of an evaluation of the work performance of city staff, in a context where their conduct has been called into question.<sup>31</sup> I find, in the circumstances, that this information reveals something of a personal nature about these individuals, and therefore, it constitutes their personal information within the introductory wording of the definition of "personal information" in section 2(1).

[96] The second redaction, applied in the upper half of page 10, contains the opinion of the auditor general about the integrity of the real estate appraisal process, and the opinion of a city solicitor about the credibility of the appraisal and the appraiser. I find this is not "personal information" as it is an opinion provided in a professional capacity about business processes. Moreover, it is not about an identifiable individual, nor does it reveal something of a personal nature about an individual. As only personal information can be exempt under section 14(1), I find that this information is not exempt. As the city has not claimed other exemptions for this information and no other mandatory exemptions apply, I will order it disclosed.

[97] The third redaction, applied in the lower half of page 10, contains the opinion and view of a city solicitor about another city employee's responses to his questions. I once again find this is not personal information, as it is an opinion provided in a professional capacity that does not reveal something of personal nature about an individual. As only personal information can be exempt under section 14(1), I find that this information is not exempt. As the city has not claimed other exemptions for this information and no other mandatory exemptions apply, I will order it disclosed.

[98] In summary, I have found that the information withheld in Record 3 and some of the information withheld in Record 21 is personal information. Accordingly, I will consider whether this personal information is exempt under section 14(1).

**Issue D: Is the personal information exempt under section 14(1) of the Act?**

[99] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. In the circumstances, only paragraph (f) is relevant which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

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<sup>31</sup> Previous decisions from this office have found that information relating to an individual's professional or official capacity can take on a more personal nature if it relates to that individual's performance or conduct (see, for example, Orders P-721, PO-1772, PO-2477 and PO-2976).

if the disclosure does not constitute an unjustified invasion of personal privacy.

[100] Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, the personal information it is not exempt from disclosure.

[101] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations where disclosure would not be an unjustified invasion of personal privacy. Again, in the circumstances, none of the exceptions in section 14(4) are relevant to this appeal.

[102] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.<sup>32</sup>

[103] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).<sup>33</sup>

[104] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>34</sup> In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exemption in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.<sup>35</sup>

[105] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).<sup>36</sup>

### ***Representations***

[106] The city submits that sections 14(3)(d) and (g) and 14(2)(g) and (i) are relevant to my determination as to whether disclosure of the personal information would be an

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<sup>32</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

<sup>33</sup> *Ibid.*

<sup>34</sup> Order P-239.

<sup>35</sup> Orders PO-2267 and PO-2733.

<sup>36</sup> Order P-99.

unjustified invasion of personal privacy. The appellant submits that the factor favouring disclosure at section 14(2)(a) is relevant to my consideration. These sections state:

14(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all relevant circumstances including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(g) the personal information is unlikely to be accurate or reliable;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(d) relates to employment or education history;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations

*The city's representations*

[107] The city submits that section 14(3)(d) is relevant because some of the withheld information in the record contains reference to staff performance and some of the information at issue forms part of the employment history of identifiable individuals.

[108] Regarding the presumption at section 14(3)(g), the city submits that this office has concluded that the terms "personal evaluations" and "personnel evaluations" both refer to assessments made according to measurable standards.<sup>37</sup>

[109] On this point, the city considers opinions of the auditor general about identifiable individuals in Record 21 to be analogous to "personnel evaluations", which should have been made in accordance with accepted audit principles and practices. In support of this, the city refers to Order MO-2374, where it submits that this office found that comments made by an audit team in support of recommendations made to a municipality do reflect the views and/or opinions of the audit team about identifiable individuals.

[110] Regarding the factors in section 14(2), the city submits that section 14(2)(g) is

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<sup>37</sup> Order PO-1756.

intended to weigh against disclosure of personal information where the information is unlikely to be accurate or reliable, leading to potential negative consequences for the subject.<sup>38</sup> The city concludes that because the withheld information in Record 21 contains the opinions and evaluations of the auditor general, which are unusually critical of identifiable individuals' performance, the information therein is unlikely to be accurate or reliable.

[111] Regarding 14(2)(i), the city submits that this office has found that the application of this factor is not entirely dependent on whether the damage or harm is present or imminent but, rather upon whether the damage or harm would be inherently "unfair" to the individual involved.<sup>39</sup>

[112] Referring to the withheld information in Record 3, the city believes that disclosure of the concerns, opinions and employment information of former city staff could result in "unfair damage" to their reputation. The city submits that former city staff should not be penalized for communicating their concerns with current city staff.

[113] The city also submits that I should consider the unlisted factor of "ensuring public confidence in an institution". The city states:

In March 2019, the city released all of the relevant records related to this appeal, and the issue of the Consolidated Operations Depot, with only small portions of information being withheld.

Therefore, the city has taken steps to ensure public confidence in the institution by proactively releasing records and information online in a public forum.

The city believes that because the vast majority of information contained within the responsive records has been made available for public review on the city's website, the withheld personal information would add nothing of relevance to ongoing public conversation of the issue at hand.

*The appellant's representations*

[114] The appellant submits that the presumptions in section 14(3) do not apply. With reference to 14(3)(g), the appellant submits that the auditor general's role was to audit the process of the real estate function or department, not to conduct a personnel review. The appellant submits that the withheld information is neither a character reference nor a personnel evaluation, but related to the reporting relationship between the real estate manager and senior management.

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<sup>38</sup> Order PO-2271.

<sup>39</sup> Order P-256.

[115] The appellant notes that the auditor general conducted his first audit of the real estate function in 2009, and as a follow up to that audit process, further continued problems were found to still exist at the time of the 2013 acquisition of property for the construction of a Consolidated Works Depot. The appellant submits that he believes that the withheld information would disclose business or departmental reporting relationships, processes or procedures, which evidently had not been corrected since the original audit in 2009. The appellant believes the withheld information relates to departmental reporting relationships and not the individuals.

[116] The appellant submits that even if the auditor general has been unflattering or critical of the individuals' lack of action to his 2009 report, it would be based on variances between their actions and their roles and responsibilities outlined in their job descriptions, not their individual private thoughts or characteristics.

[117] The appellant submits that the factor at section 14(2)(a) is relevant as the withheld information may help with the public's understanding of the city's acquisition of property for the Consolidated Operations Depot. The appellant states:

Withholding this information does not permit public scrutiny. In fact, withholding this information greatly detracts from, if not eliminates, the public's ability to scrutinize the activities of the institution, which the Auditor General's report calls into question.

[118] Furthermore, the appellant submits that section 14(2)(i) does not apply because:

If any member of staff, knowingly, withheld information from council, provided misleading information to council, which resulted in excessive waste of taxpayer money, there would be nothing *unfair* in any damage their own actions caused to their reputations.

[119] Finally, the appellant argues that the unlisted factor raised by the city is not relevant and argues that the city's proactive disclosure is an attempt by the city to avoid its obligations under the *Act* and hide serious errors in the property acquisition in 2013.

[120] The appellant also submits that the city's decision to withhold the personal information at issue may be an attempt to protect its own reputation.<sup>40</sup>

### ***Analysis and findings***

[121] Based on my review of the withheld personal information in records 3 and 21, I find that the presumptions in section 14(3)(d) and (g) do not apply. I do not accept the

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<sup>40</sup> The appellant makes arguments regarding the application of section 53 of the *Act*, which I do not set out here and are not relevant to my determination of section 14(1).



city's argument that the withheld personal information in Record 3 is employment history of the individual. The withheld information relates to the current place of employment for the former employee, as well as his views or opinions about that employment. Regarding the withheld personal information on page five of Record 21, I do not accept that it consists of personal evaluations, character references or personnel evaluations. I find that I have not been provided with sufficient evidence to establish that the assessments were made according to measurable standards and were not just the general opinions and comments made by the auditor general.

[122] As I have found that the presumptions in section 14(3) do not apply, I will consider the factors in section 14(2). I find that the factor in section 14(2)(i) should be given some weight for the withheld personal information in Record 3. I accept that given the nature of the personal information, any damage to this individual's reputation would be unfair in the circumstances if disclosure of this information occurred.

[123] Regarding the withheld personal information on page five of Record 21, I find that the city has not established that the factor in section 14(2)(i) applies, as I am not convinced that any damage to the reputation of the individuals involved would be unfair. However, I accept that given the comments and the context in which they were made, the information is unlikely to be accurate or is unreliable. Therefore, the factor in section 14(2)(g) should be given some weight.

[124] The city asked that I consider "ensuring public confidence in the institution" as a factor weighing against disclosure. The city notes that it has disclosed almost all of the information related to the consolidated operations depot and that disclosing the withheld personal information would add nothing to the ongoing public conversation about the issues surrounding the property purchased for the depot. I do not give this factor any weight. I find that the city has not provided me with sufficient evidence to determine that withholding the personal information would increase the public's confidence in the city.

[125] The appellant submits that I should consider section 14(2)(a) as a factor favouring disclosure of the withheld information. The appellant submits that disclosure of withheld personal information is necessary in order to subject the city's processes in purchasing the property for the depot to scrutiny. Given the specific nature of the withheld personal information, I find that disclosing it is not necessary for subjecting the city to public scrutiny and I give this factor little weight in my determination.

[126] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the withheld information is exempt under section 14(1). I have found that none of the presumptions in section 14(3) apply and the only factor in section 14(2) that applies weighs in favour of a finding that disclosure would be an unjustified invasion of the individual's personal privacy. Accordingly, I find that the personal information at issue in records 3 and 21 is exempt under section 14(1).

[127] As the appellant has raised the possible application of section 16 to the information at issue, I will proceed to consider whether the information should be disclosed under the public interest override.

**Issue E: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of section 14(1)?**

[128] Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[129] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[130] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.<sup>41</sup>

***Compelling public interest***

[131] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act’s* central purpose of shedding light on the operations of government.<sup>42</sup> Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>43</sup>

[132] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.<sup>44</sup>

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<sup>41</sup> Order P-244.

<sup>42</sup> Orders P-984 and PO-2607.

<sup>43</sup> Orders P-984 and PO-2556.

<sup>44</sup> Order P-984.

[133] Any public interest in *non*-disclosure that may exist also must be considered.<sup>45</sup> A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".<sup>46</sup>

[134] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation<sup>47</sup>
- the integrity of the criminal justice system has been called into question<sup>48</sup>
- public safety issues relating to the operation of nuclear facilities have been raised<sup>49</sup>
- disclosure would shed light on the safe operation of petrochemical facilities<sup>50</sup> or the province's ability to prepare for a nuclear emergency<sup>51</sup>
- the records contain information about contributions to municipal election campaigns<sup>52</sup>

[135] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations<sup>53</sup>
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations<sup>54</sup>
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding<sup>55</sup>

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<sup>45</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

<sup>46</sup> Orders PO-2072-F, PO-2098-R and PO-3197.

<sup>47</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

<sup>48</sup> Order PO-1779.

<sup>49</sup> Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.

<sup>50</sup> Order P-1175.

<sup>51</sup> Order P-901.

<sup>52</sup> *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

<sup>53</sup> Orders P-123/124, P-391 and M-539.

<sup>54</sup> Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

<sup>55</sup> Orders M-249 and M-317.

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter<sup>56</sup>
- the records do not respond to the applicable public interest raised by appellant<sup>57</sup>

### *Representations*

[136] The city agrees with past orders of this office, which have concluded that a compelling public interest has not been found to exist where a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.<sup>58</sup> According to the city, the majority of the pages contained within the responsive records to the appellant's original request have been published on the city's website, with only a small percentage of information being withheld.

[137] With reference to Order P-568, the city points to Assistant Commissioner Glasberg's finding that the fundamental purpose of the mandatory exemption at section 21 of FIPPA (or section 14 of the *Act*) is to ensure the protection of the personal privacy of individuals except where "infringements on this interest are justified."

[138] The city submits that the proactive disclosure via the city's website is sufficient to address any public interest considerations. It therefore submits that the public interest override at section 16 does not apply to the release of the personal information at issue in this appeal.

[139] The appellant submits that in the city's public release of documents, it provided an email string from the corporate lawyers that admits there is a compelling public interest and that this would suggest that the interest does indeed outweigh the purpose of the section 14 exemption.

[140] According to the appellant, continuing efforts by citizens of the city, including two police investigations, suggest that this issue is compelling to the public. Further, the appellant submits that an investigation of the Durham Regional Police Services ordered by the provincial legislature may include a review of the investigations by the police into the alleged fraud at the city in 2013. He also submits that current plans for a new depot in the city demonstrates that this issue will continue to be on the public radar given the previous "atrociousness of overspending, poor planning, and misleading information as experienced in 2013". In addition, the appellant points to the auditor general filing an application for judicial review of the private investigator's report commissioned by the city in 2013, which he submits has renewed the public interest.

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<sup>56</sup> Order P-613.

<sup>57</sup> Orders MO-1994 and PO-2607.

<sup>58</sup> Orders P-532, P-568, PO-2626, PO-2472, PO-2614.

[141] According to the appellant, the “public interest is not only evident, but is severe”.

[142] In reply, the city advises that in April 2018, on its own accord and in the interest of transparency and accountability, it undertook a project to release the electronic records related to the purchase of the consolidated operations depot and associated freedom of information requests. The city submits that this proactive release of records involved over 1500 hours of city clerk services staff time, involving considerable effort and city resources, including external resources to carry out the project.

[143] The city also provided me with detailed usage statistics from the third party vendor of the city’s public website related to the consolidated operations project, which show 23 unique visitors. According to the city, many of the 23 unique visitors were city staff testing the links to ensure that the upload was successfully completed. The city indicates that these statistics demonstrate the limited degree of public interest on this matter.

[144] The city maintains its position that there is no evident compelling public interest related to the disclosure of the records at issue that would clearly outweigh the purpose of the mandatory exemption in section 14 of the *Act*.

[145] In response to the city, the appellant submits that every freedom of information access request and subsequent appeal should be judged on its own merit, separate from any other request or appeal. Moreover, the appellant also notes that despite the city’s proactive disclosure of information in April 2018, it still issued a revised decision and released records for this appeal in December 2018. He also notes that there are still appeals before this office related to the issue of the consolidated operations depot project.

[146] The appellant also makes reference to the city’s “admission of guilt” statement on its website<sup>59</sup> where it states “City staff acknowledges our lack of transparency in responding to Freedom of Information request for records related to the purchase of the Consolidated Operations Depot (COD)”.

[147] The appellant also submits that the evident compelling public interest rests in the more than 35 freedom of information access requests the city has admitted to receiving on this subject matter and he claims that the city has frustrated the process and the requesters for more than six years in an effort to quell that public interest.

### *Analysis and findings*

[148] As noted above, the only information that I have found to be exempt is the withheld personal information in records 3 and 21. Based on my review of the withheld

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<sup>59</sup> <https://www.oshawa.ca/Modules/News/index.aspx?newsId=90915619-1880-4fd5-8881-0d8e250b93a4>.

information and the public interest identified by the appellant, I find that disclosure of the withheld information would not address the public interest identified by the appellant.

[149] I accept the appellant's position that there is a public interest in the city's actions in regard to the purchase of property for the consolidated works depot; however, I find the withheld personal information would not shed light on this identified public interest. Previous orders of this office have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>60</sup> I am unable to find that disclosure of the withheld personal information in records 3 and 21 would serve the purpose of informing or enlightening the public about the city's activities or decisions and accordingly, I find that there is not a compelling public interest in the disclosure of the information withheld under section 14(1). I find that section 16 does not apply and section 14(1) applies to the withheld information in records 3 and 21.

**Issue F: Did the institution conduct a reasonable search for records?**

[150] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.<sup>61</sup> If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[151] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>62</sup> To be responsive, a record must be "reasonably related" to the request.<sup>63</sup>

[152] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.<sup>64</sup>

[153] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all

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<sup>60</sup> Orders P-984 and PO-2556.

<sup>61</sup> Orders P-85, P-221 and PO-1954-I.

<sup>62</sup> Orders P-624 and PO-2559.

<sup>63</sup> Order PO-2554.

<sup>64</sup> Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.<sup>65</sup>

[154] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>66</sup>

### ***The city's representations***

[155] The city submits that it expended every reasonable effort to identify, locate and provide records that are responsive to the appellant's request and provided a written summary of all steps taken in response to the appellant's request. The city says that it responded literally to the request because it was a well-constructed and narrow request asking for specific communications between one individual and one city department only, spanning a two-week period in the summer of 2013.

[156] In support of this, the city provided a brief affidavit of a records information analyst for the city clerk services of the city, with details of the specific searches she performed. Specifically, the affiant states the following:

I searched records in the possession of City Clerks Services, both paper and electronic, including emails, for any record or communications between City Clerk Services and [named individual in request] between [specified dates] relating to the submission of his draft final report as well as a copy of the draft final report. I used the following criteria: "[named individual]", "[specified date range]", Draft Report, "Final Draft Report", and "Report".

I found responsive records related to the Request and forwarded them to City Clerk Services for review.

[157] It submits that it conducted a reasonable search for records in response to the appellant's original request.

### ***The appellant's representations***

[158] The appellant submits that the city's affidavit is brief and fails to address some concerns. The appellant notes:

- While the affiant claims to have searched emails, the appellant questions whether the affiant would have access to individual emails without the support of the city's IT services or the particular members of the Clerks services.

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<sup>65</sup> Order MO-2185.

<sup>66</sup> Order MO-2246.

- While the appellant's request was filed in 2017, the records he seeks are from 2013. The appellant notes that the affidavit does not mention any search by the affiant in any archives, backups or server locations that might hold historic data. The failure to access archives, backups or server locations could mean that any staff changes between 2013 and 2017 could have resulted in email records that have been transferred, archived, etc. that could be missing from the search results.
- The records that were disclosed to the appellant indicate that there were two main employees in Clerks services that regularly communicated with the investigator, but neither of these employees names were included in the search criteria.
- The investigator's other email address was not included in the search criteria.

[159] The appellant also submits that previous releases by the city indicate that the draft report was provided on cassette tapes and transcribed by city staff on the investigator's behalf. The appellant submits that this does not address if there were any amendments to the draft final report as opposed to the final report.

[160] The appellant also questions the fact that the affidavit, which was sworn in 2019, two years after the request was filed, does not indicate when the analyst conducted the search or, if the search was previously conducted, how she recalls the search criteria used to conduct the search.

### ***The city's reply representations***

[161] In response to the appellant's representations, the city submits that it has expended a reasonable effort to respond to the original request at issue in this appeal, as well as subsequent concerns raised by the appellant.

[162] The city makes reference to Order MO-3668-I, where the adjudicator concluded that, like the records analyst who conducted the search for the city in the current appeal, assistants or clerks may be considered experienced employees and subject-matter experts, when she found the following:

Having regard to the submissions of the parties, I am satisfied that the searches conducted by the city were completed by employees knowledgeable in the subject matter of the request.<sup>67</sup>

[163] The city further submits that the elapsed time between the issue of concern and the submission of the appellant's request would have made the search for the

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<sup>67</sup> MO-3668-I at para. 25.



requested records difficult to coordinate. Despite this, the records analyst who conducted the search had direct access to the records of the original records holders, and as such, is considered by the city to be “experienced employee of the institution, as per section 17(1)(b) of the *Act*.”

### ***The appellant’s sur-reply representations***

[164] In response, the appellant submits that the city has not fully responded to the original request. He also submits that the city has also misinterpreted Order MO-3668-I, saying that just because someone has access to the historic records, it does not make them knowledgeable in the subject matter of the request, nor does someone’s tenure with the city. The appellant submits that “an experienced employee” must also be experienced in the subject matter of the request and this would require more than simply being the holder of historic records passed on from previous employees. According to the appellant, the records holder has no basis of knowledge on how those historic records were created, filed, stored or retrieved.

[165] The appellant also notes the city’s attempt to draw attention to the number of access requests that he has filed with the city. He also questions the affiant’s statement that it was difficult to coordinate the search for the requested records.

### ***Analysis and Findings***

[166] I find that the city’s search was not reasonable, and I will order it to conduct a new search.

[167] The city was asked to provide a written summary of all steps taken in response to the request. The city’s affidavit in support of its search provides only the briefest outline of the search conducted, including the search parameters used and the records holdings searched. I find that the affidavit fails to address many of the details set out in the appellant’s representations.

[168] I find that the city has not established that it conducted a reasonable search given the lack of detail in both its representations and affidavit. I find that the appellant has provided a reasonable basis for concluding that other responsive records may exist beyond those that have been identified and located by the city, including other records that might reasonably exist in the email address accounts of other staff in the office of the clerk’s services or in emails sent from/to the investigator’s different email addresses.

[169] To that end, in this appeal, I have concluded that the omission of the investigator’s email addresses, as well as the email addresses of other staff in the

clerk's services office in the search parameters, render the search incomplete.

[170] While I am mindful of the fact that an additional search may not reveal additional responsive records,<sup>68</sup> I believe the noted shortcomings need to be addressed before I can find the city's search to be reasonable.

[171] Lastly, I find that the city has not provided me with enough information to conclude that its search was coordinated and carried out by an experienced employee, who is knowledgeable in the subject matter of the request. The city's affidavit only outlines the affiant's position and title, without any additional information about her experience and knowledge of the subject matter of the request.

[172] Accordingly, I find that the city has not conducted a reasonable search in accordance with the requirements of the *Act* and will order it to conduct a further search.

## **ORDER:**

1. I order the city to disclose the withheld information in records 6, 10 and parts of Record 21 (page 10) that I have found not to be exempt by providing the appellant with a copy of these records by **March 17, 2021** and not before **March 12, 2021**.
2. I uphold the city's decision to withhold the information in records 3 and 21 (page 5). I have attached a highlighted copy of Record 21 with the city's copy of the order indicating the information that should be withheld. To be clear, the city should not disclose the highlighted information.
3. I order the city to conduct a further search in response to the appellant's request using the investigator's/affected party's email addresses, as well as the email addresses of other staff in the city clerk's services office. I also order the city to confirm when the search(es) were conducted.
4. I order the city to provide me with an affidavit sworn by the individual(s) who conduct(s) the further searches by **March 12, 2021**, describing its search efforts. The affidavit(s) should include the following information:
  - a. the names and positions of the individuals who conducted the searches;

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<sup>68</sup> Other than the missing attachment to page I10-1 in record 10, which may be an additional responsive record that was not located by the city's searches to date.

- b. information about the types of files searched, the nature and location of the search(es) and the steps taken in conducting the search(es); and
  - c. the results of the search(es)
5. The information should be provided by way of representations with the affidavit that may be shared with the appellant, unless there is an overriding confidentiality concern.
  6. If the city locates additional responsive records because of its further search, I order the city to issue an access decision to the appellant in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.
  7. I reserve the right to require the city to provide me with a copy of the information it discloses to the appellant in accordance with this order.
  8. I remain seized of this appeal in order to address the matters arising out of order provisions 3, 4 and 5.
  9. The timelines noted in order provisions 1, 4 and 6 may be extended if the city is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original Signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

February 10, 2021 \_\_\_\_\_