Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER MO-4056-F

Appeal MA15-571

The Corporation of the City of Oshawa

May 26, 2021

Summary: Under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*), the appellant made an access request to the Corporation of the City of Oshawa (the city) for 1) "all emails and any other communication" between an investigator retained by the city and city staff or councillors, and 2) copies of the investigator's dockets. The city located records and provided partial access to them, withholding records and portions of records on the basis of several exemptions from the right of access in the *Act.* The city also relied on the confidentiality provisions found at sections 223.5 and 223.22 of the *Municipal Act* to deny access.

In Interim Order MO-3513-I, the adjudicator found that the *Municipal Act* confidentiality provisions do not apply to the records at issue, with the result that access to the records was to be decided under *MFIPPA*. The city then issued a revised decision, disclosing further information. However, some information remained withheld by the city under various exemptions. In Interim Order MO-3913-I, the adjudicator upheld the exemptions at sections 7(1) (advice or recommendations), 14(1) (personal privacy), and 12 (solicitor-client privilege), in part, and ordered disclosure of non-exempt information. She deferred some issues, including the application of the public interest override at section 16 and the reasonableness of the city's search for records, pending further representations from the parties.

In this final order, the adjudicator upholds the city's decision to withhold the information remaining at issue, finding that the public interest override at section 16 does not apply to it. She orders the city to conduct further specific searches for records and to provide a further access decision to the appellant in respect of those records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12 and 16.

BACKGROUND:

[1] This final order disposes of the remaining issues resulting from an access request

the appellant made to the City of Oshawa (city). Those issues are the application of the section 12 (solicitor-client privilege) exemption to a portion of a record, whether the public interest override applies to the information that I have found to be exempt under sections 7(1) and 14, and the reasonableness of the city's search for records.

[2] By way of 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, in which he was critical of the process leading to the purchase and the price paid for the property. 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] The city then appointed an investigator to look into the allegations contained in the Auditor General's report. This individual conducted an investigation and issued a report. City Council subsequently voted not to renew the Auditor General's appointment and to eliminate the role of Auditor General altogether.[1]

[4] With these events as a backdrop, the appellant submitted a request to the city pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to the following information:

> I am requesting all emails and any other communication (electronic or hard copy ie. texts or voice messages, fax) between [the named investigator] and any and all members of council as well as any members of city staff for the period of May 1, 2013 and September 15, 2013.
>
> I would like a copy of the dockets of all time for all work performed by [the investigator] from May 22, 2013 to Sept. 15, 2013 noted by [the investigator] on invoices July 29, 2013 and August 21, 2013 under purchase order 16050.

[5] In response to the appellant's access request, the city located 107 records and issued an access decision granting partial access to them. The city withheld much of the information in the records, including approximately 60 records in their entirety, citing various exemptions, including the discretionary exemption for advice and recommendations at section 7(1) of the *Act*, the discretionary law enforcement exemption at section 8(1), the mandatory exemption for third party information at section 10(1)(a), the discretionary exemption for solicitor-client privilege at section 12, and the mandatory personal privacy exemption at section 14(1). The city included an index of records with its access decision.

[6] The appellant appealed the city's access decision to the Information and Privacy Commissioner of Ontario (the IPC). During the mediation stage of the appeal, the appellant disputed the applicability of the exemptions claimed by the city, and also expressed his view that there is a public interest in disclosure of the requested records, thereby raising section 16 of the *Act*. The appellant also contended that further records

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[1] https://www.thestar.com/news/gta/2013/09/04/oshawa_votes_to_oust_auditor_general_in_wake_of_controversial_report.html?rf

responsive to his request should exist, raising the issue of whether the city had conducted a reasonable search for responsive records. The city maintained its decision to deny access to the withheld information. The city also maintained that it had conducted a reasonable search for the records.

[7] Also during mediation, the city took the position that sections 223.5 and 223.22 of the *Municipal Act, 2001* (the *Municipal Act*) apply to the records, as these sections impose a duty to maintain secrecy over matters involving the municipal Auditor General and the Integrity Commissioner.[2] The city issued a revised decision and a revised index of records, reflecting its reliance on these provisions.

[8] As the appeal was not resolved during mediation, it was moved to the adjudication stage of the appeal process, and I conducted an inquiry under the *Act.* In Interim Order MO-3513-I, I found that sections 223.5 and 223.22 of the *Municipal Act* do not apply to the records at issue, with the result that access to the records was to be decided under *MFIPPA*. I deferred the remaining issues pending notification of additional affected parties.[3]

[9] The city then did three things that are relevant for the purposes of this appeal. First, it issued a second revised decision, granting partial access to many records it had withheld in their entirety in its first decision. This resulted in significant additional disclosure to the appellant. However, the appellant confirmed his interest in pursuing access to the remaining information.

[10] Second, the city separately (not as a decision in response to the appellant's access request) posted to its website one of the records at issue in this appeal, the complete Auditor General's Report AG-13-09, including the "confidential attachments" referred to above, with some severances to those attachments.

[11] Finally, the city proactively disclosed on its website (with severances) over 1,000 records relating to the city's property purchase and the resulting investigations by the Auditor General and the investigator.[4] Again, this was a proactive disclosure and not directed to the appellant in the context of the access request before me. Most of the 107 records identified by the city as responsive to the request in this appeal were included in the subsequent proactive disclosure, and for the most part, more information in the records was released in the proactive disclosure than had been released in the city's decisions to the appellant.

[12] As a result of the city's further disclosures, much of the information initially withheld by the city, and the exemptions claimed for that information, were no longer at issue. However, there remained some withheld information that was responsive to the appellant's access request and that the appellant confirmed his interest in pursuing.

[13] After notifying additional affected parties, in Interim Order MO-3913-I I made a number of findings and ordered the disclosure of additional information to the appellant. I

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[2] The city took the position that the named investigator was an Integrity Commissioner.

[3] I also found that the City Clerk was not in a conflict of interest in making a decision on the appellant's access request; the appellant had raised this as a preliminary issue.

[4] The city's proactive disclosure can be found on its website here: https://www.oshawa.ca/city-hall/foi-activities.asp

deferred consideration of the city's new section 12 (solicitor-client privilege) claim[5] to some information in record 1 pending the appellant's confirmation that he is pursuing access to this information. In light of the above-noted proactive disclosure of a significant amount of information relating to the land purchase and subsequent investigation, I also deferred the issues of reasonable search, as well as the possible application of the public interest override to the information found in Interim Order MO-3913-I to qualify for the section 7(1) and 14(1) exemptions, pending further representations from the parties on those issues.

[14] I asked for, and received representations from the city on these issues. The city's representations were shared with the appellant, who provided representations in response. I invited the city to reply to the appellant's representations on the search issue and it did so.

[15] In his representations, the appellant raised a new issue. He refers to the city's plan to implement an updated "Frivolous, Vexatious or Unreasonable Request or Complaints Policy." He states that the relevant report of a committee meeting contains "loose terminology" that describes frivolous, vexatious or unreasonable requests as those that "consume a disproportionate amount of City time and resources and impede employees from attending to other essential issues." He addresses other features of the contemplated process that he views as problematic. In the appellant's view, the city is further abusing its powers in an attempt to limit public engagement and oversight, as well as the authority of the IPC.

[16] While issues relating to the treatment of allegedly frivolous or vexatious requests are important, they are not properly before me in this appeal. The city did not refuse access to the appellant's access request before me on the grounds that the request was frivolous or vexatious. I will therefore not address the appellant's concerns in this order.

[17] In this order, I uphold the city's section 12 claim for the portion of record 1 for which it was claimed. I find that the public interest override is of no application to the information to which the section 7(1) and 14(1) exemptions apply. As a result, I uphold the city's decision to withhold this information.

[18] Finally, I order the city conduct another search for responsive records and to issue an access decision to the appellant.

RECORDS:

[19] The records that contain the information remaining at issue are set out in the following table, using the numbering in the city's April 9, 2018 revised index of records.

Record Number	Date	Record description	Exemptions[6]

[5] The city first raised this claim in its second revised decision, issued after Interim Order MO-3513-I.

[6] For record 1, the city's section 12 exemption claim is to be addressed at this stage. For the remainder of the records, I have noted the exemption that I upheld in Interim Order MO-3913-I. The issue to be decided for those records is whether the public interest override at section 16 applies to the withheld information.

1	May 22 and 23, 2013	Emails between the investigator and the City Clerk	s. 12
4	February 21, 2007	Letter from an individual to the city (duplicate of information remaining at issue in Confidential Attachment 6, below)	s. 14(1)
29	May 24, 26, 27 and 28, 2013	Emails between the investigator, City Clerk and another individual	s. 7(1)
38	May 30 and June 9, 2013	Emails between the investigator and the City Clerk	s. 7(1)
65	June 25, 26 and 27, 2013	Emails between the investigator, Council, City Clerk, City Solicitor and external parties	s. 14(1)
75	July 3, 2013	Emails between the investigator the City Clerk, another individual and an external party	s. 14(1)
80	July 24 and 25, 2013	Emails between the investigator, the City Clerk, the Auditor General, a councillor and another individual	s. 14(1)
81	July 24, 26 and 29, 2013	Email between the investigator and the City Clerk	s. 14(1)
85	July 29, 2013	Emails between the investigator, councillors, the Auditor General and the City Clerk	s. 14(1)
87	July 24, 25 and 31, 2013	Emails between the investigator, Auditor General, City Clerk, a councillor and another individual	s. 14(1)
104	August 13 and 14, 2013	Emails between the investigator, the Auditor General, and the City Solicitor	s. 14(1)
106	August 16, 2013	Email between the investigator, City Solicitor, City Clerk and others	s. 14(1)
110	August 13 and 14, 2013	Emails between the investigator, the Auditor General, the City Solicitor, the City Clerk and others	s. 14(1)
Confidential Attachment 6	February 21, 2007	Letter from an individual to the city (duplicate of Record 4)	s. 14(1)

Confidential Attachment B	August 13, 2012	Letter from Durham Region to the Auditor General	s. 14(1)

ISSUES:

A. The city's section 12 (solicitor-client privilege) claim for record 1

   1. The city's late raising of the section 12 exemption for record 1

   2. Is the withheld information in record 1 exempt under section 12?

B. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 7(1) and 14(1) exemptions?

C. Did the city conduct a reasonable search for records?

DISCUSSION:

Issue A: The city's section 12 (solicitor-client privilege) claim for record 1

1. The city's late raising of section 12 for record 1

[20] Record 1 is an email string between the investigator and the City Clerk. As I noted in Interim Order MO-3913-I, the city did not claim the discretionary exemption at section 12 for record 1 until it raised it in its second revised access decision, issued after Interim Order MO-3513-I. At issue is a short sentence fragment in the record.

[21] The IPC's *Code of Procedure* establishes basic procedural guidelines for parties involved in appeals before this office. Section 11.01 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during the course of an appeal:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[22] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where an institution had notice of the 35-day rule, no denial of natural justice was found in refusing to consider a discretionary exemption claimed outside the 35-day

period.[7]

Representations

[23] The city notes that it originally fully withheld record 1 under different exemption claims. However, as a response to Interim Order MO-3513-I, the city issued a revised decision providing the appellant with partial access to the record, with limited portions withheld under various exemptions including section 12. It submits that the late raising of the section 12 exemption was partly due to the high volume of records that were responsive to the original request, and partly due to its proactive disclosure of records, which occurred after it responded to this access request.

[24] Given that the record was originally withheld in full, albeit under different exemption claims, the city submits that the appellant has not been prejudiced by the late raising of a discretionary exemption, and the integrity of the appeals process has not been compromised in any way.

[25] The appellant submits that the city has demonstrated a pattern of avoiding its responsibilities under the *Act*, and that its late section 12 claim is another example of this. He also says that it is evident, from his review of various records disclosed as part of the proactive disclosure, that the city has a habit of being deceptive in its application of the section 12 exemption.

Analysis and findings

[26] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must balance the relative prejudice to the city and to the appellant.[8] The circumstances of an appeal must be considered in determining whether a discretionary exemption can be raised after the 35-day period.[9]

[27] In this case, I accept that there has been little prejudice to the appellant as a result of the late raising of this exemption. As the city notes, the appellant was on notice early on that access to this record was in issue. He has now had a full opportunity to be heard on the section 12 exemption claim for this record, and has made representations on it. I have also taken into account the important interests that section 12 seeks to protect, the small amount of information affected, and the fact that the information at issue relates to an entirely different matter from the circumstances underlying this appeal. For these reasons, I have decided to allow the city to raise the section 12 exemption in this instance.

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[7] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg),* Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

[8] Order PO-1832.

[9] Orders PO-2113 and PO-2331.

2. Does the section 12 exemption apply to the information in record 1 withheld under that exemption? Did the city properly exercise its discretion under section 12?

[28] Section 12 states as follows:

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

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

Common law solicitor-client communication privilege

[30] At common law, solicitor-client privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[10] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[11] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[12]

[31] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[13]

[32] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[14] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[15]

Waiver

[33] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.[16] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or

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[10] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[11] Orders PO-2441, MO-2166 and MO-1925.
[12] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[13] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[14] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[15] *Kitchener (City) v. Ontario (Information and Privacy Commissioner),* 2012 ONSC 3496 (Div. Ct.)
[16] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd*. (1983), 45 B.C.L.R. 218 (S.C.).

objective intention to waive it.[17]

[34] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[18] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[19]

Representations

[35] The city submits that record 1 contains email correspondence between the former City Clerk and the investigator that is of a confidential nature. Specifically, the information refers to a settlement reached in litigation between an identifiable individual and the city.

[36] The city notes that it severed the record in an effort to provide the requester with as much information as possible.

[37] The appellant submits that there was no contemplation of litigation in respect of the Consolidated Operations Depot matter. He says that the city often waives privilege by disclosing information to third parties and that it is reasonable to expect it did so here.

Analysis and findings

[38] The information at issue is a small part of one sentence in record 1, an email between the city and the investigator. The sentence refers to a matter that the city's in-house solicitor had previously been involved in. Having reviewed the information, I am satisfied that disclosing it would reveal solicitor-client privileged communications. I find, therefore, that it is exempt under section 12. I also find that the privilege was not waived, since in the circumstances the investigator was not a third party but an agent of the city, and there is no evidence that this information was otherwise shared with any other third party.

[39] The public interest override at section 16 cannot apply to information that is exempt under section 12.[20] However, because the exemption is discretionary, the city could have chosen to disclose this information, despite the application of the section 12 exemption. An institution must exercise its discretion, and the IPC can order the institution to re-exercise its discretion where necessary.

[40] Having reviewed the parties' submissions on the city's exercise of discretion, I am prepared to uphold the city's exercise of discretion in this instance. There is no evidence that the city failed to take into account relevant considerations, took into account irrelevant ones or acted in bad faith when it decided to withhold the small piece of information that I have found is exempt under section 12. I also again observe, for the benefit of the appellant, that the matter referred to in the withheld information does not relate in any way to the Consolidated Operations Depot purchase or subsequent

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[17] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[18] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[19] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[20] Section 12 is not listed in section 16 as an exemption that can be subject to the public interest override. The Supreme Court of Canada upheld the constitutionality of the lack of a public interest override for this type of information in Ontario *(Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23.

investigations.

Issue B: Is there a compelling public interest in disclosure of the information that is exempt under sections 7(1) and 14(1) that clearly outweighs the purpose of those exemptions?

[41] The appellant has raised the application of the public interest override provision in section 16, which states:

> An exemption from disclosure of a record under sections **7**, 9, 9.1, 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. (emphasis added).

[42] 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.

[43] 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 that clearly outweighs the purpose of the exemption.[21]

Compelling public interest

[44] In considering whether there is a "public interest" in disclosure of the record, the first question is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[22] 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.[23]

[45] A public interest does not exist where the interests being advanced are essentially private in nature.[24] However, where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[25]

[46] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[26] Any public interest in *non*-disclosure that may exist also must be

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[21] Order P-244.
[22] Orders P-984 and PO-2607.
[23] Orders P-984 and PO-2556.
[24] Orders P-12, P-347 and P-1439.
[25] Order MO-1564.
[26] Order P-984.

considered.[27] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[28]

[47] A compelling public interest has been found not to exist where, for example, a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[29] where there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[30] or where the records do not respond to the applicable public interest raised by appellant.[31]

Purpose of the exemption

[48] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. The second question is whether this interest also clearly outweighs the purpose of the established exemption claim in the specific circumstances.

[49] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[32]

Representations

[50] The city submitted initially that any public interest in disclosure of the information at issue is outweighed by the public interest in non-disclosure, and in particular, the need for council to receive free and frank advice and recommendations (protected by section 7(1)), and the need to protect the privacy rights of individuals (protected by section 14(1)).

[51] The appellant argued in his initial representations that there continues to be much public and online debate over the purchase of property for the city's operations depot, the allegations contained in the Auditor General's report, and the validity of the investigator's report. He argues that understanding the Auditor General's findings in the confidential attachments to Report AG-13-09 would "inform or enlighten the citizenry about the activities of their government, 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." He argues that the citizens of Oshawa deserve to know whether or not the city spends their tax dollars wisely and with sufficient oversight.

[52] The city takes issue with the appellant's attacking the "validity" of the investigator's report, noting the investigator's qualifications and experience.

[53] In Interim Order MO-3913-I, I noted that the parties made their representations on the public interest issue before the city proactively disclosed a large amount of

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[27] Ontario *Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[28] Orders PO-2072-F, PO-2098-R and PO-3197.
[29] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[30] Order P-613.
[31] Orders MO-1994 and PO-2607.
[32] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

information, some of which includes information that was at issue in this appeal, and all of which relates in some way to the land purchase in question. In response to my request for further submissions on the public interest issue, the city submits as follows.

[54] The city says that in April 2018, it undertook of its own accord, and in the interest of transparency and accountability, a project to release the electronic records related to the purchase of the Consolidated Operations Depot, and associated freedom of information requests. This proactive release of records related to the operations depot involved over 1500 hours of City Clerk Services staff time, and additional city resources, including external resources to carry out the project.

[55] The city refers to its news release of March 29, 2019, which states:

> "The electronic records related to the City of Oshawa's purchase of the property for the Consolidated Operations Depot (C.O.D.), located at 199 Wentworth Street East, and the subsequent investigation undertaken by [the named investigator] are now available on the City's website at www.oshawa.ca/FOIactivity. The scope includes all available electronic records from 2001 to 2014 on the City Clerk Services corporate file server including records on the former computer F: Drive of [the named investigator]…
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> The electronic records include documentation such as staff reports, technical reports and studies, e-mail communications and internal memorandums. Additionally, records related to the purchase of the C.O.D. released through Freedom of Information (F.O.I.) requests are also included. The records do not include staff interviews conducted by [the named investigator] as they are confidential and have been withheld according to Sections 14(2)(h) and 14(3)(b) of M.F.I.P.P.A. and the Municipal Act Section 223.5."

[56] The city says that digital copies of all records were made available for purchase at a minimal cost or downloadable for free from its website, but that to date, no requests for a copy of the records on the USB drive have been made by members of the public. In the city's submission, this is an indication of a lack of public interest in records relating to the operations depot purchase and subsequent investigations.

[57] The city submits, therefore, that there is no compelling public interest in the disclosure of the remaining records at issue that would clearly outweigh the purpose of the discretionary exemption in section 7(1), or the mandatory exemption in section 14(1).

[58] The appellant submits that the city, in its proactive release of records, misapplied exemptions under the *Act* in an attempt to improperly withhold information. He observes that the city solicitor himself stated (in an email that was part of the proactive disclosure) that the public interest override should be applied to release certain city reports of closed meetings (none of these reports are records at issue before me). He submits that if a public interest in this information existed, then all withheld information at issue in this appeal should similarly be ordered disclosed.

[59] The appellant also argues that the fact that the city spent 1500 hours of time on the proactive disclosure of records signals a continued public interest in the controversial

land purchase for the Consolidated Operations Depot. He notes, further, that the publicly released records are available to download free of charge from the city's website, and that the fact that no one has purchased a copy is irrelevant.

Analysis and finding

[60] I have carefully reviewed the parties' representations and the information that I have found qualifies for exemption under sections 7(1) and 14(1). For the following reasons, I have concluded that there is no compelling public interest in the disclosure of this information.

[61] The information that I have found exempt under section 14(1) (personal privacy) is found in various emails passing between the investigator and the city. It falls into two main categories:

1. Personal contact information of several individuals, and

2. Information about the employment history and work performance of several city employees.

[62] In my view, there is no public interest in the disclosure of the personal contact information of the individuals in question. Releasing those details would not shed any further light on the Consolidated Operations Depot purchase or subsequent investigations.

[63] I also am of the view that there is no compelling public interest in the information relating to the work histories and performance of the city employees in question. I make this finding in full recognition of the fact that the appellant and others are interested in the actions of city staff as they relate to the land purchase in question. However, I have reviewed the information the city proactively disclosed, and a large amount of it relates to these issues. In my view, ordering disclosure of the withheld personal information in the records at issue before me would add little or nothing to the information that is already in the public domain for the purpose of fostering informed public debate on the issue.

[64] I find, therefore, that section 16 does not apply to the information that is exempt under section 14(1).

[65] I now turn to the information to which section 7(1) applies.

[66] The withheld information in record 29, an email between the investigator and the City Clerk, relates to how the investigator intended to conduct his investigation and his advice to the city on a related issue. Although I recognize that there is a public interest in how the investigation unfolded, I am not satisfied that there is any compelling public interest in the disclosure of this particular information. On balance, I find the information to be relatively innocuous and I conclude that the public interest override in section 16 does not apply to it.

[67] The withheld information in record 38, another email from the investigator and the City Clerk, is of a different nature. While it too is advice that the investigator provided to the city, the subject of his advice touches on matters that, in my view, are of public interest, seen in the entire context of this matter. However, from my review of the

investigator's public interim and final reports,[33] I see that the information at issue is already in the public domain. While I cannot be more specific without revealing the contents of the information at issue, I am satisfied that given that it is already public, there is no public interest, compelling or otherwise, in the disclosure of this information because disclosing it would not shed any further light on the matter in question.

[68] In conclusion, I find that the public interest override is of no application to the information that I have found to be exempt under sections 7(1) and 14, and I uphold the city's decision to withhold this information.

[69] I note that the section 7(1) exemption is discretionary, so while the exemption applies, the city could still have decided to disclose it, even absent the application of the public interest override. However, I see no error in the city's exercise of discretion in deciding to withhold the information. While the appellant argues that section 7(1) does not apply to the information, I have already found, in Interim Order MO-3913-I, that it does. I am also not persuaded by the appellant's representations to the effect that the city failed to take into account relevant considerations in exercising its discretion.

Issue C: Did the city conduct a reasonable search for records?

[70] As noted at the outset, the appellant's access request was for:

> All emails and any other communication (electronic or hard copy, i.e. texts or voice messages) between [the investigator] and any and all members of Council as well as any members of City staff for the period of May 1, 2013 and September 15, 2013.
>
> I would like a copy of the dockets of all time for all work performed by [the investigator] from May 22, 2013 to Sept. 15, 2013 noted by [the investigator] on invoices July 29, 2013 and August 21, 2013 under purchase order 16050.

[71] 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.[34] Where the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, further searches may be ordered.[35]

[72] 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 records that relate to the request.[36] 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

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[33] These reports are on the city's website and the city provided them as part of its representations in this appeal.
[34] Orders P-85, P-221 and PO-1954-I.
[35] Order MO-2185.
[36] Orders P-624, PO-2554 and PO-2559.

are reasonably related to the request.[37]

[73] 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.[38]

[74] The parties made their initial representations on this issue before the city's proactive disclosure. I asked for further representations in light of my view that the records that the city proactively disclosed may be relevant to the search issue.

Representations

[75] With the city's initial representations, it filed an affidavit of its Records and Information Analyst (the analyst) who coordinated the search for records in response to the appellant's access request. The analyst outlined the steps she took to process the request, which included contacting the city's Finance Services and Information Technology Services Departments for all relevant records. She also contacted the city's City Clerk Services Department and that department too provided her with copies of all relevant records in its possession. Further, she did an independent search of a folder containing all communications between the investigator, staff and councillors, which is maintained as part of the Clerk's record holdings.

[76] After the completion of these searches, responsive records were provided to staff in City Clerk Services, who reviewed the records in their entirety, applied various exemptions to them, and released the records in part to the appellant.

[77] In the Notice of Inquiry that I sent to the city at the outset of the adjudication of this appeal, I asked it to comment on whether an email dated May 21, 2013 from a city councillor to the investigator should have been identified as a responsive record in relation to the appellant's access request. I referred to a previous order, Order MO-3281 (an order relating to an access request to the city by a different requester), where I found that the May 21, 2013 email was in the city's control and ordered the city to issue an access decision in relation to it.

[78] In its representations, the city took the position that its search in relation to this appeal was conducted before I issued Order MO-3281, that Order MO-3281 did not have retroactive effect, and that it is not the city's practice to revisit past searches after the IPC issues an order.

[79] The appellant made extensive representations on the search issue during the course of the adjudication of this appeal, including unsolicited representations. I have reviewed and considered his arguments in their entirety, but will set out only a summary here.

[80] The appellant states that the city's affidavit is deficient because it provides no details of the actions of the individuals directly involved in searching for records.

[81] The appellant also points out that the investigator's report refers to "daily" receipt

[37] Orders M-909, PO-2469 and PO-2592.
[38] Order MO-2246.

of various communications from the city. The appellant says that there is "no evidence" that these communications have surfaced. In relation to the councillor who sent the May 21, 2013 email, the appellant notes that the city's revised index of records in this appeal was created three months after I issued Order MO-3281, and that revised index should have included the councillor's communications.

[82] Further, the appellant says that there is no evidence that the city searched for the investigator's dockets, even though the investigator stated in his billings that dockets are available on request. He notes there is no suggestion in the emails he has received that the investigator was ever asked for dockets. The city, for its part, argues that that the billings disclosed to the appellant are in fact dockets.

[83] Finally, the appellant notes that in another appeal before the IPC, Appeal MA16-83, the city stated that it emailed documents to the investigator for him to review for the purpose of his investigation.[39] The implication is that these emails ought to have been discovered in the city's search for records.

[84] The appellant also refers to an index of records that the city provided to a different requester in response to a different access request. According to the appellant, that index lists some records that ought to have been identified as responsive records in this appeal but were not.[40]

[85] Following the issuance of Interim Order MO-3913-I, I asked the parties for further representations on the search issue in light of the city's proactive disclosure.

[86] The city submits that it expended every reasonable effort to identify, locate and provide records that are responsive to the appellant's request. It says that typically, its staff search both electronic and physical files in response to an access request under the *Act*, and then provide all responsive records to City Clerk Services. However, due to the time since the original request, the city says it is now unable to confirm detailed specifics as to the original searches.

[87] The city notes that in my Notice of Inquiry, I asked it the following question:

> The city proactively disclosed a significant amount of information after its access decisions in this appeal. A number of the records that the city proactively disclosed would appear to be responsive to this request but were not identified as such in the city's access decisions in this appeal. Do you agree? Please comment on the reasonableness of the city's search for records in this appeal in light of the additional information that the city subsequently found and proactively disclosed.

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[39] However, as detailed in Interim Order MO-3860-I, the city later stated that it had placed documents on the investigator's F: drive.

[40] These representations were unsolicited representations received after the deadline for the appellant's representations, and I did not share them with the city for its response. However, the records referred to in that index are also listed in the index of records for the records that the city proactively disclosed. As noted below, I specifically put to the city the issue that the proactive disclosure appears to contain some records that are responsive to this access request but which were not identified as such in the access decisions before me.

[88] In response, the city says that the request at issue in this appeal is related to several other access requests on the same topic, which led to the city's decision to proactively release a number of records. It states that, "as such all responsive records in this specific instance were included in the City's proactive release." The city also states, however, that the existence of the subsequent proactive release of records does not diminish the effort of city staff to conduct a reasonable search in response to the appellant's access request. The city maintains that it expended a reasonable effort to respond to the appellant's access request.

[89] The appellant questions why the city limited its searches to various areas, when his request was for all communications between the investigator and any members of council or staff. He notes, for example, that legal services was not one of the departments the city consulted in its search for records.

[90] With respect to the proactive disclosure of records, the appellant says that the city's proactive disclosure did not include all records that are responsive to his access request. He notes that the city recently, in response to another access request, referred to or disclosed records that were not included in the proactive release. He also suggests that there may be records other than those on the city's corporate file server.

[91] He also notes, conversely, that the proactive release does include some records that are responsive to his access request but which were not identified as responsive records in the access decisions provided to him.

[92] The appellant also suggests that the records already disclosed indicate that there were other communications that would be responsive to his request but which have not been provided to him.

[93] Finally, the appellant refers to the city's ongoing project to amend its record retention schedules and asks me to review the pending changes to ensure that best practices are being used and that the city does not delete any records relevant to outstanding appeals.

[94] In reply, the city maintains that a complete and thorough search has been conducted in response to the original request, "in conjunction with both the proactive disclosure and subsequent orders issued by the Information and Privacy Commissioner related to Appeal MA15-571."

[95] In response to the appellant's concern that the city did not search all servers for its proactive release of records, the city submits that the city's proactive release was intended to supplement records that had been released in response to various access requests on the same topic. It submits that it is not required to prove that a reasonable search was conducted related to the proactive release of records.

[96] The city states, further, that the search for records that was conducted in response to the appellant's original access request included all corporate file servers. The city submits that the original request was circulated to Information Technology Services staff in order to facilitate an effective search of all city servers for responsive records.

[97] In response to the appellant's concerns regarding the city's update to its records

retention by-law, the city submits that the recently approved records retention by-law neither encourages nor permits city staff to inappropriately destroy official records in its custody or control.

Analysis and findings

The relevance of the city's proactive disclosure

[98] I will begin with a brief description of the city's proactive disclosure and its relevance to the search issue in this appeal.

[99] The index to the city's proactive disclosure is titled, "Routine Disclosure of Electronic Records Related to the Purchase of 199 Wentworth St E." The index lists 1,045 records, ranging in date from July 2001 to January 2014. The records themselves are available for downloading from the city's website. The city has applied redactions to some of the records under various exemptions in the *Act.*

[100] The access request before me is for communications between the investigator and city staff or councillors from May 1, 2013 and September 15, 2013, and the investigator's dockets. The issue before me is whether the city conducted a reasonable search for records in response to the appellant's access request. Whether the city has identified and proactively disclosed all of the records in its record holdings relating to the property purchase is not an issue before me. I will therefore not entertain the appellant's arguments to the effect that the proactive disclosure was not "complete".

[101] For similar reasons, I also discount the city's submission that its search in response to the access request before me, "in conjunction with the proactive disclosure", has resulted in a thorough search for responsive records. The city's proactive disclosure was not addressed to the appellant in the context of this access request and the appellant therefore has no right to appeal any of the redactions made to records that were proactively disclosed. To the extent that there are records included in the proactive disclosure that are responsive to the appellant's access request but which were not identified as responsive records in the city's access decisions, the appellant is entitled to an access decision under the *Act* in respect of them.

[102] I have reviewed the index of the city's proactive disclosure and the index of records in this appeal, and there are some records listed in the proactive disclosure that were not identified as responsive records in this appeal but which, on their face, relate to the appellant's access request. Some of these records have redactions applied to them. The appellant is entitled to have these records identified as responsive records in the context of his access request, and I will order the city to issue an access decision that identifies these records.

Emails between a city councillor and the investigator

[103] In Order MO-3281 (resolving an appeal relating to the City of Oshawa but filed by a different requester), I found that an email dated May 21, 2013 between the investigator and a city councillor was in the city's control. Additional emails between these two individuals were found and disclosed, as recounted in Order MO-3511 and Final Order MO-3768-F.

[104] These emails were not listed in the city's original access decision before me, nor in its revised access decision. It is clear that any such emails between the investigator and this councillor between May 1, 2013 and September 15, 2013 are responsive to the appellant's access request, and I will order the city to identify them as responsive records in an access decision.

[105] I specifically reject the city's assertion that Order MO-3281 does not apply retroactively to its access decision in the matter before me. While the city may not have been aware of its obligation in respect of these emails at the time of its access decision in this matter, that is a separate issue from whether they were, in fact, responsive records that should now be identified in an access decision.

Dockets

[106] The appellant says that the city has not searched for the investigator's dockets. The invoices themselves set out an overall figure for the investigator's time spent and a general description of the activities the investigator carried out. The invoices state that dockets of recorded time are available on request. As the appellant notes, there is no suggestion in the emails he has received that the investigator was ever in fact asked for these more detailed dockets. The city, for its part, now says that the invoices themselves are the dockets.

[107] I agree that there is no suggestion in the emails released so far that the city ever asked the investigator for his dockets. However, the fact that the city did not ask for or receive them does not mean that they do not exist. The investigator said in his invoices that his dockets of recorded time were available upon request. This suggests to me that he may be in possession of time dockets over and above the invoices he provided to the city. I will, therefore, order the city to ask him for his dockets and to issue an access decision for them under the *Act.*

Documents emailed to the investigator for his investigation

[108] The appellant implies that there should be more emails passing between the investigator and the city. He notes that in Appeal MA16-83, the city stated that it emailed various documents to the investigator for his review.

[109] Whether the investigator may have received documents from the city by email or on an F: drive has been the subject of much debate and confusion – see Orders MO-3493-I, MO-3532-F, MO-3751-R and MO-3860-I.

[110] However, from my review of both the records the city has already disclosed and the investigator's final public report, I see no basis for concluding that there are additional emails passing from the city to the investigator whereby documents were provided to him. I note that investigator's final report refers to his having received 27 boxes of material from the city to review for the purposes of his investigation. This implies that in the end, many of the documents he reviewed for his investigation may have been provided to him in hard copy.

[111] The appellant also refers to the investigator's comment in his final report to the effect that he was in receipt of "daily" emails from the city. I disagree with the appellant's

assertion that there is "no evidence" of these emails having surfaced. Many of the responsive records already disclosed consist of daily email exchanges between the investigator and the city.

[112] Finally, the appellant did not provide any details to support his argument that some of the emails he received suggest that there are other recorded communications that have not been identified. I am not satisfied that he has provided a reasonable basis for this assertion.

The city's evidence regarding its searches for communications between the investigator and the city

[113] The appellant says the city's evidence regarding its search is deficient. He points out that the city did not provide sworn evidence from the individuals in each department who actually conducted the searches. He also says that the search itself is deficient because the city did not search all of its servers for records. He also asks why the city limited its searches to certain areas and did not include others, such as Legal Services. The city states in response that its search for records included a search by IT of all of its file servers.

[114] Having reviewed the city's evidence, including its affidavit evidence, I am satisfied that it has demonstrated that its search for communications between the investigator and the city was reasonable overall. In my view, in conducting a search, an institution is expected and entitled to focus on areas that are likely to hold responsive records. A reasonable search does not necessarily entail an exhaustive search of every department of an institution. The appellant has not explained why he believes that further responsive records exist in departments other than those the city searched.

[115] If it were not for the evidence that further responsive communications between the city and the investigator exist, I would be prepared to uphold the city's search for communications between the investigator and the city as reasonable. However, above, I have identified two respects in which the city's search was deficient: it did not identify some responsive records that it later disclosed in its proactive disclosure, and it did not identify the councillor's emails described above. The latter omission appears to have been due to the city's misunderstanding of its control over those emails. However, the former is more troubling because it appears that somehow these emails were simply missed in its searches.

[116] There is also some evidence that the city may have found records relating to this access request when conducting searches in response to other access requests. The city explained in its representations that it treats each access request individually and does not cross-reference responsive records in one appeal against those identified in a previous appeal. However, the city has an obligation to identify any records responsive to the appellant's access request, even if they were located in the context of a search in respect of a different request. I will order to city to identify any responsive records that it has discovered through its searches in response to other access requests, and to issue an access decision for them under the *Act.*

The city's new records retention policy

[117] The appellant takes issue with the city's recent changes to its records retention policies. These policies are not relevant to the issues before me. This appeal is not a general review of the city's information practices, but rather, an inquiry into various issues including whether the city's search for records in response to the appellant's access request was reasonable. The appellant has not explained how the city's new records retention policies are relevant to the issues before me. I will therefore not address them further in this order.

Conclusion

[118] Given the clear evidence of additional responsive records, I do not uphold the reasonableness of the city's search for records. I will order it to conduct the following specific searches:

- Searches for the councillor's emails referred to in paragraphs 103-105 of this order,
- Searches for the investigator's dockets by asking him for his dockets,
- Searches for any records listed in relation to the proactive disclosure that are responsive to the appellant's access request but that were not identified as such, and
- Searches for any records that the city found in relation to other access requests that are responsive to the appellant's access request but that were not identified as such.

ORDER:

1. I uphold the city's decision to withhold the information set out in the table above.
2. I do not uphold the city's search for records responsive to the appellant's access request. I order the city to perform the searches identified in paragraph 118 of this order, and to provide the appellant with its decision on access to these records, treating the date of this order as the date of the access request for the purpose of the procedural requirements of the *Act.*

Original signed by
Gillian Shaw
Senior Adjudicator

May 26, 2021