

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4455-I

Appeal MA20-00425

The Corporation of the City of Oshawa

October 30, 2023

Summary: The appellant submitted a request to the City of Oshawa (the city) for access to records related to certain aviation companies. The city located records responsive to the request and issued a decision denying access to them in part. The city relied on the discretionary exemptions at section 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(d) and (e) (economic and other interests), and 12 (solicitor-client privilege), as well as the mandatory exemption at section 14(1) (personal privacy) of the *Act*. The appellant appealed the city's decision. In this interim order, the adjudicator upholds the city's decision that section 12 applies to the information at issue. She also finds that sections 6(1)(b), 7(1), 11(d), and 14(1) apply to some pages and/or portions of pages of the records at issue, and that section 11(e) does not apply to any of the information at issue.

The adjudicator orders the city to withhold the information that section 14(1) applies to and upholds its discretion to apply sections 7(1), 11(d) and 12 and withhold certain information, but orders it to re-exercise its discretion in relation to its application of section the 6(1)(b) exemption. The adjudicator orders the city to disclose to the appellant the remaining information to which she concluded none of the exemptions apply.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2, 6(1)(b), 7(1), 11, 12 and 14(1).

OVERVIEW:

[1] The Corporation of the City of Oshawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the

following:

... all records including but not limited to, council minutes, any committee minutes and reports, internal and external correspondence and reports or any other records, in relation to [the appellant]. This request is for the time period between 2012 and 2019 inclusive.

[2] The city granted the requester partial access to the records. It withheld some of the requested information pursuant to the discretionary exemptions at sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11 (economic or other interests), 12 (solicitor-client privilege) and the mandatory exemption at section 14(1) (personal privacy) of the *Act*. The city attached an index of records to its decision identifying the basis for withholding the information in each record.

[3] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner's Office of Ontario (the IPC). A mediated resolution was not possible and the appellant requested that the appeal move to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry pursuant to the *Act*.

[4] An adjudicator began an inquiry by sending the parties Notices of Inquiry and obtaining their representations. The adjudicator also wrote to the parties to discuss the unusually high volume of records at issue in this appeal. The adjudicator noted that his intention was not to review all of the records but instead, to conduct an inquiry based on a sample of records agreed to by the parties and to make findings and direct the city to apply those findings to the remaining records at issue. The matter was then transferred to me to continue the inquiry.

[5] After reviewing the file materials, I wrote to the appellant to discuss the representative sample, which remained voluminous for an IPC appeal. In the interest of moving matters forward, the appellant agreed to reduce the scope of the appeal to the set of records entitled, "Copy of Planning Services Paper File related to [the appellant], August 2012 - December 2019," (the Paper File) provided that a decision could be issued within an agreed upon timeframe.

[6] The majority of the records in the Paper File are email chains. Additionally, there are letters, reports, agreements, handwritten notes, maps, charts and calculations. The records are described in detail in Appendix I to this decision, which also contains a list of the exemptions claimed by the city and my findings with respect to those exemptions. The reasons for the findings are set out below in this decision.

[7] In summary, I find that the mandatory exemption at section 14(1) applies to some of the information claimed by the city and I order it to withhold that information. I find that the discretionary exemption at section 12 of the *Act* applies to all of the records for which it was claimed by the city. I also find that the discretionary

exemptions at sections 6(1)(b), 7(1), and 11(d) apply to some of the information at issue, as listed in Appendix I. However, section 11(e) does not apply to any of the information at issue. I uphold the city's discretion to apply the section 7(1), 11(d), and 12 exemptions, but I order it to re-exercise its discretion regarding the application of the 6(1)(b) exemption. I order the city to disclose the remaining information not covered by the exemptions to the appellant.

ISSUES:

- A. Does the record at issue contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?
- C. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records at issue?
- D. Does the discretionary exemption at section 6(1)(b) relating to closed meetings apply to the records at issue?
- E. Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to the records at issue?
- F. Does the discretionary exemption at section 11 for economic and other interests of the institution apply to the records at issue?
- G. Did the city exercise its discretion under sections 6(1)(b), 7(1), 11 and 12? If so, should I uphold the exercise of discretion?

DISCUSSION:

ISSUE A: Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

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

"personal information" means recorded information about an identifiable individual, including,

(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, ...

(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.

[9] The list of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) of section 2(1) may still qualify as personal information.¹

[10] 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.² Even if the information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

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

The parties' representations

[12] The city submits that the information at issue in Group A of Appendix I to this decision belongs to either staff members or residents who submitted complaints related to the airport operations pursuant to the city's Noise By-law. The city says the withheld information contains residents personal contact information, complaint details submitted in accordance with the noise by-law, and names appearing with other personal information relating to the individual, or where the disclosure of the name would reveal other personal details about the individual.

[13] The appellant submits that it is not interested in the identity or personal information of third parties in the records. However, it submits that any personal

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1408, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1800, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002 CanLII 30891 \(ON CA\)](#), [2002] OJ No. 4300 (C.A.).

information should be redacted and the remaining information disclosed.

[14] The record at issue in Group A is a two-page email chain wherein an individual communicates concerns about airport operations to the city and the city responds and forwards the email to other city employees with further directions. Based on my review of the email chain, I find that some portions contain personal information, as defined in accordance with paragraphs (d), (e), and (f) of the definition of personal information in section 2(1), as set out above.⁵ In the next section of this decision, I will consider whether the personal information is exempt from disclosure pursuant to the mandatory exemption in section 14(1).

[15] The remaining portions of the Group A record does not reveal anything of a personal nature about an identifiable individual and I will order the city to disclose those portions to the appellant.

ISSUE B: Does the mandatory personal privacy exemption at section 14(1) apply to the highlighted information in Group A?

[16] Where a requester seeks personal information of other individuals, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) in section 14(1) applies. In the circumstances, it appears that the only exception that could apply is section 14(1)(f), which allows disclosure if it would not be an unjustified invasion of personal privacy. Based on my review, none of the exceptions in section 14(4) apply to the records at issue.

[17] The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f).

[18] 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(1). 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).⁶

[19] If no section 14(3) presumption applies and no exceptions in section 14(4) apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy.⁷ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring

⁵ I have highlighted those portions which are personal information in red in the copy of the records that will be provided to the city with this decision.

⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), [1993 CanLII 3388 \(ON SCDC\)](#), 13 OR (3d) 767 (Div.Ct.).

⁷ Order P-239.

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 mandatory section 14(1) exemption applies.⁸

The parties' representations

[20] The majority of the city's representations on the application of section 14(1) of the *Act* apply to records that are no longer at issue in this inquiry. As such, I will refer only to those parts of the city's representations which are relevant to the portions of information in the Group A record that I identified as personal information above.

[21] The city submits that the personal privacy exemption at section 14(1) of the *Act* applies to the personal information in the record in Group A. To begin, it submits that none of the exceptions in sections 14(1)(a) to (e) apply to the personal information.

[22] The city says that section 14(2)(h) applies. Specifically, it says that the personal information relates to by-law complaints made in confidence to the city. It submits that a statement on its website assures potential complainants that information supplied will be kept in confidence. It also refers me to Order MO-3556 where an IPC adjudicator accepted that an individual who submitted a by-law related complaint had an expectation of confidentiality when doing so.

[23] The city also says that if by-law complaints submitted in confidence by residents were shared with members of the public and not kept confidential, there could be a silencing effect of residents not sharing legitimate and relevant information to the city, which would impede the city's ability to carry out its investigative and enforcement functions. Therefore, the city submits that its application of section 14(1) should be upheld.

[24] Finally, the city submits that none of the situations listed in section 14(4) apply to the withheld personal information at issue.

[25] None of the appellant's representations apply to the personal information in the Group A records and as such, I will not repeat those representations here.

Findings and analysis

[26] Having reviewed the personal information at issue in the Group A record, and the parties' representations, I find that none of the personal information fits within the exceptions set out in section 14(1)(a) to (e), nor section 14(4) of the *Act*. I also find that none of the presumptions in section 14(3) apply.⁹ As such, I turned to consider

⁸ Orders PO-2267 and PO-2733.

⁹ I note that city made some representations in support of section 14(3)(b) of the *Act*. Although I considered those representations, I concluded that there was insufficient information in the records to link them to the remaining information at issue. It appears likely that these representations were made in support of other information that is no longer at issue in this inquiry. I also confirm that I reviewed and

whether any of the factors or presumptions under section 14(2) apply. For the reasons that follow, I find that section 14(2)(h) applies, which weighs in favour of privacy protection.

[27] Section 14(2)(h) specifies the following:

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

(h) the personal information has been supplied by the individual to whom the information relates in confidence.

[28] For the factor in section 14(2)(h) to apply, both the individual supplying the information and the recipient must have had an expectation that the information would be treated confidentially, and that expectation must be reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁰

[29] In this case, the personal information is contained in an email chain that includes a complaint about by-law enforcement made to the city by an individual. I accept that the individual making the complaint had a reasonable expectation of privacy, based on the information provided on the city's website and its past practice. In the circumstances, I find that the personal information at issue was supplied by the complainant in confidence and that the factor in section 14(2)(h), which weighs against disclosure, applies.

[30] Based on my review, none of the other presumptions or factors apply, and as a result, the exception in section 14(1)(f) is not made out, and the personal information in the Group A record is exempt from disclosure under section 14(1) of the *Act*. The city must not disclose this information.

ISSUE C: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the record at issue?

[31] The city submits that section 12 applies to the records listed in Group B of Appendix 1. Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

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

considered all of the representations from both parties, including the city's reply and the appellant's sur-reply, even though I do not specifically refer to them in this decision.

¹⁰ Order PO-1670.

an institution for use in giving legal advice or in contemplation of or for use in litigation.

[32] Section 12 contains two different exemptions, referred to in previous IPC decisions as “branches.” The first branch (“subject to solicitor-client privilege”) is based on common law. The second branch (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies. The city claims both branches apply to the records in Group B of Appendix I. For the reasons below, I find that branch 1 common law solicitor-client communication privilege applies.

[33] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.¹¹ This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.¹² The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.¹³

[34] The privilege may also apply to the lawyer’s working papers directly related to seeking, formulating or giving legal advice.¹⁴

[35] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.¹⁵ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.¹⁶

The city’s representations

[36] The city submits that the Group B records contain direct communications between a solicitor and client, made for the purpose of obtaining or giving professional legal advice and that as a result, section 12 of the *Act* applies. The city says that

- the records at issue were prepared for use in giving or seeking legal advice,
- they contain written communications that are of a confidential nature; and
- consist of communications between city staff and solicitor(s) related to the seeking, formulating and giving of legal advice.

¹¹ Orders PO-2441, MO-2166 and MO-1925.

¹² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

¹⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

[37] The city submits that the Group B records comprise a continuum of communications between solicitor and client wherein the solicitor provides advice and comments to city staff regarding the drafting of a potential lease agreement and the drafting of a confidential report to be considered during a closed session portion of the Development Services Committee meeting of December 9, 2019.

[38] The city says that the current appeal is similar to the circumstance in Order MO-1374 where an adjudicator concluded that draft confidential reports and draft by-laws were prepared within the confidential framework of the solicitor-client relationship and as a result, were exempt under section 12 of the *Act*.

[39] In response, the appellant submits that the city's broad representations with respect to solicitor-client privilege without explanations as to how it applies to each of the individual records withheld does not meet the burden of proof with respect to each individual document. The appellant says that no particulars have been provided that would allow it to determine whether each record is covered by solicitor-client privilege.

Findings and analysis

[40] I have reviewed all of the Group B records and find that the solicitor-client communication privilege exemption in section 12 of the *Act* applies to all of the information at issue.

[41] While the city did not provide detailed representations regarding each of the records at issue, it did provide unredacted copies and as a result, I have had the benefit of reviewing the records themselves. I find that all of the records in Group B are emails, and each contains the following types of information:

- requests for legal advice on specific topics,
- legal advice in response to those requests, and/or
- discussions about the legal advice provided by legal counsel.

[42] Based on my review of the Group B records, I find that each email contains only city employees, using their city designated emails. Multiple city lawyers, identified by their email signatures, provide legal advice in response to various requests, and those responses are discussed. There are no outside participants in the email discussions and I am satisfied, based on my review of the content, that the matters discussed were kept confidential within the city.

[43] In my view, each of the emails forms part of the continuum of communications aimed at keeping both the solicitor and client informed so that advice may be sought and given as required. Accordingly, I find that section 12 applies to all of them. Later in this decision, I will consider whether the city has properly exercised its discretion in withholding the Group B records from disclosure.

ISSUE D: Does the discretionary exemption at section 6(1)(b) relating to draft by-laws and closed meetings apply to the records at issue?

[44] The city claims that the records are exempt under section 6(1)(b) of the *Act*, which states:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[45] For this exemption to apply, the institution must show that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting,
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.¹⁷

[46] The institution must show that it held a meeting, and that it was authorized by law to hold the meeting *in camera*.¹⁸ For the meeting to be authorized to be held *in camera*, its purpose must have been to deal with a matter for which a closed meeting is authorized by statute.¹⁹

[47] For section 6(1)(b) to apply, it must be established that disclosure of the record would reveal the actual substance of deliberations that took place at the *in camera* meeting, and not just the subject of the meeting or the deliberations.²⁰ "Deliberations" refer to discussions conducted with a view towards making a decision.²¹

[48] Section 6(1)(b) does not protect records merely because they refer to matters discussed at a closed meeting.²² Rather, it specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.²³ Previous orders of this office have found that:

¹⁷ Orders M-64, M-102 and MO-1248.

¹⁸ Order M-102.

¹⁹ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

²⁰ Orders MO-703, MO-1344, MO-2389 and MO-2499-I.

²¹ Order M-184.

²² Order MO-1344.

²³ Orders MO-1344, MO-2389 and MO-2499-I.

- “deliberations” refer to discussions conducted with a view towards making a decision;²⁴ and
- “substance” generally means more than just the subject of the meeting.²⁵

[49] Section 6(2) of the *Act* sets out exceptions to section 6(1). It reads, in part:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

(b) in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public.

The parties’ representations

[50] The city submits that the Development Services Committee (DSC) of Oshawa City Council held a meeting on December 9, 2019 (the DSC Meeting) and that although the majority of the meeting was open to the public, a confidential report was considered in absence of the public in accordance with the *Municipal Act*.²⁶

[51] The city submits that the DSC Meeting was closed pursuant to section 239(2)(c) of the *Municipal Act*, which states that all meetings shall be open to the public, with the following exceptions:

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(b) a proposed or pending acquisition or disposition of land by the municipality or local board;

[52] The city states that the resolution to close the DSC Meeting to the public was included in the minutes. It provided a copy of the agenda and minutes with its representations.

[53] The city says that a procedural by-law passed under section 238(2) of the *Municipal Act* sets out the requirements for closed meetings. It provided a copy of the by-law, which it says was in effect at the time of the closed meeting. It says that the requirements set out in the by-law apply to the type of closed session that occurred during the DSC Meeting.

[54] The city submits that details regarding the conditions of holding a closed meeting, including notice to the public, are contained within the agenda and minutes for the DSC Meeting.

²⁴ Order M-184.

²⁵ Orders M-703 and MO-1344.

²⁶ *Municipal Act, 2001*, S.O. 2001, c. 25

[55] The city argues that the actual substance and deliberations of the closed portion of the DSC Meeting would be revealed if the records listed at Group C in Appendix I were disclosed. Specifically, the city says that the Group C records contain the following categories of information in relation to the "preparation, delivery and implementation of the recommendations under deliberation at the meeting in question:"

- Staff discussion of options in preparation of the closed report to the Development Services Committee for the DSC Meeting,
- Emails including the confidential motion resulting from the closed session of the DSC Meeting,
- Copies of both the draft(s) and final closed report to the Development Services Committee for consideration at the DSC Meeting,
- Staff notes and edits related to the preparation of the closed report to the Development Services Committee for consideration at the DSC Meeting, and
- Staff discussions in preparation of the closed portion of the agenda for the DSC Meeting.

[56] The city refers me to Orders M-64 and M-394, which it says are analogous to the current appeal.

[57] The city denies that the exception set out in section 6(2) applies to the Group C records.

[58] The appellant submits that it is unclear from the city's representations whether all the records at issue relate to the DSC Meeting. The appellant says that the records that predate the DSC Meeting should be produced to the extent that they do not involve information leading up to the deliberations that occurred during the closed session portion of the DSC Meeting.

[59] Additionally, the appellant says that pages 3246, 3247 to 3248 and 3296 should be produced as it is not clear from the descriptions provided by the city how these records could possibly reveal the actual substance of the deliberations at the DSC Meeting.

[60] Finally, the appellant submits that any information not related to the deliberations at the DSC Meeting should be severed and disclosed.

Findings and analysis

[61] As noted above, the first and second parts of the test for exemption under section 6(1)(b) require the city to establish that a meeting was held, and that it was properly held *in camera*. Part two of the test asks whether the purpose of the meeting

was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.

[62] To meet part three of the test, the city must establish that disclosure of the records at issue would reveal the actual substance of deliberations which took place at its *in camera* meeting, not merely the subject of the deliberations

Parts 1 and 2: was there an in camera meeting of Council that was authorized by statute?

[63] Based on all of the evidence before me, including the copy of the *Council Procedure By-law 111-2017* and the Development Services Committee's Agenda and Meeting Minutes for the DSC Meeting provided by the city with its representations, I am satisfied that Council held a closed meeting on December 9, 2019, for the purpose of considering a proposed acquisition or disposition of land, as it was authorized to do under section 239(2)(c) of the *Municipal Act* and section 13 of By-law 111-2017, and in satisfaction of the notice requirement under section 7(8)(1) of the By-law.

[64] As a result, I accept that the city has established parts 1 and 2 of the test under section 6(1)(b). I will now consider whether disclosure of the Group C records would reveal the substance of the closed meeting deliberations.

Part 3 – would disclosure of the records reveal the actual substance of the deliberations of the meeting?

[65] Under part three of the test, I must determine whether disclosure of the records at issue would reveal the substance of the DSC's deliberations during the *in camera* meeting. The city has the onus of establishing how disclosure of the records would reveal the actual substance of the deliberations at the meeting and not merely the subject of the deliberations. I will now review each of the records listed in Group C of Appendix I to determine whether part three of the test is met.

[66] Pages 3146 to 3199 of the Group C records are comprised of a copy of a report labelled "Closed Report DS-19-230 to Development Services Committee" (the Report). I have reviewed the Report and based on all of the evidence before me, I accept that the contents were considered and discussed at the DSC Meeting and that the substance of the Report is intrinsically linked to the DSC's deliberations. The report sets out the background to the issue being considered, the relevant information necessary to make a decision on the issue, and detailed analysis about the options. It is clear to me that revealing this information would reveal the substance of what the DSC discussed during the closed meeting. As a result, I accept that section 6(1)(b) applies to the DSC Report on pages 3146 to 3199.

[67] Next, as noted in the city's index of records included in its representations, pages 3204 to 3205 of the Group C records contain a "Memorandum of confidential direction of Development Services Committee concerning Closed Report DS-19-230." I have

reviewed the contents of the memorandum and I accept that disclosing it would reveal the substance of the DSC's deliberations and as a result, section 6(1)(b) applies.

[68] Pages 3206 to 3207 are comprised of an email chain that summarizes the main points of the DSC Meeting. I am satisfied that section 6(1)(b) applies to it as well for the same reasons I set out above.

[69] I have reviewed the email chains on pages 3212 to 3213 and 3216 of the Group C records and I find that they contain discussions about revisions to the Report for the DSC Meeting. I accept that disclosing some portions of the information on pages 3212 to 3213 and the entirety of page 3216 would reveal the actual substance of the deliberations of the closed meeting and find that section 6(1)(b) applies.²⁷

[70] Next, the city says that pages 3236 to 3241 are handwritten notes and edits related to the Report. I have reviewed these pages and I accept that description. Specifically, page 3240 is a page of the draft report with markings, notes and revisions in handwriting. The other pages contain notes and calculations that clearly relate to the information in the Report. Based on all of the evidence before me, I accept that revealing the information related to the draft report would reveal the actual substance of the DSC's deliberations.

[71] Finally, I also accept that section 6(1)(b) applies to pages 3338 to 3340. These pages contain the executive summary of a previous closed report from a meeting regarding a related matter. I note that the information in these pages is directly referred to in the Report, which I have already concluded that section 6(1)(b) applies to above, at paragraph 66. As a result, I find that section 6(1)(b) also applies to pages 3338 to 3340.

[72] To be clear, I find the information I concluded that section 6(1)(b) applies to contains the substance of deliberations relating to the property in question. Further, I find that these records, or portions thereof, contain more than the mere subject of the deliberations. I accept that they contain detailed information about the plans for the property considered by the DSC. All of this information would, if disclosed, reveal information the DSC considered and discussed with a view towards making a decision regarding the property at issue. As such, I find the disclosure of this information would reveal the substance of deliberations at the closed meeting.

[73] However, I find that the city has not established that pages 3246, 3247 to 3248, and 3296 contain information subject to section 6(1)(b).

[74] Page 3246 contains an email from the city to an outside party seeking

²⁷ I have highlighted the portions of the records that section 6(1)(b) applies to in red in the copy of the records provided to this city with this decision. I also note that although the city claimed that section 6(1)(b) applies to pages 3209 to 3210 I have not considered those pages in this section as I find below that section 7(1) applies to the same information.

information and a follow-up internal email. Absent any representations explaining how section 6(1)(b) applies to this information, I am not convinced that it does. In any event, the city has already disclosed nearly identical information to the appellant on page 3244. As this information is already in the public realm, I find that it does not warrant further consideration.²⁸

[75] Pages 3247 to 3248 contain an email chain with an outside organization. The organization responds to a request from the city and a city employee then forwards that response to another employee and comments on it. The city has not provided specific representations about these emails to explain why it has applied section 6(1)(b). It is not apparent from my review of the emails themselves that section 6(1)(b) applies. I am unable to conclude that disclosing the emails would reveal the substance of the DSC's deliberations at the closed meeting and I find that section 6(1)(b) does not apply.

[76] Page 3296 is an email chain that attaches an agenda for the DSC Meeting and indicates that the meeting will be closed. The attachment does not form part of the records at issue in this appeal. The email is general in nature and does not contain any information that the DSC would have deliberated on. As a result, I find that section 6(1)(b) does not apply.²⁹

[77] I have reviewed the exceptions to the exemption set out in section 6(2) and find that none are established in the circumstances of this appeal.

[78] In summary, I find that section 6(1)(b) applies to some of the records at issue in full, and others in part, as described in Appendix I to this decision under Group C. Later in this decision, I will consider whether the city has properly exercised its discretion in withholding the information subject to section 6(1)(b) from disclosure.

ISSUE E: Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to the records at issue?

[79] The city says that section 7(1) of the *Act* applies to the records in Group D. This section exempts certain records containing advice or recommendations given to an institution. It states:

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

[80] The purpose of section 7(1) is to preserve an effective and neutral public service

²⁸ For a more in-depth discussion of this issue, see page 13 of Order PO-2481, where Adjudicator Corban declined to make a finding on whether an exemption applied to information that had already been disclosed.

²⁹ I confirm that prior to making these findings, I reviewed and considered the orders referenced by the city in its representations but was not persuaded that they were applicable or relevant to the pages I concluded were not subject to section 6(1)(b).

by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.³⁰

[81] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[82] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.³¹

[83] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[84] Section 7(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.³²

[85] The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 7(1).³³ This is the case even if the content of the draft is not included in the final version.

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

- factual or background information,³⁴
- a supervisor's direction to staff on how to conduct an investigation,³⁵ and
- information prepared for public dissemination.³⁶

³⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

³¹ See above at paras. 26 and 47.

³² Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

³³ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

³⁴ Order PO-3315.

³⁵ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

³⁶ Order PO-2677

The parties' representations

[87] The city says that the Group D records contain advice and that the disclosure of that advice, when compared with the actual actions taken (or not taken) by the city would lead to correct inferences about advice city staff provided, particularly because the appellant is a party to the lease negotiations that are the subject of the Group D records and has knowledge of the workings of the property.

[88] The city submits that previous orders have held that advice does not necessarily have to include a specific recommended course of action. In support of this assertion, the city refers me to IPC Order MO-2548, where an adjudicator accepted that disclosing the records at issue would permit the inferring of advice by allowing the appellant to compare suggestions and advice with the actions actually taken by a city.

[89] The city asserts that the advice contained within the records at issue in Group D was provided by city staff in preparation for the development of policy decisions, including closed reports and draft lease conditions, regarding the city's relationship and lease with the appellant at the Oshawa Executive Airport.

[90] The city says that while the records contain actual advice of city staff, there are some instances where the advice is implied, rather than expressed.

[91] The city submits that where the advice cannot be reasonably severed, the exemption has been applied to the record as a whole. It argues that where the advice of staff is implied, it has been interwoven such that it cannot be separated from the remainder of the information in the record. It refers me to Order PO-2481, which it says supports its finding that all of the information should be withheld pursuant to section 7(1) in these circumstances.

[92] The city denies that any of the exceptions in section 7(2) and/or 7(3) apply. In particular, it says that while the records at issue may also contain factual information gathered in the preparation of the Report, the release of the withheld information would permit the drawing of accurate inferences as to the nature of the actual advice provided by city staff.

[93] The appellant submits that "advice or recommendations" for the purpose of section 7(1) of the *Act* must contain more than "mere information."³⁷ The appellant submits that in accordance with Order MO-2548, the following types of information do not qualify as advice or recommendations:

- Factual or background information,
- Analytical information,

³⁷ Order PO-2681.

- Evaluative information,
- Notifications or cautions,
- Views,
- Draft documents, and/or
- Supervisor's direction to staff on how to conduct an investigation.

[94] The appellant submits that the documents withheld by the city in this section must be produced to the extent that they fall under the exceptions outlined under section 7(2) (a) through (k) of the *Act*.

Findings and analysis

[95] For the reasons that follow, I find that section 7(1) applies to some pages, or portions of pages, at issue in the Group D records, as listed in Appendix I. However, section 7(1) does not apply to the remaining information and I will order the city to disclose those pages, or portions of pages, to the appellant.

[96] To begin, I uphold the city's claim that pages 3208 and 3209 to 3210 in the Group D records contain advice and recommendations as contemplated by section 7(1). Page 3208 includes a city employee's opinion, the basis for that opinion and suggestions and advice for what the city's next steps could be. While the email contains some factual information, I agree with the city that it is inextricably tied to the advice such that revealing it would also reveal the content of the advice being given.

[97] With regard to pages 3209 and 3210, this is an email chain where a request is made for suggestions on a report. An employee response with specific advice for changes that should, or should not, be made. As above, the factual information in the employee's response is interwoven with the advice and cannot be revealed without also revealing contents of the advice given. As a result, section 7(1) applies to these pages.³⁸

[98] Additionally, I also find that certain portions of pages 3200 to 3201 and 3223 to 3225 qualify as advice and/or recommendation pursuant to section 7(1) of the *Act*.³⁹ Specifically, there are three lines in pages 3200 to 3201 that provide advice on specific matters related to the drafting of a lease. Pages 3223 to 3225 are comprised of questions and answers directly related to advice provided by a city employee. I accept that revealing the questions about the advice would reveal the contents of the advice provided and as a result, I find that section 7(1) applies to ten lines of information in

³⁸ I have not considered whether section 7(1) applies to page 3216 because I have already concluded that it is subject to section 6(1)(b), above.

³⁹ These portions are highlighted in red in the copy of the records provided to the city with this decision.

the email chain.⁴⁰ I also note that pages 3229 to 3231 duplicate the information on pages 3223 to 3225 and so I make the same finding for these pages regarding the application of section 7(1).

[99] Pages 3226 to 3228 are comprised of handwritten notes. The city described them as notes from a "meeting regarding the [the appellant] Lease." The city did not provide any further explanation, context or information about the notes, nor did it make any representations about why it believes section 7(1) applies to them. In the absence of specific representations, I have reviewed the notes and I accept that there are some recommendations discussed in the notes. Specifically, 27 lines in the notes clearly address recommendations regarding either steps to be taken, or not taken, or provisions to be included or excluded from the lease that was being discussed. In these 27 lines, options are discussed along with "pros and cons." I accept that these portions qualify for exemption pursuant to section 7(1) of the *Act*.⁴¹

[100] However, absent any representations explaining the context of the remaining notes, I am unable to conclude that they are advice and/or recommendations pursuant to section 7(1). My view is that these are notes from a discussion at a meeting. I am unable to accept that they are wholly comprised of advice or recommendations. As the city has not applied any other exemptions to pages 3226 to 3228 I will order it to disclose the remaining portions to the appellant.

[101] Finally, I find that four lines of an email chain on pages 3297 to 3298 contain advice and/or recommendations for the purposes of section 7(1).⁴² The four lines in the email chain include a suggested course of action. I am satisfied that revealing the remaining portions would not reveal the content of the suggested course of action. The remaining portions of these pages that are not subject to section 7(1) must be disclosed to the appellant in accordance with Appendix I.

[102] I find that none of the remaining information in the Group D records contain advice and/or recommendations, as contemplated by section 7(1) of the *Act*. The city has not made any specific representations on why section 7(1) applies to this information and so I have reviewed each of the records and will address them below.

[103] Pages 3131 to 3132 includes a request for an employee to review an attachment that was not included in the responsive records. The employee says that there are recommendations attached, but the attachment is not included in the records. As a result, no advice or recommendations would be revealed by revealing these pages.

⁴⁰ Specifically, the portions highlighted in red in the copy of the records provided to the city with this decision. I also note that the city has also claimed that section 11 applies to pages 3223 to 3225 and so I will consider the remaining information not subject to section 7(1) later in this decision.

⁴¹ The portions highlighted in red in the copy of the records provided to the city with this decision.

⁴² These portions have been highlighted in red in the copy of the records provided to the city with this decision.

[104] Pages 3212 to 3213 are comprised of an email chain where an employee asks a question and receives an answer. I previously determined that section 6(1)(b) applied to some portions of these pages.⁴³ I have considered the remaining information and although the sender says "please advise," the information sought appears to be factual. I find that section 7(1) does not apply.

[105] In pages 3247 to 3248 an outside organization responds to a request from the city. A city employee then forwards that response to another employee and comments on it. I do not accept that any of the information in this email chain can be considered advice or recommendations. The information is factual in nature. The employee comments on the response and specifies their intention to follow up. This is not the sort of information section 7(1) aims to capture and the city must disclose it to the appellant.

[106] Pages 3256 to 3259 are comprised of an email chain containing historical background information in response to a request for an explanation. The email is then forwarded to other employees with a brief summary of the information provided. I have not identified any information in the email chain that would fit the criteria for exemption in section 7(1) and as a result, I find that section does not apply.⁴⁴

[107] Pages 3270 to 3273 duplicate the majority of the information in pages 3256 to 3259. That information is then forwarded others to print and file. Section 7(1) does not apply to these pages either, for the same reasons.

[108] Page 3274 is a letter from the Airport Manager at the Oshawa Municipal Airport to the appellant. The letter is dated and signed. The city made no specific representation about why it believes section 7(1) applies to this letter. Without additional explanation, I am unable to identify any reason that section 7(1) would apply. As such, I find that it does not.⁴⁵

[109] Page 3275 is a spreadsheet containing calculations with the title, "CFA base calculation old lease, 2003-2012." As with the previous page, the city did not provide any explanation about why it applied section 7(1) of the *Act* to this information and I am not able to identify any reason why it would apply. As a result, I do not accept the city's claim that this record contains advice and/or recommendations and I find that section 7(1) does not apply.⁴⁶

[110] Pages 3276 to 3277 are comprised of an email chain that begins with a series of questions and answers, which are then forwarded to others for further action and

⁴³ As highlighted in red in the copy of the records provided to the city with this decision.

⁴⁴ The city has also claimed that section 11 applies to these pages, as well as pages 3274, 3275, 3276 to 3277, 3280 to 3282, 3284, and as such, I will consider them again later in this decision. See also, Appendix I.

⁴⁵ See footnote 39.

⁴⁶ Ibid.

comment. I have not identified any information in the email chain that could be considered advice or recommendations as contemplated by section 7(1). In my view, the information included is factual and/or explanatory. Other city employees then specify what they plan to do with that information. There is no suggested course of action that will ultimately be accepted or rejected, no policy options to be considered, nor is there any evaluative analysis that could be considered "advice." As such, I find that section 7(1) does not apply.⁴⁷

[111] Similarly, pages 3280 to 3282 and 3284 contain a question from one employee to another and an answer in response with some figures and calculations. While one of the employees asks the other what they suggest doing going forward in a certain situation, the employee who responds does not offer any advice or recommendations in response. While they do indicate what steps they will take, nothing in their response could be characterized as advice or recommendations for the purposes of section 7(1). As a result, I find that section does not apply.⁴⁸

[112] Finally, although the city included pages 3314 to 3316 in the index of records it says are subject to section 7(1), it did not identify any information in those pages as being subject to section 7(1) in the copy of records provided to the IPC. It did, however, identify each page as being subject to section 11 of the *Act*. Given my finding below about section 11, I will not also consider whether section 7(1) applies to pages 3314 to 3316.

[113] In summary, I find that section 7(1) applies to some of the records at issue in full, and others in part, as described in Appendix I to this decision under Group D. Later in this decision, I will consider whether the city has properly exercised its discretion in withholding the information subject to section 7(1) from disclosure.

ISSUE F: Does the discretionary exemption at section 11 for economic and other interests of the institution apply to the records at issue?

[114] The city submits that sections 11(d) and 11(e) apply to the Group E records listed in Appendix I. The purpose of section 11 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.⁴⁹ The relevant portions of section 11 state:

A head may refuse to disclose a record that contains,

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution; ...

[115] An institution resisting disclosure of a record on the basis of sections 11 (d) cannot simply assert that the harms mentioned in those sections are obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act*.⁵⁰

[116] The institution must show that the risk of harm is real and not just a possibility.⁵¹ However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁵²

[117] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.⁵³

[118] With regard to section 11(e), it is designed to protect an institution's position in negotiations. For it to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution.⁵⁴

[119] The IPC has defined "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme."⁵⁵ In fact, all of the terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action

⁵⁰ Orders MO-2363 and PO-2435.

⁵¹ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁵² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

⁵³ Orders MO-2363 and PO-2758.

⁵⁴ Order PO-2064.

⁵⁵ Orders P-348 and PO-2536.

with an organized structure or definition.⁵⁶

[120] The information must relate to a strategy or approach to negotiations. It is not enough for the information to simply reflect mandatory steps to follow in a negotiation.⁵⁷

[121] Section 11(e) applies to financial, commercial, labour, international or similar negotiations. It does not apply to government policy that is being developed with a view to introducing new legislation.⁵⁸

The parties' representations

[122] The city says that the Group E records contain information related to negotiations, or potential negotiations, the release of which could prove to be injurious to the financial interests of the city if subsequent negotiations on this matter took place in the future. The city also says that it is currently engaged in litigation with the appellant and that the release of this information could negatively affect its position in that litigation.

[123] The city argues that the current appeal is similar in nature to the situation in Order MO-2462. In MO-2462, the City of Toronto received a request for correspondence related to terms and conditions that were in the process of being negotiated between the city and the successful proponent in a restoration project.

[124] The records at issue in that appeal related to the City of Toronto's strategies for negotiation and it argued that the disclosure of the records would reasonably be expected to place it at a disadvantage in further negotiations. The city notes that the adjudicator in MO-2462 accepted that the terms and conditions related to the restoration project qualified for exemption pursuant to section 11(d).

[125] Regarding section 11(e), the city submits that the Group E records contain positions, plans, procedures, criteria and/or instructions distributed among city staff, which were intended to be applied to negotiations between the city and the appellant.

[126] The city says that the premature release of the Group E records related to policy decisions, including draft lease details or agreements, would be injurious to the city's position in negotiations related to future lease agreements for the use of the Oshawa Executive Airport by the appellant, or any other party.

[127] The city relies on Order MO-2548, where it says that an adjudicator concluded releasing the information at issue would provide an unfair advantage in negotiations, leading to the ability of individuals to use that information to profit at the public's

⁵⁶ Orders PO-2034 and PO-2598.

⁵⁷ Orders PO-2034 and PO-2598.

⁵⁸ Orders PO-2064 and PO-2536.

expense concerning any future financial, commercial, labour, international, or intergovernmental negotiations. The city says the circumstances in the current appeal are similar.

[128] The appellant submits that the city has not made any representations on how the disclosure of each record would impact the possible future negotiations. It says that the city makes a broad statement that the records “contain positions, plans, procedures, criteria and/or instructions” distributed among city staff. However, the appellant argues that the city does not particularize what kind of exemption is applied to each record that is being withheld.

Findings and analysis

[129] For the reasons that follow, I find that section 11(d) applies to pages 3260 to 3262, 3263 to 3265, 3276 to 3277, and 3278 to 3279 of the Group E records, as detailed in Appendix I. I find that sections 11(d) or 11(e) do not apply to any of the other Group E records and the city must disclose those records to the appellant.

Section 11(d)

[130] Each of pages 3260 to 3262, 3263 to 3265, 3276 to 3277, and 3278 to 3279 contains detailed analysis and/or calculations (or other information that I accept may be useful in commercial negotiations) about the potential valuation of a particular piece of land, and/or the lease of that land. As noted by the city, previous IPC orders have concluded that the disclosure of prospective uses and the value placed on a property by various parties could be disadvantageous when there are transactions pending.⁵⁹

[131] Based on my review of the parties’ representations, and in particular, my review of the records themselves, I find that section 11(d) applies to the information in these pages because disclosing the information could reasonably be expected to be injurious to the city’s financial interests by revealing information upon which it based its opinion on the value of the land and/or the lease.

[132] I am not satisfied, however, that the remaining Group E records contain similar information. I will briefly address each of those records now.

[133] I have already determined that some portions of pages 3223 to 3225 are subject to section 7(1) of the *Act*. As a result, I will not consider those portions again. The remaining information that is not subject to section 7(1) relates to the drafting of a report and reference a lease already in place. I am unable to conclude that the disclosure of any of this remaining information could reasonably be expected to have the effect contemplated by section 11(d) of the *Act*. As such, I find that section does not apply.

⁵⁹ Order MO-2462.

[134] Pages 3229 to 3231 are duplicates of pages 3223 to 3225. As such, I make the same finding as above.

[135] Pages 3256 to 3259 contain an email chain about a historical issue with a lease that was already in place. The city did not explain how the disclosure of this information could reasonably be expected to cause it financial harm. I am unable to identify any reason that it would. As a result, I find that section 11(d) does not apply.

[136] I make the same finding for pages 3270-3273, which duplicate pages 3256 to 3259.

[137] Next, I find that the city has not explained how the disclosure of the following information could reasonably be expected to result in the harm described in section 11(d):

- a map/diagram on page 3266,
- a portion of a zoning by-law, which is publicly available, on pages 3267 to 3269,
- a letter from the Oshawa Municipal Airport Manager to the appellant on page 3274,
- a table containing information about calculations from a previous lease with the appellant on page 3275,
- an email chain discussing a potential issue with the amount of rent charged with the previous lease with the appellant on pages 3280 to 3282.

[138] Absent further explanation from the city about why section 11(d) applies to any of this information, I am unable to conclude that it does.

Section 11(e)

[139] I find that the Group E records do not contain positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution. In my view, the information remaining at issue is too general to qualify for exemption under section 11(e), and I find that the exemption does not apply to these records.

[140] As noted in previous IPC orders, the terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action. In order for this exemption to apply, there must be some evidence of an organized structure or definition to the course of action.⁶⁰ The IPC has adopted the dictionary definition of "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or

⁶⁰ See, for example, IPC Orders MO-4031-I, Orders PO-2034 and PO-2598.

scheme".⁶¹

[141] None of the Group E records contain an organized structure or a pre-determined course of action, which is required for the section 11(e) exemption to apply. Therefore, as the city has not provided sufficient evidence to establish that the withheld information consists of or contains "positions, plans, procedures, criteria or instructions" and these are not evident in the record before me, I find that the city has not satisfied the test for exemption under section 11(e).

Summary of findings

[142] In summary, I find that section 11(d) applies to some of the records at issue in full, as described in Appendix I to this decision under Group E. Later in this decision, I will consider whether the city has properly exercised its discretion in withholding the information subject to section 11(d) from disclosure. Section 11(e) does not apply to any of the information at issue.

Issue G: Did the city exercise its discretion under sections 6(1)(b), 7(1), 11 and 12 of the *Act*? If so, should I uphold the exercise of discretion?

[143] The exemptions in sections 6(1)(b), 7(1), 11, and 12 are discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[144] Additionally, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[145] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁶² The IPC cannot, however, substitute its own discretion for that of the institution.⁶³

The parties' representations

[146] The city submits that it properly exercised its discretion under sections 7(1), 11, and 12. It says that it considered various relevant factors, including the purposes of the *Act*, the wording of the exemptions, the importance of transparency in decision-making,

⁶¹ Orders P-348 and PO-2536.

⁶² Order MO-1573.

⁶³ Section 43(2).

and its past practice with respect to similar information, among other appropriate considerations for each of sections 7(1), 11, and 12 of the *Act*.

[147] The city denies that it exercised its discretion in bad faith or for an improper purpose and submits that it did not take into consideration any irrelevant factors. The city asserts that it has made reasonable efforts to assist the appellant by providing as many of the responsive records as possible while remaining true to the spirit of the *Act*, the wording of the exemptions applied, and the interests they seek to protect.

[148] The appellant's representations regarding the city's exercise of discretion are brief. It says that the city has not provided sufficient particulars that would allow it to determine whether it properly exercised its discretion.

Findings and analysis

[149] Based on my review of the parties' representations and the nature and content of the records, I find that the city has properly exercised its discretion to withhold the records under section 7(1), 11 and 12 of the *Act*. I note that the city took into account various considerations, such as the purposes and principles of the *Act*, and the wording of the exemption and the interests it seeks to protect. I have not identified any evidence to suggest that the city exercised its discretion in bad faith or for an improper purpose. Accordingly, I uphold the city's exercise of discretion in deciding to withhold the records pursuant to the sections 7(1), 11 and 12 exemptions.

[150] However, I note that the section 6(1)(b) exemption is also discretionary. It does not appear that the city has considered the fact that it could disclose the records that I have concluded section 6(1)(b) applies to due to the permissive language "may" in that section. Given that the city specifically set out the criteria it considered when exercising its discretion to apply section 7(1), 11 and 12, I can only conclude that it has not also considered the fact that it could exercise its discretion to disclose those records, or portions of records, that I have concluded are subject to section 6(1)(b).

[151] As a result, I will order the city to review the information that I found are exempt under section 6(1)(b) and consider whether it might exercise its discretion to disclose that information to the appellant.

ORDER:

1. I uphold the city's decision regarding section 14(1) of the *Act*, in part, as described in Group A of Appendix I. The city must withhold the information highlighted in red in the copy of the records provided to it with this order.
2. I uphold the city's decision to apply section 12 of the *Act* to the records in Group B of Appendix I and confirm that it may withhold this information.

3. I uphold the city's decision regarding section 7(1) of the *Act*, in part. The city may withhold the pages in Group D of Appendix I where I specified that section 7(1) applies in full, as well as the information highlighted in red in the copy of the records provided to the city with this order.
4. I uphold the city's decision regarding section 11 of the *Act*, in part. The city may withhold the full pages in Group E of Appendix I where I specified that section 11 applies in full, as well as the information highlighted in red in the copy of the records provided to the city with this order.
5. While I uphold the city's decision that section 6(1)(b) applies to some of the records, or portions of records, listed in Group C of Appendix I, I order it to re-exercise its discretion to deny access to those pages, or portions of pages highlighted in red in the copy of the records provided to the city with this order, in accordance with the factors set out above, and to advise the appellant and this office of the result of this re-exercise of discretion, in writing no later than **November 28, 2023**.
6. If, after re-exercising its discretion, the city continues to withhold all or part of these records on the basis of any or all of the discretionary exemptions listed, I order it to provide the appellant and this office with an explanation of the basis for exercising its discretion to do so no later than **November 28, 2023**.
7. If, after re-exercising its discretion, the city decides to disclose records the pages, or portions of pages, that I concluded section 6(1)(b) applies to, set out in Order Provision 5 above, it may do so immediately.
8. The city must disclose the remaining information not subject to sections 6(1)(b), 7(1), 11, 12, and/or 14(1) of the *Act* to the appellant by **November 28, 2023**.
9. I remain seized of this appeal in order to address any outstanding issues as set out in this interim order.

Original Signed by: _____
Meganne Cameron
Adjudicator

October 30, 2023 _____

APPENDIX

Page Numbers	City's description of record	Exemption(s) Claim	Finding
GROUP A – Section 14(1) (personal information)			
3234-3235	Email chain with subject line: "FW: Flight school noise Nov 23 & Nov 24," dated November 25, 2019	Section 14(1)	Section 14(1) <u>applies in part</u> to the information highlighted in red only.
GROUP B – Section 12 (solicitor-client privilege)			
3128	Email chain with subject line: "CFA Lease," dated December 19, 2019	Section 7(1) Section 12	Section 12 <u>applies in full.</u>
3129-3130	Email chain with subject line: "RE: C.F.A. Draft Cover Letter," dated December 19, 2019	Section 7(1) Section 12	Section 12 <u>applies in full.</u>
3133-3139	Email chain with subject line: "RE: C.F.A. Lease," dated December 18, 2019	Section 7(1) Section 12	Section 12 <u>applies in full.</u>
3140-3141	Email chain with subject line: "RE: C.F.A. Lease," dated December 18, 2019	Section 12	Section 12 <u>applies in full.</u>
3142-3145	Email chain with subject line: "FW: C.F.A. Lease," dated December 17, 2019	Section 7(1) Section 12	Section 12 <u>applies in full.</u>
3202-3203	Email chain with subject line: "RE: DSC Followup," dated December 11, 2019	Section 7(1) Section 12	Section 12 <u>applies in full.</u>
3249-3250	Email chain with subject line: "RE: Canadian Flight Academy Lease," dated November 14, 2019	Section 12	Section 12 <u>applies in full.</u>
3286-3287	Email chain with subject line: "RE: Canadian Flight Academy Request for New Lease Agreement," dated October 21, 2019	Section 12	Section 12 <u>applies in full.</u>
3288-3289	Email chain with subject line: "RE: Canadian Flight Academy Request for New Lease Agreement," dated October 21, 2019	Section 12	Section 12 <u>applies in full.</u>
3290-3292	Email chain with subject line: "RE:	Section 12	Section 12 <u>applies</u>

	CFA," dated October 9, 2019		<u>in full.</u>
GROUP C – Section 6(1)(b) (closed meetings)			
3146-3199	Closed Report DS-19-230 to Development Services Committee regarding Request for a Lease Agreement between the City of Oshawa and Canadian Flight Academy Ltd. for Land at the Oshawa Executive Airport (including attachments)	Section 6(1)(b)	Section 6(1)(b) <u>applies in full report and attachments.</u>
3204-3205	Memorandum of confidential direction of Development Services Committee concerning Closed Report DS-19-230, dated December 11, 2019	Section 6(1)(b)	Section 6(1)(b) <u>applies in full.</u>
3206-3207	Email chain with subject line: "RE: CFA Motion Last Night," dated December 10, 2019	Section 6(1)(b)	Section 6(1)(b) <u>applies in full.</u>
3209-3210	Email from Warren Munro to Tom Goodeve entitled "FW: DS-19-230 Canadian Flight Academy," dated December 5, 2019	Section 6(1)(b) Section 7(1)	Section 7(1) <u>applies in full.</u> Section 6(1)(b) not considered.
3212-3213	Email chain with subject line: "RE: CFA Report," dated December 5, 2019	Section 6(1)(b) Section 7(1)	Section 6(1)(b) <u>applies in part to the information highlighted in red only.</u>
3216	Email chain with subject line "RE: CFA Report," dated December 4, 2019	Section 6(1)(b)	Section 6(1)(b) <u>applies in full.</u>
3236-3241	Handwritten notes and edits related to Closed Report DS-19-230, undated	Section 6(1)(b)	Section 6(1)(b) <u>applies in full.</u>
3246	Email chain with subject line: "RE: Canadian Flight Academy lease at Oshawa Executive Airport," dated November 17, 2019	Section 6(1)(b)	Section 6(1)(b) does not apply.
3247-3248	Email chain with subject line: "FW: Runway Use Data Request," dated November 15, 2019	Section 6(1)(b)	Section 6(1)(b) does not apply.
3296	Email chain with subject line: "Re: Adding Correspondence to Next	Section 6(1)(b)	Section 6(1)(b) does not apply.

	DSC Agenda," dated August 21, 2019		
3338-3340	Closed Report DS-10-118 to Development Services Committee regarding Proposed 20 Year Lease Agreement with Canadian Flight Academy Ltd., dated May 26, 2010	Section 6(1)(b)	Section 6(1)(b) <u>applies in full.</u>
GROUP D - Section 7(1) (Advice or recommendations)			
3128	Email chain with subject line: "CFA Lease," dated December 19, 2019	Section 7(1) Section 12	Section 12 <u>applies in full.</u> Section 7(1) not considered.
3129-3130	Email chain with subject line "RE: C.F.A. Draft Cover Letter," dated December 19, 2019	Section 7(1) Section 12	Section 12 <u>applies in full.</u> Section 7(1) not considered.
3131-3132	Email chain with subject line: "RE: Insurance Review," dated December 18, 2019	Section 7(1)	Section 7(1) does not apply.
3133-3139	Email chain with subject line: "RE: C.F.A. Lease," dated December 18, 2019	Section 7(1) Section 12	Section 12 <u>applies in full.</u> Section 7(1) not considered.
3142-3145	Email chain with subject line "FW: C.F.A. Lease," dated December 17, 2019	Section 7(1) Section 12	Section 12 <u>applies in full.</u> Section 7(1) not considered.
3200-3201	Email chain with subject line: "RE: CFA Lease," dated December 17, 2019 (cc: Tom Goodeve) (with handwritten notes)	Section 7(1)	Section 7(1) <u>applies in part to the information highlighted in red only.</u>
3202-3203	Email chain with subject line: "RE: DSC Follow-up," dated December 11, 2019	Section 7(1) Section 12	Section 12 <u>applies in full.</u> Section 7(1) not considered.
3208	Email chain with subject line: "Flight training definition," dated	Section 7(1)	Section 7(1) <u>applies in full.</u>

	December 10, 2019		
3209-3210	Email chain with subject line: "FW: DS-19-230 Canadian Flight Academy," dated December 5, 2019	Section 7(1)	Section 7(1) <u>applies in full.</u>
3212-3213	Email chain with subject line: "RE: CFA Report," dated December 5, 2019	Section 6(1)(b) Section 7(1)	Section 6(1)(b) <u>applies in part to</u> the information highlighted in red only. Section 7(1) does not apply.
3216	Email chain with subject line: "RE: CFA Report," dated December 4, 2019	Section 7(1)	Section 6(1)(b) <u>applies in full.</u> Section 7(1) not considered.
3223-3225	Email chain with subject line "FW: CFA Lease," dated November 29, 2019	Section 7(1) Section 11(1)	Section 7(1) <u>applies in part to</u> the information highlighted in red only. Section 11(1) does not apply.
3226-3228	Handwritten Notes from meeting regarding the Canadian Flight Academy Lease, dated November 28, 2019	Section 7(1)	Section 7(1) <u>applies in part to</u> the information highlighted in red only.
3229-3231 Duplicate of 3223-3225	Email chain with subject line "RE: CFA Lease," dated November 28, 2019	Section 7(1)	Section 7(1) <u>applies in part to</u> the information highlighted in red only. Section 11(1) does not apply.
3247-3248	Email chain with subject line: "FW: Runway Use Data Request," dated November 15, 2019	Section 7(1) Section 6(1)(b)	Section 7(1) does not apply. Section 6(1)(b) does not apply.

3256-3259	Email chain with subject line: "FW: CFA Lease," dated November 5, 2019	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3270-3273 Duplicate of 3256-3259	Email with subject line: "FW: RE: CFA Lease," dated October 31, 2019	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3274	Correspondence from Total Aviation and Airport Solutions to Canadian Flight Academy, dated August 17, 2012	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3275	CFA base calculation old lease, 2003-2012	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3276-3277	Email chain with subject line: "RE: Responses to Airport Budget Questions," dated October 30, 2019	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) <u>applies in full.</u>
3280-3282	Email chain with subject line "RE: Rent Rate Canadian Flight Academy," dated October 23, 2019	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3284	Email chain with subject line: "RE: Rent Rate Canadian Flight Academy," dated October 22, 2019 (with handwritten notes)	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3297-3298	Email chain with subject line: "RE: Lease Extension," dated August 2, 2019	Section 7(1)	Section 7(1) <u>applies in part</u> to the information highlighted in red only.
3314-3316	Email chain with subject line: "RE: CFA space and CBSA," dated May 6, 2014	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1)

			applies in full.
Group E - Section 11 (Economic and other interests)			
3223-3225	Email chain with subject line: "FW: CFA Lease," dated November 29, 2019	Section 7(1) Section 11(1)	Section 7(1) <u>applies in part</u> to the information highlighted in red only. Section 11(1) does not apply.
3229-3231 Duplicate of 3223-3225	Email chain with subject line: "RE: CFA Lease," dated November 28, 2019	Section 7(1) Section 11(1)	Section 7(1) <u>applies in part</u> to the information highlighted in red only. Section 11(1) does not apply.
3256-3259	Email chain with subject line: "FW: CFA Lease," dated November 5, 2019	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3260-3262	Email chain with subject line: "RE: LOV information for Canadian Flight Academy," dated November 4, 2019	Section 11(1)	Section 11(1) <u>applies in full</u> .
3263-3265	Correspondence from Coldwell Banker Commercial, dated November 1, 2019	Section 11(1)	Section 11(1) <u>applies in full</u> .
3266	Attachment No. 1 to Report DS-10-118	Section 11(1)	Section 11(1) does not apply.
3267-3269	Schedule B to Report DS-10-118 regarding Airport Zones	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3270-3273 Duplicate of 3256-3259	Email chain with subject line: "FW: RE: CFA Lease," dated October 31, 2019	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3274	Correspondence from Total	Section 7(1)	Section 7(1) does

	Aviation and Airport Solutions to Canadian Flight Academy, dated August 17, 2012	Section 11(1)	not apply. Section 11(1) does not apply.
3275	CFA base calculation old lease, 2003-2012	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3276-3277	Email from Zachary Drake to Warren Munro, Tom Goodeve, Meaghan Harrington and Laura A. Brown entitled "RE: Responses to Airport Budget Questions," dated October 30, 2019	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) applies in full.
3278-3279 Partial duplicate of 3260-3262	Email chain with subject line: "LOV information for Canadian Flight Academy," dated October 24, 2019	Section 11(1)	Section 11(1) <u>applies in full.</u>
3280-3282	Email chain with subject line: "RE: Rent Rate Canadian Flight Academy," dated October 23, 2019	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3284	Email chain with subject line: "RE: Rent Rate Canadian Flight Academy," dated October 22, 2019 (with handwritten notes)	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) does not apply.
3314-3316	Email from Stephen Wilcox to Rhonda Keenan entitled "RE: CFA space and CBSA," dated May 6, 2014 (cc: Tom Hodgins, Cindy Symons-Milroy)	Section 7(1) Section 11(1)	Section 7(1) does not apply. Section 11(1) <u>applies in full.</u>
3321-3334	Voided Lease Agreement between the City of Oshawa and Canadian Flight Academy, dated January 14, 2011, unauthorized	Section 11(1)	Section 11(1) does not apply.
3335-3337	CFA base calculations, 2003-2012	Section 11(1)	Section 11(1) does not apply.