Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4686

Appeal MA22-00283

City of Greater Sudbury

August 20, 2025

Summary: The City of Greater Sudbury received an access request for emails and communications from specified city employees and two named companies relating to the Kingsway Entertainment District. The city issued a decision granting the appellant partial access to the responsive records. The city withheld records and information that it claimed were exempt under section 14(1) (personal privacy), section 6(1)(b) (closed meeting), section 7(1) (advice and recommendations), and section 12 (solicitor-client privilege). The city also withheld some information that it claimed was excluded from the *Act* by section 52(3)3 (employment or labour relations).

In this order, the adjudicator upholds the city's claim that some information is excluded from the *Act*, but finds that other information is not excluded, and orders the city to issue an access decision for this information. The adjudicator upholds the city's claim that sections 6(1)(b), 7(1), 12 and 14(1) apply to exempt the withheld information from disclosure.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1) (definition of "personal information"), 6(1)(b), 7(1), 12, 14(1) and 52(3)3.

Orders and Investigation Reports Considered: Orders PO-3642 and PO-3778.

Cases Considered: *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC); *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125.

OVERVIEW:

[1] The City of Greater Sudbury (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to contracts and emails relating to particular development projects. Specifically, the request sought:

- Emails/communication between [two named individuals and two named companies] specific to the Kingsway Entertainment District,
- Emails/communication between [one named individual and one named company] regarding the Kingsway Entertainment District, and
- Emails/communication between [three named individuals] specific to the Kingsway Entertainment District.

[2] Prior to issuing an access decision, the city identified the records responsive to the request. It then notified third parties who may have an interest in certain records (A through J) and sought their views on disclosure. After considering the third parties' views, the city issued an access decision. It granted the requester full access to records A, B, C, D, E, F, G, and I, and partial access to records H and J, and to the remaining 51 responsive records. The city denied access to records that it claimed were excluded from the application of the *Act* under section 52(3) (employment or labour relations). It also denied access to information it claimed was exempt from disclosure under the mandatory exemption in section 14(1) (personal privacy) and the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*.

[3] The requester appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).[1] The IPC attempted mediation.

[4] The appeal was not resolved during mediation and was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry. An IPC adjudicator commenced an inquiry and invited representations from the parties. The city provided representations, which were shared in accordance with the IPC's *Code of Procedure*. The appellant did not provide representations but confirmed her interest in the appeal. The appeal was then transferred to me to complete the inquiry. I reviewed the appeal and determined that I did not need to hear further from the parties to make my decision.

[5] In this order, I uphold the city's claim that the section 6(1)(b), 7(1), 12 and 14(1) exemptions apply to the information for which they were claimed. I also uphold the city's claim that some information is excluded by the *Act* by section 52(3)3. However, I do not uphold the city's claim that the information in record 1 is excluded by

[1] One of the third parties appealed the city's decision to the IPC. That appeal was settled at mediation and the file was closed.

section 52(3)3, and I order it to issue an access decision for this information (at pages 889, 915, 918, 1311, 1314 of record 1).

RECORDS:

[6] The records at issue consist of emails, draft presentations, letters and draft letters and draft project updates. They are identified in the city's index as records 1 through 51, and records H and J.

ISSUES:

A. Does the section 52(3)3 exclusion for records relating to labour relations or employment matters apply to records 1 and 4?

B. Do records 1, H and J contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

C. Does the mandatory personal privacy exemption at section 14(1) apply to records 1, H and J?

D. Does the discretionary exemption at section 6(1)(b) relating to draft by-laws and closed meetings apply to records 1 and 3?

E. Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to records 1 and 5-51?

F. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to records 1 and 2?

G. Did the city exercise its discretion under sections 6(1)(b), 7(1) and 12? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the section 52(3)3 exclusion for records relating to labour relations or employment matters apply to Records 1 and 4?

[7] Section 52(3) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.[2]

[2] Order PO-2639.

[8] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[3] Section 52(3)3 states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> …
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[9] If section 52(3)3 applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*. If section 52(3)3 applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.[4]

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

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[11] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition;[5]
- an employee's dismissal;[6]
- a grievance under a collective agreement;[7]
- disciplinary proceedings under the *Police Services Act*;[8]

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[3] *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2015 ONCA 107 (CanLII).
[4] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509.
[5] Orders M-830 and PO-2123.
[6] Order MO-1654-I.
[7] Orders M-832 and PO-1769.
[8] Order MO-1433-F.

- a "voluntary exit program;"[9]
- a review of "workload and working relationships";[10] and
- the work of an advisory committee regarding the relationship between the government and physicians represented under the Health Care Accessibility Act.[11]

[12] The phrase "labour relations or employment-related matters" has been found not to apply in the context of:

- an organizational or operational review;[12] or
- litigation in which the institution may be found vicariously liable for the actions of its employee.[13]

[13] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[14]

Representations

[14] The city submits that the section 52(3)3 exclusion applies to parts of record 1 and all of record 4. The city notes that record 1 consists of a number of emails with corresponding attachments and includes information unrelated to the Kingsway Entertainment District (the KED), including information about labour relations and employment related matters. The city notes that, throughout the pandemic, its chief administrative officer kept members of its council apprised of various matters via email and certain emails included updates regarding city staffing changes and needs. The city refers to page 889 of record 1 as an example, noting that the sections regarding Ontario health and transit action plan were disclosed but in that same email information about labour relations and employment related matters was redacted. It notes that in other emails, sections that provided information regarding labour relations negotiations, staff shortages, staff recall difficulties, payroll matters, and staff redevelopment were redacted.

[15] The city submits that various emails and attachments that make up record 1 were created and maintained by city staff to communicate information to its council and executive leadership regarding staffing and labour relations matters. It suggests that the requirements for the application of the exclusion have been established and that

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[9] Order M-1074.
[10] Order PO-2057.
[11] *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), cited above.
[12] Orders M-941 and P-1369.
[13] Orders PO-1722, PO-1905 and *Ontario* (*Ministry of Correctional Services*) *v. Goodis*, cited above.
[14] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), cited above.

parts of record 1 were properly excluded from disclosure. The city notes that the redactions were limited and have no impact on the information related to the KED.

[16] With regard to record 4, the city fully withheld a performance planning and development package (PPD) for a specified executive director. The city submits that the PPD offers an opportunity for supervisors to provide a formal evaluation of a subordinate's work performance and set future development goals. The city confirms that the PPD is a written communication between a superior and their direct report regarding the employee's performance, development and annual merit increase. Therefore, the city submits the criteria for the application of the exclusion is met.

Analysis and finding

[17] For the following reasons, I find that most of the information in record 1 that is claimed to be excluded, is not excluded from the *Act* by section 52(3)3.

[18] The IPC has consistently taken the position that the exclusions at section 52(3)3 are record-and fact-specific. Therefore, in order to qualify for an exclusion, a record is examined as a whole. The whole-record method of analysis is also described as the "record-by-record" approach.

[19] In Order PO-3642, the Ministry of Community Safety and Correctional Services took the position that a portion of a record could qualify for exclusion, even where the record in which the portion appears is not itself excluded. The adjudicator reviewed several IPC orders where an institution attempted to exclude only part of a record under section 65(6) (the provincial equivalent to section 52(3)). She noted that in each case, "the question is whether the collection, preparation, maintenance or use of the record, as a whole, is sufficiently connected to an excluded purpose so as to remove the entire record from the scope of the Act." The adjudicator found that this approach was consistent with the language of the exclusion, which applies to records that meet the relevant criteria. She also noted that it corresponds with the Legislature's decision not to incorporate a requirement for the severance of excluded records in the *Act*. The adjudicator concluded that an exclusion cannot apply to part of a record that is not itself excluded. As a result, the adjudicator found that the exclusion did not apply to the one record before her, as a whole, and ordered the ministry to issue a decision on access to the withheld portion of the record.

[20] I adopt the approach taken in Order PO-3642. The question before me, therefore, is whether a record (as a whole) relates to employment-related matters in which the city has an interest. As the application of an exclusion must be considered in the context of the whole record, for records where the city claims the exclusion only applies in part, I will consider the application of the exclusion to the whole record in order to determine the appellant's access rights under the *Act*.

[21] In this appeal, the city has addressed a number of emails with attachments as

record 1. The city collected the bulk of the emails (including any attachments) it located in its search and categorized all of the information, which consists of 1655 pages, as record 1. Accordingly, in order to determine whether the information claimed excluded by the city is actually excluded, I have decided to review the pages or groups of pages as separate records for the purpose of my analysis. After reviewing the various emails in record 1, I confirm that the information that is withheld on pages 889, 915, 918, 1311 and 1314 is information that appears in emails that are briefing memos and daily updates each several pages in length. I will treat each of these memos and updates as separate records for the purpose of my analysis (for example, the severed information on page 889 will be assessed as one record that is a briefing memo starting at page 888 – 890).

[22] After reviewing the information that was severed in record 1 and claimed to be excluded, I find that this information on pages 889, 915, 918, 1311 and 1314 relate to labour relations while the bulk of the disclosed information in each of these memos address other matters. Although the severances on pages 889, 915, 918, 1311 and 1314 are about labour relations, I cannot conclude that each of the records, as a whole, relate to labour relations or employment-related matters. The bulk of the information in each of these emails addresses information that relates to briefing memos and daily updates and is not addressing labour relations or employment-related matters. As a result, I find that severed information in each of these records is not excluded from the *Act,* and I will order the city to issue an access decision addressing the severances on pages 889, 915, 918, 1311 and 1314.

[23] I now consider whether the withheld information at page 1412 of record 1, which is a two page email that I will consider as a separate record, and the information that was fully withheld in record 4 is excluded from the *Act* under section 52(3)3.

[24] To satisfy parts 1 and 2 of the 3-part test, set out above, the city must establish that the records were collected, prepared, maintained or used by it or on its behalf, in relation to meetings, consultations, discussions or communications. Based on the city's representations and a review of the withheld information, I am satisfied that the information in an email on page 1412 of record 1 concerns a performance planning and development package (PPD) with attachments. The information in record 4 consists of attachments to an email that are PPD agreements for a specified city employee. In its representations, the city confirms that the PPD is a written communication between a superior and their direct report regarding the employee's performance, development and annual merit increase. After reviewing all of this information, I am satisfied that the first and second part of the test in section 52(3)3 have been met because it is evident that these emails and attachments were collected and maintained by the city and they are in relation to meetings consultations and discussions concerning the PPD.

[25] To satisfy part 3 of the test, the city must also establish that the meetings consultations and discussions that took place were about labour relations or employment-related matters in which it has an interest.

[26] The phrase "employment related matters in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[15] The decision of the Divisional Court in *Ontario* (*Ministry of Correctional Services*) *v. Goodis* went on to confirm that section 65(6)3 (the provincial equivalent to section 52(3)3 must be interpreted narrowly in light of the purposes of the *Act* so as to exclude only those records that actually relate to employment matters in which the institution has an interest. The Court also noted that whether or not a particular record is employment-related would depend on an examination of the particular record.[16]

[27] After examining the records at issue I agree that the email on page 1412 of record 1 attaching a PPD, and the entirety of record 4 which consists of a PPD documents in draft form, concern meetings, consultations and discussions about employment-related information in which the city has an interest. Therefore part 3 of the test is met.

[28] As I have found that all three parts of the test have been met, I find that the email at page 1412 of record 1 and the PPDs in record 4 are excluded from the *Act* by section 52(3)3 and I uphold the city's decision for this information.

Issue B: Do Records 1, H and J contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[29] In order to determine whether the withheld information in records 1, H and J is exempt under the personal privacy exemption in section 14(1), I must first determine whether it qualifies as personal information. Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.

[30] Section 2(1) of the *Act* provides a non-exhaustive list of examples of personal information:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

[15] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), 2001 CanLII 8582 (ON CA), application for leave to appeal to the Supreme Court of Canada dismissed June 13, 2002
[16] 2008 CanLII 2603 (ON SCDC).

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Representations and finding

[31] The city states that most of the withheld information is personal information such as the names and contact information of individuals who are private citizens, along with their employment details, personal travel plans, and opinions about identifiable individuals. The city submits that its redactions were limited and served the purpose of obscuring the identity of private citizens while providing access to information related to the KED.

[32] After reviewing the information at issue, I agree with the city that it qualifies as personal information. It consists of individuals' education history, addresses, phone numbers, email addresses, and personal views, which qualify as personal information under paragraphs (a), (b), (d), (e) and (g) of the definition of that term in section 2(1). It also consists of an individual's name that appears with other personal information relating to that individual that qualifies as personal information under paragraph (h) of the definition. I find that records 1, H and J contain personal information of several individuals.

Issue C: Does the mandatory personal privacy exemption at section 14(1) apply to Records 1, H and J?

[33] One of the purposes of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions. This general rule is subject to a number of exceptions set out in paragraphs (a) to (f) of section 14(1).

[34] If any of the five exceptions covered in sections 14(1)(a) to (e) exists, the city must disclose the information. The parties do not submit that any of the section 14(1)(a) to (e) exceptions applies, and I find that none does.[17]

[35] The section 14(1)(f) exception requires the city to disclose another individual's personal information to a requester only if this would not be an "unjustified invasion of personal privacy." Sections 14(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy.

[36] Section 14(2) lists factors that may be relevant to determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) identifies situations in which disclosure is not an unjustified invasion of personal privacy.

[37] Sections 14(3)(a) to (h) should generally be considered first.[18] If the personal information being requested does not fit within any presumption under section 14(3), one must next consider the factors set out in section 14(2) to determine whether or not disclosure would be an unjustified invasion of personal privacy. The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).[19] There is no suggestion before me that the situations in section 14(4) are present, or that any of the presumptions in section 14(3) applies. I find that sections 14(3) and (4) do not apply to the appeal.

[38] The city submits that its redactions were limited and served the purpose of obscuring the identity of private citizens while still providing access to information related to the KED. The city submits that there are no factors under section 14(2) that support disclosure of the withheld personal information. It suggests that disclosure is not desirable for public scrutiny because the personal information at issue has little bearing on the KED. It also points to measures that were instituted to address the need for public scrutiny of the KED; particularly, the public engagement campaign and open public meeting sessions. The city argues that withholding of the personal information under the mandatory exemption is appropriate and does not obfuscate information

[17] As noted, the appellant did not provide representations in this appeal.
[18] If any of the section 14(3) presumptions are found to apply, they cannot be rebutted by the factors in section 14(2) for the purposes of deciding whether the section 14(1) exemption has been established.
[19] Order P-99.

related to the KED.

[39] After reviewing the withheld personal information, I am unable to conclude that any of the factors in section 14(2) favouring disclosure applies. The withheld information consists of personal emails, phone numbers, addresses, educational background, personal views of the individual, and an individual's name that appears with other personal information relating to that individual that if disclosed would reveal other personal information about that individual. As noted, the appellant provided no representations and there is no suggestion before me that the section 14(1) exemption does not apply to the withheld information. I find that the withheld information is exempt under the personal privacy exemption because its disclosure would constitute an unjustified invasion of personal privacy of identifiable individuals who contacted the city.

[40] I uphold the city's decision to withhold the information under section 14(1).

Issue D: Does the discretionary exemption at section 6(1)(b) relating to draft by-laws and closed meetings apply to Records 1 and 3?

[41] Section 6 protects certain records relating to a municipal institution's legislative function or closed meetings of a council, board, commission or other body. It reads:

> 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.

[42] 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.[20]

[43] The city submits that the information at issue relates to three closed meeting that it lawfully held under section 239 of the *Municipal Act, 2001* (the *Municipal Act*). It explains that one of the closed meetings was held pursuant to the *Municipal Act*, sections 239(2)(a), (c), (d) and (k), and the other two closed meetings were held pursuant to section 239(2)(b) of the *Municipal Act.* The city asserts that it provided public notice for those meetings as it was required to do.

[20] Orders M-64, M-102 and MO-1248.

[44] The city states that record 3, which consists of several reports (drafts and final versions) and the emails circulating them, relate to the three closed meetings. It states that disclosing record 3 would reveal the substance of the closed meeting deliberations as the reports at issue were prepared for the purpose of informing and guiding the discussion.

[45] The city notes that it is common practice with matters presented to council or its committees that its staff prepare reports for the benefit of its members. It states that the draft reports were sent by email to various staff members for review and input and once finalized, they were sent to a limited number of staff and council members. The city submits that the reports aim to inform council, provide recommendations for action and serve as the foundation for the meeting discussions.

[46] The city submits that unless a closed session is called during an open meeting or an additional item is added immediately prior to a scheduled closed session, which is permitted in accordance with section 11.01 of the city's Procedure By-law, the city will provide a general synopsis of the matters scheduled for a closed session on the agenda face of the corresponding open meeting agenda. It notes that following this standard practice, a notice is provided to the public for each closed session by including notes on the public agendas which are published on the city's website. The city refers to the three closed sessions noting that prior to moving into each respective closed session, a resolution was carried by a majority of members to move into closed sessions to deal with the matters as outlined in the agenda.

[47] The city submits that since council was permitted to meet in closed session in accordance with the *Municipal Act*, and the reports at issue were prepared in order to inform and guide the discussions of members, it applied section 6(1)(b) to the records to deny access to them.

[48] The city notes that record 1 contains emails between staff where portions were withheld because they contained closed meeting material. It states that it applied limited redactions to the information with the sole objective of obscuring the portions that would reveal the content of reports submitted for consideration and discussion during a closed meeting. The city submits that the withheld information either speaks to content envisioned for inclusion in closed meeting reports or reiterate the discussions held in closed meetings, and disclosure of it would reveal the substance of deliberations of a lawfully held closed meeting.

[49] The city also submits that none of the exceptions set out in section 6(2) applies to the withheld information: the matters were not also part of an open meeting, and a vote was not held in a public forum on the matters discussed by council in the closed meeting.

Analysis and finding

[50] The records the city withheld under section 6(1)(b) include portions of emails that reveal the content of reports that were discussed in a closed meeting (record 1), and the entire reports and/or drafts of the reports along with circulating emails (record 3).

Part 1: the city's council held a meeting

[51] The first part of the test for exemption under section 6(1)(b) requires the city to establish that a meeting was held.[21] The records support the city's position that its council held a meeting on three specified dates. Therefore, I find that the first part of the three part test is met.

Part 2: a statute authorizes the holding of the meeting in the absence of the public.

[52] The second part of the test requires the city to establish that the meetings were properly held *in camera* (in the absence of the public) by identifying the relevant statutory authority to support it. In determining whether there was statutory authority to hold a meeting in camera under part 2 of the test, I must consider whether the purpose of the meeting was to deal with the specific subject matter identified in the statute authorizing the holding of a closed meeting.

[53] Under section 239(1) of the *Municipal Act*, all meetings must be open to the public unless they fall within the prescribed exceptions. Section 239(2) of the *Municipal Act* sets out the exceptions that authorize the convening of a meeting in the absence of the public.

[54] I have reviewed the information withheld under this section which, as noted, includes reports and draft reports along with emails discussing the reports and other emails addressing information that was discussed in a closed meeting session. The public notice that was given for the closed meeting of July 14, 2021, noted that the closed meeting was pursuant to the *Municipal Act*, sections 239(2)(a), (c), (d) and (k) and sets out a summary of the closed session report, at issue, as follows:

> Resolution to move to Closed Session to deal with one (1) Security of Municipal Property item regarding the City's information technology systems and data, one (1) Labour Relations or Employee Negotiations item regarding negotiations with ONA and one (1) Acquisition or Disposition of Land / Position, Plan or Instructions to be Applied to Negotiations item

[55] After reviewing the withheld information, I agree that the city's council was

[21] https://pub-greatersudbury.escribemeetings.com/Meeting.aspx?Id=b92bf0e4-6ba2-41fb-85ad-9f7d06e39a51&Agenda=Agenda&lang=English

authorized to discuss these matters in a closed meeting. Section 239(2)(a) of the *Municipal Act* specifically authorizes that a meeting may be closed to the public if the matter being considered is security of the property of the municipality. Section 239(2)(c) authorizes that a meeting may be closed if the subject matter being considered is a proposed or pending acquisition of land by the municipality. Section 239(2)(d) authorizes that a meeting may be closed if the subject matter deals with labour relations or employee negotiations. Finally, section 239(2)(k) authorizes that a meeting may be closed if a position, plan, procedure, criteria or instruction to be applied to any negotiations on behalf of the municipality is being considered.

[56] The public notices that were given for the closed meetings of February 24, 2021, and October 13, 2020, note that the closed meetings were pursuant to the *Municipal Act*, section 239(2)(b) and set out a summary of the closed session report, at issue, as follows:

> Resolution to move to Closed Session to deal with two (2) Personal Matters (Identifiable Individual(s)) items regarding a performance review and regarding employment matters

[57] After reviewing the content of the portion of the emails that were withheld in record 1 and the reports and drafts of the reports fully withheld in record 3, I agree that the city's council was authorized to discuss the matters in a closed meeting. Section 239(2)(b) of the *Municipal Act*, specifically authorizes that a meeting may be closed to the public if the subject matter being considered is personal matters about an identifiable individual, including municipal employees.

[58] In conclusion, I find that the municipality was authorized under the *Municipal Act*, to hold the meetings of October 13, 2020, February 24, 2021, and July 14, 2021, *in* camera.

Part 3: Disclosure of the records would reveal the actual substance of the deliberations of the meetings

[59] With respect to the third requirement set out above, the wording of the provision and previous IPC decisions establishes that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the records would reveal the actual substance of deliberations that took place at the closed meeting, not only the subject of the deliberations.

[60] The city submits that the withheld information would reveal the actual substance of the deliberations of the meeting as the records contain information revealing the nature of the issues discussed.

[61] After reviewing the portions of the emails that were withheld under section 6(1)(b) in record 1 and the reports and drafts of reports that were fully withheld in

record 3, I find that disclosure of the withheld information would reveal the substance of deliberations that took place at the closed meetings. The information in the records contains more than a discussion of the subject of the deliberations; it contains detailed information about the subject and provides insight into council's deliberations in the closed meetings.

[62] There is no suggestion before me that any of the information at issue – the subject-matter of the deliberations – has been considered in an open meeting, and the city specifically states that it has not. Therefore, I find that none of the exceptions in section 6(2) applies. As a result, I uphold the city's decision and find that the information is exempt under section 6(1)(b), subject to my consideration of the city's exercise of discretion, below.

Issue E: Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to Records 1 and 5-51?

[63] Section 7(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[22]

[64] The city notes that the information it withheld under section 7(1) includes information about a suggested course of action for a closed session report (record 1) and draft reports, messaging and representations that contain advice and recommendations of its staff (records 5 to 51).

[65] The city submits that when drafting reports, its staff bears the responsibility of deciding what information to include, how it should be presented and in what context. The city notes that its staff consult with one another for guidance and feedback. The city states that it encourages collaboration amongst its staff to yield better results in its messaging content for updates and responses to inquiries.

[66] The city indicates that it claimed the section 7(1) exemption for this collaborative process. It notes that the core intention of the exemption is to ensure that a person employed or retained by an institution may freely and frankly provide advice and make recommendations.

[67] The city submits that each record is clearly identifiable as a draft as each includes a combination of track changes, highlighted information, incomplete sections and comments. The city refers to Order PO-3778 where the adjudicator agreed that the inclusion of track change revisions, editorial changes, comments and recommendations were properly exempt under section 13(1) (the provincial equivalent of section 7(1)). The city submits that none of the exceptions outlined in section 7(2) or 7(3) applies.

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

Analysis and finding

[68] For the reasons that follow, I find that the section 7(1) exemption applies to the withheld information.

[69] The Ontario Court of Appeal in *Ontario* (*Finance*) *v. Ontario* (*Information and Privacy Commissioner*)[23] held that the section 7(1) exemption aims to preserve a neutral public service by ensuring that people employed or retained by the institution are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. As noted, advice involves an evaluative analysis of information and is broader than recommendations, which refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred. Neither "advice" nor "recommendations" includes "objective information" or factual material.

[70] In Order PO-3778, referenced by the city, the adjudicator found that the inclusion of track change revisions, editorial changes and comments constituted recommendations and were properly exempt under section 13(1) (the provincial equivalent of section 7(1)). I agree with this approach and adopt it for the purpose of this appeal.

[71] The information the city withheld under section 7(1) in record 1 (page 1455) is part of an email, and records 5 – 51, which the city withheld in full, consist of drafts of presentations, reports and letters. After reviewing the information, I find that the withheld information in record 1 contains a course of suggested action that can be either accepted or rejected and constitutes a recommendation. I also find that records 5 – 51, which are draft documents, contain track changes, comments and highlighted information, and constitute recommendations.

[72] I uphold the city's exemption claim under section 7(1) for all of the withheld information and records, subject to my consideration of the city's exercise of discretion, below.

[73] I have also considered whether the mandatory exceptions to the section 7(1) exemption in section 7(2) apply to the information I have found exempt. Based on my review, I find that none of the exceptions in section 7(2) applies to the information I have found to be exempt.

Issue F: Does the discretionary solicitor-client privilege exemption at section 12 of the Act apply to Records 1 and 2?

[74] 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

[23] 2012 ONCA 125.

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

[75] 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.

[76] Branch 1, common law solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

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.[24] 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.[25] 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.[26] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[27]

[77] 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.[28] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[29]

[78] Common law litigation privilege is based on the need to protect the adversarial process by ensuring that legal counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[30] The litigation must be ongoing or reasonably

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[24] Orders PO-2441, MO-2166 and MO-1925.
[25] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[26] *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.
[27] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[28] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[29] *Kitchener* (*City*) *v. Ontario* (*Information and Privacy Commissioner*), 2012 ONSC 3496 (Div. Ct.)
[30] *Blank v. Canada* (*Minister of Justice*) (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

contemplated for the common law litigation privilege to apply.[31] Litigation privilege does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[32]

[79] Under the common law, a client may waive solicitor-client privilege. An express waiver of privilege happens where the client knows of the existence of the privilege and voluntarily demonstrates an intention to waive the privilege.[33] There may also be an implied waiver of solicitor-client privilege where fairness requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.[34] Generally, disclosure to outsiders of privileged information is a waiver of privilege.[35] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[36]

[80] The branch 2 exemption is a statutory privilege that applies where the records were "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." The statutory and common law privileges, although not identical, exist for similar reasons. Like the common law solicitor-client communication privilege, statutory solicitor-client communication privilege covers records prepared for use in giving legal advice.

[81] Statutory litigation privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[37] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[38] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[39]

Representations

[82] The city claims that the records qualify as solicitor-client communication privileged under Branches 1 and 2, and litigation privileged under Branch 2. The city

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[31] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada* (*Minister of Justice*), cited above.
[32] *Ontario* (*Ministry of Correctional Service*) *v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[33] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[34] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[35] 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.).
[36] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[37] See *Ontario* (*Attorney General*) *v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[38] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[39] *Ontario* (*Attorney General*) *v. Ontario (Information and Privacy Commission, Inquiry Officer*), cited above.

does not provide a copy of the records. Instead, it addresses the records in its representations, including in portions that were kept confidential from the appellant, and in an affidavit sworn by the city solicitor.

[83] The city states that the KED was a large scale project that included a partnership between it and the private sector with legal implications that are significant and diverse. It submits that it used in-house legal counsel to draft agreements, consult on risk mitigation and provide legal guidance. Additionally, it submits that it used external counsel to represent the city on multiple appeals filed with the Ontario Land Tribunal, and a separate application for judicial review of council's decision regarding the KED before the Divisional Court.

[84] The city submits that as a result of the complexities of the KED portfolio, several emails and corresponding attachments containing privileged information were generated, and these are all exempt from disclosure under section 12. The city notes that a significant portion of the withheld emails consists of communications between staff and a city solicitor regarding matters relating to the KED. It submits that legal counsel, being privy to information originating from various departments, would interject with instructions and/or their emails would be forwarded to other city staff as guidance.

[85] The city claims that litigation privilege applies to a portion of the withheld information that includes communications regarding the Ontario Land Tribunal appeals. It notes that much of the same information includes consultation with city solicitors to which communication privilege may also be applied. It submits that records prepared by non-legal staff that address litigation matters are captured by the exemption as these records fall within the zone of privacy intended to be protected by litigation privilege.

[86] The city states that privilege was not expressly or tacitly waived. It submits that it takes the utmost precautions to protect its solicitor-client privileged information and has not acted in a manner inconsistent with the privilege. The city submits that section 12 establishes a "class privilege" that applies to the records. It argues that, as a result, it is neither appropriate nor required to sever any part of these records and disclose them.

[87] The city also provides an affidavit with its representations to address its section 12 claim. The affidavit is sworn by the city solicitor and clerk for the city. The affiant attests that he reviewed all the records and is satisfied that they reflect privileged communications between city employees and legal services staff or were created in contemplation of, or for use in, litigation. The affiant attests that he has personal knowledge of the legal issues contained in the records as a number of the communications are between himself and various other legal counsel for the city. He attests that the nature of the records falls into the following categories:

- the records contain confidential communication between the city solicitor and city employees for the purpose of obtaining legal advice
- the records contain a summary of legal advice provided by a solicitor
- the records contain information that was provided to the solicitor as part of a continuum of communication between the city solicitor and client to ensure the solicitor is apprised of all information when legal advice is sought, and
- the records contain information that was created in contemplation of or for use in litigation.

Analysis and finding

[88] For the reasons that follow, I find that both the statutory communication privilege and litigation privilege under Branch 2 apply to exempt the records under section 12.

[89] Having considered the city's affidavit and its representations, including confidential portions that were not shared with the appellant, I am satisfied that the records represent confidential communication between the city solicitor and city employees for the purpose of obtaining and giving legal advice. I accept the affidavit evidence of the city solicitor and clerk, and I consider it sufficient to uphold the city's claim of the solicitor-client exemption for the withheld records that it addresses.

[90] Also, given the various proceedings with the Ontario Land Tribunal referenced by the city, and the judicial review at the Divisional Court concerning the KED, I am satisfied that litigation privilege would apply to much of this same information in the emails at issue. I accept that the emails are privileged as they were created for the dominant purpose of addressing the various proceedings. As noted by the city, even though the tribunal proceedings have concluded, the statutory litigation privilege does not expire.

[91] I also find that the city did not waive any privilege in the records at issue. I accept that the city employs precautions to protect its solicitor-client privileged information, and I have not been presented with any evidence to suggest that it has waived this privilege.

[92] As a result, I uphold the city's claim that the withheld information is exempt by section 12, subject to my consideration of the city's exercise of discretion, below.

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

[93] The section 6(1)(b), 7(1) and 12 exemptions are discretionary, meaning that the city can decide to disclose information even if the information qualifies for exemption.

The city must exercise its discretion taking relevant considerations into account. These include the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected. Also relevant are:

- the words of the exemption and the interests it seeks to protect,
- whether the requester is seeking their own personal information,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

[94] The city submits that in exercising its discretion under these exemptions it weighed the following considerations:

- Final versions of draft reports and presentations for council and its committees are publicly available.
- A significant amount of information regarding the KED is already available through public resources.
- Section 6(1)(b) upholds the integrity of section 239 of the *Municipal Act* regarding closed meeting matters. Section 7(1) creates a space which permits staff to explore various ideas and solutions in a collaborative fashion. Section 12 recognizes that solicitor-client privilege and litigation privilege are cornerstones of Canada's legal system.
- That the appellant is not seeking her own personal information.
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requestor, or any affected person. The city notes that at the time of the request, the KED was marred by a number of appeals

before what is now the OLT in addition to an application for judicial review. It states that staff were also navigating the various aspects of the project with many reports and presentations being prepared for council and Committees. The city states that when applying the discretionary exemptions, it was mindful of the overall community interest in the project while recognizing that the right of access is tempered by the exemptions outlined in the *Act.*

- The age of the information, as the city notes that the records are not historical or archival in nature and they related to an ongoing project at the time of the request.

Finding

[95] After reviewing the records and the representations of the city, I uphold the city's exercise of discretion.

[96] I find that the city exercised its discretion under section 12. I find that the city considered relevant factors in exercising its discretion, including the need to allow for the giving and receiving of confidential legal advice and whether disclosure to the appellant would result in the possible waiver of solicitor-client privilege over confidential communications between client and counsel.

[97] I am satisfied that it exercised its discretion in choosing to withhold the records under section 6(1)(b) and section 7(1). After reviewing the factors the city considered when making its decision, I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. The city's representations demonstrate that it took relevant factors into account when exercising its discretion and did not consider irrelevant factors. In particular, I am satisfied that when the city considered applying the section 6(1)(b) and section 7(1) exemptions to the records, it properly considered the purpose of the exemptions, and the interests sought to be protected. Considering the information in the records, I find that the city has not exercised its discretion in bad faith.

[98] Accordingly, I uphold the city's exercise of discretion.

ORDER:

1. I do not uphold the city's claim of the section 52(3)3 exclusion to some of the information in record 1 and order the city to provide an access decision to the appellant concerning the severances on pages 889, 915, 918, 1311 and 1314 of record 1 within 30 days from the date of this order.

2. I uphold the remainder of the city's decision.

Original Signed by: August 20, 2025

Alec Fadel
Adjudicator