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Order F15-52

CITY OF VANCOUVER

Hamish Flanagan
Adjudicator

September 24, 2015

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Summary: The applicant requested all correspondence and minutes naming himself and certain City Of Vancouver employees relating to the applicant's role with various Community Centre Associations. The City disclosed some information but withheld some emails under ss. 13 (advice or recommendations), 14 (solicitor client privilege) and 22 (unreasonable invasion of personal privacy) of FIPPA. The adjudicator authorized the City to withhold all of the information withheld under s. 14 and most of the information withheld under s. 13. The adjudicator also determined that the City was required to refuse to disclose almost all of the information withheld under s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 14 and 22.

Authorities Considered: Order F14-38, 2014 BCIPC 41 (CanLII); Order F12-02, 2012 BCIPC 2 (CanLII); Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F06-16, 2006 CanLII 25576 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC).

Cases Considered: *R. v. B.*, 1995 CanLII 2007 (BC SC); *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31; *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88; *Jacobson v. Atlas Copco Canada Inc.,* 2015 ONSC 4; *John Doe v. Ontario,* 2014 SCC 36; *College of Physicians of B.C. v. British Columbia,* 2002 BCCA 665 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association,* 2013 BCSC 2025 (CanLII); *John Doe v. Ministry of Finance,* 2014 SCC 36 (CanLII); *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA).

INTRODUCTION

[1] The applicant requested records naming himself and certain City of Vancouver ("City") employees related to the applicant's role with various community centre associations in Vancouver. The City disclosed some information from the 61 pages of responsive records to the applicant, but withheld some information under ss. 13 (advice or recommendations), 14 (solicitor client privilege) and 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the City's decision. The City disclosed additional information during OIPC mediation. The applicant requested that the OIPC convene an inquiry regarding the information the City continued to withhold.

ISSUES

[3] The issues in this inquiry are:

1. Is the City authorized to refuse access to information because it is subject to solicitor client privilege under s. 14 of FIPPA?
2. Is the City authorized to refuse access to information because it discloses policy advice or recommendations under s. 13 of FIPPA?
3. Is the City required to refuse access to information because disclosure of the information would be an unreasonable invasion of a third party's personal privacy under s. 22 of FIPPA?

[4] Section 57 of FIPPA establishes the burden of proof in an inquiry. At an inquiry into a decision to refuse an applicant access to all or part of a record, under ss. 13 or 14, it is up to the head of the public body to prove that the applicant has no right of access to the record or part. However, if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy under s. 22 of FIPPA.

DISCUSSION

[5] **Background**—The applicant works as a consultant with various community centre associations, which are involved in the governance and administration of community centres in Vancouver. The community centres are owned by the City and are under the exclusive possession, jurisdiction and

control of the Vancouver Board of Parks and Recreation (commonly known as the Parks Board) pursuant to the Vancouver Charter.[1]

[6] The applicant was the subject of complaints by City employees[2] arising from his consulting role. The applicant has commenced a defamation action in relation to these complaints.

[7] **Records in Issue**—The records in issue are emails. The emails are between City employees regarding operational issues at community centres and the City's relationship and interactions with community centre associations.

Section 14

[8] The City has applied s. 14 to some information.[3] Section 14 states:

> **Legal advice**
>
> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[9] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal advice privilege and litigation privilege. The City refers at various points in its submissions to both kinds of privilege, though its submissions mostly refer to legal advice privilege. I will therefore first consider legal advice privilege, and if necessary then consider litigation privilege. The applicant does not specifically address s. 14 in his submissions.

[10] Regarding legal advice privilege, the City accepts the following test set out in *R. v. B.*,[4] which has been adopted in previous Orders:[5]

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

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[1] [SBC 1953] c.55. City initial submission at para. 1.
[2] The City's evidence is that individuals who work for the Parks Board are City employees.
[3] At pp. 21-24, 25, 27-32, 34, 36-37 and 43-44 of the records.
[4] *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.
[5] See for example Order F14-38, 2014 BCIPC 41 at para. 46.

> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.

[11] I can only describe the records over which the City has claimed privilege[6] in general terms because the portion of the City's submission that describes the records in detail, and why the City says the records satisfy the above test, was received *in camera*.

[12] The first two conditions for determining legal advice privilege are clearly met. The records are written communications in the form of emails. The emails were only between City employees, so were of a confidential character.

[13] The third condition is that the communications must be between a client and a legal advisor. The emails at issue are communications between an in-house lawyer employed by the City and other City employees. The Supreme Court of Canada in *Pritchard v. Ontario (Human Rights Commission)* stated that solicitor client privilege may apply when an in-house lawyer is providing legal advice to their employer client.[7] One email at page 43 is an earlier email communication between employees that is being forwarded on to the in-house lawyer. In the context in which it appears, the email was being forwarded by an employee to a lawyer, so qualifies as communication between a client and a legal advisor.[8]

[14] The fourth condition for solicitor client privilege is that the communication must be directly related to the seeking, formulating, or giving of legal advice. This generally includes factual information requested by and provided to legal counsel for the purpose of obtaining legal advice.[9] I note that factual information provided must be for the purpose of obtaining legal advice, it is not sufficient that the information is supplied just for the purposes of providing information.[10] I find that the affidavit evidence is sufficient to establish that the withheld emails, even where they contain only factual information, occur in a context where they were directly related to the seeking, formulating, or giving of legal advice.

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[6] At pp. 21-24, 29-32, and 34 (information at pp. 29-32 and 34 mostly comprises a duplicate of information at pp. 21-24); 25, 27-28, 36-37 and 43-44.

[7] *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31 at para. 19 citing *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 49.

[8] That email will exist independently of the record in which it appears on p. 43, and s. 14 may not apply to it in that independent context as it will not be between a lawyer and a client. However, the motive of the applicant's request as disclosed in his submission suggests that he would have little interest in the email as an independent record so I will not consider this matter further.

[9] *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88.

[10] See for example *Jacobson v. Atlas Copco Canada Inc.,* 2015 ONSC 4 where information was not found to be supplied for the purpose of the lawyer providing advice.

[15] In summary, I find that all of the information withheld under s. 14[11] is subject to legal advice privilege and that the City is authorized to withhold it under s. 14 of FIPPA. I therefore do not need to consider whether litigation privilege applies to any of the records.

[16] Finally in relation to the records withheld under s. 14, while I cannot describe the records in any detail because the City's description of them was received *in camera*, I observe for the benefit of the applicant that some of the records withheld under s. 14 are not related to what I discern from the applicant's brief submission is his primary motivation for his request, (i.e., to obtain information relating to an incident in which he has filed a defamation action against the City and one of its employees).

[17] **Policy Advice or Recommendations**—Some of the contents of emails withheld under s. 13 were also withheld under s.14. As I have found all of the information withheld under s. 14 can be withheld under that section I will not consider whether s. 13 also applies to that information.

[18] Section 13(1) states:

> Policy advice, recommendations or draft regulations
>
> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

Purpose and scope of s. 13(1)

[19] The purpose of s. 13(1) is to allow for the full and frank discussion of advice or recommendations on a proposed course of action by a public body. This helps to protect public bodies from the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny. In *John Doe v. Ontario*,[12] the Supreme Court of Canada, reiterated this point:

> Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada... The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or

[11] At pp. 21-24, 25, 27-32, 34, 36-37 and 43-44 of the records.
[12] 2014 SCC 36 at para. 45.

> perceived partisan considerations into public servants' participation in the decision-making process.

[20] Section 13(1) relates to "advice or recommendations". Previous orders have also found that a public body is authorized to refuse access to information that would allow an individual to draw accurate inferences about advice or recommendations.[13] In addition, the British Columbia Court of Appeal stated in *College of Physicians of B.C. v. British Columbia* that "advice" is not necessarily limited to words offered as a recommendation about future action. As Levine J.A. states in *College of Physicians,* "advice" includes "expert opinion on matters of fact on which a public body must make a decision for future action."[14]

[21] Section 13(1) can encompass information about policy issues, possible options for changes to policies and considerations for these various options, and discussions about implications and possible impacts of different options.[15] Further, in *John Doe v. Ministry of Finance*[16] the Supreme Court of Canada determined that the word "advice" in Ontario's FIPPA,[17] that is equivalent to s. 13(1) of BC's FIPPA, includes policy options, whether or not the advice is communicated to anyone.

[22] The process for determining whether s. 13 of FIPPA applies to information involves two stages. The first stage is to determine whether the disclosure of the information "would reveal advice or recommendations developed by or for a public body or a minister" in accordance with s. 13(1). If it does, it is necessary to consider whether the information at issue falls within any of the categories of information listed in s. 13(2) of FIPPA, as a public body must not refuse to disclose information under s. 13(1) if a provision in s. 13(2) applies.

Position of the Parties

[23] The City submits that the emails it is withholding under s. 13 contain advice and recommendations between City employees relating to various matters involving the applicant or other third parties, and that the information does not fall within any of the exceptions listed in s. 13(2). The applicant's submission does not address s. 13.

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[13] This was also at the heart of the analysis in *Insurance Corporation of British Columbia v. Automotive Retailers Association,* 2013 BCSC 2025 (CanLII). See paras. 52 and 66.
[14] 2002 BCCA 665 (CanLII) at para. 113.
[15] See Order F12-02, 2012 BCIPC 2 (CanLII), Order F10-15, 2010 BCIPC 24 (CanLII) at para. 23, Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 102-127, Order F06-16, 2006 CanLII 25576 (BC IPC) at para. 48, *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), and *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).
[16] 2014 SCC 36 (CanLII).
[17] Section 13(1) of Ontario's *Freedom of Information and Protection of Privacy Act*.

Application of s. 13(1) to the records

[24] Based on my review of the records and the City's submissions, I find that some of the information withheld under s. 13 discloses advice or recommendations provided by City employees. The information withheld under s. 13 on page 4 of the records reveals advice and recommendations between employees regarding future communication with the applicant. The information withheld under s. 13 on page 10 (duplicated on page 12) of the records reveals advice following an incident involving a City employee and the applicant. The last sentence withheld under s. 13 on page 16 reveals advice to a City employee from a fellow employee.

[25] The remaining information withheld under s. 13 does not comprise advice or recommendations. For instance, the information on page 5, which was withheld under s. 13, comprises either instructions from one employee to a subordinate employee,[18] or is factual information in the form of a "heads up" or information-sharing between employees. It does not contain or allow an accurate inference regarding advice or recommendations.[19] I observe that one employee describes the withheld information as "information" as opposed to advice.

[26] The first two sentences on page 12 are withheld under s. 13 but I find that they are part of a regular exchange of communication between employees that do not contain or allow an accurate inference regarding advice or recommendations. The third sentence on page 12 is a communication from one employee to subordinate employees in the nature of a "heads up," informing the subordinates about an action the employee is going to take. It does not disclose or allow an accurate inference about advice or recommendations.

[27] Except for the last sentence on page 16 as discussed above, the remaining information withheld under s. 13 on page 16 is a "heads up" or information update to other employees. It informs, rather than provides advice or recommendations.

[28] I observe that the City's severing of the records does not always accord with the distinction between the provision of advice and the mere act of providing a "heads up". An exchange of information that informs, or alerts a fellow employee, especially a subordinate, about an action or step that another employee intends to or has taken, is a "heads up" and does not fall within s. 13 of FIPPA. Advice is typically given in relation to a decision that is to be made, whereas a "heads up" is more in the nature of informing. Information that informs which is integral to providing advice can fall within the meaning of advice or recommendations, but merely advising a fellow employee, for example, of an action that has been taken, is typically not advice.

[18] First redaction on p. 5 of the records.
[19] Second and third redaction on p. 5 of the records.

Application of s. 13(2) to the records

[29] I am satisfied from my review of the records that s. 13(2) does not apply to any of the information that comprises advice or recommendations under s. 13(1).[20]

[30] **Disclosure Harmful to Personal Privacy**— Section 22(1) states:

> The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[31] I will now consider the information the City withheld under s. 22 that I have not already found can be withheld under ss. 14 or 13.[21]

[32] Numerous orders have considered the analytical approach to s. 22.[22] The public body must first determine if the information in dispute is personal information because s. 22 only applies to "personal information" of third parties as defined by FIPPA. If the information is personal information, the public body must consider whether the information meets the criteria identified in s. 22(4). If s. 22(4) applies, s. 22 does not require the public body to refuse to disclose the information. If s. 22(4) does not apply, the public body must determine whether disclosure of the information falls within s. 22(3). If s. 22(3) applies, disclosure is presumed to be an unreasonable invasion of third party privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information at issue would be an unreasonable invasion of a third party's personal privacy.

Personal Information

[33] Section 22 of FIPPA only applies to "personal information", which is recorded information about an identifiable individual other than contact information. Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual".[23]

[34] The information withheld under s. 22 comprises personal information, including names of third parties. Some of the information is the personal

[20] The information withheld under s. 13 on p. 4, on p. 10 (duplicated on p. 12), and the last sentence on p. 16.
[21] Information withheld under s. 22 on pp. 5, 10-13 and 16.
[22] See for example Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 22-24.
[23] Schedule 1 of FIPPA.

information of both the applicant and third parties because it comprises opinions or statements by third parties about the applicant.

Subsection 22(4)

[35] Subsection 22(4) specifies circumstances when disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. Section 22(4)(e), which provides that it is not an unreasonable invasion to disclose information about a third party's position, function or remuneration as an employee of a public body is potentially relevant to some information on page 5 of the records.

[36] Although the City acknowledges in its submissions that some of the withheld information on page 5 relates to a third party's position,[24] it says s. 22(4) does not apply.[25] However, I find that s. 22(4)(e) applies to information in two emails, where employees confer about what another City employee's position is and refer to a further employee's position and former position. I recognize that the discussion about what the third party employee's position is occurs in a context where it reveals information about the named employee other than their position. As this additional information is about the employee's attendance at a public meeting it is already publically known. I therefore do not consider that it would be an unreasonable invasion of the third party's personal privacy to disclose the information on page 5 that discusses the third party employee's position and related information. I have highlighted the information that should be disclosed pursuant to s. 22(4)(e) in a copy of page 5 of the records accompanying the City's copy of this Order.

Subsection 22(3)

[37] Subsection 22(3) provides the circumstances in which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. The City identifies the following provisions of s. 22(3) as applicable to withheld information at page 5 of the records:

> A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
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> …
>
> (h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character

[24] City initial submission at para. 40.
[25] City initial submission at para. 40 regarding information on p. 5 of the records.

> reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party,
>
> …

[38] Some of the information on page 5, which the City says falls within s. 22(3)(d), I have already found must be disclosed because it falls within s. 22(4)(e). However, I accept that the information withheld in the top portion of page 5 relates to a third party's employment history so s. 22(3)(d) applies. Regarding the balance of the information withheld on page 5, I find it relates to matters other than employment, occupational or educational history, so s. 22(3)(d) does not apply to it.

[39] I find that s. 22(3)(h) does not apply to any of the information on page 5 because the information does not reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation. The information about the third party employee is factual in nature rather than evaluative.

[40] While the City does not explicitly address the application of s. 22(3)(d) to the remaining information withheld under s. 22, I find that it clearly applies[26] because the information relates to a workplace incident and investigation.

Subsection 22(2)

[41] Section 22(2) states in part:

> In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (f) the personal information has been supplied in confidence,
>
> …

[26] At pp. 10-13 and 16 of the records.

> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant,
>
> …

[42] The City says it considered the above factors in reaching the conclusion that the information on pages 10 to 13 and 16 must be withheld under s. 22 of FIPPA. The City addresses the application of these factors to the records at para. 45 of its initial submission:

> The information is personal in nature and would not assist in subjecting the activities of the City to public scrutiny. It was supplied in confidence and is sensitive as it relates to complaints of harassment or discrimination. The applicant has already received the information relevant to a fair determination of the Applicant's rights in the context of the Defamation Action. While the Applicant already has access to some of the information the City must still carefully consider its disclosure in this context as previous decisions of the OIPC are clear that disclosure under FIPPA is to be regarded as disclosure to the world. In the context of the Defamation Action, the applicant is bound by an implied undertaking as to confidentiality such that he may only make use of the documents for the purpose of the legal proceedings. This implied undertaking would likely not apply to records or information disclosed in the FIPPA process. Further disclosure of the names and personal observations and reflections of the third parties may unfairly damage the reputation of the third parties, either within the workplace or among the wider community.

[43] I accept the City's submission that s. 22(2)(a) and s. 22(2)(c), are not factors that weigh in favour of disclosure in this case, and that the other s. 22(2) factors noted are factors that weigh against disclosure. I note that while there is no express statement that the information was supplied in confidence, it is clear from the sensitive nature of the workplace incidents and investigation that form the subject matter of the emails that the employees intended they be kept confidential.

Other factors

Applicant's knowledge

[44] It is apparent from the information already disclosed, and from the applicant's actions as discussed in the submissions, that the applicant is already familiar with the general subject matter and some of the specific content of the withheld information. This is a factor in favour of disclosure.

Applicant's personal information

[45] Another factor that supports disclosure is that some of the information is the personal information of the applicant. However, as noted above the personal

information of the applicant is also the personal information of third parties, which means that this factor has diminished weight.

Section 22(1)

[46] For the information[27] in the records withheld under s. 22 subject to a presumption that disclosure would unreasonably invade third party personal privacy, I find the presumption is not rebutted by the factors in favour of disclosure. The information at pages 10-13 and 16 is sensitive information about third party's thoughts and feelings in the context of a workplace incident and investigation. The applicant's possible knowledge of some of the information and the fact that some of the information is about him is insufficient to outweigh the third party's personal privacy interests in this case. The information subject to a presumption at page 5 is similarly sensitive, relating to the involvement of human resource staff with a third party.

[47] I have weighed the relevant factors for the information which is not subject to any presumption withheld under s. 22 on page 5. I find that it would not be an unreasonable invasion of the privacy of third parties to disclose this information. Some of the information is about a third parties' volunteer position with a community association and therefore publically available information. The information is factual in nature and some, while also information of third parties, is also the personal information of the applicant and is not sensitive information. I have highlighted the information that the City must disclose in a copy of page 5 of the records accompanying the City's copy of this order.

[48] In conclusion, I require the City to disclose some information on page 5 that it withheld under s. 22. It is required to refuse to disclose the remaining information withheld under s. 22 at pages 5, 10-13 and 16 of the records.

Summary of a record under s. 22(5)

[49] Section 22(5) requires a public body to provide an applicant with a summary of their personal information if it cannot be disclosed under s. 22, except in specified circumstances. One of the exceptions is if "the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information". In my view, the City could not prepare a meaningful summary of the withheld information about the applicant that cannot be disclosed without enabling a connection to be made between the information and an identifiable third party. Accordingly, I find that the exception in s. 22(5)(a) applies and the City is not required to provide the applicant with a s. 22(5) summary.

[27] At pp. 10-13 and 16 of the records and the information subject to a presumption on p. 5 of the records.

CONCLUSION

[50] For the reasons given above, under s. 58 of FIPPA, I order that the City is:

a) authorized to refuse to disclose the information withheld under s.14 of FIPPA;[28]

b) authorized to refuse to disclose the information at page 4, 10 and 12 and some information identified above on page 16 withheld under s. 13 of FIPPA;

c) subject to (d) required to refuse to disclose the information withheld under s. 22 of FIPPA at pages 5, 10-13 and the information it is not already authorized to withhold under s. 13 at page 16.

d) required to disclose the information highlighted at page 5 it is withholding under s. 22.

[51] Under s. 58 of FIPPA, I order that the City is required to disclose the information I have ordered disclosed by November 5, 2015, pursuant to s. 59 of FIPPA. The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the information it provides to the applicant.

September 24, 2015

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No: F14-56925

[28] At pp. 21-24, 25, 27-32, 34, 36-37 and 43-44 of the records.