



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER M-457 (Revised)

Appeal M-9400340

City of Toronto



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NATURE OF THE APPEAL:

In June 1993, as part of its efforts to implement the Social Contract, the City of Toronto (the City) decided to adopt a recommendation to eliminate overtime pay and/or lieu time for Deputies and Department Heads.

Under the compensation arrangement which existed prior to this decision, each senior official could claim up to five weeks a year in either salary or time off. The effect of this change was to reduce the compensation formerly paid to these individuals by as much as 9.6%. Since this initial determination was made, there have been ongoing discussions between the City and its senior officials to determine how this disparity might be addressed.

The requester in this appeal, which is brought under the Municipal Freedom of Information and Protection of Privacy Act (the Act), is a City Councillor with an expressed interest in this issue. He has asked that the City of Toronto (the City) provide him with access to the following categories of information:

- (1) A copy of a letter dated February 4, 1994, from a named solicitor to the former Mayor of Toronto regarding the subject of overtime pay for City of Toronto Commissioners.
- (2) Any other documentation relating to this topic for the period commencing July 1, 1993 to the date of the request (April 6, 1994).
- (3) Information about any meetings and/or telephone calls involving the former Mayor and City Commissioners or Department Heads and/or their representatives on this subject for the same time period. (Such information was to include the dates that these sessions took place including the names of the persons who attended.)
- (4) Any documentation which was derived from these sessions.

The City originally identified a total of 33 records that were responsive to the request. The City decided to disclose 10 of these documents to the requester in their entirety, to release two of the records in part and to withhold the remaining 21 records. The City's decision not to disclose the 23 records, either in whole or in part, was based on the following exemptions contained in the Act:

- closed meetings - section 6(1)(b)
- advice or recommendations - section 7(1)
- third party information - section 10(1)
- economic and other interests of the City - sections 11(d), (e) and (f)
- proposed plans, projects or policies of the City - section 11(g)
- solicitor-client privilege - section 12
- invasion of privacy - section 14(1)

The requester appealed this decision to the Commissioner's office.

During the mediation stage of the appeal (and within 35 days after the mailing of the Confirmation of

Appeal), the City indicated that it wished to apply the exemptions contained in sections 11(d), (e), (f) and (g) of the Act to Records 1, 3, 7, 8, 10 to 12, 19, 21 and 31.

In his correspondence to the Commissioner's office, the requester/appellant also raised two collateral issues. First, he took the position that further records which were responsive to his request should exist. Second, he submitted that the City's decision letter was inadequate since it did not address each aspect of his request and because it did not adequately describe each record to which access has been denied.

A Notice of Inquiry was provided to the parties to the appeal, including 22 senior City officials, representatives from several law firms and a staff relations consultant. Representations were received from the appellant, the City, 21 of the City officials who collectively filed a three-page submission and the consultant who consented to the release of any identifiable information about himself which might be contained in the last two pages of Record 9.

In his submissions, the appellant argued that the City official who signed the decision letter was personally interested in the result of the appeal and, hence, had placed herself in a conflict of interest situation.

In its representations, the City stated that it had located an additional 10 records that were responsive to the request (which I shall refer to as Records 34 to 43). The City indicated that it would be prepared to release the first page of Records 35, 36 and 38, as well as Records 37, and 39 to 43 in their entirety.

The City also withdrew its reliance on section 6(1)(b) for Records 5 and 6, section 10(1) for Records 1, 3, 7 to 11, 20 to 23 and 29 to 32, and sections 11(e) and (f) for Records 9 and 11. In addition, the City indicated that it was no longer claiming any exemptions for Record 19. Finally, the City did not put forward any representations to substantiate the application of section 11(d) of the Act. Consequently, I will not consider the applicability of this exemption in my order.

The effect of all of this is that the City will be required to disclose Records 19, 37 and 39 to 43 to the appellant in their entirety. I will deal with the disposition of Records 35, 36 and 38 later in this appeal.

The contents of the 26 records which remain at issue in this appeal are generally described in Appendix "A" which is attached to this order. For ease of reference, I have retained the original numbering scheme adopted by the City.

PRELIMINARY ISSUE:

ADEQUACY OF DECISION LETTER

The appellant submits that the contents of the City's original decision letter do not comply with the requirements of section 22(1)(b) of the Act. In particular, he points out that the index of records attached

to the City's decision fails in a number of cases to specify the author of a particular record or its recipient or the subject matter of the document. He goes on to argue that such omissions have made it difficult for him to make submissions on the status of these records.

Section 22(1)(b) specifies that the notice of refusal to provide access (which is contained in an institution's decision letter) shall include the specific section of the Act under which access is refused and the reason that the provision applies to the record. Previous orders issued by the Commissioner's office have held that a notice of refusal must contain sufficient detail to allow a requester to make a reasonably informed decision on whether to review an institution's decision.

In its representations, the City states that it provided the appellant with an index which described each of the records at issue in as much detail as possible without revealing the information which it claimed was exempt from disclosure. The City also indicates that, in its decision letter, it supplemented this information with an explanation of the reasons why it had chosen to rely on a number of exemptions. For these reasons, the City argues that it has complied with the requirements established under section 22(1)(b) of the Act.

I have carefully reviewed the City's decision letter in conjunction with the records at issue. I find that the method by which the City described the records at issue and explained the basis for the application of the various exemptions complies for the most part with the wording and intent of section 22(1)(b). In my view, however, the utility of the index provided to the appellant could have been enhanced if the City had, for each record, included the name of the author and recipient as well the subject which the document addressed. Where necessary, I have incorporated this information into the index which is attached to this order.

DISCUSSION:

INVASION OF PRIVACY

The City and 21 of its officials claim that Records 1, 3, 7 to 11, 21, 23, 29 and 32 in their entirety and parts of Records 18, 34, 35 and 36 contain the personal information of one or more of these individuals.

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual.

In their representations, both the City and its officials acknowledge that these records relate to a group of senior officials and do not refer to any specific individuals. The parties submit, however, that the group in question is finite in nature and that its members are readily identifiable based on a review of the records.

In order to satisfy the definition of personal information in section 2(1) of the Act, the information in question must pertain to an **identifiable** individual. I have carefully reviewed the 17 records at issue and, in my view, none of these documents (with the possible exception of certain references found in Records 18 and 34) contain information relating to a single identifiable individual. Rather, the records relate to a discrete

grouping of about two dozen senior executives. While admittedly any group is made up of a collection of individuals, the records at issue in this appeal relate predominantly to the group and not to its individual members.

For this reason, I find that the contents of Records 1, 3, 7 to 11, 21, 23, 29, 32, 35 and 36 do not constitute personal information for the purposes of the Act. On this basis, it necessarily follows (subject to my discussion of Records 18 and 34 below) that the invasion of privacy exemption does not apply to any of the information found in these documents.

I will now deal with the excerpt from Record 18 which the City has not disclosed to the appellant. The passage in question sets out the salary and related information for an executive position within the City which is occupied by a single incumbent. Since there is only one individual who would receive this specific salary, I find that the information which has been withheld from disclosure constitutes recorded information about an identifiable individual.

In its representations, the City submits that the presumption found in section 14(3)(f) of the Act (finances or income of an individual) applies to protect the salary related personal information from disclosure. I agree that the personal information in question falls within the ambit of this presumption.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act (which is not the case in the present appeal) or where a finding is made that section 16 of the Act (the so-called public interest override provision) applies to the personal information contained in the record. It is the appellant's position that there does exist a public interest in the disclosure of the salary related information.

In order for section 16 of the Act to apply to the personal information contained in the record, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the invasion of privacy exemption. In undertaking this analysis, I am mindful of the fact that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

The appellant submits that disclosure of the record is in the best interests of the public as "there is a clear and compelling need for the public to know what it is paying its public servants". He also states that, since this issue has been publicized in the local media, there is already public interest in the subject. In my view, this factor is not dispositive in determining whether section 16 of the Act applies to the personal information contained in the record.

Having reviewed the record and considering all of the circumstances of this appeal, it is my view that there does not exist a **compelling** public interest in the disclosure of the personal information which would clearly outweigh the purpose of the section 14 exemption. Accordingly, I find that section 16 does not apply and that the personal information contained in Record 18 is properly exempt from disclosure under section 14(1) of the Act.

Record 34 is a one-page computer print-out entitled "Mayor's Scheduled Event Calendar". Although this record includes the names of several City officials, I find that this information relates to these individuals in their employment, as opposed to their personal capacities. For this reason, and based on the approach articulated in many previous orders, these references do not constitute personal information for the purposes of section 2(1) of the Act. In addition, since section 14(1) of the Act is the only exemption which the City has claimed for Record 34, I order that the responsive portions of this document be disclosed to the appellant.

THIRD PARTY INFORMATION

In its representations, the City indicated that it no longer wished to apply the section 10(1) exemption to a total of 15 records for which this provision had originally been claimed. In addition, none of the City officials who received notice of the appeal suggested that this exemption applied to the records at issue.

Since, however, section 10(1) is a mandatory exemption, I have independently reviewed the responsive records to determine whether there is any information which would qualify for exemption under this provision. My conclusion is that none of the records fall within the ambit of this exemption.

CLOSED MEETINGS

The City claims that the closed meetings exemption found in section 6(1)(b) of the Act applies to Records 4, 21 and 23. In order for the City to rely on this provision, it must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the records at issue would reveal the actual substance of the deliberations of this meeting.

I will now consider whether each part of the section 6(1)(b) test has been established.

The City submits that Record 4 (which is a report from the City Solicitor) and Record 21 (which consists of a letter from counsel for the City officials and a covering note) were discussed during in camera meetings of the City's "Executive Committee in Conference" (the ECC) on August 23, 1993 and January 31, 1994, respectively. The City further submits that Record 23 (which is a letter from the Secretary of the Executive Committee to the former Mayor which includes the letter referred to as Record 21) would reveal the substance of the deliberations of the January 31, 1994 session.

In its representations, the City has provided evidence to indicate that the two meetings of the ECC did take place and that the public was excluded from these sessions. On this basis, I find that the first part of the section 6(1)(b) test has been satisfied.

I must now determine whether there exists a statute which authorizes the holding of these meetings in the absence of the public. The City submits that such authority is granted under section 55 of the Municipal Act which states that:

The meetings, except meetings of a committee including a committee of the whole, of every council and of every local board as defined by the Municipal Affairs Act, except police services boards and school boards, shall be open to the public, and no person shall be excluded therefrom except for improper conduct.

Based on the evidence before me, I find that the two sessions of the City's ECC are meetings of a committee of Council within the meaning of section 55(1) of the Municipal Act and that the City had the requisite authority to hold them in the absence of the public. Accordingly, I find that the second part of the section 6(1)(b) test has been met.

I will now consider whether the disclosure of the three records would reveal the actual substance of the deliberations of these meetings.

In Orders M-184 and M-196, I defined the term substance as the "theme or subject of a thing" and the word deliberations to mean "discussions conducted with a view towards making a decision".

Following a review of the City's representations in conjunction with the three records, I find that the "theme or subject" of the in camera meetings was whether the City's decision to eliminate overtime pay and lieu time for its senior officials was appropriate. I also find that the ECC discussed this topic with a view towards deciding how this matter should be resolved. On this basis, I have concluded that the disclosure of Records 4 and 21 would reveal the actual substance of the discussions conducted by the ECC and, hence, its deliberations. I also find that the release of Record 23 would permit the drawing of accurate inferences about the substance of those discussions.

For these reasons, I conclude that the City has met the third and final part of the section 6(1)(b) test.

In his representations, the appellant indicates that the subjects canvassed by the ECC may well have been considered in an open meeting. On this basis, I must consider the applicability of the mandatory exception contained in section 6(2)(b) of the Act. This provision specifies that the head of an institution shall not refuse to disclose a record under section 6(1)(b) where the subject matter of the deliberations has been considered in a meeting open to the public.

In his submissions, the appellant has failed to provide any specific evidence to verify the fact that an open meeting to discuss the issue of lieu time for senior officials actually took place. In the absence of such evidence, I find that section 6(2)(b) does not apply to the three records at issue. The result is that the City is entitled to rely on the closed meetings exemption to withhold Records 4, 21 and 23 from disclosure.

ADVICE OR RECOMMENDATIONS

The City also claims that the advice or recommendations exemption found in section 7(1) of the Act applies to Record 6 in its entirety and to one paragraph which has been deleted from page one of Record 9.

Section 7(1) of the Act states that:

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

It has been established in many previous orders that advice and recommendations for the purpose of section 7(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of the exemption in section 13(1) which is the provincial equivalent of section 7(1) of the Act. He there indicated that the objective of this provision is "to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making."

In Order P-434, former Assistant Commissioner Tom Mitchinson elaborated on this position in the following fashion:

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial Act] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the Act would be to extend the exemption beyond its purpose and intent.

I agree with the views expressed in these orders. I will now determine whether the advice or recommendations exemption applies to the information contained in the two records at issue.

Record 6 is a memorandum authored by the former Mayor and a City Councillor for consideration by the City's Executive Committee. The document deals with the subject of compensation for the heads of City departments, which qualifies as a human resources issue. Based on the rationale outlined in Order P-434, section 7(1) of the Act would ordinarily not be available to exempt such a record from disclosure.

It is clear, however, that the issue addressed in Record 6, namely the impact of the Social Contract on the

remuneration paid to senior City officials, is not a typical human resources matter. At the outset, this topic involves an entire class of employees as opposed to an individual staff member. Second, this memorandum was co-authored by the former Mayor. Finally, Record 6 was directed to the City's Executive Committee, which is the municipality's most senior decision making body. Collectively, these considerations show that the information communicated in this document was of considerable importance to the City.

I have carefully reflected on the nature of this document. Based on the contents of this memorandum and the context in which it was produced, I am persuaded that Record 6 formed part of an important decision/policy-making process within the City. For this reason, I find that although this record pertains to a human resources issue, the facts of this appeal can be distinguished from the more typical scenario addressed in Order P-434. I also find that the contents of this record qualify as advice or recommendations for the purposes of the section 7(1) exemption. The result is that the City is entitled to rely on this exemption to withhold Record 6 from disclosure.

The undisclosed portion of Record 9 consists of a statement regarding the possible involvement of an individual in negotiations between the City and its officials. The City submits that the paragraph in question relates to a suggested course of action which a City Councillor could either accept or reject.

I have carefully reviewed the representations provided by the City. Although the word advice is found in this paragraph, I find that the passage simply reflects the opinion of the author. In addition, the paragraph contains neither an action plan nor a formalized manner of proceeding which are usually the hallmarks of advice or recommendations. On this basis, I find that the City cannot rely on section 7(1) to exempt the passage in question from disclosure. Since no other exemption applies to this paragraph, I order that Record 9 be disclosed in its entirety to the appellant.

To summarize, only Record 6 qualifies for exemption under the advice or recommendations exemption.

SOLICITOR-CLIENT PRIVILEGE

The City also claims that section 12 of the Act applies to exempt Records 1 to 3, 5, 8, 10, 11, 20, 22, 24, 29 to 32, the last page of Record 12, the first two pages of Records 29 and 30 and the last two pages of Records 35 and 36 from disclosure. Under this provision, the City may refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1 of the exemption); and
2. a record which 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 (Branch 2 of the exemption).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the City must

provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
 - (b) the communication must be of a confidential nature, **and**
 - (c) the communication must be between a client (or his or her agent) and a legal advisor, **and**
 - (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

Two criteria must, in turn, be met in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

In its representations, the City indicates that it is relying on both branches of the exemption.

I have carefully reviewed the contents of Records 2, 3, 5, 24, 30, 31 and 32, which variously consist of letters and facsimile transmissions exchanged between the City and its legal advisors. I find that each of these documents constitutes a confidential communication involving the City and its legal counsel which relates directly to either seeking, formulating or providing legal advice. On this basis, I find that these records are exempt from disclosure in their entirety under the first branch of the section 12 test.

Record 1 consists of a letter from the City's legal counsel to counsel for the City's senior officials in which the position of the City on a particular issue is conveyed. Since this document does not constitute a communication between a legal advisor and his or her client, I find that it does not fall within the first part of Branch 1 under section 12. I also find that this record was not created or obtained especially for a lawyer's brief for existing or contemplated litigation which means that the second part of Branch 1 does not apply. Finally, I have not been provided with any evidence to indicate that the dominant purpose of the communication is for use in giving legal advice, or in contemplation of litigation, or for use in litigation. On this basis, the City has not established that the second branch of section 12 applies to this record.

Record 12 consists of a letter from the City Solicitor to the former Mayor respecting the payment of a legal account, and a note from the former Mayor to the City Solicitor enclosing a compensation chart. I have carefully reviewed these documents and find that they neither fall under the first or second branch of the section 12 exemption. Since no other exemption applies to this record, I order that it be disclosed to the appellant.

Record 29 is a letter dated February 4, 1994, from the City's outside legal counsel to the former Mayor. On March 31, 1994, the former Mayor transmitted a copy of Record 29 to the appellant (the City has referred to the March 31 package as Record 35). Finally, there is Record 36 which contains a copy of Record 29 with three paragraphs of that document deleted. The City claims that the first two pages of Record 29 and the last two pages of Records 35 and 36 are exempt from disclosure under both branches of section 12.

In his representations, the appellant points out that the City has already provided him with a copy of Record 35 (which he has referred to as Record 29). On this basis, he contends that the City has waived any solicitor-client privilege which may have applied to this document. This waiver of privilege would also extend, by necessary implication, to the first two pages of Record 29 and the enclosure in Record 36.

In order to determine whether an institution has waived its reliance on the solicitor-client privilege, it is necessary to consider all of the circumstances surrounding the release of the documents. Based on the facts of this case, it is clear that the City voluntarily disclosed Record 35 to the appellant. In the absence of any persuasive submissions to the contrary, I find that the City has, in fact, waived the solicitor client privilege with respect to this document. The result is that the City cannot rely on section 12 of the Act to withhold access to this document. The same result applies to the first two pages of Record 29 and the enclosure in Record 36.

I will now consider Records 8, 10 to 12, 20 and 22. Each of these documents consists of a covering letter and/or a statement of account issued by the City's outside legal counsel which is directed to the City for payment. These accounts were issued for advice provided on certain compensation issues.

In Order P-624, I commented on the character of a legal account as a discrete type of document. I approached this topic in the following fashion:

A legal account is essentially an invoice which itemizes the services rendered by a law firm and the amounts charged for these services. From this perspective, a legal account is no different than an invoice for services remitted to an institution by a consultant or other category of professional. The one distinguishing feature of a legal account is that it is issued by a law firm to its client and relates to the provision of legal services.

Although a legal account arises out of a solicitor-client relationship, this record category differs qualitatively from legal opinions or other communications which purport to provide

legal advice from a lawyer to his or her client (and which have traditionally attracted the solicitor-client privilege at common law). To put the matter somewhat differently, the essence of a legal opinion is that it provides legal advice to a client with respect to discrete legal issues. The essence of a legal account is that it requests payment for legal services previously rendered.

In Orders M-213 and P-624, I also stated that for a legal account to qualify for exemption under section 12, its contents must relate in a direct and tangible way to the seeking, formulating or provision of legal advice. I then indicated that, from a practical perspective, that test would be satisfied where the disclosure of the information contained in the account would reveal the subject(s) for which legal advice was sought, the strategy used to address the issues raised, the particulars of any legal advice provided or the outcome of these investigations.

The covering letters and statements of account described as Records 8, 10 to 12, 20 and 22 individually provide a tally of the hours spent by members of the law firm as well as the disbursements incurred in providing its legal advice. Some of the documents also contain brief narratives of the steps taken to complete the assignments.

In my view, the disclosure of the information contained in these documents, with several exceptions, would neither reveal the subjects for which legal advice was sought, the legal advice provided, the legal strategy pursued nor the results obtained. On this basis, these records do not contain information which relates in a direct and tangible way to the seeking, formulating or provision of legal advice.

I find, however, that a number of excerpts which I have highlighted in yellow on pages 3 and 4 of Record 8, page 2 of Record 10 and pages 2 and 3 of Record 11 would either disclose the subjects for which legal advice was sought or the legal strategy pursued to address these issues.

The result is that, with the exceptions that I have outlined, these six documents do not qualify for protection under the first part of Branch 1 of the section 12 exemption.

I have also considered whether these records might fall within the second part of Branch 1 or under Branch 2 of section 12. I have concluded that neither aspect of the exemption is applicable to these particular records.

To summarize, I have found that section 12 of the Act applies to exempt Records 2, 3, 5, 24, 30, 31 and 32 and the highlighted passages in Records 8, 10 and 11 from disclosure. I have further concluded that this exemption does not apply to Records 1, 12, 20, 22, 29, 35, 36, and the non-highlighted portions of Records 8, 10 and 11. Since no other exemptions have been successfully claimed for Records 20, 29, 35 and 36, I order that these documents be disclosed to the appellant.

PLANS RELATING TO NEGOTIATIONS OR THE MANAGEMENT OF PERSONNEL IN THE CITY

The City claims that sections 11(e) and (f) of the Act apply to exempt Records 1, 7, 8, 10, 11, and 22 and the last two pages of Record 38 from disclosure. The City has, however, withdrawn its reliance on these two exemptions for Records 9 and 12. Since there are no other exemptions which apply to these two documents, I order that they be disclosed to the appellant.

For a record to qualify for exemption under section 11(e) of the Act, the City must demonstrate that:

1. the record contains positions, plans, procedures, criteria or instructions; **and**
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations; **and**
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.

In order for section 11(f) of the Act to apply to a record, the City must establish that:

1. the record contains a plan or plans, **and**
2. the plan or plans relate to:
 - (i) the management of personnel or
 - (ii) the administration of an institution, **and**
3. the plan or plans have not yet been put into operation or made public.

The representations which the City has provided to substantiate its reliance on these exemptions are very general in nature. With respect to section 11(e), the City notes that negotiations with its senior officials are still underway. It then indicates that the information contained in the records would either disclose the position which the City intends to apply to these negotiations or would allow a third party to accurately draw inferences about this position. In the context of section 11(f), the City contends that the records contain plans relating to the management of personnel which have not yet been made public. The City has neither elaborated on these arguments nor provided further evidence to substantiate its assertions.

I have carefully considered the City's representations in conjunction with the records at issue. With respect to Record 1, I would note that the negotiation position referred to in this document has already been communicated to counsel for the senior City officials. The contents of Record 7, on the other hand, are similar to that found in Record 19, which the City has agreed to disclose to the appellant. I also find that the information contained in Records 8, 10, 11 and 22, which I have not previously protected under section 12, could not reasonably produce the harms set out in section 11(e) or (f) of the Act. Finally, the City has not persuaded me that the last two pages of Record 38 qualify for exemption under either of these provisions.

To summarize, the City has neither established that section 11(e) nor (f) applies to the records at issue. The result is that Records 1, 7, 22, 38 and the non-highlighted portions of Records 8, 10 and 11 should be disclosed to the appellant. In addition, because of the determinations which I have made in this order, it is not necessary to consider the application of section 11(g) of the Act to any of the records for which this exemption was claimed.

REASONABLENESS OF SEARCH

In his representations, the appellant contends that the City has convened a number of meetings on the subject of overtime pay for senior officials and that it has failed to locate records that are fully responsive to his request.

Along with its submissions, the City has provided an affidavit sworn by the Executive Assistant to the former Mayor who conducted the search for responsive records. This individual states that he is familiar with the records management system in the former Mayor's office and that he personally searched for documents which would respond to the appellant's request on two separate occasions. The Executive Assistant goes on to indicate that, to the best of his knowledge, he has located all of the relevant records and that documentation of the sort requested would not be kept in any other location.

Where a requester provides sufficient details about the records to which he is seeking access and the City indicates that no further responsive records can be found, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that the City prove to the degree of absolute certainty that such records do not exist, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records that are responsive to the request.

Following a careful review of the evidence, I am satisfied that the search conducted by the City was reasonable in the circumstances of this appeal.

PERCEIVED CONFLICT OF INTEREST AND THE RELIANCE ON DISCRETIONARY EXEMPTIONS

The appellant has questioned the authority of the City Clerk to make a decision regarding access under the Act as she is also one of the senior City officials who has an interest in the records at issue.

In addressing this issue, the City states that, in processing this request, the City Clerk considered whether it would be appropriate to assign her decision making powers to another City official. The City points out, however, that every other senior official within the City's administrative hierarchy had a similar interest in the records at issue. As a practical matter, therefore, the City Clerk determined that there did not exist another individual to whom this authority could reasonably be delegated.

The City also submits that, if the City Clerk had chosen to refer this matter back to the City's Executive Committee (the head of the institution for the purposes of the Act) this would have also created an apparent conflict. This would occur because:

[t]he Executive Committee would have been required to make a decision on access to records regarding an issue on which it is also empowered to recommend to Council the outcome of the substantive issue, namely, appropriate compensation for the heads and deputies.

As a result, the City Clerk determined that she had no choice but to sign the decision letter herself.

I have carefully reflected on the admittedly unique circumstances of this case. At the outset, I wish to emphasize that the City Clerk was placed in a difficult position in responding to this request. I also believe that her decision to sign the decision letter was arrived at in good faith.

I equally believe, however, that the City Clerk and her senior colleagues have a personal interest in the records which are at issue in this appeal. On this basis, I believe that a perception could arise among members of the public that the City Clerk had been placed in a conflict of interest position when she signed the decision letter which withheld a number of records from disclosure.

I also disagree with the City's statement that members of the City's Executive Committee would have been placed in a similar conflict of interest position. While I acknowledge that members of the Executive Committee were interested in the substantive issue of employee compensation, they had no financial interest in the resolution of this matter. I also believe that members of the public would view members of this Committee as less personally interested in determining whether or not the records at issue in this appeal should be released to the appellant.

The question of when a conflict of interest situation might arise under the Act has been canvassed by Management Board of Cabinet in its freedom of information and protection of privacy publication entitled "Handbook for Municipalities and Local Boards", April 1993. On pages 2 and 3 of this document, the authors address this issue in the following fashion:

A conflict of interest may exist where a public official knows that he or she has a private interest that is sufficiently connected to his or her public duties to influence those public duties. The focus for conflict of interest is frequently financial matters. It may also arise when the head is meeting his or her decision making responsibilities under the Act.

A head may be in a conflict of interest situation where it is reasonable to assume that he or she is making decisions based on their personal interest rather than the public interest. In some situations, the conflict of interest may be more apparent than real. It is recommended that delegations of the head's powers reflect the possibility of conflict of interest and provide alternate decision-makers in those instances.

While the fact situations which define an actual or perceived conflict of interest can vary appreciably, I believe that the comments in the publication present a reasonable view on how these sorts of scenarios should be addressed.

In this appeal, I believe that a well-informed member of the public could perceive that the City Clerk had been placed in a conflict of interest situation when she signed the decision letter. On this basis, I must now determine how to resolve this situation.

When an institution relies on a discretionary exemption to withhold a record from disclosure, it must exercise its discretion to apply this exemption in accordance with established legal principles. In Order 58, former Commissioner Sidney B. Linden commented on the role of the head of an institution in exercising discretion to either disclose or withhold a requested record:

In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law ... I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.

I believe that these comments apply equally to those situations where the decision making function under the Act has been delegated.

In this order, I have found that the discretionary exemptions contained in sections 6(1)(b), 7(1) or 12 of the Act apply to Records 2 to 6, 21, 23, 24, 30, 31 and 32, and to the highlighted portions of Records 8, 10 and 11. Based on the facts of this case, I find that, because of her personal interest in these records, the City Clerk could not exercise her discretion to withhold these 14 records in accordance with established legal principles.

For this reason, I have decided to order the City's Executive Committee, as head of the institution, to review the City Clerk's exercise of discretion to withhold the 14 records which have not been disclosed. The Executive Committee would be free to exercise this authority as a group, via sub-committee or through the delegation of this power to an individual or individuals not personally interested in the records at issue.

ORDER:

1. I uphold the decision of the City not to disclose the excerpt from Record 18 previously withheld from the appellant.
2. I order the City to disclose Records 1, 7, 9, 12, 19, 20, 22, 29 and 34 to 43 in their entirety and the non-highlighted portions of Records 8, 10 and 11 which I have provided to the City's Freedom of Information and Privacy Co-ordinator to the appellant within thirty-five (35) days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
3. I order the City of Toronto's Executive Committee, a sub-committee thereof or an individual or individuals delegated by Executive Committee to reconsider the City Clerk's exercise of discretion

to rely on sections 6(1)(b), 7(1) or 12 of the Act to exempt Records 2 to 6, 21, 23, 24, 30, 31 and 32 and the highlighted portions of Records 8, 10 and 11 from disclosure within thirty (30) days of the date of this Interim Order. The person or persons charged with this responsibility should not be personally interested in the issues of lieu time or overtime pay for senior City officials.

4. I order the Executive Committee to provide the appellant with a written decision indicating whether it will continue to rely on these discretionary exemptions to withhold the 14 records in question within 35 days of the date of this order.
5. I order the Executive Committee to provide the Commissioner's office with further representations concerning the factors considered in the exercise of its discretion to rely on these exemptions for the 14 records at issue within 35 days of the date of this Interim Order. The representations referred to in this provision should be submitted to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
6. In order to verify compliance with the provisions of this order, I reserve the right to require that the City provide me with a copy of the decision letter provided to the appellant pursuant to Provision 4.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

February 6, 1995

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION	EXEMPTION(S) CLAIMED	DECISION ON RECORD
1	Letter dated April 14, 1994 from the City's outside legal counsel to the legal counsel for the City officials	10(1)(a), (c) and (d), 11(d), (e), (f) and (g), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	Disclosed
2	Letter dated August 27, 1993 from the City Solicitor to the City Clerk	12	City to reconsider exercise of discretion
3	A package containing a fax covering sheet, a letter dated April 8, 1994 from counsel for the City officials to the City's outside legal counsel and two letters from the City's outside legal counsel, dated April 11, 1994 to the former Mayor and counsel for the City officials	10(1)(a), (c) and (d), 11(d), (e), (f) and (g), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	City to reconsider exercise of discretion
4	Report from the City Solicitor to the ECC dated August 19, 1993 on the subject of paid overtime and lieu time	6(1)(b), 11(d),(e),(f) and (g) and 12	City to reconsider exercise of discretion
5	Letter dated August 30, 1993 from the City's outside legal counsel to the ECC on the subject of overtime	6(1)(b), 11(d), (e),(f) and (g) and 12	City to reconsider exercise of discretion
6	Draft report to the ECC (in duplicate) dated September 13, 1992 from the former Mayor and a City Councillor on the subject of compensation	6(1)(b), 7(1) and 11(d),(e),(f) and (g)	City to reconsider exercise of discretion
7	Letter dated October 28, 1993 from the Chair of the Committee of Heads to the former Mayor and a City Councillor	10(1)(a), (c) and (d), 11(d), (e), (f) and (g), 14(2)(f) and (h) and 14(3)(d) and (f)	Disclosed
8	A package consisting of a transmittal memorandum, a statement of account dated September 14, 1993 and a covering memorandum dated September 17, 1993 from the City's outside legal counsel	10(1)(a), (c) and (d), 11(d), (e), (f) and (g), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	Disclosed in part. City to reconsider exercise of discretion for portions of record withheld
9	A package consisting of a covering memorandum dated October 19, 1993 and a letter dated September	7(1), 10(1)(a), 11(d),(e),(f)	Disclosed

RECORD NUMBER	DESCRIPTION	EXEMPTION(S) CLAIMED	DECISION ON RECORD
	29, 1993 from a City official to the former Mayor's Executive Assistant	and (g), 14(3)(d) and (f)	
10	Letter dated October 28, 1993 from the City's outside legal counsel enclosing a statement of account dated October 19, 1993	10(1)(a), (c) and (d), 11(d), (e), (f) and (g), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	Disclosed in part. City to reconsider exercise of discretion for portions of record withheld
11	Letter dated November 5, 1993 from the City's outside legal counsel enclosing a copy of Record 8	10(1)(a), (c), (d), 11(d), (e), (f) and (g), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	Disclosed in part. City to reconsider exercise of discretion for portions of record withheld
12	Letter dated November 10, 1993 from the City Solicitor to the former Mayor enclosing a chart entitled "Heads & Deputies Impact of Wage Rollback, Social Contract & Loss of Lieu Time Tables"	11(d),(e),(f) and (g) and 12	Disclosed
18	A document entitled "Heads' and Deputies' Reductions Chart"	14(3)(d)(f)	Disclosed in part
20	Letter dated December 20, 1993 from the City's outside legal counsel to the former Mayor respecting an outstanding account	10(1)(a), (c) and (d) and 12	Disclosed
21	Covering memorandum and letter dated January 14, 1994 from counsel for the City officials to the former Mayor	6(1)(b), 10(1)(a), (c) and (d), 11(d), (e), (f) and (g), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	City to reconsider exercise of discretion
22	A package consisting of a covering memorandum dated January 17, 1994, a letter dated January 10, 1994 and a statement of account dated January 4, 1994 all from the City's outside legal counsel	10(1)(a), (c) and (d) and 12	Disclosed
23	Letter dated February 2, 1994 from the Secretary of Executive Committee to the former Mayor enclosing a copy of the letter previously identified as Record 21	6(1)(b), 7(1), 10(1)(a), (c) and (d), 11(d), (e), (f) and (g), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	City to reconsider exercise of discretion

RECORD NUMBER	DESCRIPTION	EXEMPTION(S) CLAIMED	DECISION ON RECORD
24	Fax from a City employee to the City's outside legal counsel requesting a response to a particular question	12	City to reconsider exercise of discretion
29	Letter dated February 4, 1994 from the City's outside legal counsel to the former Mayor	10(1)(a), (c) and (d), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	Disclosed
30	Letter dated February 4, 1994 from the City's outside legal counsel to the former Mayor	10(1)(a), (c) and (d), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	City to reconsider exercise of discretion
31	Letter dated February 7, 1994 from the City's outside legal counsel to the former Mayor enclosing two letters dated January 14 (Record 21) and February 3, 1994 from counsel for the City officials	10(1)(a), (c) and (d), 11(d), (e), (f) and (g), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	City to reconsider exercise of discretion
32	Letter dated March 15, 1994 from the City's outside legal counsel enclosing the same two records referenced in Record 31	10(1)(a), (c) and (d), 11(d), (e), (f) and (g), 12, 14(2)(f) and (h) and 14(3)(d) and (f)	City to reconsider exercise of discretion
34	Mayor's Scheduled Events Calendar	14(2)(f) and (h) and 14(3)(d) and (f)	Responsive portions disclosed
35	Letter dated March 31, 1994 from the former Mayor to the appellant enclosing a copy of the first two pages of Record 29	12, 14(2)(f) and (h) and 14(3)(d) and (f)	Disclosed
36	A document entitled "Question to the Mayor" dated February 4, 1994 from the appellant to the former Mayor which encloses the first two pages of Record 29	12, 14(2)(f) and (h) and 14(3)(d) and (f)	Disclosed
38	A document entitled Heads & Deputies "Impact of Wage Rollback, Social Contract & Loss of Lieu Time Tables"	11(e) and (f)	Disclosed

Note that the City has withdrawn its exemptions for Records 19, 37 and 39 to 43.