Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-846

Appeal M_9600040

City of North York

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The City of North York (the City) and the requester have been involved in various and ongoing disputes for over a decade on the issue of development of certain lands owned or controlled by the requester and situated within the City (the property). The property has been the subject of long and protracted litigation between the parties before the Ontario Municipal Board (the OMB) as well as various levels of courts. Further planning applications and related issues remain before the OMB.

CHRONOLOGY OF REQUESTS AND RESULTING APPEALS

On July 14, 1994, the requester filed a request with the City for access under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to "all records in any way related to events leading to the adoption of Interim Control By-law Nos. 31983 and 32033, through to their subsequent enactment, as well as the initiation and enactment of the two Zoning By-law Nos. 32322 and 32323". On September 9, 1994, the City issued a decision, setting out a fee estimate with respect to those records to which access was granted. The City denied access to four records under section 12 (solicitor-client privilege) and to 11 handwritten records pursuant to section 7 of the Act. No payment was received and there was no further communication from the appellant at that time.

In a subsequent letter dated May 2, 1995 (which I will refer to as the "second request"), the requester sought access to "all records ... relating to the history, consideration, processing and development" of the property. In this second request, the requester specifically sought access to the records of a named councillor, the Clerk's department, Buildings and Inspections department, Legal department and the Planning and Development department. The requester also indicated that he wished to pursue access to the records described in his first request.

The City obtained clarification with respect to the second request from the requester who narrowed the scope of the request to those records in the Legal department dated 1980 onwards. The requester remitted payment to the City on his first request. On July 11, 1995, the City confirmed receipt of payment and advised that it was proceeding to process both requests. In this letter, the City dealt with part of the request by denying access to the councillor's records on the basis that they are not in the custody or under the control of the City and therefore, not subject to the Act, but did not address the other records requested.

On July 17, 1995, the City issued its decision in response to the balance of the second request, setting out the fee payable in respect of each record to which access was granted and indicating the exemptions claimed for other records. At this time, the City advised the appellant that the 11 records referred to in its earlier decision had since been destroyed.

The requester appealed the section 12 exemption claimed in respect of the four records and the destruction of the 11 records described in the response to the first request. The requester also appealed the City's decision regarding its jurisdiction over the councillor's records and the section 12 exemption claimed for other records.

Subsequent to the filing of the appeals, the City issued a third decision, dated January 2, 1996, and denied access to 791 additional records from its Legal department based on the exemption in section 12 of the Act.

Because the subject matter of the two requests is related, some of the responsive records were the same and the City appeared to have treated the second request as a continuation of the first one, one appeal file, M-9500425, was opened. It was later continued under Appeal File No. M_9600040, which is the subject of this order. Therefore, this order will resolve the issues arising from the three decisions issued by the City. In this appeal, the requester (now the appellant) is represented by counsel and any references to the appellant in this order will mean the appellant as represented by his counsel.

RECORDS AT ISSUE

During mediation, the appellant reviewed the index for the 791 records and removed 115 records from the scope of this appeal. The City reviewed its decision and granted access to certain records, including some Councillor records to which access had previously been denied.

Later in the mediation process, the City identified an additional 25 records responsive to the request and granted access to 13 of these records. The City denied access to the remaining 12 records under section 12 of the Act.

The records that remain at issue in this appeal consist of the following:

(1) 435 records from the Legal department which include the four records described in the City's September 9, 1994 letter and withheld under section 12 of the Act.

(2) the 12 records which were part of the additional 25 records identified by the City in its subsequent review and withheld on the basis of section 12 of the Act.

(3) 29 councillor's records which the City claims are not in its custody or control.

The records in items (1) and (2) are described and numbered under the relevant file numbers on Appendices A and B, prepared by the City and sent to the appellant. The records identified on the appendices therefore constitute all of the records that remain at issue in this appeal with the exception of the councillor's records, which are not included on that list. In this order, any reference to records by number will mean the numbered record on the appendices. I have conducted an independent review of each of the records at issue in this appeal.

This office provided a Notice of Inquiry to the appellant and the City. Representations were received from both parties.

In his representations, the appellant submitted that the City's search for responsive records was not reasonable because a specific file was not included among those searched by the City. In support of his assertion, the appellant provided a copy of a memorandum from the City's Senior Counsel to the Planning Department, which referred to a file number not included in the list of files searched and identified by the City.

Accordingly, a supplementary Notice of Inquiry was forwarded to the parties, inviting submissions on whether the search conducted by the City was reasonable in the circumstances. Representations were received from both the appellant and the City.

The issues in this appeal are as follows:

(1) Whether the councillor's records withheld by the City are in the custody or under the control of the City and subject to the Act.

(2) Whether the solicitor client exemption provided by section 12 applies to the records.

(3) Whether the search conducted by the City for records responsive to the request was reasonable in the circumstances.

(4) Whether the destruction of the handwritten notes by the City was in contravention of its responsibilities and obligations under the Act and the regulations.

The records to which access has been granted have not all been provided to the appellant. To avoid any confusion, I will order the City to disclose to the appellant all the records responsive to the request and that are not being considered in this appeal. However, if the appellant wants copies of these records, he will be required to pay any applicable photocopy charges. In the interests of economy, the City has suggested that the appellant view the records and identify the ones that he wants copied.

DISCUSSION:

COUNCILLOR'S RECORDS AT ISSUE

In its representations, the City submits that there are three files of records in the councillor's custody but under the control of the City which the City has decided to disclose to the appellant. Therefore, these records are not at issue in this appeal and I order the City to disclose the records to the appellant.

The City indicates that there are four other records which are in the control of the City and currently in the councillor's custody for which the section 12 exemption has been claimed. These four records are listed in Appendix A provided by the City to the appellant as Record Numbers 640, 670, 673 and 632. I will include these records in my discussion on the application of section 12 below.

The City submits that there are 29 records in the custody of the councillor which are not in the custody or under the control of the City. The records consist of personal correspondence to the councillor from constituents and her responses to them, other correspondence on constituency related matters and copies of two planning reports which contain the handwritten notes of the councillor. Having reviewed the records, I note that of the 29 records identified, one of the records is a facsimile copy of another record. Accordingly, in my view, there are a total of 28 records to be considered in connection with the issue of custody and control.

CUSTODY OR CONTROL OF COUNCILLOR'S RECORDS

At the time of the City's decisions, section 4(1) of the Act read as follows:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or part falls within one of the exemptions under sections 6 to 15.

It is clear from the wording of section 4(1) that in order to be subject to an access request under the Act, a record need only be in the custody **or** under the control of an institution (Order P-994).

In Order 120, former Commissioner Sidney B. Linden stated that the concepts of custody and control should be given a broad and liberal interpretation in order to give effect to the purposes and principles of the Act. The former Commissioner then proceeded to outline the following approach for determining whether specific records fell within the custody or control of an institution:

> In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular situation.
>
> In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular:
>
> (1) Was the record created by an officer or employee of the institution?
>
> (2) What use did the creator intend to make of the record?
>
> (3) Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
>
> (4) If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
>
> (5) Does the institution have a right to possession of the record?
>
> (6) Does the content of the record relate to the institution's mandate and functions?

(7) Does the institution have the authority to regulate the record's use?

(8) To what extent has the record been relied upon by the institution?

(9) How closely is the record integrated with other records held by the institution?

(10) Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

This approach has been followed in many subsequent orders. In each case, the issue of custody and/or control has been decided based on the particular facts of the case, the factors outlined in Order 120 and the related considerations which have been articulated in these orders. Similarly, this appeal must be decided on the basis of its particular facts.

In response to the criteria referred to in Order 120, the City submits that it has historically considered that a councillor's records are the personal papers of the councillor. The City states that councillor's records are physically maintained in such a manner that they are not accessible to employees of the institution. The City states that the records are completely separate and apart from the records of the institution, maintained in the custody of the councillor for their own purposes and the City has no control or right of possession over such records.

The City states that a councillor's records are not the subject of the City's record destruction policy, procedure or by-law; upon expiry of a councillor's term of office, the City requests the records for archival purposes and provides a tax receipt in return. However, there is no requirement that a councillor maintain the records or provide them for the archival purposes of the City.

Finally, the City submits that councillor's records are not retained in the central depository for records and that the City's records classification system developed in 1992 has no listing for councillor's records. On this basis, the City asserts that the records are not within the custody or under the control of the City.

In his representations, the appellant concedes that a councillor is not an employee of the City. The appellant submits that while a councillor is not an "employee" of the City, he or she does hold a public office. The appellant submits that the term "officer" should be broadly interpreted and that councillors are clearly officers in the sense that they have the duties of legislative officers. The appellant draws an analogy between councillors and officers of a private corporation, stating that "just like a private corporation is vicariously liable for the actions of its

officers and directors, a municipal corporation is liable for any claims made against individual councillors in the exercise of their public office."

The appellant submits that the City would have a right of possession of the councillor's records. The appellant asserts that the councillor intended to use the records to assist her in taking positions on legislative matters before Council and that if the records are not in the physical possession of the City, then they were maintained by the councillor for the purpose of fulfilling her duties.

The appellant maintains that the records relate to the City's mandate and functions since the councillor represents the interests of the ratepayers in the subject area and the primary function of the City, through its elected officials, is to make legislative decisions in the interests of its public. The appellant submits that therefore there is a direct relationship between the records and the mandate of the City.

The appellant submits that the City has the authority to regulate the use of the records in certain ways. The appellant gives an example in which the councillor has relied on the information in the records and Council chooses to accept or reject a position put forth by the councillor. The appellant further submits that the councillor had access to the City's Planning department and the records relate directly to decisions taken by the Council on the subject property. The appellant also submits that the councillor would not have created the records unless they were significant to the institution. Therefore, the appellant submits that the City has sufficient control over the councillor's records to order them to be disclosed.

I have carefully reviewed the evidence before me. I note that the City is disclosing three files of councillor's records to the appellant. As I have indicated previously, the 28 councillor's records at issue consist of personal correspondence from ratepayers to the councillor and her responses to them, other constituency related correspondence and copies of two planning reports with handwritten notes on them.

Although I do not agree with the appellant's contention that if a councillor is an "officer" of the municipal corporation the records are therefore necessarily under the City's control, I will begin by considering whether the councillor is, in fact, an "officer". As a first step, it is necessary to consider the meaning of the term "officer" in the context of municipal corporations and to determine whether a municipal councillor is an "officer" of the municipal corporation.

In Order M-813, Inquiry Officer Laurel Cropley considered the definition of "officer" within the context of the Act. She found that while the term "officer" was not defined in the Municipal Act or related legislation such as the Ontario Municipal Board Act and the Municipal Employees Retirement System Act, the meaning of the word in municipal law has been considered in the courts and has been the subject of academic writing. The Inquiry Officer commented:

> In general, the above sources interpret the term "officer" to refer to a high ranking individual within the municipal civic service, who exercises management and administrative functions, and who derives his or her authority either from statute or from council. The Alberta Court of Appeal referred to "officers" in Speakman v. Calgary (City) (1908), 9 W.W.R. 264, I Alta. L.R. 454 (C.A.) as summarized in

> Stephen Auerback and Andrew James, The Annotated Municipal Act (Thompson:Scarborough, 1989), Volume 1, pp. 17-33, as those who exercise powers "of an executive and coercive and quasi-coercive character, and are binding upon and affect the rights of the inhabitants and ratepayers of the municipality."
>
> In my view, the authorities referred to above all indicate that, except in unusual circumstances, a member of a municipal council is generally not considered to be an "officer" of a municipal corporation. An example of an unusual circumstance would be where a municipal councillor of a small municipality has been appointed a commissioner, superintendent or overseer of any work pursuant to section 256 of the Municipal Act. In this regard, the authorities indicate that this would be an extremely unusual situation, and where it occurs, the councillor would be considered an "officer" only for the purposes of the specific duties he or she undertakes in this capacity.

The Inquiry Officer concluded that in the circumstances of that case, the councillor was not fulfilling the statutory duties and powers of an officer such as Mayor, Chair, Reeve or Warden and therefore was not functioning as an "officer" of the institution.

I agree with the reasoning and the conclusions drawn by Inquiry Officer Cropley and find that they apply equally in the circumstances of this case. In my view, this is not the "extremely unusual situation" where the councillor was assigned special duties and was functioning as an "officer" of the institution. Having reviewed the records and having considered the circumstances of this appeal, I find that the councillor was acting on behalf of the constituents and representing their interests as opposed to acting on behalf of the City. Accordingly, I find that the councillor was not functioning as an "officer" of the City.

With respect to the remaining criteria listed in Order 120, based on a careful review of the records, the representations of the parties and the particular circumstances of this case, I find that the councillor's records are the councillor's personal records held by her in her capacity as the elected representative of her constituents and relate to her mandate and functions. I find that the City does not have these records in its possession, nor does it have any right to possess them. I have no evidence before me that these particular records have been relied upon by the City. I also find that the records are not integrated with other records of the City and the City has no authority to regulate the records or to dispose of or otherwise deal with them. Accordingly, I find that the records are not in the custody or under the control of the City.

SOLICITOR-CLIENT PRIVILEGE

For ease of reference, I have divided the records for which the City has claimed the section 12 exemption into four categories:

(1) Reports to City Council

(2) Statements of account, covering letters and copies of cheques

(3) Letters and memoranda

(4) Notes and draft documents, including letters and affidavits

The City claims that section 12 of the Act applies to exempt all of the above records.

Section 12 of the Act reads as follows:

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

Section 12 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); 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).

In order for a record to be subject to the common law solicitor-client privilege, the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is written or oral communication, **and**
   (b) the communication must be of a confidential nature,
   (c) the communication must be between a client (or his agent) and a legal adviser, **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.

[Order 49]

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied 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 the City; and

2. The record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

In order for a record to qualify as being prepared in contemplation of litigation, it must be established that:

(a) the dominant purpose for the preparation of the document must be contemplation of litigation; and

(b) there must be a reasonable prospect of such litigation at the time of the preparation of the document - litigation must be more than just a vague or theoretical possibility.

[Order 52]

The City relies on both branches of section 12 to withhold access to the records.

CITY'S SUBMISSIONS

Branch 1 - Common Law Solicitor-Client Privilege

The City submits that all the records for which it has claimed section 12 represent written confidential communications between the City and its counsel and on this basis, the first branch of the common law privilege applies. The City explains that "counsel" refers either to a member of its legal department or outside counsel retained by the City for the purpose of obtaining legal advice on certain matters. The City states that the records, which include confidential reports to Council, working papers, letters and memoranda and statements of account all relate directly to the seeking, formulating or giving of legal advice.

The City refers to Order 126 in which former Commissioner Sidney B. Linden found that the statements of account were subject to solicitor-client privilege. The City relies on Southey J.'s comments referred to in that order that the solicitor-client privilege extends to "all communication relating to the obtaining of legal advice". The City points out that because of the number of on-going litigation matters between the parties, numerous issues are involved relating to both substantive legal advice as well as the conduct of various litigation matters. The City submits that all of the information in the records is therefore privileged.

The City submits that part two of the solicitor-client privilege (the litigation privilege) also applies to the records. The City states that there has been, for the past 13 years, and continues to be, on-going litigation of one form or another and that all of the various files and matters relate to the one issue: the extent of the development of the lands controlled by the appellant. The City explains that notwithstanding the fact that some of the files may be technically "closed", counsel relies on the information in the records for ongoing litigation as the materials in the files all relate to the same subject.

The City submits therefore, that the files shown on Appendix A as being closed, do not automatically lose their litigation privilege and that in fact, the privilege is extended. The City

further submits that because of the contentious nature of the issues, litigation was contemplated at the time that the records were prepared and that litigation was always more than a vague or theoretical possibility. The City states that litigation was and has been ongoing for a long time and all materials including notes were made in preparation for the litigation to assist the solicitor or outside counsel retained on various matters and therefore, qualify for exemption under the litigation privilege.

Branch 2 - Statutory Solicitor-Client Privilege

The City submits that the records are also exempt from disclosure under Branch 2 of the section 12 exemption. The City states that the records were prepared by or for counsel employed as well as counsel retained for various aspects of the litigation matters. In addition, through the various proceedings, where there were matters for which a law firm had been retained, watching briefs were maintained by the City through its legal department. The City points out that many of the records were prepared for use in giving legal advice. Information in some records was relied upon or referred to in other records for giving legal advice.

As I have noted previously, where a claim under Branch 2 is based on the record being prepared "in contemplation of" litigation, the records must have been prepared for the dominant purpose of litigation **and** there must have been a reasonable prospect of litigation at the time that the records were prepared. The City submits that the records all relate to the various claims of the appellant and document preparation relating to the various legal proceedings that have taken place with respect to the development of the lands. The City states that there was always a reasonable prospect of litigation at the time the records were prepared. The City points out that events subsequent to the date of creation of the records to the present, when litigation continues to be ongoing, support this position. The City has also provided evidence of the various matters litigated since 1983 and the matters that remain outstanding.

The City states that there are certain records for which litigation was not the only purpose but for which the contemplation of litigation remained the dominant purpose for which they were prepared. The City submits that therefore the exemptions provided by Branch 1 and 2 of section 12 apply to the records.

APPELLANT'S SUBMISSIONS

Branch 1 - Common Law Solicitor-Client Privilege

The appellant submits that the City must identify which branch of the section 12 exemption it is claiming in respect of each of the records. The appellant points out that the solicitor-client privilege applies only to confidential communications between counsel and client or client's agent and the communication must relate directly to the seeking, formulating or giving of legal advice. The appellant states that in many of the records, neither the sender nor the recipient is a legal representative and therefore, without evidence from the City, the exemption in section 12 cannot not apply.

Branch 2 - Statutory Solicitor-Client Privilege

The appellant submits that unless the City provides evidence that the records were prepared for the dominant purpose of existing or contemplated litigation, the litigation privilege cannot apply.

The appellant states that many of the records predate the planning applications currently before the OMB. The appellant refers to a memorandum from the City's Planning Commissioner to the City solicitor which confirms that the City's file in respect of the previous official plan and amendments and subdivision application for the subject property is now closed. On this basis, the appellant asserts that the litigation privilege under either Branch 1 or 2 cannot apply to the records unless they relate to the planning application currently before the OMB.

I have carefully reviewed the information in the records together with the representations of the parties and I make the following findings.

REPORTS TO COUNCIL

I find that the confidential reports to council were prepared by or for counsel employed or retained by an institution for use in giving legal advice and these records properly qualify for exemption under Branch 2 of section 12.

LEGAL ACCOUNTS

Previous orders of the Commissioner have considered the application of the exemption in section 12 to legal accounts. In Order 126, Commissioner Linden found that, while the invoices and accounts at issue did not contain legal advice, they reflected communications of a confidential nature directly related to the seeking, formulating, or giving of legal advice, and were therefore exempt from disclosure. In Order M-213, former Assistant Commissioner Irwin Glasberg noted this finding and concluded that "the implication of this decision is not that the solicitor-client exemption will automatically apply to records of this nature but rather that the decision-maker must determine, based on the contents of each legal account, whether the information contained in the document relates in a tangible and direct way to the seeking, formulating or provision of legal advice."

From a practical perspective, the exemption would apply where the disclosure of the information 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 (Order P-676). I agree with the reasoning and approach articulated in these orders and adopt them for the purposes of this appeal.

I have reviewed the information in the various accounts and find that with the exception of Records 1, 81, 143, 144, 682 and 683, disclosure of the information in the statements of account would reveal the subject matters for which legal advice was sought, the strategy used to address the issues raised or the outcome of some of the investigations. I find, therefore, that the statement of accounts (with the exception of Records 1, 81, 143, 144, 682 and 683), are subject to the common-law solicitor-client privilege and are exempt from disclosure under section 12. I find, however, that Records 1, 144 and 682 (letters enclosing payment of account), 81 and 143 (copies of cheques) and Record 683 (general statement of account) do not contain the type of information that would qualify for exemption under either of Branch 1 or Branch 2 of section 12.

As no other discretionary exemptions have been claimed and no mandatory exemption applies, the City should disclose Records 1, 81, 143, 144, 682 and 683 to the appellant.

LETTERS AND MEMORANDA; NOTES AND DRAFT DOCUMENTS

My review of categories (3) and (4), being letters and memoranda and notes and draft documents, indicates that the information they contain is related to the central dispute between the parties. Based on the evidence before me, it is clear that litigation has been ongoing for a long time and that it continues at present, even though certain files may be technically "closed". I accept the City's position that litigation was either contemplated or an actuality at the time that the records were prepared. On this basis, I find that the letters and memoranda were prepared by or for counsel employed or retained by the City for use in giving legal advice or in contemplation of or for use in litigation. I also accept, that due to the nature and history of the relationship between the City and the appellant, the records were prepared for the dominant purpose of or in contemplation of litigation. I find that the records in categories (3) and (4) are exempt from disclosure pursuant to Branch 2 of the section 12 exemption. The termination of litigation does not affect the application of Branch 2 of the section 19 exemption (Orders P-538 and P-667).

In summary, I have found that the four records described in the July 17, 1995 decision letter and the records listed in Appendices A and B with the exception of Records 1, 81, 143, 144, 682 and 683 qualify for exemption from disclosure pursuant to section 12 of the Act.

REASONABLENESS OF SEARCH

In his representations, the appellant refers to a memorandum dated March 27, 1995 from a City solicitor to the Planning Department Staff, a copy of which was provided to this office. The memorandum refers to File No. AP92.24. The appellant states that this file has not been disclosed or made available to the appellant by the City nor is it included in the list of records for which the City has claimed privilege. The appellant therefore questions the reasonableness of the search conducted by the City for records responsive to the request.

In cases where a requester provides sufficient details about the records which he or she is seeking and the City indicates that records do not exist, it is my responsibility to insure that the City has made a reasonable search to identify any records that are responsive to the request. The Act does not require the City to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the City must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

The City acknowledges the issue raised by the appellant and explains that the reference to File No. AP92.24 on page 37 of the original index provided to the appellant is a typographical error. The reference should correctly read File No. AP94.24. With its representations, the City has provided a summary list, showing the status and relationship of the files and I note that File AP94.24 is included in the list. The City states that File AP92.24 is a legal department file that is unrelated to this or any of the matters relating to the request. The City points out that the memorandum referred to by the appellant is listed as Record 595 on the original index provided to the appellant and is among the records that the City is disclosing to the appellant.

I have reviewed the representations of the parties together with the particular circumstances of this appeal. In my view, the explanation provided by the City in response to the appellant is reasonable and I accept the City's submissions on this point. Accordingly, I am satisfied that the searches conducted by the City for records responsive to the request were reasonable in the circumstances of this appeal.

DESTRUCTION OF RECORDS RESPONSIVE TO THE REQUEST

The appellant submits that the City destroyed certain records despite the fact that they were responsive to his request. As I have indicated previously, these records consist of the 11 handwritten documents which were referred to in the City's decision letter dated September 9, 1994 and which the City had claimed were exempt from disclosure under section 7 of the Act (advice and recommendations).

Section 3(3) of O. Reg. 823 under the Act provides as follows:

> Every head shall ensure that reasonable measures to protect the records in his or her institution from inadvertent destruction or damage are defined, documented and put in place, taking into account the nature of the records to be protected.

The appellant submits that although the City was aware that the appellant might have decided to appeal the September 4, 1994 decision, the records were still destroyed. The appellant states that in its letter of July 17, 1995, the City advised that the 11 records had been destroyed "as per our usual course of business". The appellant submits that the records were prematurely destroyed and that "reasonable measures" to protect the records from destruction were not taken.

The appellant points out that section 116 of the Municipal Act provides that records shall be destroyed by a municipality only in accordance with its by-laws or with the approval of the minister. The appellant states that the City's record retention By-law No. 27502 does not address handwritten notes and that this issue is being addressed in the City's proposed new by-law which deals expressly with handwritten notes.

The City responds that the records were initially the subject of a request dated July 14, 1994 and the City's decision letter dated September 9, 1994. The City argues that there was no response from the appellant with respect to the fee estimate or the exemptions claimed. The appellant also did not appeal the decision in accordance with section 39(2) of the Act.

The City explains that it has been the policy of the Planning department to purge working files once the subject matter of the file has gone to Council for consideration. The subject matter of the file had been considered by Council on July 6, 1994. The City states that the working file containing the 11 handwritten records was purged prior to the receipt of the appellant's new request dated May 2, 1995. In this regard, the City has provided two affidavits sworn by its Senior Planner, Policy Research and Systems Division (the Senior Planner) and its Director of Corporate Records, City Clerk's department (the Director).

In his affidavit, the Senior Planner states that at the time of the appellant's request (July 14, 1994), he held the position of Senior Planner in the Zoning By-law Review section. He states that in 1992, the Planning Department's records were in the process of being converted to the new Corporate Records Classification System. A policy developed as part of this system requires the purging of working notes from all files, once the matter to which they related has been completed. A copy of the policy has been provided to this office.

The Senior Planner's affidavit also states that in July of 1994, files responsive to the appellant's request of July 14, 1994 were forwarded to the Director for review. On or about March 10, 1995, the files were returned to the Senior Planner by the Director who advised that the request file was closed as the request appeared to have been abandoned. The Senior Planner states that the returned files were then reviewed in accordance with the Planning Department's policy. Draft handwritten notes were destroyed as the final report on the residential uses in certain zones was completed and the matter had been dealt with by Council at its July 6, 1994 meeting.

In her affidavit, the Director states that she has held her position since August, 1990 and that she is also responsible for the administration of the Act. The Director also states that the Records Classification System requires the purging of all working notes once the matter to which they relate has been completed. The Director states that on July 14, 1994, the appellant made a request for access to information pertaining to Interim Control By-law Nos. 31983 and 32033 and Zoning By-law Nos.32322 and 32323. On September 9, 1994, the City issued a fee estimate and an access decision on the responsive records.

The Director further explains that the records consisted of working notes with respect to the preparation of a report. The final report was completed on December 23, 1993 and two supplementary reports were completed on April 13, 1994 and June 22, 1994. The subject matter of the reports was addressed by Council at its meeting on July 6, 1994. The Director states that by March of 1995, as the City had not received a reply from the appellant, she decided to close her request file. The Director explains that in addition, over 120 days had elapsed and no appeal had been filed.

The Director states that no copies of the records were made. The Director explains that responsive records are reviewed in their original state and in order to keep photocopying costs to a minimum, no copies are made until the requester pays a fee deposit. The Director states that she personally returned the files to the various departments in March, 1995 prior to the receipt of a new request from the appellant in May, 1995.

I have carefully reviewed the representations of the parties together with the circumstances of this case. Given the nature of the appellant's issue, any finding must necessarily be based on the particular circumstances of this case. In my view, it may be useful to summarize the sequence of events described in the two affidavits, with particular attention to the timing of the appellant's requests.

On July 14, 1994, the appellant filed a request for access to records related to the passage of certain interim control and zoning by-laws. Files are forwarded to the Director for review for the purpose of responding to the request. On September 9, 1994, the City issued a decision, setting out a fee estimate with respect to those records to which access was granted. The City also

indicated that access was denied to four records under section 12 of the Act (solicitor-client privilege) and to 11 other documents consisting of handwritten notes pursuant to section 7 of the Act (advice and recommendations). The City provided the appellant with a file reference number in the event of any questions. No payment was received and no appeal was filed in respect of the fee estimate or the exemptions claimed. In essence there was no further communication from the appellant until May 2, 1995. In March, 1995, the records were returned to the Planning Department and were processed in accordance with its records retention policy.

In his letter dated May 2, 1995, the appellant requested access to records related to the history and development of the property. The appellant also paid the fee estimate set out in the City's earlier decision which the City accepted.

On July 17, 1995, the City advised the appellant that the 11 records referred to in its earlier decision had been destroyed. The appellant claims that the records should not have been destroyed as his request was still active.

I have carefully reviewed the representations of the parties together with all the circumstances leading to this appeal. In my view, the facts of this case speak for themselves. The appellant made a request and the City responded with a fee estimate and a decision on access to the records. The City's decision was dated September 9, 1994. The appellant did not respond either with respect to the fee estimate or to the decision on access until he filed a similar request on May 2, 1995. The City waited until March and then proceeded to deal with the records in accordance with its record retention policy. The files were then purged and the handwritten records destroyed.

In my view, the City showed restraint and respected the appellant's interests by waiting until March, 1995 prior to acting on its department policy. I find that the City's actions were reasonable in the circumstances. The records in question were handwritten notes related to reports on zoning issues. The final products, the interim and final reports were retained while drafts and notes were destroyed. The records were treated in accordance with the City's records management policy in effect at the time. In my view, it is not reasonable to expect an institution to wait and preserve a record indefinitely where a requester has not indicated an interest or commitment to following through with the request and in all respects appears to have abandoned the request.

The regulations made under the Act require that the head of an institution ensure that reasonable measures to protect records in its custody are defined, documented and put into place, having regard to the nature of the records. I agree with the appellant that the City's current record retention by-law is lacking in that it does not address the issue of handwritten documents. However, as the appellant has pointed out, the City has acknowledged this deficiency in a proposed new by-law expressly dealing with handwritten documents. I would expect that the City will have its new by-law in place at the earliest to avoid similar situations from occurring.

ORDER:

1. I uphold the City's decision to deny access to the 28 councillor's records.

2. I order the City to disclose Records 1, 81, 91, 143, 144, 682 and 683 to the appellant.

3. I also order the City to disclose to the appellant the records in Provision 2 **and** all the records to which it has granted access but has not yet disclosed, upon payment of the appropriate fees. The appellant should view these records and identify the records which he wants copied by **November 11, 1996**. In the event that the appellant has not viewed these records within the time provided for herein, the City will be deemed to have complied with its obligations pursuant to this provision.

4. I uphold the City's decision to deny access to the remaining records listed in Appendices A and B.

5. I find that the City's search for responsive records was reasonable in the circumstances of this appeal and this aspect of the appeal is dismissed.

6. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 2 and 3.

Original signed by: October 10, 1996
Mumtaz Jiwan
Inquiry Officer