



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-1084

Appeal M-9700217

City of Burlington



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NATURE OF THE APPEAL:

The City of Burlington (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for information relating to the proposed re-designation, re-zoning and plan of sub-division of a specific property, the new City official plan for the property, any proposed re-designation of lands in the vicinity of the property to residential uses, the development of the non-residential land conversion policy and the potential relocation of CN's Stewart Street Yard operations to Aldershot.

The City granted partial access to the records it identified as responsive to the request, claiming the exemptions found in the following sections of the Act to deny access to the remainder:

- advice or recommendations - section 7(1);
- economic and other interests - sections 11(c)(d) and (e);
- proposed plans of an institution - section 11(g); and
- solicitor-client privilege - section 12.

The requester (now the appellant) appealed the City's decision.

In his letter of appeal, the appellant narrowed the records at issue to the documents identified as Records 1(b), 3(b) and 5 in the City's Index of Records which was attached to the access decision.

The City then granted access to additional records and provided the appellant with a more detailed index describing the documents contained in each record remaining at issue. After reviewing the detailed index, the appellant further narrowed the documents at issue.

This office provided a Notice of Inquiry to the appellant and the City. In this Notice, the Appeals Officer identified information at issue which may also fall under the mandatory exemptions found in sections 10 (third party information) and 14 (invasion of privacy) of the Act. The potential section 10 information includes such things as invoices, costs, reports and proposals submitted by third parties; the potential section 14 information includes individuals' work histories, personal histories and the identity of an individual who submitted a request under the federal access legislation. Because the records may contain third party information, this office sent a Notice of Inquiry to a number of affected parties. Representations were received from six affected parties. In his representations, one affected party did not object to the disclosure of information he had provided but did not want his name and address released. The other affected parties all objected to the disclosure of information pertaining to themselves personally and/or to their companies.

PRELIMINARY MATTER:

THE LATE RAISING OF A DISCRETIONARY EXEMPTION

The City raises the possible application of section 15 for the first time in its representations for the following records:

- File folder 2 Record 11;
- File folder 3(i) Records 5 and 11;
- File folder 3(j) Records 2, 7, 15 and part of Record 11.

On July 31, 1997, the Commissioner's office provided the City with a Confirmation of Appeal which indicated that an appeal from the City's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the City would have 35 days from the date of the confirmation (that is, until September 5, 1997) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

As I have indicated, it was not until December 10, 1997, following the issuance of the Notice of Inquiry, that the City indicated for the first time that it wished to rely on section 15 of the Act to deny access to the above-noted records.

Previous orders issued by the Commissioner's office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the provincial Act, the equivalent of section 40 of the Act.

Inquiry Officer Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, Inquiry Officer Fineberg made the important point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In the present case, the City was advised of the policy in question yet decided to rely on a new discretionary exemption over four months after the Confirmation of Appeal was issued. Since the City has failed to advance any arguments to indicate why the 35-day time limit should not apply in the present appeal, I will not consider the application of the section 15 exemption in this appeal.

RECORDS:

The records remaining at issue are those identified by the appellant in the highlighted index attached to his September 24, 1997 letter to this office with a copy to the City. The appellant has further narrowed/clarified the records at issue by removing from the scope of the appeal the portions of Records 3(i) and 3(j) described as, "... hiring consultants, project costs and fees, and strategies and options for the relocation of the CN rail yard to Aldershot" found immediately following the first highlighted portion in the index for each of the two records.

There are three volumes of records. Each volume is divided into file folders, which the City has numbered: 1, 1(a), 2, 3, and 3(a) through (j). As noted above, only the non-highlighted portions of the index provided by the appellant are at issue. The parties are aware of the information at issue. Because of its volume, I have chosen to deal generally with the information in each file folder in my discussion.

TESTS:

The Commissioner's office has developed a number of tests to assist in the application of certain exemptions in the Act to various types of records and information. As I noted above, the City has submitted that the records are exempt from disclosure under sections 7(1), 11(c), (d), (e), (g) and 12. Further, this office has identified the possible application of sections 10(1) and 14(1). The following tests have been articulated in previous orders with respect to some of these exemptions. Where no test has been expressed in previous orders for an exemption, I have set out the exemption itself as it appears in the Act.

Section 7(1)

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 [Order 118].

Section 10(1)

For a record to qualify for exemption under sections 10(1)(a), (b) or (c) the City and/or the party resisting disclosure must satisfy each part of the following three-part test:

1. The record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. The information must have been supplied to the City in confidence, either implicitly or explicitly; **and**

3. The prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsections 10(1) will occur.

Sections 11(c) and (d)

These provisions state that:

A head may refuse to disclose a record that contains,

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution.

Section 11(e)

For a record to qualify for exemption under section 11(e), each part of the following test must be established:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to any negotiations; **and**
3. the negotiations must be carried on currently, or will be carried on in the future; **and**
4. the negotiations must be conducted by or on behalf of an institution.

[Order M-92]

Section 11(g)

In order to qualify for exemption under this section, the City must establish that a record:

1. contains information including proposed plans, policies or projects; **and**
2. that the disclosure of the information could reasonably be expected to result in:

- (i) premature disclosure of a pending policy decision, or
- (ii) undue financial benefit or loss to a person.

Each element of this two-part test must be satisfied (Order P-229).

Section 12

This section consists of two branches, which provide a head 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 (Branch 1), the institution 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 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.

[Order 49. See also Order M-2 and Order M-19]

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 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.

[See Order 210]

Section 14

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

DISCUSSION:

GENERAL DISCUSSION REGARDING EXEMPTION CLAIMS

The City appears to have claimed section 12 (solicitor-client privilege) generally for all of the records at issue, although it has not submitted representations on this section with respect to a number of them. In the index which was sent to the appellant, however, the City asserts that these records were made in contemplation of litigation. I have considered all of the evidence provided by the City in this regard, and have examined the records. In my view, the City has not provided sufficient evidence to show that litigation was contemplated at the time the majority of these records were created. In my view, these records are more correctly characterized, generally, as records prepared by the City’s employees or consultants to be used in developing its position and in its negotiations regarding this matter. Accordingly, I will not consider the application of section 12 further unless it has been specifically raised with respect to a specific record.

VOLUME 1 RECORDS

File folder 1(a)

The only record at issue in this file folder consists of a one-page note to file. The City indicates that this note, which is marked “confidential”, is part of a larger report by the City Planner and details the positive and negative aspects of the “TCG revised concept plan”. The City submits that this note contains advice or recommendations of the Planner regarding the TCG revised plan which was made in the course of the deliberative process regarding the City’s position on this revised concept plan (section 7(1)). The City submits further that disclosure of this record would reveal the instructions given by the City Planner regarding negotiations between the City and TCG (section 11(e)).

Having reviewed this record, I am satisfied that it qualifies as advice within the meaning of section 7(1). As this record is properly exempt under section 7(1), I do not need to consider the application of section 11(e) to it.

File folder 2

Record 1 contains a retainer letter and resume of a consultant. The City claims that sections 7(1), 10(1) and 12 apply to the retainer letter and that section 14(1) applies to the resume.

I find that the resume qualifies as the personal information of the consultant. The appellant has not submitted representations on this issue *per se* other than to indicate that the onus is on the City to establish that disclosure of the personal information would be an unjustified invasion of privacy.

I do not agree with the appellant that the onus is on the City to establish the application of section 14(1). In my view, once it is determined that a record contains the personal information of an individual other than the appellant, and no exceptions apply, pursuant to section 14(1)(f), the onus shifts to the appellant to establish that disclosure **would not** constitute an unjustified invasion of privacy. I find that the consultant’s resume is properly exempt under section 14(1) as it falls within the presumption in section 14(3)(d) (employment history).

With respect to the retainer letter, I find that it simply sets out the terms of the retainer. I am not persuaded that it either provides advice or is seeking advice from the City’s solicitor. Accordingly, I find that neither section 7(1) nor 12 applies to it.

This record contains commercial information relating to the consultant’s retainer which was supplied to the City. The consultant (who is an affected party) submits that this record was supplied in confidence and I am satisfied that it was. I am not persuaded, however, that disclosure of this information, which essentially sets out the manner in which the consultant will conduct her affairs with the City, will lead to any of the harms set out in section 10(1). Accordingly, I find that section 10(1) does not apply to Record 1. Therefore, the retainer letter should be disclosed to the appellant.

The City submits that Records 2, 3, 4, 5, 6, 7, 10, 12, 13, 14, 15, 16, 17 and 18 were created in contemplation of litigation, that is, a hearing before the Ontario Municipal Board (the OMB). The appellant advises that this hearing was scheduled to take place in early January 1998. No evidence has been submitted which indicates that this matter has concluded. I am satisfied that these records were

prepared by or for counsel employed or retained by the City in contemplation of litigation. Accordingly, these records are exempt under section 12.

The City indicates further that Records 8 and 9 are reports prepared by a third party. The City submits that these reports contain commercial information about a third party regarding emergency response planning. The City submits that these records could have been supplied in confidence. Other than that, the City indicates that this is third party information that is not the City's to disclose. Although notified, the affected party which prepared this information did not respond to this office. On the basis of the representations, I find that there is insufficient evidence on which to conclude that disclosure of these two records (tabs 8 and 9 in the City's representations) would result in the harm contemplated by section 10(1). As no other exemptions have been claimed for these records, they should be disclosed to the appellant.

The City indicates that the record at tab 11 of its representations is available to the public at the offices of the OMB. It does not appear that this information has been provided to the appellant, however. Accordingly, I order the City to provide the appellant with a copy of this record.

File folder 3(a)

This file folder consists, in part, of 11 letters or memoranda (Records 1 - 11) from a consultant retained by the City to various City employees.

The City submits that these letters contain the advice or recommendations from this individual regarding negotiations and other issues concerning the relocation of the CN yard. The City submits further that the advice or recommendations were made in the course of the deliberative process concerning these issues.

The City also claims that sections 11(c), (d) and (g) apply to six letters and that sections 11(c), (d), (e) and (g) apply to the rest. Essentially, the City argues that disclosure of negotiations and strategies for negotiations could result in closure of the negotiations and would cause an inability to oppose relocation of the CN yard. The City submits that this could prejudice its economic interests and be injurious to its interests because of the costs associated with the rail yard.

I am satisfied that all of the memoranda and letters, with the exception of Record 6, contain advice and/or recommendations within the meaning of section 7. Record 6 is a proposal submitted by the consultant. I am satisfied that it contains sufficiently particularized information which could reasonably be expected to prejudice the City's economic interests in respect of its interests in the rail yard within the meaning of section 11(c).

Record 12 of file folder 3(a) contains seven pages consisting of a meeting agenda and e-mails between a City employee and the City's consultants. These pages contain discussions concerning zoning designations on the Aldershot CN lands. The City submits that pages 3 and 4 contain advice and recommendations regarding the retainer with the consultants. In my view, discussions regarding the

consultants' retainers do not qualify under section 7(1) as they do not pertain in any way to a suggested course of action to be taken as part of the deliberative process.

The City also submits that sections 11(c), (d), (e) and (g) apply to this record for the same reasons referred to above. I am satisfied that disclosure of this record, with the exception of pages 3 and 4, could reasonably be expected to negatively affect negotiations between the City and CP and thus prejudice the City's economic interests. Therefore, pages 1, 2 and 5 - 7 of this record are exempt under section 11(c).

Pages 3 and 4 contain discussions about the consultants which are sufficiently personal in nature to qualify as personal information. I have no evidence before me to indicate that disclosure of this information would **not** be an unjustified invasion of personal privacy, therefore, these two pages are exempt under section 14(1).

Record 13 of file folder 3(a) consists of 3 pages of handwritten notes attached to a seven-page letter from the consultant. The City indicates that the notes summarize the advice and recommendations which are discussed in the letter and argues that to release the notes would be tantamount to releasing the letter. Therefore the City argues that section 7 applies to this record. The City also claims that sections 11(c), (d) and (g) apply to this record for the reasons referred to above. I agree with the City that section 7(1) applies to this record.

Finally, Record 14 consists of invoices from the consultant regarding his fees for services provided. The City submits that this commercial information was provided in confidence by the consultant and if disclosed, could injure the consultant's competitive position. The City does not indicate how this could reasonably be expected to occur. The consultant indicates that the disclosure of some documents (he does not specify which ones) could lead to an advantage to his competitors. He does not indicate how this could reasonably be expected to occur. Based on the evidence before me, including the record itself, I am not persuaded that the harm contemplated by the City and affected party could reasonably be expected to occur as a result of disclosure of this record. Therefore, section 10(1) does not apply and as no other exemptions have been claimed for Record 14, it should be disclosed to the appellant.

File folder 3(b)

Only Record 2 is at issue. This record consists of an e-mail. The City submits that section 10(1) applies to exempt the information in this record. The City indicates that this record contains financial and commercial information relating to business connections and fees for services rendered by a law firm. Similar to my findings above, I am not persuaded that disclosure of this information could reasonably be expected to result in any of the harms listed in section 10(1). Accordingly, as no other exemption has been claimed for this information it should be disclosed to the appellant.

File folder 3(c)

This file contains a one-page interoffice memorandum from a fire Prevention Officer to the Fire Chief and one page of handwritten notes. These records contain the names of possible risk analysis consultants to be approached as experts. The City claims that section 7 applies to this record. In my view, the selection of individuals to act as experts does not fall within the deliberative process of the institution. Further, there is no recommendation as to which person(s) should be selected. Accordingly, I find that this record does not qualify for exemption under section 7 and should be disclosed to the appellant.

VOLUME 2 RECORDS

File folder 3(d)

Record 1 consists of 246 pages of records relating to or received by the federal government pursuant to a Freedom of Information access request made by the City. These records are contained in a file folder identified as pertaining to a law firm retained by the City. The City submits that pages 1 - 23 of this record are privileged under both branches of section 12 as they consist of confidential communications between the City and its solicitors for the purposes of providing advice on the federal access requests.

The City also submits that disclosure of the strategies regarding making access requests of various government departments and agencies and negotiations with those departments and agencies, could cause an inability to oppose relocation of the CN yard and result in prejudice to the City's economic interests.

The City has claimed sections 7, 11(c), (d), (e) and (g) and 12 for these pages.

I am not persuaded that correspondence regarding the formulation and "strategies" involved in making access requests under the federal Act has any bearing on the City's ability to oppose relocation of the CN yard. Accordingly, I find that sections 11(c), (d), (e) and (g) do not apply. Moreover, I find that these pages are informational only and do not contain advice within the meaning of section 7. Nor do they contain "legal" advice within the meaning of section 12.

In reviewing these pages it became apparent that they also contain the personal information of an individual who made an access request under the Federal Act. This person objects to the disclosure of his name and address. As I noted above, the appellant has not addressed this issue with any particularity. In my view, I have not been provided with sufficient information for me to conclude that any of the factors which favour disclosure of the personal information apply in the circumstances of this appeal.

In the absence of any factors favouring disclosure, therefore, I find that the mandatory exemption provided by section 14(1) of the Act applies to the name and address of the individual referred to in the record.

The City indicates that the records received pursuant to the access request (pages 24 - 246) were prepared in order to communicate confidential information to counsel for the City for the purpose of obtaining legal advice and in contemplation of a hearing involving the City.

The appellant submits that these pages consist of public documents since they were released under the Federal Act. In my view, the fact that a record is obtained pursuant to an access request by a party does not mean that any other party has a right to receive that information from the original requester. If the records were obtained for a purpose which is consistent with one of the exemptions under the Act then they will be protected thereunder.

I am satisfied that the records were obtained by counsel for the City in contemplation of or for use in litigation (that is, the OMB hearing). Accordingly, I find that pages 24 - 246 are exempt under section 12.

Record 2 consists of four pages of handwritten notes by a City employee. These notes relate to City strategy regarding negotiations with various rail lines. The City submits that disclosure of the potential focus of negotiations would result in the harms contemplated by sections 11(c), (d), (e) and (g).

The City also submits that this record contains a summary of the advice and recommendations of its consultant and is thus exempt under section 7. I agree and find that these pages are properly exempt under section 7.

Record 3 is an e-mail from counsel for the City summarizing advice received from outside counsel. I am satisfied that this record contains confidential communications from counsel retained by the City and is directly related to the giving of legal advice. Accordingly, I find that this record is exempt under section 12.

File folder 3(e)

Record 1 contains a business development booklet which also contains resumes, client lists and work histories of individuals at a consulting firm. This record was submitted to the City in an attempt to be retained. Similar to my findings above, I find that the resumes, client lists and work histories of individuals portion of this record contains the personal information of the individuals referred to in it and is properly exempt under section 14(1) as disclosure would be a presumed unjustified invasion under section 14(3)(d). However, the remaining portion of this document is promotional and pertaining to the firm. It does not contain personal information. As no other exemptions have been claimed for this part of Record 1, it should be disclosed to the appellant.

Record 2 is a two-page letter with six pages of resumes attached. The letter details the terms of reference for a study regarding property value impact of the CN relocation. The City claims that sections 7, 12 and 14 apply to this record.

In my view, similar to my reasoning above, section 14(3)(d) applies only to the six pages of resumes. Therefore, this portion of the record is properly exempt under section 14(1).

I am satisfied that the letter portion of this record contains confidential communications between the consultant retained by the City and the City's solicitor for the purposes of obtaining legal advice. Accordingly, I am satisfied that this part of the record qualifies under section 12.

Records 3 and 4 consist of details of fees for consultants' work. The City claims that section 10 applies to this information. In my view, there is nothing in the representations or the record themselves to indicate that my earlier findings regarding similar types of records should not apply to these two records. Accordingly, I find that they do not qualify for exemption under section 10(1). As no other exemptions have been claimed for them, they should be disclosed to the appellant.

File folder 3(f)

Record 1 consists of resumes. Similar to my findings above, this information is exempt under section 14(1) as it contains personal information which falls within the presumption in section 14(3)(d).

Record 2 is a National Heritage study. The City claims that this record is exempt under section 12 as it is a communication between a consultant for the City and the City's solicitor for the purpose of obtaining advice from the solicitor concerning the content of the study. In the circumstances of this appeal, I am satisfied that the consultant was acting in the capacity of representative of the City and that he sent a copy of this record to the City's solicitor for use in obtaining legal advice. Accordingly, I find that Record 2 qualifies for exemption under Branch 2 of the section 12 exemption.

Record 3 is a staff report prepared by a City employee. The City has applied section 7 to exempt this record. The appellant submits that, by its very nature, this is a public document. He does not explain, however, how or why this is the case. I cannot accept a bald assertion that this is the case without further evidence. On reviewing this record, I am satisfied that the information in it relates to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. Therefore, Record 3 is exempt under section 7.

Record 4 is an 18-page briefing document prepared by the City's consultants regarding the strategy and position concerning a particular study. The City claims that sections 7, 11(c), (d) and (g) apply to exempt this record from disclosure. I am satisfied that this record also contains advice and recommendations within the meaning of section 7.

Record 5 is a two-page proposal from a consultant and contains financial information relating to services proposed to be performed. The City claims that section 10(1) applies to this information. As I indicated above, there is no evidence before me to support a finding that section 10(1) applies to this information. Therefore, it is not exempt and should be disclosed to the appellant.

Record 6 is a memorandum from the City's consultant regarding alternatives to the rail yard's relocation. The City has applied section 7 to this record. I agree. Accordingly, this record is properly exempt under section 7.

Record 7 consists of e-mails regarding the retaining of a consultant. The City has applied section 7 to these e-mails. I am not persuaded that discussions of this nature qualify for exemption under section 7. Therefore, Record 7 is not exempt and should be disclosed to the appellant.

Record 8 is an e-mail commenting on attached newspaper articles. The City has applied section 7 to this record. In my view, only the e-mail portion of this record qualifies for exemption under section 7. As no other exemptions have been claimed for the newspaper article, it should be disclosed to the appellant.

The City has applied both branches of section 12 to Record 9, which is a handwritten note listing consulting and law firms. The City indicates that this note qualifies as a communication between City staff and its solicitor for the purpose of obtaining advice regarding the choosing of consultants and areas for study. I am not persuaded that this record relates to the provision of services which would qualify as "legal advice" within the meaning of section 12. Accordingly, I find that it is not exempt under this section.

Record 10 is a 66-page booklet from outside counsel detailing services and containing resumes, client information and work histories. The City claims that both sections 10(1) and 14(1) apply. I am satisfied that section 14(1) applies to the resumes, client information and work histories (based on the above reasoning). However, I am not persuaded that disclosure of the remaining commercial information could reasonably be expected to injure the competitive position of the law firm as this information simply outlines the services it provides. Further, it is not reasonable to expect that this type of information would be considered to have been submitted in confidence as it essentially advertises the type of work performed by the law firm. Accordingly, I find that the remaining information in this record is not exempt under section 10(1).

File folder 3(g)

Record 1 is a letter and attached resume prepared by a consultant regarding noise related issues. I find the information contained in the resume qualifies for exemption under section 14(1) as the disclosure of this personal information would constitute a presumed unjustified invasion of privacy under section 14(3)(d). The opinions of this individual, however, were provided in his professional capacity and do not qualify as personal information.

The City claims that sections 7 and 12 also apply to this record. In my view, page 1 does not qualify for exemption under either section 7 or 12. It is merely a facsimile cover sheet which does not contain the type of information contemplated by these sections. I am satisfied, however, that the attached letter contains the advice and recommendations of a consultant retained by the City and this is exempt under section 7.

Record 2 is an invoice and cheque request for services rendered by the City's consultants. Similar to my findings above, this record does not fall within the protection of section 10(1) of the Act and should be disclosed to the appellant.

File folder 3(h)

Record 1 is a one-page letter of authorization to proceed with an environmental audit. I find that this record does not contain any personal information. The City claims that sections 11(c), (d) and (g) apply to this record. This letter is simply an authorization to begin and does not contain any other information. I find that none of the section 11 exemptions apply to this record. Accordingly, it should be disclosed to the appellant.

Record 2 contains 10 pages consisting of a variety of documents relating to an ecological study. The City claims that sections 7, 10(1) and 14(1) apply. Although Record 2 contains commercial information pertaining to the consultant's business, the information is primarily promotional. It is not evident on its face that this information was supplied in confidence and the consultant has not submitted representations. Even if it were supplied in confidence, I am not persuaded, because of the nature of the information, that disclosure would result in any section 10 harms to the consultant. Accordingly, I find that the record does not meet the three-part test in section 10 and is therefore, not exempt under this provision.

I find that the record pertains to the business activities of the consulting firm and does not contain personal information. Further, this record is informational and does not contain advice or recommendations within the meaning of section 7. As no exemptions apply to this record, it should be disclosed to the appellant.

Record 3 is a cheque requisition/invoice from a consultant which details study tasks completed. Similar to my findings above, this record is not exempt under section 10(1). The City claims that section 7 applies to it as well. In my view, this record does not contain any advice or recommendations within the meaning of section 7. It merely describes, very generally, fees for work to be completed and provides some other information relating to timing of the work to be done. As no other exemptions apply to this record, it should be disclosed to the appellant.

VOLUME 3 RECORDS

File folder 3(i)

Record 1 is a duplicate of Record 4 in File folder 3(f). My previous discussion is, therefore, applicable to this record.

Record 2 is a promotional booklet and resumes of consultants. I am not satisfied that this record was supplied to the City in confidence nor that disclosure of promotional information could reasonably be

expected to result in injury to the consultant's competitive position. I am satisfied, however, that the resumes, client information and work histories qualify as personal information and are exempt under section 14(1).

Record 3 contains a resume and e-mails regarding the retaining of this individual as a consultant. The resume is exempt under section 14(1) (as per the above reasoning). Although the e-mails relate to decisions regarding the retention of the services of a consultant, I find that they do not relate in any way to the deliberative process within the meaning of section 7. Accordingly, the e-mails are not exempt and should be disclosed to the appellant.

Record 4 is a Fedex airway bill. This record does not contain personal information. As no other exemption applies, it should be disclosed to the appellant.

Record 5 is a 19-page report from a transportation consultant on the CN rail yard Aldershot location. This record contains a variety of documents.

I find that the client list qualifies as the consultant's personal information. However, his opinions were provided in his professional capacity and do not qualify as personal information. The client list is exempt under section 14(3)(d) as per the reasoning above.

The City claims that section 7 applies to the advice and recommendations in this record regarding the strategy and position on the issues identified in the record. I agree and find that this part of the record is exempt under section 7.

The City claims that part of this record is an article from Railway Age magazine which is currently available to the public. The City has not made the title and issue in which this article is available known to the appellant. This information is necessary in order for him to access this record. Accordingly, I will order the City to provide a copy of this article to the appellant.

Record 6 contains fees, invoices and cheque requisitions. For the same reasons cited above, these records are not exempt under section 10(1). The City claims that section 7 also applies to this information. I find that this record does not contain any advice or recommendations nor would its disclosure reveal any advice or recommendations provided by the consultant. Therefore, it is not exempt under section 7 and should be disclosed.

Record 7 consists of the terms of reference for a consultant's report, a note regarding the retention of a consultant and a letter containing fees relating to the services proposed to be performed by a consultant and the consultant's client list, which I am satisfied forms part of the consultant's resume.

I am satisfied that the client list qualifies as the personal information of the consultant and it is exempt under section 14(1). For reasons similar to the above discussions, I am not persuaded that section 10 applies to the consultant's fees. I also find that staff recommendations regarding the retention of a consultant were not made within the deliberative process as contemplated by section 7. The City claims

that sections 11(c), (d) and (g) apply to the terms of reference. I am satisfied that this record contains sufficient detail such that disclosure of this information could reasonably be expected to reveal the City's strategy regarding the CN yard relocation and thus prejudice its economic interests (section 11(c)).

Record 8 consists of 19 pages of records which are generally described as agendas and minutes. Pages 4 - 9, however, consist of a letter between the City and its solicitor which was prepared for the purpose of providing legal advice regarding the CN sale. Page 4 contains a summary of the legal advice in pages 5 - 10. Page 11 is an e-mail from the City's solicitor outlining advice provided by outside counsel regarding planning matters. The City claims the exemption in section 12 for these portions of the record and has applied sections 7, 11(c), (d) and (g) to the rest. I am satisfied that the pages for which section 12 has been claimed are properly exempt under this section. In my view, pages 1, 2, 3, 12 and 13 do not contain advice or recommendations. Nor would their disclosure result in any of the harms in section 11. I find that disclosure of pages 11, 14 and 15 - 19 could reasonably be expected to reveal the City's strategy regarding the CN yard relocation and thus prejudice its economic position. Therefore, these pages are exempt under section 11(c).

Record 9 is a two-page site visit report. The City claims that section 7, 11(c), (d), (e) and (g) apply. Similar to my findings above, I am satisfied that disclosure of this record could reasonably be expected to prejudice the economic position of the City and it is properly exempt under section 11(c).

Record 10 is a Corporate Search request. The City claims that section 14(1) applies to exempt the addresses of the individuals referred to in the record. The information in this record consists of a company's "Registered Office Address". In my view, this does not qualify as personal information and should be disclosed to the appellant.

Record 11 contains the minutes of a City Council meeting dated September 11/97. The City submits that **if** this discussion was held in camera, then section 7 would apply. **If not**, the records are publicly available. The City has not indicated which is the case. In my view, the City's representations regarding this record are extremely vague and the evidence provided by it is insufficient for me to conclude that the record contains advice or recommendations within the meaning of section 7. Accordingly, this record is not exempt. With respect to this record, I would like to add that there is no evidence to indicate that this Council meeting was held in camera and thus not open to the public. Even if the record did contain advice or recommendations, in my view, exempting information which would have been delivered in a public forum would lead to an absurd result. Therefore, I will order the City to disclose it to the appellant.

Record 12 is an agenda dated September 14, 1995 regarding a meeting between City staff and its consultants regarding the proposed CN relocation. The City claims that section 7, 11(c), (d), (e) and (g) apply. In my view, this record is sufficiently detailed such that its disclosure could reasonably be expected to reveal the City's strategy regarding the CN yard relocation and thus prejudice its economic position. Therefore, these pages are exempt under section 11(c).

Records 13 and 14 are confidential memoranda from City staff to the City's solicitor concerning the CN rail yard. The City claims that both branches of section 12 apply to these records. I am satisfied that these two records contain confidential communications between the City and its legal advisor which is directly related to the seeking, formulating and giving of legal advice and is thus exempt under section 12.

Record 15 contains fees for services. I find that section 10(1) does not apply to this information as per my reasoning above. This record should be disclosed to the appellant.

Record 16 is a letter from the City to CP Rail regarding the Hamilton operations. The City claims that sections 11(c), (d), (e) and (g) apply as this record contains information on the City's strategy on possible negotiations with CP Rail. The City submits that disclosure of the strategy could result in an inability to oppose relocation of the rail yard. I agree and find that disclosure of this record could reasonably be expected to prejudice the City's economic interests. It is therefore exempt under section 11(c).

Record 17 is a memorandum regarding the retaining of consultants. I am not persuaded that this type of advice qualifies as pertaining to the deliberative process within the meaning of section 7. Accordingly, this record is not exempt.

Record 18 is a letter from CN to the City regarding the relocation of the CN yard to Aldershot. The City claims that sections 11(c), (d), (e) and (g) apply. Similar to my reasoning above, I find this record is exempt under section 11(c).

Record 19 is a proposed draft plan of subdivision (page 1 only). The City submits that this is commercial information supplied to it by CN in confidence and that its disclosure could injure CN's competitive position. CN did not submit representations to this office. The City does not indicate in any way how this injury could reasonably be expected to occur should this record be disclosed. In my view, there is nothing on the face of the record to draw me to conclude that the section 10(1) harms could reasonably be expected to occur. Accordingly, as the third part of the section 10 test has not been met, I find that this record is not exempt.

Record 20 is a list of potential consultants provided by GO Transit to the City. I am not persuaded that disclosure of the mere identification of a list of potential consultants could reasonably be expected to injure the competitive position of GO Transit with respect to the retaining of certain consultants. Therefore, I find that the third part of the section 10(1) test has not been met.

The City claims that section 14 also applies to the author's opinions on consultants. I find that this information was provided by the author in his professional capacity and does not qualify as personal information. As no exemptions apply to this record, it should be disclosed to the appellant.

Record 21 is a facsimile sent to the City regarding a company that produces video presentations. The City claims that section 7 applies to this record. As with many of the other documents referred to

above which relate to the process involved in putting together the City's position regarding its negotiations of the matter concerning the CN Rail yard, I find that this record does not in and of itself relate to the deliberative process and is, therefore, not exempt under section 7.

Record 22 contains handwritten notes regarding a variety of issues. The City has applied sections 7, 11(c), (d), (e), (g) and 12 to them. I find that disclosure of the first bundle of four pages would reveal the confidential communications between the City and its legal advisor regarding the seeking, formulating and giving of legal advice and is thus exempt under section 12. The second bundle contains information, the disclosure of which would reveal the City's strategy regarding the CN yard relocation and thus could reasonably be expected to prejudice its economic position (section 11(c)).

File folder 3(j)

Record 1 contains detailed invoices and cheque requisitions regarding outside legal services received by the City. The City submits that this record reveals communications between the City and its solicitors in which the City is seeking legal advice regarding strategy. The City has also applied section 10(1) to this record. Similar to my findings above, section 10(1) does not apply to this record.

I agree that the statements of account contain details of the work undertaken by counsel on behalf of the City. Therefore, I find that this information is properly exempt under section 12 as it comprises confidential communications between a client and its legal advisor directly related to the seeking and giving of legal advice.

However, some of the pages in this record simply identify the bottom dollar figure of the fee for services rendered. This information is found on photocopies of cheques (and cheque statement attachment), cheque requisition forms and purchase orders. This information does not qualify for exemption as it is not directly related to, nor would it reveal, the seeking or giving of legal advice. Nor would this information be used by counsel in giving legal advice.

Record 2 is entitled "Response to the West Harbourfront Development Study Final Report". The City claims that pages 1 - 15 of this record **may** be publicly available. The City, however, does not indicate that it definitely **is** available. I am not satisfied that if the appellant goes to the City of Hamilton's Clerk's office that he will obtain this record. Accordingly, I will order the City to disclose pages 1 - 15 to the appellant.

The City claims that sections 11(c), (d), (e) and (g) apply to pages 16 - 17 of this record. I find that disclosure of these pages would reveal the City's strategy regarding the rail yard which could reasonably be expected to prejudice the City's economic interests.

I note that pages 20 - 29 contain the work histories of three consultants. In my view, this information is exempt under section 14(1) as its disclosure would be a presumed unjustified invasion of privacy under section 14(3)(d).

The City has not claimed any exemption for the remaining two pages of Record 2, and I find that none apply. Therefore, I find that they are not exempt and should be disclosed to the appellant.

Record 3 is a letter from CN's counsel to the City regarding the relocation of the CN Rail yard to Aldershot. The City claims that section 10(1) applies to this record. CN did not submit representations in this appeal. I am prepared to accept that this record relates to the commercial activities of CN. However, I have no evidence before me that this document was submitted in confidence. Nor is it apparent from the record itself or from the sparse representations of the City on this issue that disclosure of the record could reasonably be expected to result in any of the section 10(1) harms. Accordingly, this record should be disclosed to the appellant.

Record 4 is a letter from the City to a consultant setting out the authorization and terms of reference for an environmental audit. The City claims that this record reveals the focus of advice or recommendations to be provided by the consultants. In my view, this record does not set out, nor would it reveal, any advice or recommendations. Rather, it is akin to a request for advice and recommendations on a particular matter. Accordingly, section 7 does not apply and this record should be disclosed to the appellant.

The City also claims that section 7 applies to Record 5, which is a letter regarding the terms of reference for a property value study. I similarly find that section 7 does not apply to this record.

The City claims that this record is also exempt under both branches of section 12 as it is a communication between the City's consultant and the City's solicitor for the purposes of obtaining advice regarding the scope of the study. This letter contains a very detailed outline of the proposed work to be done by the consultant, and I am satisfied that this record contains communications between the consultant, as representative of the City, and the City's solicitor and was used in giving legal advice.

Record 6 is a letter from the City's consultants to the City's solicitor which contains preliminary comments on issues relating to the relocation of the rail yard. The record also contains a copy of a consultant's resume.

As above, I find that the resume qualifies as the personal information of the consultant and is properly exempt under section 14(1) as its disclosure would be a presumed unjustified invasion of privacy under section 14(3)(d).

The City claims that the comments qualify under both branches of section 12 as this record is a communication between the consultant and the solicitor for the purpose of obtaining advice on the scope of the matter. I am satisfied that this record is properly exempt under section 12.

Record 7 is a two-page recommendation from a report adopted by the Hamilton City Council. The City claims that if the council meeting at which this report was discussed was not held in camera, then the record is publicly available at the Clerk's office. The City has made similar statements throughout its

representations. In my view, the City is in the best position, and the onus is on it, to establish that this record has been made available to the public. The City has not done so. As no other exemptions apply to this record, I will order the City to disclose it to the appellant.

Record 8 contains a consultant's resume, letters and reports.

I am satisfied that the resume qualifies for exemption under section 14(1) for reasons noted above. The comments made by the consultant do not qualify as personal information as they were made in his professional capacity.

The City claims that sections 11(c), (d) and (g) apply to this record. I am satisfied that disclosure of this record in its entirety would reveal the City's strategy regarding the rail yard and that this could reasonably be expected to prejudice its economic interests.

Record 9 contains letters from the consultants to the City regarding the CN rail yard relocation plus two agendas regarding the proposed CN relocation.

The City indicates that page 10 of this record contains the curriculum vitae of a consultant. Consistent with the above findings, I find that this record is properly exempt under section 14(1).

Parts of pages 1 - 5 contain fees relating to services provided by a consultant. For reasons referred to above, I find that this information is not exempt under section 10(1). The City claims that the exemptions in sections 7, 11(c), (d) and (g) apply to the remaining information.

In my view, neither section 7 nor 11 apply to the two agendas which form part of this record. They do not contain advice or recommendations, but rather simply set out in a very general way, the items to be discussed at meetings. Because the agenda items lack any detail it is not possible to glean any information from them which would fall under any part of section 11. I am satisfied, however, that disclosure of the remaining parts of Record 9 could reasonably be expected to prejudice the City's economic interests as the information relates to the City's strategy regarding the CN rail yard.

Record 10 contains corporate search information along with a cover letter which indicates the fee charged for this service. I find that section 10(1) does not apply to the fees. Nor does section 14(1) apply to the address as this is commercial information rather than personal information. Accordingly, this record should be disclosed to the appellant.

Record 11 contains two agendas and attachments, a letter and attachments and e-mails relating to the proposed CN relocation. The City indicates that pages 15 - 19 of this record consist of an article from Railway Age magazine and are currently available to the public. Similar to my decision above, I will order the City to provide a copy of the article to the appellant.

The City claims that section 7 applies to some pages and that section 12 applies to others. The City indicates further that the record contains a consultant's client list and that this qualifies as his personal

information. I agree, and find that this information, which forms part of the consultant's resume, is exempt under section 14(1) for reasons cited above.

Finally, the City claims that sections 11(c), (d) and (g) apply to all of the information in this record (except for pages 15 - 19).

I find that the May 26, 1997 agenda and the May 15, 1997 letter do not contain any information which would fall within any of the exemptions claimed by the City. Therefore, these two pages should be disclosed to the appellant. However, I find that all of the attachments and the May 6, 1997 agenda contains detailed notes, the disclosure of which could reasonably be expected to prejudice the City's economic interests (section 11(c)). Therefore, the remaining portions of this record are exempt from disclosure.

Record 12 is an inter-office memorandum. The City claims that it is exempt under sections 7 and 12 as it was prepared by outside counsel and contains the legal and consulting fees which will be necessary to pursue the City's strategy. The City also claims that section 10(1) applies to this financial/commercial information. I do not agree and similar to my findings above, this information is not exempt under section 10(1).

Moreover, I am not persuaded that information regarding expenditures for the pursuit of the City's strategies qualifies as advice or recommendations within the meaning of section 7. However, this record contains details of the work done/to be done by the City's solicitors. Therefore, I find that it contains confidential communications between the client and its solicitor directly related to the seeking and giving of legal advice.

Record 13 is an inter-office memorandum which was copied to the City's legal counsel. The City submits that this is a confidential communication between the City and its solicitor for the purposes of obtaining advice from the solicitor regarding the City's negotiations. I agree and find that this record is properly exempt under section 12.

Record 14 contains City Council minutes regarding the retainer of a law firm. A cover letter is attached which is marked "confidential". The City claims that section 12 applies to this record. There is no evidence before me that the Council meeting was held in camera. If it was not held in camera, then both the meeting and any resultant minutes from that meeting would be public. As such, I have some difficulty accepting that an item for consideration by the Council, in and of itself, will fall within the exemption in section 12. Accordingly, I find that it is not exempt and as no other exemptions have been claimed for this record, it should be disclosed to the appellant.

Record 15 is a staff report. The City indicates that this record **may** be publicly available if the Community Development Committee discussion was not held in camera. The City does not claim a specific exemption for this record other than section 15 (publicly available). It is not clear that this record will be released if the appellant requests it from the Clerk's office. Therefore, I will order the City to provide access to it in response to this request.

Record 16 is a draft report prepared by staff. I am satisfied that this record contains the advice and recommendations of staff made in the course of the deliberative process of decision-making and thus qualifies for exemption under section 7.

Record 17 consists of notes to file regarding a preplan for the CN rail yard. The City claims that section 7 applies to this information. I am satisfied that disclosure of this record would reveal the advice and recommendations of staff regarding the draft plan and thus qualifies for exemption under section 7.

Record 18 is an inter-office memorandum from the Mayor to a number of individuals regarding a feasibility study for the possibility of moving the CN rail yard. The City claims that sections 7, 11(c), (d) and (g) apply to this record. In my view, this record is informational only and does not contain any advice or recommendations within the meaning of section 7. Nor does it contain any proposed plans, policies or projects the disclosure of which could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to any party. Finally, I am not persuaded that disclosure of this record could reasonably be expected to result in any of the harms referred to in sections 11(c) or (d). As no exemption applies to this record, it should be disclosed to the appellant.

ORDER:

1. I order the City to disclose to the appellant the following records and parts of records by **April 14, 1998** but not earlier than **April 9, 1998**:

File folder 2	Records 8, 9 and 11; and the retainer letter portion of Record 1;
File folder 3(a)	Record 14;
File folder 3(b)	Record 2;
File folder 3(c)	Record 1;
File folder 3(d)	Pages 1 - 23 of Record 1, except for the name and address of the individual who made a federal access request;
File folder 3(e)	Records 3 and 4; and Record 1, except the resumes, client lists and work histories of the consultants;
File folder 3(f)	Records 5, 7 and 9; the newspaper article in Record 8 and all of Record 10, except the resumes, client information and work histories of counsel at the firm;

File folder 3(g) Record 2; page 1 of Record 1;

File folder 3(h) Records 1 and 2;

File folder 3(i) Records 4, 5, 6, 10, 11, 15, 17, 19, 20 and 21; and Record 2, except the resumes, client information and work histories of consultants, Record 3, except the resume of a consultant, and pages 1, 2, 3, 12 and 13 of Record 8;

File folder 3(j) Records 3, 4, 7, 10, 14, 15 and 18; and photocopies of cheques (and cheque statement attachments), cheque requisition forms and purchase orders in Record 1, pages 1 - 15 and the agendas in Record 9, and pages 15 - 19, the May 26, 1997 agenda, the May 15, 1997 letter, and the magazine article in Record 11.

2. I uphold the City's decision to withhold the remaining records and parts of records.
3. 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 and parts of records which are disclosed to the appellant pursuant to Provision 1 of this order.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ March 10, 1998