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

ORDER MO-1285

Appeal MA-990076-1

City of Toronto

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BACKGROUND:

The former City of Toronto (the former City) was involved with the Board of Management of a named organization (the Centre) under the Community Recreation Centres Act, and pursuant to an enabling Committee By-law. The Centre operates a number of recreational and social programs in the community. In May 1996, as a result of a number of concerns being expressed about the Centre to the former City's Neighbourhoods Committee, the former City's Council recommended that a task force be struck to review the structure and functioning of the Board of Management and the Board of Directors of the Centre as well as alleged irregularities at the most recently held Annual General Meeting. Based on the information gathered by the Task Force, a final report was written and distributed to all interested parties.

NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all information relating to the appellant as President of the Centre for the period from 1994 to 1997. The appellant listed 15 locations within the City where responsive records may exist.

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 some records in whole or in part:

- advice or recommendations - section 7;
- solicitor-client privilege - section 12;
- invasion of privacy - sections 14(1) and 38(b) of the Act

The City also informed the appellant that:

- any notes of City and Metro councillors are constituency records and not subject to the Act,
- no responsive records exist with respect to mayoralty records,
- requested video tapes of witness statements do not exist.

In addition, the City charged the appellant $405.80 for search and preparation time and photocopying, broken down as follows:

Search fee:	4 hours @ $30 per hour	$120.00
Photocopying:	979 pages @ $0.20 per page	195.80
Preparation:	3 hours @ $30 per hour	90.00
		$405.80

The appellant then requested a fee waiver. With respect to this request, the appellant made the following statement:

> Due to the enormous files created by paid City and Metro staff; as my volunteer time and resources are limited and important to me, and my family in earning a living, and providing the [Centre] and our community with valuable volunteer resources such records should be provided free of charge to allow me to make the necessary review and ascertain the level of correction necessary. Any financial impacts on me would directly hurt the delivery of high need services in critical program areas to our community and further impact the security of public good.

The City found that in the absence of any detailed financial information about the appellant's financial position, it was unable to conclude that payment would cause the appellant financial hardship within the meaning of section 45(4)(b). Further, the City determined that the appellant's fee waiver request did not satisfy it that the dissemination of the records would benefit either public health or public safety within the meaning of section 45(4)(c).

The appellant appealed the denial of access to the records, the fee and the City's decision not to grant a fee waiver. The appellant also stated that he believes that more records exist. In this regard, the appellant indicated that the request was misinterpreted in that he requested audio tapes of witness interviews and videotapes of council meetings.

In addition, the appellant alleged that there is a conflict of interest involving two named individuals who are members of the City's Freedom of Information section. The appellant believes that a conflict exists because the two named individuals have been involved with the Centre and/or were also involved in issues surrounding the appellant and the Centre. According to the appellant, both individuals were involved in the processing of his request, and in fact, one of these individuals has signed all correspondence from the City to the appellant on the City Clerk's behalf. The City was advised of the identities of these two individuals.

The following issues were resolved and/or clarified during mediation:

- The appellant accepts that responsive mayoralty records do not exist.
- The appellant is no longer seeking access to councillors' notes.
- The appellant has confirmed that he has access to video tapes of council meetings. These are public records and are no longer at issue.
- The appellant has removed five records to which access was denied from the scope of the appeal.
- The appellant accepts that there are no video tapes of witness statements, although he does seek access to any audio tapes or transcripts of witness statements. The City, in a supplementary decision issued after a further search, confirmed the existence of responsive audio tapes of interviews that are linked to "interview transcripts/questionnaires" previously located. The City denied access to these audio tapes based on the exemptions found in sections 14(1) and 38(b) of the Act.

As a result of the above, the reasonableness of search is no longer at issue and the audio tapes have been added as records at issue in this appeal.
Also during mediation, the City reduced the total fee to $222.20, broken down as follows:

Search fee:	4 hours @ $30 per hour	$120.00
Photocopying:	436 pages @ $0.20 per page	87.20
Preparation:	30 minutes @ $7.50 per 15 minutes	15.00
		$222.20

The appellant wishes the revised fee to be subject to this appeal.

I sent a Notice of Inquiry to the appellant and the City seeking representations on the issues in this appeal. Since it appeared that the records may contain the appellant's personal information, the Notice also raised the possible application of the discretionary exemption in section 38(a) of the Act (discretion to refuse requester's own information) in connection with sections 7 and 12. I received representations from both parties.

The appellant has submitted extensive representations in this matter. His representations detail the events at the Centre from his perspective and outline his views on the involvement of the City and various individuals. His representations also describe his frustration with the City and the manner in which his access request has been handled. Some of his representations address the issues to be determined in this appeal, for example, the issue of conflict of interest. However, for the most part, they simply provide background information and do not specifically address the issues.

RECORDS:

The records are contained in 16 files. They include correspondence, memoranda, minutes of meetings, briefing notes, interview notes, transcripts and summaries, audio tapes, handwritten notes, legal correspondence and notes, complaint records, and other similar records.

The City provided an index of records to this office. This index identified the records, whether or not access was granted in whole or in part and the exemption(s) claimed for each record. This index was provided to the appellant. He then made a note of those records to which he sought access and the method of access he was seeking for all records, including those to which access was denied.

In the end, 36 records which were withheld in full, 6 records which were withheld in part and 27 audio tapes remain at issue. I note that on the index provided by the City, File No. 9, 'all legal correspondence and notes' was identified as one record, but in fact contains 6 records. In the following discussion, I will identify them as File 9 - Records 1 to 6.

DISCUSSION:

CONFLICT OF INTEREST

The appellant submits that two named City employees who have been involved in the processing of his request have special interests in the identification and selection process of records due to their involvement with the Centre and their support of the daycare issues at the Centre in the past.
In particular, the appellant states that one City employee served on the Board of Directors of the Centre in 1989 as well as on the daycare Advisory Committee, and that she was a parent user and participated in daycare issues.

With respect to another City employee, the appellant states that she and her husband along with a named group interfered with the May, September 1996 and the June 1997 Annual General Meetings. He describes the events at the Annual General Meetings from his perspective and other actions taken by interested individuals. He concludes:

> I believe [the City employee] was assigned this file to clean-up evidence of colleagues who created the issues. It is obvious that a well informed person or a reasonable person would attribute bias. It was always the original strategy of various individuals to bias the proceedings against our Agency. [emphasis in the original]

Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example: Order M-640).

In Order M-457, former Assistant Commissioner Irwin Glasberg referred to the Management Board of Cabinet's publication "Handbook for Municipalities and Local Boards", which stated in part:

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

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

The above references have all focussed on the issue of conflict of interest with respect to the decision maker. In my view, it is equally possible that a conflict of interest could arise in regards to any individual working on the file if that individual has a private interest that is sufficiently connected to that person's duties such that his or her public duties are affected. Further, in my view, in addition to financial matters, the focus for conflict of interest is frequently political interests.

The question to ask in this case is whether the involvement of the two City employees in the events relating to the Centre were such that any reasonable person could reasonably perceive a conflict of interest in the processing of the request.

In responding to the appellant's allegations the City states that during the time that the appellant was President of the [Centre] 1994 to 1997, neither of the two City employees was an employee of the former City, the institution that created and compiled the majority of the records to which the appellant is seeking access.

The First City employee

The City acknowledges that this employee served on a voluntary basis on the Board of Directors and as Chair of the Building Development and Expansion Committee of the Centre in 1988 - 90. However, the City notes that this was well before the appellant was President and the events outlined above occurred. Further, the City indicates that the appellant was totally unaware of the previous involvement of the employee with the Centre until she volunteered this information during a telephone conversation with the appellant following the submission of his access request.

The City points out that the employee at the present time has no formal or direct involvement with the Centre and has not since the fall of 1990. Moreover, the City confirms that the employee has, to her knowledge, never met, spoken to or heard of the name of the appellant until his request was made.

The Second City employee

The City confirms that this employee was a parent user at the Centre in 1994 and 1995. The City also acknowledges that at that time, her spouse acted on behalf of a day care advocacy group. The City states, however, that the employee did not take part in any of this group's activities. The City asserts that her only involvement with the [Centre] was on the same basis as that of any other parent similarly affected by issues involving day care. The City notes that the employee has not been involved with the Centre since 1995, and that she has had no formal or direct involvement with it.

The processing of the appellant's access request

The City acknowledges that both individuals by virtue of their positions with the City have had some part in processing the appellant's request. The City indicates, however, that when the request was first received, the former City's Freedom of Information Co-ordinator was the individual responsible for contacting the various program areas for responsive records. The City states that he was involved with the appellant prior to the request during which time he provided informal disclosure of records to the appellant, and was, accordingly, the most familiar with the records requested.

The City states that when the former Co-ordinator left his employment with the City, the second City employee assumed carriage of the file and followed up on his initial contacts. The City notes, however, that although she was involved in the search of files from the former Mayor's office, this was done in conjunction

with the present Manager of Public Access, who had recently joined the City. The City states that all further processing of the request was undertaken by the Manager together with the second City employee.

The City notes that neither employee is the "head" for the purposes of the Act, despite the fact that the first City employee signed correspondence on behalf of the City Clerk who is the delegated head.

The City submits that neither employee has a private or special interest in whether or not the appellant has access to the requested records. In this regard, the City asserts that no personal or financial gain will be accrued to either party if the appellant is denied access to the information he is seeking. Further, the City submits that based on a consideration of the provisions of the Act, the City's decision on access would be the same irrespective of the involvement of these two individual's in the processing of the request.

Findings

The First City Employee

In my view, simply being involved in the Centre in the past and holding views on an issue which became contentious sometime in the future in not sufficient to establish that this employee had a private interest in the matter involving the appellant. Based on the evidence submitted by the City, I am satisfied that this employee did not have any personal interest in the Centre during the time in which the appellant was President, nor did she have any personal interest in matters pertaining to the appellant. In these circumstances, I find that a well-informed person could not reasonably perceive a conflict of interest on her part in the processing of the appellant's access request.

The Second City Employee

In Order M-640, Adjudicator Holly Big Canoe considered whether there existed a conflict of interest where the basis of the claim was that the Regional Clerk's husband is a friend of the person who made allegations of harassment against the appellant. She concluded that:

> The records consist of statements made by the complainant and witnesses in response to questions posed by the Harassment Panel during its investigation of alleged harassment. Based upon my review of the records, the correspondence, and representations, I find that the relationship is too remote for the Regional Clerk to have a personal or special interest in the disclosure or non-disclosure of the records and, in my view a well-informed person would not reasonably perceive a conflict of interest on the part of the Regional Clerk in making the decision.

In my view, the circumstances of the current appeal are quite different. Although I have acknowledged that the submissions provided by the appellant reflect a description of the events at the Centre from his perspective, I am satisfied that they demonstrate the involvement of, at least, this employee's husband in these events. I also accept that the employee herself had some involvement in the issues relating to the problems at the Centre, perhaps, as the City indicates, on the same basis as that of any other parent similarly affected by issues involving day care. Nevertheless, in my view, there is sufficient association with

the events at that time, including the advocacy role of her husband, to raise a perception that she might have some personal interest in the disclosure or non-disclosure of the records, thus creating a conflict in the processing of this request.

In Order M-457, former Assistant Commissioner Glasberg commented on the approach to take in resolving a conflict of interest situation in circumstances where discretionary exemptions have been claimed by the institution. He stated:

> In this appeal, I believe that a well-informed member of the public could perceive that the City Clerk had been placed in a conflict of interest situation when she signed the decision letter. On this basis, I must now determine how to resolve this situation.
>
> When an institution relies on a discretionary exemption to withhold a record from disclosure, it must exercise its discretion to apply this exemption in accordance with established legal principles. In Order 58, former Commissioner Sidney B. Linden commented on the role of the head of an institution in exercising discretion to either disclose or withhold a requested record:
>
> > In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law ... I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.
>
> I believe that these comments apply equally to those situations where the decision making function under the Act has been delegated.
>
> In this order, I have found that the discretionary exemptions contained in sections 6(1)(b), 7(1) or 12 of the Act apply to Records 2 to 6, 21, 23, 24, 30, 31 and 32, and to the highlighted portions of Records 8, 10 and 11. Based on the facts of this case, I find that, because of her personal interest in these records, the City Clerk could not exercise her discretion to withhold these 14 records in accordance with established legal principles.

In the current case, I found that the discretionary exemption in section 38(b) applied to most of the information and that the discretionary exemptions in sections 7 and 12 applied to all but one portion of the remaining information. I have considered the comments made by the former Assistant Commissioner, however, I am of the view that the circumstances of the current appeal are distinguishable from the situation he describes in Order M-457.

In this regard, I am not persuaded that this employee's personal interest in the subject matter to which the records relate was such that it could interfere with the decision-making process. In particular, I note that her role in the processing of this request involved collecting the records from the program areas and processing them in accordance with the instructions given by the decision maker. The decision on access, including the exercise of discretion was the responsibility of the City Clerk. I am not persuaded by the

evidence submitted by the appellant or in consideration of all of the circumstances of this appeal that this employee's role in the processing of the request influenced the decision maker in arriving at her decision in this matter. I am satisfied that her role in the processing of the request was peripheral to the actual decisions respecting access. Therefore, I find that the City's decision would not have been any different as a result of her involvement with the file.

Nor am I persuaded that her involvement could have affected the search which was conducted for responsive records as this was initiated prior to her involvement. Moreover, another employee was also involved in the processing of the request which makes it even less likely that she could have interfered with it.

Finally, the appellant has made a number of allegations about the second City employee, all of which are unsubstantiated. He has not provided me with any evidence which would suggest that she has, or would be likely to have interfered with or undermined in any way the processing of his request.

As a result, I find that although there is a perceived conflict of interest on the part of the second City employee, I am not persuaded that it has or could reasonably have interfered in any way with the decision-making process, the reasonableness of search (even though this is not an issue in this appeal) or the preparation of the records which were determined independently to be responsive to the request.

On a final note, I would caution the City to take care in involving staff in files pertaining to matters in which they have been actively involved or involved through close association.

PERSONAL INFORMATION

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

The City indicates that the majority of the records at issue in this appeal were created as a result of the in-depth examination of the circumstances surrounding the management of the Centre. The City states further that some of the records pertain directly to matters concerning the appellant during his time as President of the Centre.

The City submits that the records contain information about the individuals who participated in the review process, in particular, their views and perceptions about the management of the Centre, including its President. As well, the City submits that the records contain information of individuals who made specific complaints about the appellant.

The City indicates that although most of the information at issue relates to the appellant in his professional capacity as President, some comments made about him are of a more personal nature and may constitute his personal information.

Finally, the City notes that many of the records do not expressly identify the individual(s) involved, but takes the position that their identities can be ascertained.

It has been established by this office in previous orders that information provided by individuals in and as part of their professional capacities does not qualify as personal information (see Reconsideration Order R-980015 for a complete discussion on this issue). Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447 and M-122).

From my review of the records it is apparent that the focus of the creation of the majority of them was the general review of the management of the Centre. However, within that framework, it is equally apparent that the references to the appellant in the records at issue are very critical and are directed at him personally, as opposed to being directed at the position and/or role of President. In my view, they go beyond the "professional" and pertain more to his personal attributes. In this context, I find that the information contained in the records is recorded information "about" the appellant, personally, and thus qualifies as his personal information. The appellant's personal information is contained in all but five of the records at issue (Records File 7 - Record 4, File 11 - Record 3, File 12 - Record 4, and File 14 - Records 2 and 3).

I find that all of the records except the five records mentioned above contain information about other individuals, either referred to in them or as the source of the information. In many cases, individuals are not named but in the circumstances it would not be difficult for anyone involved in the Centre to identify them. Previous orders of this office have found that if there is a reasonable expectation that an individual can be identified from the information in a record, then such information qualifies as his or her personal information (Order P-230).

Records File 7 - Record 4, File 11 - Record 3, File 12 - Record 4, and File 14 - Records 2 and 3 do not contain personal information.

INVASION OF PRIVACY

The City claims that the exemption in section 14 and/or 38(b) applies to exempt 31 records from disclosure. As I have found that all of these records contain the appellant's personal information, I will consider the application of section 38(b) to all of them.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Section 38(b) of the Act introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his own personal information against another individual's right to the protection of their privacy. If the head determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives him the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, 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 the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

In deciding that disclosure of the records would be an unjustified invasion of personal privacy, the City relied on the factors listed under sections 14(2)(f) and (h). The appellant indicates that in his view the information about him in the records is inaccurate thus raising the relevance of the factor in section 14(2)(g). These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

The appellant also believes that most of the information at issue has been made public or "has been disclosed to others for the purpose of public mischief and to discredit me ..."

Section 14(2)(g)

The appellant essentially takes the position that the information in the records is false and made for the purpose of discrediting him. In supporting this contention, the appellant relies on the events which transpired during his tenure as President, identifying the various individuals he believes are intent on defaming his reputation.

It is clear from the appellant's representations that he believes that there was a movement afoot to force his resignation as President of the Board. His representations, however, do not provide tangible evidence of any inaccuracies in the records. Rather, they paint a different picture of the events from his perspective.

That being said, however, I note that much of the information in the records pertains to individuals' views and perceptions about the management of the Centre and in this context, it is possible that inaccuracies may occur in the telling. Therefore, I am prepared to accept that section 14(2)(g) may be relevant to some portions of the records. However, I note that the individual pieces of information obtained by the Task

Force were compiled to produce the final report, and it is the collective information they obtained which formed the basis for their conclusions. This information was obtained from a large group of interested and involved parties acting in very different capacities within the Centre. Based on the information which is contained in the records, the manner in which it was delivered and the extent of the review, I am not convinced that the relevance of any inaccuracies regarding the appellant in them is of much weight.

Further, some of the information records various individuals' personal dealings with the appellant and the impact such dealings had on them. In my view, the appellant has provided insufficient evidence to establish that this information is likely to be inaccurate or unreliable.

Sections 14(2)(f) and (h)

The City states that the personal information at issue in this appeal includes information relating to the concerns of staff, parents and other users of the Centre about the Centre's management and about the appellant in his capacity as President. The majority of the records at issue relate to the interview process employed by the Task Force and contain the views and perceptions of the interviewees in this regard. Other records were also created in this context and address issues raised during the interview process.

Further, some of the records contain the addresses, telephone numbers and other personal information about individuals who have made specific complaints about the appellant. It should be noted that the appellant was provided with access to the particulars of the complaints.

The City submits that in the context of the problems the Centre was experiencing and their impact on staff, other Board members and users of the Centre, this information is highly sensitive.

The City states further that all of the information obtained during the Task Force's investigation was provided in confidence. In this regard, the City notes that information was obtained orally and in writing. The City states that in responding to the interviewers' questions, all interviewees were read the following statement:

> In answering the following questions, please answer to the best of your knowledge. We are interested in your personal opinion and perceptions. You will not be identified in our report. Information will be reported in summary form only.

The appellant believes that much of the information has been made public or distributed to other interested parties.

The City acknowledges that a number of years have passed since this review, but states that many of the individuals who participated in the review are still involved with the Centre and, in particular, the appellant. It submits that in the context in which the records were created, disclosure of the personal information in them would cause extreme personal distress to the individuals referred to or identifiable in them. This is in part because of the sensitivity of the information in light of the concerns expressed in the records, and in part because of the assurances of confidentiality which were given at the time the information was provided.

In reviewing the records, I note that clearly stated assurances of confidentiality were given to all interviewees. Further, I am satisfied that individuals who have made a complaint against the appellant in his capacity as President would reasonably expect that their home address and telephone number as well as any other intimate personal details would not be disclosed. As I noted above, the substance of the complaints was provided to the appellant. Despite the appellant's assertions that much of the information has been made public, I am not persuaded that the specific information at issue falls into this category. Clearly, the comments made during the interviews, collectively, formed the basis for the conclusions reached in the report, but I am satisfied that they were referred to in aggregate form and not as identifiable statements made by particular individuals. Accordingly, I am satisfied that the personal information in the records was supplied by the individuals to whom the information relates in confidence. Therefore, I find that section 14(2)(h) is relevant in the circumstances.

Having reviewed the records in their totality, it is apparent that the situation at the Centre had reached an unpleasant level. As noted in the Neighbourhoods Committee Report No. 13:

> [T]he way the community responded and reacted to the existence of the Task Force was clearly demonstrative of the strong emotions which may have contributed to the conflict.

I am satisfied that in this context, there was a heightened sensitivity among those individuals involved in the Centre, particularly in relation to the appellant and the manner in which he was perceived by them. I find that the disclosure of their comments or views regarding the problems at the Centre would cause excessive personal distress to these individuals (Order P-434) and the information is highly sensitive within the meaning of this section (section 14(2)(f)).

The purpose of the Task Force was to identify and make recommendations relating to problems at the Centre. In order to advance this purpose, a number of individuals came forward and participated in the review. Given the concerns expressed and the general circumstances in which they were made, along with the fact that explicit assurances of confidentiality were given to them, I find that the factors in sections 14(2)(f) and (h) weigh significantly in the balance.

Consequently, in balancing the appellant's right to information about himself in the records with the rights of other individuals to their privacy, I find that the factors weighing against disclosure outweigh the appellant's right to access. Therefore, I find that section 38(b) applies to all of the records which contain the personal information of the appellant and other individuals.

ADVICE OR RECOMMENDATIONS

As I indicated above, Records File 7 - Record 4, File 11 - Record 3, File 12 - Record 4, and File 14 - Records 2 and 3 do not contain personal information. The City claims the application of the exemption in section 7 for these five records. The City also claimed section 7 for Record File 4 - Record 2, however, I found above that disclosure of this record would constitute an unjustified invasion of personal privacy. I will, therefore, not consider it in this discussion.

Section 7(1) provides:

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

This exemption is subject to the exceptions listed in section 7(2).

Previous orders of this office have stated the following with respect to the meaning of the words "advice" and "recommendations" in the equivalent to section 7 in the Freedom of Information and Protection of Privacy Act [Orders 118, P-348, P-363, P-883]:

> "Advice" for the purposes of section 7(1) of the Act must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. "Recommendations" are to be viewed in the same vein.

The "advice or recommendations" exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making [Orders 94 and M-847]. Put another way, its purpose is to ensure that:

> ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24 and P-1363].

The City submits that the records at issue in this discussion all reflect communications about the management of the Centre and that they were intended for use by senior staff in developing recommendations as to the course of action with respect to the handling of the matters that arose from the conflict at the Centre. The City relies on Order P-233 in which it was determined that a record may be exempt if it would reveal advice or recommendations by inference even though it is not itself advisory in nature.

File 7 - Record 4 is a confidential memorandum. It relates to administrative matters and is directional, ie. on how to proceed, rather than of an advisory nature. In my view, it does not contain any advice or recommendations, nor would its disclosure reveal information of an advisory nature. Therefore, I find that this record is not exempt under section 7. As no other exemption has been claimed for File 7-Record 4, it should be disclosed to the appellant.

File 11 - Record 3 and File 14 - Record 3 contain draft documents with margin notes made by City staff. Both records contain suggestions (advice) regarding changes to the documents and make recommendations in this regard. I am satisfied that these two records contain advice and/or recommendations made as part of the deliberative process in regards to matters pertaining to the Centre.

File 12 - Record 4 and File 14 - Record 2 contain notes made by a Community Service Grants Officer regarding the conflict at the Centre. I accept the City's submissions that disclosure of File 12 - Record 4 and page 1 of File 14 - Record 2 would reveal advice or recommendations by inference even though they are not themselves advisory in nature. I find further that page 2 of File 14 - Record 2 contains

recommendations relating to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

In summary, I find that all of the records with the exception of File 7 - Record 4 qualify for exemption under section 7(1). I have considered the exceptions in section 7(2) and find that none apply. Therefore, File 11 - Record 3, File 14 - Record 3, File 12 - Record 4 and File 14 - Record 2 are exempt under section 7(1) of the Act.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR -CLIENT PRIVILEGE

Under section 38(a) of the Act, the City has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 12, would apply to that personal information. The City claims that section 12 applies to all of the records in File 9.

Section 12 of the Act reads:

> 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.

This section consists of two branches, which provide an institution with 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 [Orders 49, M-2, 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 [Order 210].

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships [Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)].

The City relies on solicitor-client communication privilege. In my analysis of this issue I will apply common law principles of solicitor-client privilege, without differentiating between the two branches, for the reasons set out above.

Solicitor-client communication privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

The City indicates that Records 1 to 6 in File 9 all consist of handwritten notes made by a City solicitor which record her advice to different staff on a number of issues relating to the Centre with only negligible references to the appellant. The City takes the position that these records record oral conversations between the solicitor and City employee(s) (the client), that the communications are implicitly of a confidential nature and are directly related to the seeking or giving of legal advice.

The appellant takes the position that because the records contain his own personal information, section 12 should not apply.

I have reviewed the six records at issue contained in File 9, and I am satisfied that these records are confidential communications between the City and the City's solicitor made for the purpose of providing or obtaining professional legal advice on a matter concerning the issues to be dealt with by the Task Force and matters pertaining to the appellant. Each of the records is part of the "continuum of communications" between a solicitor and client as described in Balabel. As a result, I am satisfied that Records 1 to 6 of File 9 qualify for exemption under section 12 on the basis of solicitor-client communication privilege.

Waiver

Even if solicitor-client communication privilege applies to a communication at the time it is made, that privilege may be lost through waiver. Waiver of common law solicitor-client privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [(S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983), 35 C.P.C. 146 (B.C. S.C.); Order P-1342].

In Order M-260, former Inquiry Officer Anita Fineberg considered the issue of waiver of solicitor-client privilege:

Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.

In the recent text Solicitor-Client Privilege in Canadian Law, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:

> Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
>
> Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.
>
> . . . . .
>
> In S. & K. Processors Ltd....McLachlin J. noted:
>
> However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require ...
>
> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)

The following passage from Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), as set out in The Law of Evidence in Canada (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of Piché v. Lecours Lumber Co. (1993), 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

The appellant believes that the information in these records has been disclosed to the public and therefore believes that the City has waived privilege in them. This position is based on his view of the events which occurred regarding the City's involvement in the matter. He has provided no tangible evidence that the information in these particular records has been disclosed. Based on my review of the records and the lack of evidence in the appellant's representations on this issue, I am not persuaded that the content of these

records would have been disclosed to the public. Nor am I persuaded that the City has waived privilege in any other manner. Therefore, I find that the City has not waived the solicitor-client privilege in them.

The fact that the records may refer to the appellant is not a consideration in determining whether the exemption in section 12 applies to them. However, it is a consideration which might be taken into account by the City in exercising its discretion under section 38(a) to withhold the records from disclosure. I am satisfied, based on the totality of the City's representations, that it has taken the proper considerations into account in its exercise of discretion with respect to these records and it should not be disturbed on appeal.

Accordingly, I find that Records 1 to 6 of File 9 are exempt under sections 12 and 38(a) of the Act.

FEES:

The charging of a fee is authorized by section 45(1) of the Act, and more specific provisions regarding fees are found in sections 6 and 6.1 of Regulation 823.

Section 45(1) of the Act states:

> A head shall require the person who makes a request for access to a record to pay fees in amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

Sections 6 and 6.1 of Regulation 823 (as amended by O. Reg. 22/96) state:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:

- For photocopies and computer printouts, 20 cents per page.

- For floppy disks, $10 for each disk.
- For developing a computer program or other method of producing the personal information requested from machine readable record, $15 for each 15 minutes spent by any person.

- The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the personal information requested if those costs are specified in an invoice that the institution has received.

In determining whether the City's charges for search and preparation time are in accordance with the Act, I must first determine whether the appellant's request is for general records, for his own personal information, or for both. This is because the regulation under the Act makes a distinction between the costs which are allowed to be charged when a request is for general records or when it is for the requester's personal information.

The City takes the position that the appellant requested access to all information pertaining to himself in his professional capacity as President of the Centre. Therefore, the City believes that it is entitled to require the appellant to pay the fees charged in accordance with Regulation 6. The City also states that its search entailed a large number of general records dating back to 1994 in the 15 program areas identified by the appellant.

It is apparent, from my review of the records, that they consist of a variety of documents the focus of which is the investigation and review of the activities of the Centre and its Board. In my view, many of these records contain information that is not about the appellant, personally or as President of the Centre. Some of these records do not contain any information specifically about the appellant. However, the information in many of them relating to the appellant is often intertwined with other information about the Centre.

Although the appellant asked for information about himself as President of the Centre, I found above that the information in the records at issue go beyond the "professional" and pertain more to his personal attributes. In this context, I found that the information contained in the records is recorded information "about" the appellant, personally, and thus qualifies as his personal information.

In finding that the information about the appellant relating to his tenure as President constitutes his personal information I must conclude that his request was for his own personal information. Because of the nature of the matter, the responsive records also contain a large amount of general information. In this sense, the appellant has requested both his own information and general records.

In Order PO-1647, I considered a similar situation. In that case, however, I noted that the request had been divided into several different parts. I found that only one part of the request pertained to the appellant's personal information. I was further able to determine, based on the institution's representations, that it had calculated the fees for each part of the request separately. Consequently, I assessed the fee estimate for each part of the request under the applicable section of the Regulation.

The situation in the present appeal is different. Although the appellant identified 15 different program areas, each area produced information pertaining to him. Because the appellant's personal information is intertwined with the general information in the records, it is not possible to calculate what percentage of time was spent on general records and what percentage was spent dealing with his personal information.

Moreover, although the Act clearly contemplates that requesters pay for the records for which they have requested, the inclusion of section 6.1 of Regulation 823 recognizes the higher right to access to one's own personal information in the custody or control of government institutions as set out in section 1 of the Act. Where there is doubt as to how the fees should be applied, in my view, the balance must weigh in favour of the appellant.

Therefore, I find that the City should have calculated its fees in accordance with section 6.1 of Regulation 823. On this basis, I find that the City cannot charge the appellant for search or preparation time.

The City indicates that the cost of photocopying the records is based on 20 cents per page. The City acknowledges that the appellant is no longer seeking three pages of records and notes that its estimate should be reduced by 60 cents. As indicated above, section 6.1 permits the charging of fees for photocopying at 20 cents per page. Therefore, I find that the City's calculation of this aspect of the fees was done in accordance with the Act and regulation and should be upheld.

The City notes that the appellant was given an opportunity to view the records to which he was being granted access, so that he could determine which records he wanted photocopied, thereby reducing the photocopying fees. The City states that the appellant did not act on its offer.

The appellant provided this office with a copy of the index on which he has indicated for each record whether he either wishes to view or to view and/or photocopy it. It appears that the actual cost of

photocopying the records to which he is granted access may, therefore, be reduced through co-operation between the parties. I encourage them to do so.

As a result of the above, I will allow the City to charge the appellant for photocopying 433 pages at $.20 per page for a total of $86.60. In the event that the appellant attends at the City's Freedom of Information offices and, after viewing the records to which access is granted, determines that he does not require copies of all or some of them, this amount should be reduced accordingly.

FEE WAIVER:

The provisions of the Act relating to fee waiver are found in section 45(4), which states as follows:

> A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed in the regulations.

Section 8 of the Regulation then prescribes, in part:

> The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> ...

In the present case, the City has decided to disclose 433 pages of records to the appellant.

Under section 45(5), an appellant has the right to ask the Commissioner to review an institution's decision not to waive the fee. The Commissioner may then either confirm or overturn this decision based on a consideration of the criteria set out in section 45(4) of the Act (Order P-474).

It has been established in previous orders that the person requesting a fee waiver must justify the waiver request and demonstrate that the criteria for a fee waiver are present in the circumstances (Orders M-429,

M-598 and M-914). I am also mindful of the Legislature's intention to include a user pay principle in the Act, as evidenced by the provisions of section 45.

In Order P-474, former Assistant Commissioner Irwin Glasberg found that the appropriate standard of review for discussions under section 57(4) of the provincial Freedom of Information and Protection of Privacy Act (which is the equivalent of section 45(4) of the Act), is one of correctness. In that same order, former Assistant Commissioner Glasberg also found that the phrase "in the head's opinion" means only that the head of an institution has a duty to determine whether it is fair and equitable in a particular case to waive a fee, and this wording does not affect the statutory authority of the Commissioner and her delegates to review the correctness of that decision.

The appellant believes that although the request involves a large number of records, I should take into account the manner in which the records were created and his reasons for seeking access to them. Essentially, the appellant believes that they were "deliberately created at the request of city staff and local NDP politicians to poison our community and malign its leadership".

In my view, the purpose for which a record was created does not fall within the considerations listed in section 45(4) of the Act. Therefore, I will not consider these arguments in this context. However, the appellant goes on to state that he is self employed and relies on freelance projects for work. He indicates that he may go several months without any income. He states further that he and his wife live on a specified income which would by most standards be considered modest.

The City refers to the appellant's statement referred to above under "Nature of the Appeal" and takes the position that the appellant has not provided any specific information as to his financial position. In this regard, the City submits that to simply state that he has limited resources is not a sufficient explanation of how payment of the fee would cause him financial hardship.

I accept the appellant's statement that he lives on a low income. However, he has not provided any information relating to his expenses or how payment of the fees in this appeal would cause him financial hardship. He indicates in his representations that he has already spent "thousands of dollars" in relation to the matter pertaining to the Centre. The fees which I have allowed the City to charge relate only to the costs of photocopying the records. As a result of this order, that amount is considerably lower than originally claimed by the City. Moreover, through co-operation, the appellant may be able to reduce this amount if he wishes only to view some of them. In these circumstances, I am not prepared to make a conjecture about the impact of this reduced amount. Therefore, I find that the appellant has not established that payment of the fee of $86.60 would cause him financial hardship.

Even if I were to accept that payment of the fee would constitute a financial hardship for the appellant, I must go on to consider whether it was fair and equitable for the City **not** to have waived payment of the fee. Previous orders have set out a number of factors to be considered in determining whether a denial of a fee waiver is "fair and equitable". These factors are:

(1) the manner in which the City attempted to respond to the appellant's request;

(2) whether the City worked with the appellant to narrow and/or clarify the request;

(3) whether the City provided any documentation to the appellant free of charge;

(4) whether the appellant worked constructively with the City to narrow the scope of the request;

(5) whether the request involves a large number of records;

(6) whether or not the appellant has advanced a compromise solution that would reduce costs;

(7) whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the City.

As I noted above, the records covered 15 different program areas. The City states that the search for records responsive to the request involved a number of City staff and required searching through boxes of files. The City states that the amount it charged the appellant for searching for responsive records was far less than the actual time expended. Although I found that the City could not charge the appellant for search time, in my view, the size of the record and the amount of time expended by the City in searching for responsive records is a factor to consider in determining whether waiver of the fee would shift an unreasonable burden of the cost from the appellant to the City.

I also recognize that the City has been involved with the appellant prior to this access request and that it has provided informal disclosure of records to him.

The City reiterates that it provided the appellant with an opportunity to review the records to reduce the number which needed to be photocopied. The appellant subsequently indicated that he was amenable to doing so but has not taken the City up on its offer as of yet.

Neither party has provided any evidence concerning a number of the factors to consider in determining whether it is fair and equitable to grant a fee waiver in the circumstances of this appeal.

As a result of this appeal, the only cost the appellant is being charged for is for photocopying the records. As I indicated above, if the appellant and the City co-operate with each other, the amount of the costs for photocopying the records may be reduced. Given the size of the record and the amount of time expended by the City in searching for and compiling it and the number of records it is prepared to disclose to the appellant, I find that granting the appellant a fee waiver would shift an unreasonable burden of the cost from the appellant to the City. Consequently, I find that it was fair and equitable for the City **not** to have waived payment of the fee.

ORDER:

1. I do not uphold the City's fee estimate of $222.20.

2. I uphold the City's decision to charge the appellant $.20 per page for photocopying the records to which access is granted.

3. I uphold the City's decision not to grant a fee waiver.

4. I order the City to disclose File 7 - Record 4 to the appellant by providing him with a copy of this record on or before April 3, 2000.

5. I uphold the City's decision to withhold the remaining records from disclosure.

6. In order to verify compliance with the provisions of this order, I reserve the right to require that the City provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 4.

Original signed by: March 13, 2000
Laurel Cropley
Adjudicator