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

ORDER MO-1547

Appeal MA-010085-2

City of Toronto

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NATURE OF THE APPEAL:

The appellant submitted a request to the City of Toronto (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> All records including offer of purchase and sale, personal notes, and memorandum from various departments' staff regarding the purchase of [named] property completed on November 29/2000 also including details and proof of all costs associated in this transaction.

Initially, the City claimed a time extension under section 20(1) of the *Act* for the processing of this request. The appellant appealed that decision and Appeal MA-010085-1 was opened. During mediation of that appeal, the appellant removed a number of records from the scope of his request, including title search documents, environmental study documents and certain correspondence between the Toronto Parking Authority (the TPA) and its solicitor. Appeal MA-010085-1 was subsequently closed and the City issued a decision on access to the remaining records.

The City granted access to a number of records. The City denied access to two records in part and to the remaining records in their entirety on the basis of the following exemptions under the *Act*:

- Section 6(1)(b) – closed meeting;
- Section 7(1) – advice or recommendations;
- Sections 11(c), (d) and (e) – economic and other interests;
- Section 12 – solicitor-client privilege; and
- Section 14(1) – invasion of privacy.

The appellant appealed this decision and the current appeal file was opened.

During mediation, the appellant indicated his belief that the City's interpretation of his request was too narrow. In particular, the appellant believed that any records relating to an aborted transaction, which had occurred earlier in the year, prior to the actual purchase and sale of the property in November 2000, should also be considered to be responsive to his request.

The City appeared to take the position that only records relating to the specific purchase and sale of the property in question, which was completed in November 2000, are responsive to the appellant's request.

This issue could not be resolved during mediation and was included as an issue in this appeal.

Further mediation could not be effected and this matter was forwarded to adjudication. I sent a Notice of Inquiry setting out the facts and issues to be determined at inquiry to the City, initially. The City submitted representations in response.

In its representations, the City indicates that it no longer objects to the disclosure of Records 491–530 (duplicate Record 534–573), 417–419 and 604–607. As a result, these records are no longer at issue in this appeal. It is not clear whether the City has disclosed these records to the appellant. Accordingly, I will include a provision in this Order requiring it to disclose them to the appellant.

The City also indicates that it appears that there may have been some miscommunication regarding its interpretation of the scope of the appellant's request and those records which are responsive to it. The City states that it included records relating to an "aborted transaction" within the scope of its search for responsive records.

Finally, the City raises the application of the discretionary exemption in section 6(1)(b) for additional records. Because this exemption has been raised late in the appeal process, I have included the late raising of a new discretionary exemption as an issue in this inquiry.

I decided to seek representations from the appellant on all issues in this appeal, including the issue relating to the late raising of a new discretionary exemption. I provided him with a copy of the non-confidential portions of the City's representations along with the Notice of Inquiry. The appellant was asked to review these representations and to refer to them, where appropriate, in responding to the issues set out therein. In particular, I noted that if the appellant is satisfied with any portion of the City's response, he should so indicate. For example, if the appellant is satisfied that the City has properly interpreted the scope of his request he should indicate that this issue has been resolved to his satisfaction. Otherwise, he should submit representations on the issue.

Although the appellant indicated a desire to submit representations, and was granted an extension to do so, he did not submit any.

RECORDS:

The records at issue consist of internal memoranda, legal agreements and draft agreements, survey, valuation report and other reports. It should be noted that there are a number of duplicate records contained in the package of records that has been sent to this office. In some cases, the duplicates are identical, in other cases, one copy may have handwritten notes made on it. Where applicable, I will note the duplicate records in brackets. Unless there is a reason to consider the duplicates separately, I will only consider the exemption claims for the first record and my decision will apply equally to the other duplicates.

PRELIMINARY MATTERS:

SCOPE OF THE REQUEST

As I indicated above, there appeared to be some confusion as to the scope of the records that were identified as being responsive to the appellant's request, in particular, records pertaining to an aborted transaction that had occurred earlier in the year. In its submissions, the City states:

> In response to the access request, the City reviewed **all** relevant TPA and Legal Department records dating from 1996 to the time of the request.
>
> The City considered all of the records in its decision except for the records that had been removed as non-responsive as agreed with the appellant during the mediation of Appeal MA-010085-1.
>
> Record 86 refers to "the previous terms" of negotiations from April 1999 to June 29, 2000, i.e., negotiations related to the aborted transaction. A careful review of the index of records provided to the appellant together with the records disclosed to him and the records still at issue in this appeal demonstrates that the records related to the aborted transaction were in fact included as being responsive to the request.
>
> Given the above circumstances, the City concluded in error that the statement made by the appellant during mediation that he was seeking access to records relating to an earlier aborted transaction had to be in reference to "dealings" prior to 1999.
>
> The City submits that since it appears that the appellant and the IPC are referring to the aborted negotiations that took place in 1999/2000, the City correctly interpreted the scope of the appellant's request and responded accordingly.

As I noted above, although specifically requested to address this issue in the Notice of Inquiry that was sent to him, the appellant did not submit representations in response. Based on my review of the records and the City's explanation with respect to how it interpreted the appellant's request, I am satisfied that it has properly interpreted the scope of the request as including all records relating to the 1999/2000 transaction, including those pertaining to the aborted transaction.

LATE RAISING OF A NEW DISCRETIONARY EXEMPTION

In its representations, the City raises the discretionary exemption in section 6(1)(b) for Records 230-238, 485-487 and 488-490 in addition to those for which it had already claimed this exemption.

On May 29, 2001, the Commissioner's office provided the City with a Confirmation of Appeal, advising that the appellant had appealed its decision to deny access to the requested records. This Confirmation also stated that, based on a policy adopted by the Commissioner's office, the City would have 35 days from the date of the confirmation (July 3, 2001) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

Although mediation was undertaken with respect to the issues in this appeal, it was not until it submitted its representations that the City decided to rely on the exemption in section 6(1)(b) for the above pages.

As a delegate of the Commissioner, I have the authority to control the manner in which an appeal is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise discretionary exemptions not originally cited in the original decision letter, subject to a consideration of the particular circumstances of each case (see: Order P-883, upheld on judicial review in *Ontario (Ministry of Consumer and Commercial Relations)* v. *Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

In Order P-658, former Adjudicator Anita Fineberg explained that the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process:

> (1) Unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively try to achieve a mediated settlement of the matter under appeal pursuant to section 51 of the *Act*.
>
> (2) Where a new discretionary exemption is raised after the Inquiry Status Report is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the exemptions raised. The processing of the appeal will, therefore, be further delayed.
>
> (3) In many cases, the value of information which is the subject of an access request diminishes with time. In these cases, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the 35-day policy is to provide institutions 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. The 35-day policy is not inflexible, however. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

The City indicates that, as an oversight, it neglected to raise the application of section 6(1)(b) to Records 230-238, 485-487 and 488-490. It submits that it should be permitted to raise this exemption even at this late stage because these pages are "virtually the same records as above with some additional notations or they contain the information upon which the reports were drafted".

In support of its position, the City cites Order PO-1887-I in which Assistant Commissioner Tom Mitchinson allowed the Ontario Realty Corporation (the ORC) to raise new discretionary exemptions, in part because the ORC had originally claimed the same exemptions for other records and the records for which the exemptions were subsequently claimed were similar in nature to the other records already subject to those exemptions.

In reviewing Record 230-238, which is a draft report addressed to the City Council's Administration Committee, I agree that this record is similar in nature to the other records for which section 6(1)(b) had been claimed. In the absence of representations from the appellant on this issue, I find that the reasoning in Order PO-1887-I is similarly applicable in the circumstances, and I will consider whether section 6(1)(b) applies to it. Record 485-487 (duplicate Record 488-490) is an internal memorandum from City staff to the President of the TPA. Although different in nature, the information contained in this record is similar, if not identical to that contained in other records for which section 6(1)(b) had been claimed. Accordingly, I will also consider the possible application of this exemption to this record.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

The City has claimed the application of the mandatory exemption in section 14(1) to a portion of a sentence on Record 86 (duplicate Record 87) and has disclosed the remaining portion to the appellant.

Personal information is defined, in part, as "recorded information about an identifiable individual". Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" (Orders P-257, P-427, P-1412, P-1621).

The Commissioner's orders dealing with non-government employees, professional or corporate officers treat the issue of "personal information" in much the same way as those dealing with government employees. The seminal order in this respect is Order 80. In that case, the institution had invoked section 21 to exempt from disclosure the names of officers of the Council on Mind Abuse (COMA) appearing on correspondence with the Ministry concerning COMA funding procedures. Former Commissioner Linden rejected the institution's submission:

> The institution submits that "...the name of the individual, where it is linked with another identifier, in this case the title of the individual and the organization of which that individual is either executive director, or president, is personal information defined in section of the *FIO/PPA*...." All pieces of correspondence concern corporate, as opposed to personal, matters (i.e. funding procedures for COMA), as evidenced by the following: the letters from COMA to the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for taking such an approach. He also

extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 on the approach which this office has taken to the definition of personal information. In applying the principles which he described in that order, Adjudicator Hale came to the following conclusions:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the *Act*. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message [emphasis in original].
>
> In the present situation, I find that the records do not contain the personal opinions of the affected persons. Rather, as evidenced by the contents of the records themselves, each of these individuals is giving voice to the views of the organization which he/she represents. In my view, it cannot be said that the affected persons are communicating their personal opinions on the subjects addressed in the records. Accordingly, I find that this information cannot properly be characterized as falling within the ambit of the term "personal opinions or views" within the meaning of section 2(1)(e).

Record 86 (duplicate Record 87) is a letter from the owner of the property (the vendor) to the TPA. It is written on corporate letterhead and is signed by the vendor in his capacity as "President". The City submits that the information that has been severed from this record is information about the vendor in his personal as opposed to business capacity and as such, qualifies as "personal information". I concur. Although this record pertains to the vendor's role in the transaction in his business capacity, the portion which has been withheld reflects his

personal circumstances, offered as an explanation for not finalizing the original transaction. I find that this portion of the record qualifies as personal information.

Where the record only contains the personal information of other individuals, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies.

In the circumstances, the only exception which could apply is section 14(1)(f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

In determining whether section 14(1) applies, sections 14(2) and (3) 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 section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption.

As I noted above, the appellant did not submit representations in this appeal. 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 contained in Record 86 (duplicate Record 87) 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 personal information contained in the record. This information is, accordingly, exempt from disclosure.

CLOSED MEETING

The City submits that the exemption in section 6(1)(b) applies to Records 424-427 (duplicate Records 432-435 and 1200-1202), 459-461, 462-467 and 876-881, as well as to Records 230-238 and 485-487 (duplicate Record 488-490). Sections 6(1)(b) and 6(2)(b) provide:

> (1) A head may refuse to disclose a record,
>
> > (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.
>
> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> > (b) in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public;

In order to qualify for exemption under section 6(1)(b), the City must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; and

2. that a statute authorizes the holding of this meeting in the absence of the public; and

3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102, M-219 and MO-1248]

Requirements one and two – *in camera* meeting

The first and second parts of the test for exemption under section 6(1)(b) require the City to establish that a meeting was held and that it was properly held *in camera* (Order M-102).

The City indicates that the above-noted records are confidential reports (both drafts and final) relating to the purchase of the subject property that were considered by its Administration Committee. The City states that the Administration Committee met on Tuesday, March 21, 2000 in Committee Room 1. The City attached the portion of the Minutes of this meeting to its representations relating to this issue. Item 5-23 indicates that the Committee considered a report (Record 424-427) *in camera* in accordance with the *Municipal Act* (section 55(5)(c)) as the subject matter related to the proposed acquisition of property for municipal purposes.

The City indicates that the report was also considered at *in camera* meetings of Council on April 11, 12 and 13, 2000, however it does not provide evidence confirming this. One of the records at issue makes reference to the meetings of April 11, 12 and 13. This record does not indicate that these meetings were held *in camera*. The City has provided no other evidence with respect to *in camera* meetings of Council or the Administration Committee.

I am satisfied that a meeting of a committee of Council took place on March 21, 2000, and that this meeting was held *in camera* in accordance with the provisions of section 55(5)(c) of the *Municipal Act*. Accordingly, the first two parts of the test have been met.

Requirement three – substance of deliberations

In Order M-184, former Assistant Commissioner Irwin Glasberg made the following comments on the term "deliberations":

> In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view towards making a decision. Having carefully reviewed the contents of the Minutes of Settlement, I am satisfied that the disclosure of this document would reveal the actual substance of the discussions conducted by the Board, hence its deliberations, or would permit the drawing of accurate inferences about the substance of those discussions. On this basis, I find that the institution has established that the third part of the section 6(1)(b) test applies in this case.

The former Assistant Commissioner expanded on his analysis of the interpretation of section 6(1)(b) in Order M-196 as follows:

> The Concise Oxford Dictionary, 8th edition, defines "substance" as the "theme or subject" of a thing. Having reviewed the contents of the agreement and the representations provided to me, it is my view that the "theme or subject" of the in-camera meeting was whether the terms of the retirement agreement were appropriate and whether they should be endorsed.

The City submits that the disclosure of the report as well as its earlier drafts and staff memoranda would reveal the substance of the Committee's deliberations relating to the proposed purchase of the property. The City indicates that the purpose of the Committee's deliberations was to decide whether to recommend to City Council that it adopt and/or consider the report at an *in camera* meeting. The City asserts that neither the Committee's nor Council's deliberations relating to the purchase of the property have been held in open public meetings.

Record 424-427 comprises a report to the Administration Committee (*in camera)* dated March 7, 2000. As I noted above, this record was received by the Administration Committee at its March 21, 2000 *in camera* meeting. Based on the City's submissions, I am satisfied that this record was considered by the Committee and that its disclosure would reveal the substance of the deliberations of the Administration Committee. Record 424-427, therefore, qualifies for exemption under section 6(1)(b). I am also satisfied that Records 459-461, 462-467 and 876-881, which are earlier drafts of the report, are sufficiently connected to this report that their disclosure would reveal the substance of the deliberations of the Committee.

Record 485-487 (duplicate Record 488-490) consists of a memorandum dated February 2, 2000 from City staff to the President of the TPA relating to the subject matter of the report which was subsequently submitted to the *in camera* meeting of the Administration Committee. After

comparing the information contained in this record with the substance of the report (in Record 424-427), I am satisfied that disclosure of this record would reveal the substance of the Committee's deliberations in connection with the report.

Further, based on the City's submissions, and in the absence of representations from the appellant, I am satisfied that the subject matter considered at the March 21, 2000 *in camera* meeting has not been discussed at a meeting open to the public. Therefore, the section 6(2)(b) exception does not apply. Accordingly, Records 424-427, 459-461, 462-467, 485-487 (duplicate Record 488-490) and 876-881 are exempt from disclosure pursuant to section 6(1)(b) of the *Act*.

Record 230-238 comprises drafts of a report to the Administration Committee prepared by or on behalf of the President of the TPA dated May 4 and 8. In contrast to the other draft (and final) reports noted above, none of these drafts contain an *in camera* notation on them. Further, although the City has provided copies of the draft reports, a final report has not been included in the records at issue. These draft reports post-date the March 21, 2000 meeting of the Administration Committee. The City has provided no evidence that this report was submitted to or considered by the Administration Committee. As noted above, although this record makes reference to the meetings of Council held on April 11, 12 and 13, 2000, it does not indicate that these meetings were held *in camera*. Nor has the City provided independent evidence that these meetings were held *in camera*. The subject matter of this report is different from that discussed at the March 21, 2000 meeting. Based on the evidence and submissions of the City, I find that it has not satisfied its onus in providing sufficient evidence to establish that this record went before the Administration Committee (or Council) at an *in camera* meeting or that its disclosure would reveal the substance of deliberations of any other *in camera* meeting. On this basis, I find that section 6(1)(b) does not apply to Record 230-238.

SOLICITOR-CLIENT PRIVILEGE

The City submits that the following records are subject to solicitor-client privilege: Records 29-36 (duplicate Records 88-95 and 1215-1222), 45, 74-83 (duplicate Record 747-756), 118-126, 127-136 (duplicate Record 770-778), 174-180 (duplicate Record 795-802), 189-199 (duplicate Records 812-822 and 823-830), 200-207, 230-238, 424-427, 468-484 (duplicate Record 882-890), 574-582, 586-593, 594-599, 711-721, 723-731, 759-766, 804-811, 831-837, 876-881, 1088, 1089, 1090-1095, 1101-1102, 1103, 1104, 1105-1107, 1110-1122, 1203-1209, 1223-1226 and 1227-1238. I found above that Records 424-427 and 876-881 are exempt under section 6(1)(b). Accordingly, I will not consider them under this discussion.

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.

Section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. The City submits that the records are exempt under both heads of privilege.

By way of introduction, the City indicates that these records were in the files of its solicitor who acted on behalf of the TPA with respect to the property purchase. The City states that they were subsequently transferred to its solicitors who are defending the City in a lawsuit initiated by the appellant in relation to the real estate transaction.

Solicitor-client communication privilege

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].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

The City submits:

> [T]he records are 1. communications of a confidential nature made specifically for the purpose of obtaining legal advice with respect to the purchase transaction and in particular the terms of the agreement of purchase; or 2. constitute information passed by the solicitor or TPA staff to the other party aimed at keeping both informed so that advice may be sought and given as required with respect to the purchase; or 3. constitute the solicitor's working papers for the purpose directly related to seeking, formulating or giving of the legal advice.
>
> …
>
> The City further submits that the confidentiality attached to these records has not been waived by the client(s) at any time. Some of the draft agreements were sent to the owner/owner's solicitor's but they were not "opposing parties in litigation" [Order P-1551] but rather parties involved in the transaction whose interests like the City's were to ensure the confidentiality of the documents.

Records 74-83 (duplicate Record 747-756), 118-126, 127-136 (duplicate Record 770-778) and 831-837consist of e-mails between legal counsel for the City and TPA staff with draft (revised or amended) agreements attached. Similarly, Records 45, 586-593, 594-599 and 759-766 contain letters or facsimile cover sheets between the TPA and legal counsel with draft agreements and/or documents attached, or are copies of draft agreements and other documents revised by legal counsel. Pages 236-238 of Record 230-238 comprise a draft of a memorandum prepared by or for the President of the TPA with revisions made by legal counsel. I am satisfied that these records and parts of records comprise direct written communications of a confidential nature between the client (the TPA) and its legal advisor made for the purpose of obtaining or giving legal advice or as part of the continuum of communications aimed at keeping both informed as contemplated by *Balabel*. Accordingly, I find that these records are exempt under section 12 of the *Act*.

With respect to pages 230-235 of Record 230-238, the City states that they comprise "documents that the solicitor either drafted or assisted in drafting". It is not evident on the face of these pages that they were prepared by legal counsel. Rather, it is more likely that they were prepared either by the President of the TPA or on his behalf by staff in his office. Although these drafts of the memorandum may reflect and/or incorporate the advice provided by legal counsel in pages 236-238 following her review, this is not sufficient in itself to bring the normal work product of the TPA staff within the privilege. Accordingly, I find that pages 230-235 of Record 230-238 are not exempt under solicitor-client communication privilege.

Record 29-36 (duplicate Records 88-95 and 1215-1222) is a copy of the agreement of purchase and sale signed by the parties. Records 174-180 (duplicate Record 795-802) and 1203-1209 comprise various versions of the agreement (initialed by the parties) exchanged between them, it appears, during the negotiation of the purchase and sale of the property. Records 189-199 (duplicate Records 812-822 and 823-830), 200-207, 468-484 (duplicate Record 882-890), 574-

582, 711-721, 723-731 and 804-811 are e-mails or letters exchanged between the vendor and/or its solicitor and the City (either the TPA and/or its legal counsel) with draft agreements and/or other documents attached.

Similarly, Records 1088, 1089, 1090-1095 (Record 1101-1102 and pages 1105-1106 of Record 1105-1107, which are duplicates of pages 1094-1095), 1103, 1104, 1107 (of Record 1105-1107), 1110-1122, 1223-1226 and 1227-1238 comprise the standard documents relating to the purchase and sale of the property, such as the Transfer/Deed of Land, undertakings, tax certificate, Form 1 – Land Transfer Tax Act, statement of adjustments, Affidavits as to Writs of Execution, etc. Although some of these records are drafts, some of which have handwritten notations on them, all of them were or clearly would have been exchanged between the parties to the transaction. Some of them are otherwise publicly available through the Land Registry Office (at a minimum, Record 1223-1226).

As I noted above, the City takes the position that these records comprise confidential communications and that it has not waived solicitor-client privilege in them, as the parties to the agreement are not "opposing parties in litigation". Rather, the City suggests that there is a similarity in interest in the real estate transaction sufficient to bring the records exchanged between it and the vendor during the negotiation of the transaction within the protection of the solicitor-client exemption. It appears that the City is arguing that there is a common interest between the City and the vendor.

In Order MO-1338, Senior Adjudicator David Goodis considered the application of section 12 of the *Act* to communications between counsel for the World Wildlife Fund and the City relating to the drafting of a sewer use by-law. He commented as follows on purpose of the solicitor-client privilege exemption and the principle of common or joint interest:

> In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:
>
> > Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the **government** either commences litigation or is obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
> >
> > . . . . .
> >
> > If you do things to discourage the client from telling the lawyer the true story, then the **government** does not get good legal advice. Again, the judgement is, "Yes, we exclude the information, but

> because we are protecting this value that is important." It is important that the **government**, which is spending taxpayers' money, should be able to be certain that **public servants** tell our lawyers the truth. We do not want to discourage **public servants** from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added]
>
> [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]

Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter. In Order P-1342, Adjudicator Holly Big Canoe described the principal of "joint interest" as follows:

> It is possible for two or more parties to have a joint interest in a record which could have an impact on solicitor-client privilege. In *Johal v. Billan* [1995] B.C.J. No. 2488 (B.C.S.C.) the court found that a husband and wife who had consulted the same solicitor for the purpose of drafting wills had waived the privilege between themselves, but maintained this privilege against third parties who did not share a joint interest with one or both of them. This judgement makes reference to this interest being supported by Mr. Justice Sopinka in the text *Law of Evidence in Canada*, at page 638:
>
> > Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication. ... Moreover, a client cannot claim privilege as against third persons having a joint interest with him in the

> subject-matter of the communication passing between the client and the solicitor.

Although Adjudicator Big Canoe rejected the joint interest argument in Order P-1342, it has been found to apply in other cases. In Order P-49, for example, former Commissioner Sidney Linden found a joint interest between the Ministry of Community and Social Services and a home for the aged funded by the Ministry in the context of a dispute over the performance of a construction contract.

In this case, based on the representations of the parties, and on the face of the record, it is clear that the client for the purposes of the record is the WWF, not the City. The City submits, however, that it has a joint interest with the WWF. I do not accept the City's submission. I have not been provided with evidence sufficient to establish a "joint interest" between the WWF and the City for the purposes of solicitor-client privilege. The WWF is a public interest organization with a focus on conservation and environmental issues, and in this case was seeking to ensure that the City adopted a by-law which was sensitive to these issues. Although it may be said that the City also had an interest in adopting an environmentally sound by-law, the WWF was acting as an arm's-length public interest group. I am not convinced that the interests of the WWF and the City in regard to the adoption of an environmentally sound by-law are sufficiently connected to be accurately characterized as a "joint interest".

In Order PO-1851-F, I found that communications between the Ministry of Health's legal counsel and the affected party's Registrar and/or counsel were not protected by solicitor-client communication privilege. In that case, the communications exchanged between the Ministry and the affected party (the Royal College of Dental Surgeons of Ontario) related to the development of regulations and accompanying standards of practice with respect to orders to dental hygienists. I noted part of the Ministry's argument as follows:

> The Ministry refers to previous orders of this office (Orders P-1137, PO-1663 and M-1205) as establishing a basis for the proposition that there is a common interest between it and the affected party with respect to regulation development. In addition, the Ministry notes that common interest privilege has been recognized by the courts (*Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.) and *Archean Energy Ltd. v. Canada (M.N.R.)*, [1997] A.J. No. 347 (Q.B.). The Ministry notes, in particular, that the court in *Archean* found that the sharing of documents between parties did not constitute waiver where:
>
> > the parties to a commercial transaction are not adverse in interest ... In fact, parties to a commercial transaction have a common interest in seeing the deal done ... It is a reasonable inference that Eagle instructed its solicitors to provide the opinion in order to further the reorganizations and not with an intent to waive privilege.

> The Ministry submits that the facts in *Archean* are analogous to the current appeal in that there are two parties; the Ministry and the affected party, sharing legal advice in order to reach a common goal.

In this case, I recognized that the Ministry and the affected party shared a common interest in development of the regulations, but found that the Ministry's interests and the interests of a particular college (affected by any regulation) may not necessarily coincide. In particular, I noted that the circumstances in that appeal reflected the divergence in views between different colleges, and to some extent between the affected party and the Ministry. Referring to the conclusions of Senior Adjudicator Goodis in Order MO-1338, I concluded:

> While I accept that there is some commonality in ultimate purpose in developing the regulations, the interests of the affected party and the interests of the Ministry do not coincide such that they can claim a common interest privilege in their shared communications. In my view, the circumstances of this appeal are analogous to the situation considered by Senior Adjudicator Goodis in Order MO-1338. Accordingly, I find that there was neither a solicitor-client relationship between the Ministry and the affected party as a non-governmental body, nor was there a sufficient common interest to bring the communications between them within the "common interest privilege."

In my view, these conclusions are similarly relevant in the current appeal. Although the City and the vendor share a common interest in completion of the real estate transaction, their interests in negotiating the terms of the agreement of purchase and sale cannot be viewed as "common". In such a transaction, each party is clearly negotiating the terms of the agreement most favourable to their interests. I find that the City did not hold a reasonable expectation of confidentiality (despite the fact that records may have been prepared by legal counsel and provided to the TPA) with respect to those records which contain the final versions of all documents exchanged between the parties in concluding the real estate transaction, and in particular, those which were subsequently registered at the Land Registry Office (Record 1223-1226).

Any discussions the City (or the vendor) has with its legal counsel with respect to the terms of the agreement or amendments to be made to it (as reflected in some of the records referred to above) would qualify for exemption under section 12 since they are confidential as between the client and legal counsel. These communications would be equally confidential *vis-à-vis* the other party to the transaction, whereas they likely would not be if the parties shared a common interest (*Johal*). In some cases, the TPA (as the client) has decided to share this information with the vendor (and vice versa) and in doing so, has expressly waived any solicitor-client privilege it might otherwise have claimed for it.

Accordingly, with the exception of a handwritten note on the bottom of one e-mail (page 723 of Record 723-731) regarding a conversation between the TPA and its legal counsel, the remaining records in this group are not exempt under solicitor-client communication privilege as they represent communications with third parties. The handwritten note on the bottom of page 723 is of a similar nature to the other records above that I found to qualify for solicitor client privilege.

I am satisfied that this information was not communicated to the vendor. Therefore, the handwritten note on page 723 is exempt under section 12 of the *Act*.

Litigation privilege

The City also claims that litigation privilege applies to the records at issue in this discussion. Since I have found that Records 45, 74-83 (duplicate Record 747-756), 118-126, 127-136 (duplicate Record 770-778), pages 236-238 of Record 230-238, 586-593, 594-599, the handwritten note on page 723 of Record 723-731, 759-766 and 831-837 are exempt under the communication privilege component of this exemption, I will only consider whether the remaining records and parts of records are protected by litigation privilege.

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
> >
> > It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
> >
> > . . . . .
> >
> > [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In Order MO-1337-I, Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief [see *General Accident*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

In Order MO-1337-I, the Assistant Commissioner elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere", and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief". Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation under the *Nickmar* test and should be tested under "dominant purpose".

The City explains the background to the litigation initiated by the appellant:

> In December of 1996 and again in June of 1997, following telephone conversations with TPA, the appellant faxed information about a property for sale at [the named property]. The appellant was the sales representative for [a named real estate company], the listing agent for the sale of the property. The TPA, however, decided that it was not interested in purchasing the property at that time.
>
> On April 19, 1999, following discussions with the TPA, the owner of the property presented the City with a proposal to sell it to the TPA. The TPA and the owner and their respective solicitors subsequently engaged in lengthy negotiations.
>
> …the City terminated the transaction on June 29, 1999.
>
> However, on September 12, 2000, the owner wrote to the TPA requesting its consideration to revive the deal …
>
> The purchase transaction was subsequently completed on November 29, 2000.
>
> …
>
> The appellant … has not received any commission. It would appear that he holds the City responsible, for in May of this year, he commenced a lawsuit against the City seeking damages for conspiracy to not pay commission, breach of trust and

> inducing breach of trust. The City anticipates that the case will be heard early next year.

The City submits that the records at issue in this discussion are protected by litigation privilege because they are all "relevant to the matter being litigated and have been compiled specifically for inclusion in the City's solicitors' brief". The City recently confirmed that although no court dates have been set as of yet, the litigation remains active and on-going.

As I noted above, some of the records at issue in this discussion consist of various copies and/or versions of the agreement of purchase and sale exchanged between and signed by the parties during the negotiation of the purchase and sale of the property and upon final agreement, as well as e-mails or letters exchanged between the vendor and/or its solicitor and the City (either the TPA and/or its legal counsel) with draft agreements and/or other documents attached. Record 230-238 (pages 230-235 only) is a draft memorandum to the Administration Committee from the President of the TPA. The remaining records comprise the various standard documents that would routinely be completed, some of which would also be filed in the Land Registry Office at the time of closing (Record 1223-1226, which is the only record on which there is evidence of registration).

In my view, apart from Record 1223-1226, Records 29-36 (duplicate Records 88-95 and 1215-1222), 174-180 (duplicate Record 795-802), 189-199 (duplicate Records 812-822 and 823-830), 200-207, pages 230-235 of Record 230-238, 468-484 (duplicate Record 882-890), 574-582, 711-721, the remaining portions of Record 723-731, 804-811, 1088, 1089, 1090-1095 (Record 1101-1102 and pages 1105-1106 of Record 1105-1107, which are duplicates of pages 1094-1095), 1103, 1104, page 1107 of Record 1105-1107, 1110-1122, 1203-1209 and 1227-1238 cannot be said to be "publicly available" or "documents collected by the ... solicitor from third parties and now included in his brief". Nor are these documents, including Record 1223-1226, "the result of research or the exercise of skill and knowledge by the solicitor". Rather, as per the City, it would appear that the entire file was simply transferred from one solicitor to another once litigation was initiated. As a result, I find that they do no qualify for litigation privilege under the *Nickmar* test as outlined in Order MO-1337-I. In my view, therefore, I must evaluate each of these records on the basis of the "dominant purpose" test.

The records referred to in the above paragraph are the type of records that would routinely be prepared in relation to the negotiation and finalization of the purchase and sale of the property in question. The City has provided no evidence, nor would it be likely, in the circumstances, that any of these records were produced or brought into existence with the dominant purpose of any party of either obtaining legal advice with respect to or conducting or aiding in the conduct of litigation, at the time of their production. On this basis, I find that the records are not exempt on the basis of litigation privilege.

ECONOMIC AND OTHER INTERESTS

The City initially claimed that Records 574-582, 583, 639-641, 643-646 and 660-661 are exempt under either section 11(c) and/or (d) of the *Act*. It has only made submissions on the application of these sections to Records 639-641, 643-646 and 660-661, however. I found above that Record

574-582, which is a draft of the agreement of purchase and sale, is not exempt under section 12. In the circumstances, I find that this record should be disclosed to the appellant. Record 583 contains similar types of information as the other records for which section 11(c) and (d) has been claimed, and I will consider whether either section applies to it based on the City's submissions on this issue generally.

Sections 11(c) and (d) provide:

> 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.

The Section 11 Exemption in General

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the *Act*. Sections 11(c), (d) and (g) all take into consideration the **consequences** which would result to an institution if a record was released. They may be contrasted with sections 11(a) and (e) which are concerned with the **type** of the record, rather than the consequences of disclosure. [Order MO-1199-F]

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the [provincial *Freedom of Information and Protection of Privacy*] *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour)* v. *Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

These findings apply equally to section 11(c) or (d) of the municipal *Act*, which both include the phrase "could reasonably be expected to". Accordingly, in order to establish the requirements of either of these exemptions, the City must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" as described in those sections.

The City states:

> [T]he TPA is responsible for the maintenance and management of all parking lots and street meters owned by the City. It shares its revenue generated by its operations with the City and prides itself on being financially independent of public subsidy.
>
> The business of providing parking facilities in Toronto is a highly competitive one. At last count there are almost 40 parking lot operators in the city. The TPA is in competition with these operators for both business and appropriate site locations.
>
> The records at issue contain confidential commercial and financial information relating to the TPA's rationale for choosing a specific site location, its methods of assessing profit and loss margins with respect to the operation of parking lots, including calculation of rates to charge, the requirement of "Benefiting Assessment" etc. More specifically, the records constitute the TPA's financial assessment of operating a parking lot at the [named location], including proposed construction and development costs, gross parking revenue etc.
>
> The City submits that if these records were to be disclosed to outside parties (other than the intended recipients), they would reveal information that would enable the TPA's competitors to modify their own business methods and/or to undercut the TPA in attracting business. Further, this information could be used by estate agents/property owners to give them an unfair advantage in any future purchase and sale negotiations with the TPA.

Record 639-641 comprises the financial analysis prepared by the TPA with respect to the construction and operation of a proposed carpark at the property in question calculated over a 25 year period. Record 583 is an internal memorandum from TPA staff to the President detailing and comparing the financial impact of two development options. In Order P-1190, Assistant Commissioner Mitchinson commented on the purpose of the exemption in section 18(1)(c) of the provincial *Act* (which is identical to section 11(c) of the *Act*):

> In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

These records pertain to the feasibility and projected costs/revenues pertaining to the development and operation of the property as a parking facility over a period of time, through and beyond the present. I accept the City's submission that disclosure of this information would provide potential competitors with specific financial information and projections relating to the business interests of the TPA and that this could reasonably be expected to negatively impact the

TPA's ability to compete in the market-place. I therefore find that Records 583 and 639-641 are exempt under section 11(c) of the *Act*.

Page 660 of Record 660-661 is a letter dated January 23, 1996 from the TPA to a municipal councillor relating to the property. This letter, which was written prior to the decision to consider this property for purchase, was sent in response to a query made by the councillor (page 661). Both letters were also copied to two members of the business community in the area of the subject property. In my view, any harm contemplated by the City with respect to disclosure of this record is not reasonably likely to occur. The financial information contained in it is of a bottom-line nature, it is several years old and pre-dates the financial analysis conducted by the TPA relating to the property that was subsequently purchased. Moreover, disclosure of the information to local business owners is inconsistent with the concerns expressed above. Accordingly, this record is not exempt under section 11.

Pages 643-644 of Record 643-646 comprise a letter dated July 3, 1997 from the TPA to a municipal councillor relating to the property and certain costs in connection with its purchase and development. Attached to this letter is a policy resolution relating to "Benefiting Assessment" (pages 645-646). This document sets out the formula to be applied for the calculation of the division of costs. Apart from the general submissions referred to above, the City does not specifically explain why disclosure of the information in the attachment could reasonably be expected to result in the harms in sections 11(c) and/or (d). It is apparent from a review of the attachment, that the principles outlined in it have been legislated. The City does not explain where this attachment came from. However, it appears that it may be a part of a policy and procedures manual. In my view, the City has failed to provide detailed and convincing evidence to establish a reasonable expectation of probable harm as contemplated under these two sections of the *Act*, and the attachment, therefore, is not exempt.

With respect to the letter (pages 643-644), the nature of the information in it is similar to the letter on page 660 of Record 660-661, except that it was not copied to an outside party. However, the specific financial details are more current and are directly connected to the financial analysis in Record 639-641. Based on my finding with respect to Record 639-641, I find that disclosure of the specific amounts referred to in the letter could reasonably be expected to prejudice the TPA's economic interests or competitive position and these portions are therefore exempt under section 11(c). I find, however, that the City has failed to provide detailed and convincing evidence to establish a reasonable expectation of probable harm as contemplated under either section with respect to disclosure of the remaining information in the record. I have highlighted in yellow the portions of this record that are exempt.

ADVICE OR RECOMMENDATIONS

The City claims that Records 230-238, 459-461, 462-467, 485-487 (duplicate Record 488-490) and 876-881 are exempt under section 7(1) of the *Act*. I found above that all of these records with the exception of Record 230-238 are exempt under section 6(1)(b). I also found that pages 236-238 of Record 230-238 are exempt under section 12 of the *Act*. Accordingly, I will only consider whether the exemption in section 7(1) applies to the remaining portions of Record 230-238.

Section 7(1) of the *Act* 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.

Previous orders of the Commissioner have established that advice and recommendations, for the purposes of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders P-94, P-118, P-883, upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (December 21, 1995), Toronto Doc. 220/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.) and PO-1894). Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 7(1) of the *Act* (Orders P-1054, P-1619 and MO-1264).

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Building on his earlier discussion in Order 94, former Commissioner Linden noted in Order P-118:

> The general purpose of the section 13 exemption [the provincial *Act* equivalent to section 7) has been discussed in Order 94 (Appeal Number 890137) released on September 22, 1989. At page 5, I stated that:
>
> > ...in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the *Act* stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the *Act*. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.
>
> …
>
> In my view, "advice", for the purposes of subsection 13(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.

> My interpretation of "advice" would appear to be consistent with the way in which the word has been defined by the Quebec Commission d'accès à l'information (the "Commission") when interpreting a similar provision in its legislation entitled, *An Act respecting Access to documents held by public bodies and the protection of personal information*, R.S.Q. Chapter A-2.1. According to an analysis by Dussault and Borgeat in *Administrative Law, A Treatise*, 2nd Edition, Vol. 3, Carswell, 1989 at page 347 the Commission defined "advice" in its decision in the case of *J. v. Commission scolaire Jacques-Cartier* (1985) 1 C.A.I. 82 as follows:
>
> > ... advice is "an opinion expressed during debate", the action of debating being the fact of "studying in view of a decision to be made". Advice is thus not an opinion "that a person is made aware of to keep him informed", but rather " to invite that person to do or not to do a certain thing". Considering therefore, that advice implies a decision-making process in progress, the Commission concluded "advice is counsel or a suggestion as to a line of conduct to adopt during the process. Logically, it takes place after research and examination into the facts, i.e. study, has taken place"[Tr.].

The purpose and scope of the section 13(1) [section 7(1)] exemption as interpreted by this office was implicitly endorsed by the Court of Appeal in the judicial review of Order P-1398 (*Ministry of Finance v. John Higgins, Inquiry Officer and John Doe, Requester* [1999] O.J. No. 484, 118 O.A.C. 108 (C.A.), reversing [1998] O.J. No. 5015 (Div. Ct.), leave to appeal refused [1999] S.C.C.A. No. 134 (S.C.C.).

The City did not make representations on the application of section 7 to any of the records. On review, it is apparent that pages 230-235 comprise two drafts of a memorandum from the President of the TPA to the Administration Committee. Each draft contains handwritten communications between a number of individuals which reflect the fact that the draft was reviewed and/or worked on by these individuals. It is not apparent from these notes, however, who the actual author of the draft is, or who communicated what to the President (who I assume would be the intended recipient of any advice that was provided). There is nothing on the face of the memorandum to indicate whether the draft was initially prepared by TPA staff for the President's consideration or whether it was prepared at and under his direction. In the absence of representations from the City on this issue, I find that the City has failed to satisfy its onus in establishing that this record contains, or that its disclosure would reveal advice or recommendations of an officer or employee of the City, or of a consultant retained by it. Accordingly, I find that pages 230-235 of Record 230-238 are not exempt under section 7(1) of the *Act*.

ORDER:

1. I uphold the City's decision to withhold Records 45, 74-83 (duplicate Record 747-756), 86 (duplicate Record 87), 118-126, 127-136 (duplicate Record 770-778), pages 236-238 of Record 230-238), 424-427 (duplicate Records 432-435 and 1200-1202), 459-461, 462-467, 485-487 (duplicate Record 488-490), 583, 586-593, 594-599, 639-641, 759-766, 831-837,

876-881, the handwritten note on the bottom of page 723 (of Record 723-731) and portions of Record 643-646 from disclosure. For complete clarity, I have highlighted on the copies of pages 723 and 643 that I am sending to the City along with the copy of this order, those portions which should not be disclosed.

2. I order the City to disclose the remaining records and parts of records, including those which the City has agreed to disclose, to the appellant by providing him with a copy of them on or before **July 3, 2002**.

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

Original signed by: June 11, 2002
Laurel Cropley
Adjudicator