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

Reconsideration Order MO-1900-R

Appeal MA-030105-1

Order MO-1742

City of Toronto

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NATURE OF THE APPEAL

This appeal concerns a decision of the City of Toronto (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had made an access request as follows:

> I am requesting . . . a copy of the legal opinion provided to the City from [a named law firm]. I was informed at a meeting held by the City Planning Department on December 12, 2002 that this opinion has been recently delivered to the City Solicitor for review. To clarify further the opinion is paid for by the applicant St. James Cathedral, Toronto and was delivered to your offices in support of a position that gives St. James Cathedral, Toronto the right to sell property rights notwithstanding legislation to the contrary.

By way of background the opinion relates to a proposed residential and commercial development at the southeast corner of Church Street and Adelaide Street East in Toronto, currently the site of a commercial parking lot. The site forms part of a block of land between King and Adelaide Streets with Church Street to the west, which contains the St. James Cathedral, the Parish House and the Diocesan Centre (the Cathedral Lands). The Cathedral Lands have been the subject of a long-standing and acrimonious land use and developmental rights dispute.

The City identified 10 pages of responsive records, consisting of three components, as follows:

Part 1 A City fax cover sheet with a handwritten note from a City planner to a City solicitor dated September 18, 2002 (page 1) (City planner's memorandum)

Part 2 A fax cover sheet addressed to the City planner from a law firm, and a two-page letter addressed to a City solicitor from a law firm, both dated September 18, 2002 (pages 2-4) (law firm's covering materials)

Part 3 A 6-page letter from a law firm to St. James Cathedral dated August 27, 2002 (pages 5-10) (legal opinion)

The City issued a decision denying access to all 10 pages, stating:

> You have requested access to a copy of a legal opinion letter provided to the City of Toronto by [the named law firm] in 2002 pertaining to the matter of air density transfer from 65 Church Street in Toronto.
>
> Access is denied to the complete records that you have requested under section 12 of the *Act*.
>
> Section 12 has been relied on to withhold records that are subject to solicitor-client privilege, or that were prepared by or for counsel employed or retained by the City for use in giving legal advice or in contemplation of or for use in litigation.

The appellant appealed the City's decision to this office.

I conducted an inquiry into the appeal. After receiving representations from the City and the appellant, I issued Order MO-1742 dated January 19, 2004, in which I upheld the City's decision to withhold the record under section 12.

The appellant then commenced an application for judicial review in Divisional Court seeking to quash the order and to compel the City to disclose the record to the appellant.

Later, the appellant served and filed his factum in this matter.

Having reviewed the factum and having considered the points raised by the appellant, I decided to reconsider my decision for the reasons set out below.

Having decided to reconsider my decision, I sent a letter to the parties that set out my preliminary findings on the issues raised, and invited the parties to make submissions. The City made substantive representations, while the appellant stated that he was relying on his representations in the appeal as well as in his factum filed in Divisional Court.

GROUNDS FOR RECONSIDERATION

The reconsideration procedures of the Information and Privacy Commissioner (the IPC) are set out in section 18 of the *Code of Procedure*. In particular, section 18.01 of the *Code* states:

> The IPC may reconsider an order or other decision where it is established that there is:
>
> (1) a fundamental defect in the adjudication process;
>
> (2) some other jurisdictional defect in the decision; or
>
> (3) a clerical error, accidental error or omission or other similar error in the decision.

The arguments raised in the appellant's factum have persuaded me that, in arriving at my decision, I failed to fully consider and dispose of a relevant and contentious issue in the appeal, that is, what precisely constitutes the record at issue. I have concluded that this failure constitutes a fundamental defect in the adjudication process, and my reconsideration of the scope of the request issue, as well as the issues that flow from it, are set out below.

SCOPE OF THE REQUEST

As set out above, the appellant's request was simply for a copy of a specified legal opinion. The City's response describes the requested record as "a copy of a legal opinion".

In my Notice of Inquiry dated July 28, 2003, I described the record at issue as follows:

> The information at issue is comprised of 10 pages and includes a memo requesting a legal opinion, related correspondence and a legal opinion.

In its representations sent in response to the Notice of Inquiry, the City described the record at issue as:

> . . . [A] confidential memo from an Urban Development Services senior planner to the City Solicitor dated September 18th, 2002 together with attachments requesting that she review and comment on an outside legal opinion (one of the attachments).

In response, the appellant submitted:

> The record [I have] requested access to is a legal opinion filed by [The Rector and Churchwardens of St. James Cathedral (St. James)] in support of an application for an amendment to the Toronto Official Plan and Zoning By-Laws.
>
> The record *is not* a memo from an Urban Development Services senior planner to the City Solicitor with 'attachments'. That record was not requested. It is only through the City's representations in these proceedings that the appellant has even become aware of any memo sent by an Urban Development Services senior planner to the City Solicitor . . .
>
> . . . [T]he document [I] seek exists independently of that memo and is part of [St. James'] application for rezoning . . .

In reply, the City maintained its position that the record at issue includes the internal memorandum and that "the opinion letter cannot be considered separately from the context of the memo and other attachments."

In my order, I described the record in the same fashion as I described it in my Notice of Inquiry, and did not consider the appellant's arguments on this point.

Having reviewed the relevant material on this point, I have decided to accept the appellant's submissions that his request covers only the 6-page legal opinion submitted by St. James' law firm to the City of Toronto by facsimile dated September 18, 2002 at 1:28 pm, which means that only pages 5-10 are at issue. I refer to this record as the "legal opinion".

I do not accept the City's submission that the legal opinion submitted to the City "cannot be considered separately" from the subsequent covering memorandum from the senior planner to the City Solicitor sent at 2:49 pm on the same day. The evidence on the face of the records themselves clearly points to the fact that the law firm delivered the covering materials (pages 2-4) and the legal opinion (pages 5-10) directly by fax to the City planner (despite the fact that the covering letter, pages 3-4, is addressed to the City solicitor). The City does not appear to dispute

this. The planner then prepared a fax cover sheet with handwritten notes (the City planner's memorandum, page 1), and faxed it together with the law firm's covering materials and the legal opinion to the City solicitor. In circumstances where the appellant's request makes no reference to internal City memoranda or the law firm's covering materials, and where the appellant reiterates that he does not seek such material but only the legal opinion as sent to the City, then I am obliged to conclude that the 6-page record, originally sent by St. James' law firm and received by the City planner, is the *only* record at issue in the appeal.

SOLICITOR-CLIENT PRIVILEGE

Introduction

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 contains two branches as described below. The City must establish that one or the other (or both) branches apply. I will consider the application of both branches to the record.

In determining whether solicitor-client privilege applies, it is important to consider the context in which the specific record appears. It is possible that a record found in one location or context is privileged, while a copy of the record found in a different location or in a different context is not privileged.

For example, a copy of a non-privileged document found in a lawyer's litigation brief may be subject to litigation privilege if, through research or the exercise of skill and knowledge, counsel has selected it for inclusion in the brief [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Another example of this principle can be found in Orders PO-1846-F and PO-1848-F. In those cases, a requester sought access to various records held by the Ministry of Energy, Science and Technology (the Ministry) and Ontario Hydro. In Order PO-1846-F, Adjudicator Laurel Cropley held that a note from Ontario Hydro's legal counsel to the Ministry's legal counsel was not privileged in Ontario Hydro's hands, because the note could not be considered a communication between a lawyer and a client. By contrast, in Order PO-1848-F, Adjudicator Cropley found that a copy of the same note, in the hands of the Ministry, did attract privilege, because it was a part of Ministry counsel's working papers.

Therefore, I will consider the application of solicitor-client privilege to the specific record at issue, that is, the copy of the legal opinion originally sent by St. James' law firm and received by the City planner.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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].

The privilege applies to "a continuum of communications" between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co.*].

In its reconsideration representations, the City submits:

> The [record] was specifically obtained by a diligent employee on behalf of the City. There is no other reason for the City to be in possession of [the record] other than to have its own legal advisors review and give an opinion about its contents. The document arrived at 1:28 p.m. but was clearly designated for the City's solicitor and was sent to her at 2:49 p.m. The planner in accepting the document and preparing it, i.e., getting it ready for the City's solicitor, did so with the specific purpose of obtaining legal advice. The record was information he had to provide in order to get the solicitor's legal opinion. Without it, the solicitor could not have provided the advice she was asked to give. It was a part of her

> working papers directly related to the seeking, formulating and provision of legal advice.
>
> . . . . .
>
> In [Order MO-1475], the [institution] received a letter from several of the requester's former employees. [The institution] then faxed a copy of that letter to its legal counsel, together with a request for legal advice. The requester then sought production of that letter. Adjudicator Dora Nipp held that the letter qualified for exemption under s. 12 of the *Act*.
>
> . . . . .
>
> . . . [T]he facts of this case are identical to the facts of Order MO-1475. The document at issue in both cases was obtained by the institution and a legal opinion was requested with respect to that document from *the institution's own legal counsel*.
>
> In Order MO-1338, the document at issue was not provided to or from the institution's own legal counsel, but rather from the law firm . . . hired by a non-institution [the World Wildlife Fund (the WWF)]. As such, in order to have a claim for solicitor-client privilege, the institution had to argue that it had a common interest with the WWF. The adjudicator in that case found that this was not so and that any privilege that existed between the WWF *as client* and [the law firm] *as solicitor* was waived when that opinion was passed to a third party (the City). In that case, there was no request from the City to *its own legal counsel* for an opinion based on the document provided to it by [the law firm].
>
> Accordingly, . . . based on the above, Order MO-1338 is clearly distinguishable from the present case. Rather, . . . the facts of this case are indistinguishable from Order MO-1475. In that case as well as the present appeal, a document was obtained from a third party and that document was subsequently given to the institution's legal counsel for an opinion and advice.
>
> Furthermore, . . . it is irrelevant what document is actually being provided to the institution that is subsequently sent to the institution's legal counsel for an opinion. The decision in Order MO-1475 does not turn on the character of the document at issue. Accordingly, the fact that the original document was a legal opinion does not alter the City's ability to claim solicitor-client privilege once it came into the City's possession for the purpose of seeking legal advice. [City's emphasis]

The record, as originally drafted and sent from the law firm to St. James, clearly is a legal opinion that would have been subject to common law solicitor-client communication privilege as between St. James and its law firm, outside the context of the *Act*. However, as the City appears to concede, once counsel for St. James sent the record to the City, that privilege ceased to exist, since St. James is a party at arm's length from the City, and does not have a common interest

with the City. Disclosure of the opinion to the City would therefore constitute waiver. In this respect, the following passage in Order MO-1338 applies:

> 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 by the Senior Adjudicator]
> >
> > [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".
>
> . . . . .
>
> Even if solicitor-client communication privilege could apply to the record when originally communicated to the WWF, for the same reasons I found no joint interest, I would have found that privilege was lost through waiver when subsequently provided to the City . . .
>
> . . . . .
>
> In my view, by providing the record to the City, the consultant, who was effectively an agent of the WWF, waived any privilege which may have attached to the record. The fact that the consultant asked that the City treat the record confidentially does not negate this finding.
>
> This conclusion is consistent with the finding of Adjudicator Holly Big Canoe in Order P-1342. In that case, the Adjudicator found that disclosure of otherwise privileged material by a Crown Prosecutor to the Law Society of Upper Canada constituted waiver. This decision was upheld by the Divisional Court in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495.
>
> Finally, Orders P-46 and P-136, relied on by the City, are distinguishable on their facts. The WWF and the City do not have a relationship akin to that between the home for the aged and the Ministry in Order P-46. In Order P-136, former Commissioner Linden stated that "no evidence has been presented during this appeal to indicate that the client has waived the privilege available to him at common law." In the current appeal, the representations of the City and the WWF, together with the records themselves, provide sufficient evidence to support a finding of waiver, even if privilege did attach to the record originally.

Turning to this appeal, the City submits that "the planner in accepting the document and preparing it . . . did so with the specific purpose of obtaining legal advice." These words do not reflect the correct test for solicitor-client communication privilege at common law. Rather, the test is whether the specific record constitutes a confidential communication between a lawyer and a client. The copy of the legal opinion at issue is not a confidential communication between a City lawyer and a City client and, therefore, it is not subject to common law solicitor-client communication privilege under section 12 of the *Act*.

To the extent that it was at one point a confidential communication between St. James and its law firm, that privilege has been waived.

The City submits that Order MO-1338 is distinguishable, because in this case, a City employee sent the record to a City solicitor. I am not persuaded that there is a significant distinction between the record in Order MO-1338 and the specific copy of the record at issue here. In both cases, the record at issue was the copy sent by an outside party and received by a non-lawyer

City employee. Since this transaction is not a communication between a lawyer and a client, the privilege does not apply.

The City also argues that the record formed a part of the City solicitor's working papers. While that may be the case with the copy in the City solicitor's hands, the *Susan Hosiery* working papers principle does not apply to the specific copy of the record at issue here, since it was not derived from the solicitor's file. If the City planner had not forwarded a copy of the record to the City solicitor by fax, there would be no question that the legal opinion in the hands of the planner would not be privileged. That remains the case, even if a copy is faxed to the City solicitor. It is only the copy so transmitted that becomes part of the working papers of the City solicitor. The copy of the record received by the planner does not acquire that quality.

The City submits that the facts of this case are more akin to the circumstances in Order MO-1475. In that case, Adjudicator Dora Nipp stated:

> . . . The requester . . . specifically sought access to any correspondence from individuals who were in his employ at the time his contract with the Board was terminated.
>
> The Board located nine responsive records, identified as records A1 through to A9, and granted partial access to them. It denied access to records A5 and A7, in their entirety, relying on the exemptions at sections 14 and 38(b) (invasion of personal privacy) and section 12 (solicitor-client privilege).
>
> During mediation of this appeal, the Board agreed to release record A8 and page 2 of record A7. The appellant also agreed that he is no longer seeking access to page 1 of record A7. Records A8 and A7 are no longer at issue.
>
> . . . . .
>
> I have reviewed record A5 and it is a letter to the Board signed by several of the appellant's former employees. *The materials before me indicate that the Board faxed a copy of this letter to its legal counsel, together with a request for legal advice . . .*
>
> Based on the foregoing, I am satisfied that the information contained in record A5 constitutes direct communication of a confidential nature between a solicitor and client for the purpose of obtaining professional legal advice.

In my view, Order MO-1475 is distinguishable from this case. There, the requester was not seeking the letter as received by the institution. It appears from the reasons in Order MO-1475 that the specific record at issue was the copy that was sent by the Board to its legal counsel, together with a request for legal advice. Here, although a copy of the record was sent to the City's legal counsel, the specific record at issue is the copy of the legal opinion that was sent from the outside party to the City planner. Therefore, I see nothing inconsistent between Order

MO-1475 and a finding here that the record is not subject to common law solicitor-client communication privilege.

To conclude, I find that the record does not qualify for exemption under common law solicitor-client communication privilege under section 12 of the *Act*.

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.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test 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 [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd.*].

The City submits:

> . . . [L]itigation privilege applies to the record. It can also be characterized as part of the City Solicitor's "legal brief" and was obtained in anticipation of litigation, which litigation ultimately manifested itself in proceedings both before the Ontario Municipal Board and the Ontario Superior Court of Justice. The City repeats and relies on its previous submissions on this issue.

The City's initial representations on this point, submitted during the inquiry, read:

> . . . [T]here is a faction who opposes any development in the vicinity of the Cathedral site on the basis that this would be in violation of an original Crown Patent.
>
> In his memo to the City Solicitor, the [City planner] clearly states his concerns . . . and hence his request for her legal advice.
>
> . . . [T]here exists reasonably contemplated litigation on this issue and . . . while the record was not specifically created for the dominant purpose of litigation, it will be included in the solicitor's brief in any action before the courts . . .

The record was clearly not created for the dominant purpose of contemplated litigation. Therefore, the first head of litigation privilege cannot apply.

Under the *Nickmar* principle, copies of such records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief. Generally speaking, this aspect of litigation privilege is applicable to a collection of documents to which a lawyer's expertise was applied. The mere fact that a record appears or may appear in a lawyer's brief for litigation is not sufficient. Here, the City has not supplied the kind of evidence and argument to support its claim that the single record at issue would attract the *Nickmar* principle. In any event, only the copy in the lawyer's brief would become privileged under this principle, and even if such a copy were to exist, it would not be the subject of the appellant's request.

Therefore, I find that the record does not qualify for either head of common law litigation privilege.

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

In this case, City counsel clearly did not prepare the record. Further, I find that the specific record at issue was not prepared for City counsel; rather, it was prepared by an outside law firm for an outside client, St. James. Therefore, Branch 2 solicitor-client communication privilege does not apply.

Therefore, the statutory solicitor-client communication privilege under section 12 does not apply.

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

Again, the record was not prepared by or for counsel for the City. The record was prepared by an outside law firm for an outside client and, therefore, it cannot be said that it was prepared by or for City counsel "in contemplation of or for use in litigation".

Therefore, the statutory litigation privilege under section 12 does not apply.

Conclusion

The record does not qualify for any aspect of solicitor-client privilege under section 12 of the *Act* and, therefore, it is not exempt under this provision.

THIRD PARTY INFORMATION

The City submits for the first time in this appeal that the record is subject to the section 10 third party information exemption. Although the City has raised this exemption very late in the process, I will still consider its application because it is a mandatory exemption.

Section 10(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

The City submits:

> . . . [T]he record at issue can also be characterized as a confidential document submitted by an outside third party to the City . . . [T]he record, as described by the Adjudicator in his letter of reconsideration, is a document which fits within the ambit of s. 10 and was provided to the City by a third party and **marked confidential** . . .
>
> Given the above, . . . should the Adjudicator find that s. 12 does not apply, the most appropriate action in this appeal is to refer the matter back to the City to make a decision based on s. 10 of the *Act*. This would also give the affected party, St. James Cathedral, an opportunity to provide submissions on this issue, if necessary.

I have carefully reviewed the record, as well as the City's very brief submissions on this issue, and I find that the record clearly does not contain the type of information to which section 10

could apply. The fact that the record is marked "confidential" is not itself sufficient to trigger even the provision in section 21(1)(a) that would require notice to a third party, let alone the section 10 exemption itself. That section reads:

> A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,
>
> > that the head has reason to believe might contain information referred to in subsection 10(1) that affects the interest of a person other than the person requesting information;

The record clearly does not contain a trade secret or scientific, technical, financial or labour relations information as this office has interpreted those terms. This office has said that "commercial information" means:

> Information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [Order P-1621].

While the record remotely relates to a commercial matter (a proposed land development), this alone is not sufficient to fit within the scope of "commercial information" in section 10.

Further, the City has provided no information to support the view that disclosure of the information could cause any of the types of harm set out in paragraphs (a) through (d) of section 10.

I am not persuaded that there is a sufficient basis for the application of the notice provision in section 21(1)(a) in conjunction with section 10 of the *Act*. Therefore, I decline to send the matter back to the City or to find that section 10 applies to the record or any part.

PERSONAL INFORMATION

The City also submits that the record contains personal information that is exempt under section 14 of the *Act*.

To meet the definition of "personal information" in section 2(1) of the *Act*, the information must be "about an identifiable individual" in a personal capacity, as opposed to a business, professional or official government capacity [Orders R-980015, MO-1550-F]. I have carefully reviewed the record and the City's brief submissions on this point. Similar to my finding above regarding the application of section 10, I find that the record clearly does not contain information that could qualify as "personal information" as that term is defined in section 2(1) of the *Act*. Therefore, the record does not contain the type of information that would trigger the notice

provision in section 21(1)(b) of the *Act*, which reads:

> A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,
>
> > that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 14(1)(f).

I therefore decline to send the matter back to the City and I find that no information in the record qualifies for exemption under section 14.

ORDER

1. I order the City to disclose the record to the appellant no later than **February 3, 2005**.

2. To verify compliance with provision 1, I order the City to provide me with a copy of the material disclosed to the appellant.

January 24, 2005

Bernard Morrow
Adjudicator