



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1978-I

Appeal MA-050079-1

City of Toronto



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BACKGROUND:

The requester (now the appellant) made a request to the City of Toronto under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). As outlined in more detail below, the appellant appealed the City's decision in respect of that request, and the present appeal (MA-050079-1) was opened. The appellant was also the requester and appellant in a previous appeal (MA-030105-1), which was dealt with in Orders MO-1742, MO-1900-R and MO-1923-R. All three of these orders have been the subject of applications for judicial review. The applications with respect to Orders MO-1742 and Order MO-1923-R (the "judicial review proceedings") are ongoing.

Because of the relationship between the present appeal and the ongoing judicial review proceedings, the City has asked that I place the present appeal on hold pending the conclusion of the judicial review proceedings. This interim order constitutes my ruling on the request to place the present appeal on hold.

In the previous appeal (MA-030105-1), which led to the three orders and the judicial review proceedings, the appellant had made a request under the *Act* for a copy of a legal opinion sent to the City. The legal opinion had been prepared for an outside entity (the affected party) by the affected party's legal counsel, and was later forwarded to the City. The City denied access under the exemption at section 12 of the *Act* (solicitor-client privilege).

In the present appeal, the appellant made a request under the *Act* to the City for information relating to the processing of his earlier request for the legal opinion. Specifically, the appellant asked for access to the following:

The file that would include the contemporaneous notes of the officer who had carriage of the investigation of the request 02-2989, i.e. his discussions with legal and/or all others trying to obtain the record and/or their position on the sol-client issue. All communications with the request[er] or city offices in respect of the request. All representations made by the department with possession of the record with regards to the access request 02-2989. All notes made by the head of Corporate Access [Corporate Access and Privacy, or CAP] regarding the decision to withhold the record.

This request was made while the reconsideration of Order MO-1742 was underway. The City identified 16 pages of records responsive to this request and denied access to them pursuant to sections 10 (third party information) and 12 (solicitor-client privilege) of the *Act*. In addition, the City advised the requester that "[w]ith respect to your request for all communications with the requester, please note that you have already been provided with this information as part of the public record which was part of the Judicial Review of IPC Order MO-1742". As noted, the appellant appealed this decision.

At mediation, the City advised that no responsive records were located for the components of the request relating to "representations made by the department with possession of the record with regards to the access request 02-2989" and "notes made by the head of Corporate Access regarding the decision to withhold the record". The appellant elected not to pursue these records. In addition, the appellant decided not to pursue access to the records referred to as "all

communications with the requester”, or the records at page 7 (fax cover sheet) or pages 11-16 (legal opinion). Accordingly, these records are not at issue in this appeal.

I commenced my inquiry into the City’s denial of access in this appeal by sending a Notice of Inquiry to the City and to the affected party, seeking representations. The City responded by requesting that I place this appeal on hold pending the outcome of the judicial review proceedings. As noted, this is the subject of this interim order.

I therefore sent a revised Notice of Inquiry to the City and the affected party, asking for representations only with respect to the issue of placing this appeal on hold. Both the City and affected party provided representations. I then sent the revised Notice of Inquiry to the appellant, along with complete copies of the City’s and affected party’s representations, and invited the appellant to provide representations on the issue of placing the appeal on hold. The appellant then provided representations.

For the reasons set out below, I have decided to proceed with this appeal except in relation to pages 8 to 10, inclusive, which are at issue in the present appeal and have been identified as possibly at issue in the judicial review proceedings.

RECORDS:

The records at issue in this appeal are described below:

<u>Page No.</u>	<u>Records</u>	<u>Exemption</u>
1	Memo to CAP staff from legal	section 12
2	Email to CAP staff from legal	section 12
3	Email from legal	section 12
4	Handwritten notes re communications between CAP staff and legal	section 12
5	Handwritten notes re communications between CAP staff and legal	section 12
6	Handwritten notes of CAP staff	section 12
8	Fax cover sheet from affected party’s solicitor to City planner	sections 10 & 12
9-10	Letter from affected party’s solicitor to City solicitor	sections 10& 12

DISCUSSION:

I asked the City, the affected party and the appellant to provide representations on the potential harm or prejudice in proceeding with my inquiry in the face of the judicial review application in the related appeal.

The City described the history of the access request and the resulting appeal to this office, highlighting similarities between this appeal and the one now subject to judicial review, including the background of the requests, the identity of the parties and the exemptions claimed under the *Act*.

The City submits that pages 8 to 10 of the responsive records are identical to three pages named in the related appeal and the original Order MO-1742, and are now before the Divisional Court as part of the record of proceedings. The City further submits that page 1 of the records listed in this appeal is the subject of a dispute as to whether or not it should form part of the public record of proceedings in the judicial review of Order MO-1923-R.

The City expresses concern that it could be ordered to disclose a record that may ultimately be determined to be at issue in the judicial review of Order MO-1923-R.

The City also contends that proceeding with this appeal might lead to an inconsistent result if I am “ultimately indirectly overturned” by the Court’s decision in the concurrent judicial review. In other words, if I follow the reasoning in Order MO-1923-R in deciding the substantive issues around solicitor-client privilege, the decision I reach regarding the application of the section 12 exemption to the records at issue may ultimately run contrary to that of the Divisional Court. In a related submission, the City states that the Court’s ruling on section 12 would inform the City’s decision on whether to grant access to the records in the present appeal for which section 12 has been claimed.

Finally, the City suggests that were I to proceed with this adjudication, it is likely that my decision would be the subject of a further judicial review and that this is not in the best interests of the parties since it would lead to an undesirable multiplicity of proceedings. The City refers to section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which states that “[a]s far as possible, multiplicity of legal proceedings shall be avoided.”

The affected party supports the request of the City to place this appeal on hold pending the outcome of the judicial review application and offers a similar rationale.

In its representations, the affected party echoes the concern about there potentially being two separate determinations with respect to the same records, namely pages 8 to 10. These three pages are said to have been identified as part of the records in Order MO-1742, but removed from the records at issue by Orders MO-1900-R and MO-1923-R. The affected party argues that this incorrectly narrowed the scope of that appeal.

The affected party also conveys concern about the multiplicity of proceedings, the duplication of effort and the use of resources.

The affected party presents an alternative position: that the appeal should proceed with respect to those documents that are not potentially at issue in the judicial review proceedings. The affected party asks that the appeal be placed on hold with respect to records that *are* potentially at issue,

which it identifies as pages 8 to 10, as well as the other records if they relate to or potentially reveal the contents of the records at issue, or potentially at issue, in the judicial review proceedings.

The appellant is opposed to placing this appeal on hold. The appellant asserts that there is no duplication or overlap between the access request from which this appeal flows and the preceding one which spawned the judicial review applications.

In my view, the possibility of contradictory rulings and multiplicity of proceedings must be taken seriously. The possibility that pages 8 to 10 may be at issue in the judicial review proceedings cannot be avoided or overlooked. If those records prove to be at issue in the judicial review proceedings, possible contradictory rulings and/or a multiplicity of proceedings are a significant concern. I have therefore decided to place this appeal on hold as regards those pages.

This possibility does not exist with respect to the remaining records at issue. While page 1 is the subject of a dispute as to whether it should form part of the record of proceedings in the judicial review, it is not a record at issue dealt with in any of Orders MO-1742, MO-1900-R and MO-1923-R. Like the other remaining records, the question of whether Record 1 is exempt from disclosure under the *Act* has never been determined at first instance by an order of this office, and that question is not at issue in any judicial review proceeding.

The remaining records, including page 1, are internal records of the City. They document steps in the City's response to the appellant's access request that led to the related appeal and to Orders MO-1742, MO-1900-R and MO-1923-R. As noted, the question of whether they are exempt under the *Act* is not at issue in the judicial review proceedings. I am also satisfied that they do not reveal the contents of any records at issue or potentially at issue in the judicial review proceedings. They are therefore not either directly or indirectly at issue in those proceedings, and there is no possibility of a direct conflict between the outcome of those proceedings and this appeal. As well, based on this reasoning, I am satisfied that proceeding with an adjudication concerning the remaining records would not produce a "multiplicity of proceedings".

In addition, I note that the Court's resolution of the judicial review proceedings is unlikely to significantly impact the application of section 12 to the remaining records. The essential issue in the judicial review is the application of solicitor-client privilege to a legal opinion from an outside source, which is a very different subject than its application to internal communications.

Finally, while I appreciate that proceeding with this appeal with respect to the remaining records will require effort from the parties, I do not accept that it will produce a duplication of effort or a waste of resources. As noted above, the remaining records are of a different character from the records at issue, or potentially at issue, in the judicial review proceedings.

In my view, proceeding with the appeal as regards the remaining records will not significantly prejudice the parties, and will have the advantage of protecting the appellant's interest in pursuing the timeliest and fullest adjudication of this appeal that can be achieved in the

circumstances, as well as the broader public interest in the timely resolution of disputes under the *Act*.

Accordingly, I will continue the appeal with respect to pages 1 to 6 of the records. As the only exemption claimed for those records is section 12, I will only seek representations on that exemption at the present time.

ORDER:

1. I am placing the part of this appeal relating to records 8 to 10 in abeyance pending the conclusion of all of the judicial review proceedings.
2. I am continuing my inquiry in relation to pages 1 to 6.
3. I ask that the City and the affected party provide me with representations on the section 12 exemption, as outlined in the original Notice of Inquiry issued on July 7, 2005, **no later than October 20, 2005.**

Original signed by: _____
John Higgins
Senior Adjudicator

_____ October 5, 2005