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

ORDER MO-1967

Appeal MA-040347-1

City of Vaughan

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NATURE OF THE APPEAL:

The City of Vaughan (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to all records relating to the City's official visits, communications, or actions, in regards to three identified properties, one of which belongs to the requester. It appears that the request arises as a result of a number of long-standing disputes between the property-owners which are reflected in various complaints to the City about noise and construction issues going back a number of years. Specifically, the requester sought access to the following:

> [Requester's own property address (#36)]
>
> All visits to the property, correspondence and communications with owners, including all internal notes, notes to file, official requests/orders/communications/instructions/orders verbal and documented, inspections and notes, occupancy permit visits, notes, and documented conversations, from the start of the construction of [requester's property address] (1994) to the current date.
>
> [2nd property address (#26)]
>
> All orders issued, including verbal and documented orders issued, and rescinded, orders complied with, letters from TRCA [the Toronto Regional Conservation Authority] in regards to the property extension and the sale of the OS1 zoned ravine land from the City to the resident, copy of the City permits for erecting the retaining wall and placing fill in the reclaimed land, on rear of the property (R1 zoned land abutting and OS1 zone this is a zoning requirement bylaw 289-89), copies of the engineering reports from the TRCA and City in regards to land sale from the City and the retaining wall and fill issues, a copy of the air conditioner noise compliance letter justifying the removal of the restriction on title, and a letter provided to the City of Vaughan from TRCA on or about June 20, 2001, indicating that they issued an order to [2nd property address] to reinstate the land and removed the fill for the purchased land, copies of visits from City bylaw and building standards and legal – from March 2000 to current date.
>
> [3rd property address (#46)]
>
> All orders issued, visits to site, and notes to file in regards to construction issues in particular complaints and bylaw enforcement requests from [requester's property address (#36)] and actions taken by the City from March 2004 to September 2004.

The requester indicated in her letter that the records might be stored in the City's Bylaw, Legal and Building Standards departments.

In response to the request, the City initially issued a decision letter, dated October 18, 2004, which I have summarized as follows:

[Requester's property address (#36)]

The City located the Property File, under the custody and control of the Building Standards Department, and denied access to them pursuant to section 15(a) of the *Act* (information available to the public). The City provided a contact name and a phone number for submitting an informal access request for information.

The City located Investigation Work Order records, under the custody and control of the Enforcement Services Department. The City granted partial access to them, denying access to the remainder under sections 8(1)(d), 8(2)(a) (law enforcement) and 14(1) (personal privacy) of the *Act*.

[2nd property address (#26)]

Access to the Property File was denied in full pursuant to section 15(1) of the *Act*. However, the City disclosed in full, a copy of its By-law 412-2000.

With respect to the Investigation Work Order reports for this location, the City granted partial access, denying access pursuant to section 8(1)(d) 8(2)(a) and 14(1) of the *Act*.

[3rd property address (#46)]

Access to the Property File relating to this location was also denied, pursuant to section 15(1) of the *Act*.

With respect to the Investigation Work Order reports for this location, the City advised that access was denied in its entirety, pursuant to sections 8(1)(a), 8(1)(d), 8(2)(a) and 14(1) of the *Act*.

The City further advised the requester of its decision to waive the $3.00 fees which could have been charged for processing the request.

On October 29, 2004, the City issued a second decision letter, informing the requester that additional records relating to the 2nd property address (#26) had been found in the Office of the Commissioner of Legal and Administrative Services. Access was denied to two memoranda originating from Legal Services, pursuant to section 12 (solicitor-client privilege) of the *Act*, while the remainder of the correspondence was disclosed in full. The City also indicated that it had again decided to waive the fees which could have been charged.

The requester, now the appellant, appealed the City's decisions. In her appeal letter, the appellant claimed that some of the disclosed information was inaccurate, that some of the records to which access was denied should have been disclosed and that additional records ought to exist.

During mediation, the appellant provided specific information with respect to the additional records she believes exists, to assist the City in its search for additional records. As a result of a further search by the City, additional responsive records were located in the Legal Services Department, the Enforcement Services Department and the Community Planning Department. The City subsequently issued a third decision letter to the appellant on February 18, 2005, granting access to some of the additional records and denying access to others, pursuant to sections 8(2)(a) (law enforcement report) and 14(1) (invasion of privacy) of the *Act*. I have summarized what the City told the appellant as follows:

> With respect to any correspondence to the Mayor and the Regional Councillor, the City advised that Constituency Records are not under the custody and control of the City and therefore not subject to the *Act*. This issue could not be resolved at mediation and remains at issue on appeal.
>
> With respect to the Property Files relating to the three properties for which access had been denied, pursuant to section 15(1) of the *Act*, the City indicated that the appellant has already received most of these records as a result of an informal request for information outside of the *Act*. The City pointed out that the appellant was charged a fee by-law of $75.00 per property and that it would not waive the fees charged relating to the Property Files.

Also during the mediation stage of the process, the City explained that the only record which was not provided to the appellant, through the informal request for information, was an architectural drawing designated as #04-1322 relating to the 3rd property address, to which the City applied section 8(1)(i) of the *Act* (security). This exemption was not claimed in any of the decision letters, as the City was under the impression that the appellant was not seeking access to this specific record. This issue could not be resolved at mediation and the appellant indicated that access to the architectural drawing #04-1322 is still at issue.

With respect to the noise certificate identified by the appellant for the 2nd property address (#26), the City advised that it could not be located. The appellant continues to maintain that the certificate exists.

As a result of yet another search in the Legal Services Department, the City advised that additional responsive records had been located and that access was granted in full to some of them. Access to portions of other records was denied, pursuant to section 14(1) of the *Act*. In response, the appellant confirmed that she is not pursuing access to any of the information to which section 14(1) of the *Act* was applied. However, the appellant maintains that other responsive records from the Legal Services Department should exist.

Finally, at the conclusion of mediation, the appellant indicated that she is not pursuing access to the non-responsive portions of the records, nor to certain other specified records [Document #4, pages 71 to 76].

Further mediation was not possible and the matter was streamed to the adjudication stage of the appeal process. I sought and received the City's representations, initially. All of the City's representations, with the exception of those portions whose disclosure would reveal the contents of the records, were shared with the appellant. The appellant also provided me with extensive representations, the relevant portions of which were shared with the City. I then received additional submissions from the City by way of reply.

RECORDS:

The records that remain at issue are the following:

Group 1: Architectural drawing #04-1322 relating to 3rd property address
Group 2: 2 memoranda, dated July 13, 2001 and August 17, 2003
Group 3: Correspondence, including emails, to and from the Mayor and a Regional Councillor relating to the three properties (described by the City as constituency records).
Group 4: Property files relating to the three properties
Group 5: The electronic version of the work orders identified by the City as Document #4, pages 12, 13 and 14.

DISCUSSION:

CUSTODY OR CONTROL

Under section 4(1) of the *Act*, every person has a right of access to a record or part of a record in the custody or under the control of an institution unless one of the specified exemptions applies to that record or the request for access is frivolous or vexatious.

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

In Order M-813, Adjudicator Officer Laurel Cropley reviewed the law surrounding the application of the *Act* to record-holdings maintained by municipal councillors. She analysed this issue as follows:

> It is clear from the wording of section 4(1) that in order to be subject to an access request under the *Act*, a record need only be in the custody **or** under the control of an institution (Order P-994).
>
> Under the *Act*, an "institution" is defined as:

> (a) a municipal corporation, including a metropolitan, district or regional municipality or the County of Oxford,
>
> (b) a school board, public utilities commission, hydro electric commission, transit commission, suburban roads commission, public library board, board of health, police commission, conservation authority, district welfare administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act*,
>
> (c) any agency, board, commission, corporation or other body designated as an institution in the regulations.
>
> The wording of the *Act* does not specifically refer to elected offices, such as a municipal councillor, as falling within the definition of "institution".

The City takes the position that the records identified as belonging to Group 3, consisting of various correspondence to and from the Mayor and a Regional Councillor, are not within the City's "custody or control" as they represent "constituency records". Accordingly, the City argues that these records are not subject to the *Act*. The City relies on the reasoning contained in Orders M-813, M-846 and MO-1403. It submits that because the Mayor and the Regional Councillor do not meet the definition of the term "officer" of the municipality, the records they create while representing the interests of their constituents, as opposed to the interests of the City, do not fall within the ambit of the *Act* as they are not in the custody or under the control of the City.

The City goes on to explain that certain "constituency records" of the Mayor and the Regional Councillor were incorporated into the City's own record-holdings and that they fall within its custody or control. The City notes that these records were disclosed to the appellant with its third decision letter on February 18, 2005, which describes them in greater detail. The City has not, however, clearly indicated whether additional "constituency records" relating to the subject matter of this request exist in the record-holdings of the Mayor and the Regional Councillor. Neither has it clarified whether searches have been conducted for these records or whether any such documents exist in addition to those released to the appellant on February 18, 2005.

The appellant submits that she has already received access to the records maintained by the Regional Councillor directly from him. These records are not, therefore, at issue in this appeal. Accordingly, I need only consider whether the record-holdings of the Mayor are subject to the access provisions in the *Act*.

I note that, in Order MO-1403, I specifically found that the mayor of a municipality is an "officer" of that municipality for the purposes of the *Act* while municipal councillors are not,

unless some special circumstances are present. In that decision, I made certain findings with respect to the treatment to be accorded records maintained by a municipality's mayor that relate to his or her duties as mayor, as opposed to other personal records. I found that:

> Part VI of the *Municipal Act* deals with "Officers of the Municipal Corporation". It begins with section 69, which describes a mayor as the "head of council and the chief executive officer of the corporation." This in itself indicates that the mayor is an "officer" of the municipality. The inclusion of the term "head of council", which includes a mayor, in the description of statutory rights and duties of a municipality's "officers" provides a further indication that, for the purposes of the *Municipal Act*, the mayor of a municipality is to be considered an "officer". Further support for this view is found in section 70(b), which leads me to the conclusion that a mayor of a municipality is to be considered an "officer".
>
> The City's "Elected Officials' Records Policy", discussed in the preceding section, indicates that it applies to Councillors and the Mayor. This policy, adopted by council in 1986, predated the *Act*. In my view, the positions of Councillors and the Mayor under the *Act* are different because the Mayor is an officer of the municipal corporation while Councillors are not. I find that, because she is an officer of the municipal corporation, the Mayor's record-holdings in relation to her duties as Mayor form part of the City's records for the purposes of the *Act*. By contrast, in some circumstances, records of the Mayor that do not relate to mayoral duties, and are maintained separately as constituency or personal papers, may not be subject to the *Act* (see Order P-267.)
>
> As responsive records in this appeal would clearly relate to her duties as Mayor, I find that such records within the Mayor's record-holdings are in the custody and under the control of the City and I will order the City to identify them, and issue a decision letter to the appellant.

In its submissions, the City relies on a memorandum dated January 23, 1998 from its City Clerk addressed to "All Members of Council" in which councillors are advised as to the implications of Order M-813 [referred to above] which addressed the treatment of constituency records maintained by a Councillor. In this communication, the City Clerk urged Councillors to take care in filing and maintaining their constituency records separately from "records held by the City" as the latter may be subject to requests under the *Act* while the former may not.

In the present appeal, the appellant indicates that she has received access to all of the records maintained by the Regional Councillor who was the subject of the request. I need not, therefore, address the question of whether the record-holdings of this Councillor are subject to the access provisions in the *Act*. With respect to any responsive records maintained by the Mayor, I rely on the reasoning in Orders M-813 and MO-1403 to find that, because the Mayor is an officer of the City, any records which he maintains that relate to his duties as Mayor are subject to the access

provisions in the *Act*. Records of a personal nature or "constituency records" that are maintained separately from those about the City's business, however, are not subject to the *Act*.

Records of the sort requested by the appellant do not qualify as either personal documents or constituency records, in my view. Rather, they relate directly to the business of the City and pertain to issues involving certain actions taken by City officials in the course of their duties. As a result, I find that the record-holdings of the Mayor are also subject to the access provisions in the *Act* and I will order the City to undertake a search of those records that relate to the request.

REASONABLENESS OF SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist. In the present appeal, the appellant believes that the following documents should exist:

- Copy of permission notice for access to #36 [the appellant's own home], relating to noise violations;
- noise testing report for #26 (paper and electronic copies) conducted on August 23, 2001, by [two named individuals] and indicating a reading of 63 and 65 decibels;
- noise certificate for #26 or a letter requesting noise certificate;
- MTRCA [the Metropolitan Toronto Regional Conservation Authority] permits and accompanying drawings for #46 construction, summer 2004;
- all legal files for all three properties;
- documentation produced for the purchase of #26 (i.e. opinion sought from MTRCA for the sale, opinions from staff, report to the City Councillors and Mayor for the sale of the land, notice to adjacent properties of the pending sale and other documentation);
- copy of order issued on September 15, 2004, #46 to provide a permanent and secure fence – paper based and signed copy of order.

The appellant also identified a discrepancy between the paper copies of certain records in Group 4 and the electronic versions of those same records. The City provided an explanation for the reason behind that discrepancy in its representations, which were in turn shared with the

appellant. The appellant does not appear to have taken issue with the City's position and, based on the explanation provided by the City, I am satisfied that this concern has been adequately addressed.

In addition, the appellant points out that she has now received three decision letters as a result of three different searches conducted by the City. She argues that the initial search was clearly inadequate as a large number of additional records were uncovered in the course of the second and third searches. The appellant's suspicions about the possible existence of yet more records are, in her view, well-founded, based on the past actions of the City in responding to her original request. She also has provided me with a detailed and comprehensive examination of what she perceives to be the deficiencies in the manner in which the City conducted the first two searches. As well, the appellant outlines in great detail the reasons for her belief that each of the records described above ought to exist.

Clearly, the appellant has an intimate understanding of the documents which comprise the responsive records and those which, in her view, ought to exist in the City's record-holdings. In addition, the appellant has provided me with copies of many of the records already disclosed to her to bolster her arguments that more documents, particularly those received from secondary sources, ought to exist.

The City has provided me with information outlining the nature and extent of each of the searches it has undertaken for responsive records. It has outlined the locations where searches were conducted and the results of those searches. Based on my review of this information, including the various decision letters provided to the appellant in the course of the City's processing of her request and appeal, I am satisfied that the City has, finally, conducted a reasonable search for the generic records sought by the appellant. However, in the Notice of Inquiry provided to the City, I specifically asked for its submissions on the searches conducted for the records sought by the appellant which are outlined above. The City did not, however, provide me with this information in either its original representations or those sent in reply to the appellant's submissions. I am unable to ascertain from the vast amount of material provided to me by the parties whether the specific items requested by the appellant were individually addressed by the City or whether it is instead relying on its generic representations with respect to the adequacy of the searches it has undertaken.

As a result, I cannot agree that the City has conducted an adequate search of its record-holdings. I will, therefore, order the City to conduct further searches for the specific records outlined above and identify the results of those searches in writing to both the appellant and myself.

SECURITY OF A BUILDING

The City claims that the architectural drawings designated as #04-1322, which comprise the records in Group 1, are exempt from disclosure under the discretionary exemption in section 8(1)(i) of the *Act*, which reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

Where section 8(1)(i) uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8(1)(i) are self-evident from the record [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

In support of its position, the City states:

> The Building Permit Plan, architectural drawing #04-1322, was issued for a custom-built home located at [a specific municipal address]. The architectural drawing #04-1322 shows a site plan, basement, ground floor and roof plans, basement floor plan, first floor plan, second floor plan and landscape concept for the premises at [a specified municipal address]. . . The architectural drawings for many custom-built homes detail security features such as the location of a security alarm. Disclosure of these architectural drawings may endanger the security of a custom-built home. The security of the residence at [a specified municipal address] may be compromised if the architectural drawings are routinely disclosed to the public.

The City goes on to suggest that "copyright applies to the architectural drawings for this custom-built home. The architectural drawings for [the specified address] may be available from the Architect who designed the custom-built home."

The appellant does not address the application of this exemption to the drawings requested. Instead, she provided submissions on the possible application of section 13 of the *Act* to them. I note that this exemption was not raised by the City and representations on its application were not solicited in the Notice of Inquiry provided to her.

I find that the City has failed to provide me with the kind of "detailed and convincing" evidence required to substantiate the application of the exemption in section 8(1)(i). The City has not indicated whether the drawings that are the subject of this request contain information about potential security systems to be installed in the premises or any other information whose disclosure might reasonably be expected to endanger its security, nor is this evident from the

record itself. Without information of this sort, I am unable to make a finding that the disclosure of these drawings could result in the harm contemplated by the exemption in section 8(1)(i). I find that the City's representations are merely speculative and not sufficiently detailed to establish a reasonable expectation of harm under this exemption.

It would appear from the City's representations that it has applied the discretionary exemption in section 15(a) to these records as well. I will address the possible application of this section to the drawings which comprise Group 1 below.

SOLICITOR-CLIENT PRIVILEGE

The City has claimed the application of the solicitor-client privilege exemption in section 12 of the *Act* to the two records which comprise Group 2. These documents consist of two memoranda; the first from the City's Deputy City Manager and City Solicitor to a Regional Councillor dated July 13, 2001, and the second from the City's Director of Legal Services to the same Regional Councillor dated August 17, 2001.

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.

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 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.)].

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. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

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."

The representations of the parties

The City argues that the two documents represent confidential communications about a legal issue passing between a solicitor and her client and that they fall, accordingly, within the ambit of solicitor-client communication privilege. The City argues that each of the records contain a "legal opinion" from a solicitor to her client.

The appellant states that "there is no litigation in this circumstance and although it hypothetically can be claimed that litigation can result in any action the City takes, it is not reasonable to apply a litigation exemption, given the passing of 4 years without litigation." She then goes on to make arguments respecting the application of the exemption in section 7(1) of the *Act*, and the exceptions to that exemption in sections 7(2). Again, the appellant's submissions are focussed on an exemption that was not claimed and are not of assistance to me in determining whether the records are exempt under section 12.

The appellant also argues that legal opinions respecting the application of a specific bylaw ought to be shared by the City with those who may be affected by any decision that flows from the advice given by the solicitor. She also suggests that counsel for the City are also counsel for its

residents and that she enjoys a similar solicitor-client relationship with a solicitor employed by the City to that available to City employees or elected officials.

Findings

I have reviewed the two memoranda which comprise the records under consideration and find that they represent confidential communications between a solicitor, in both cases employed by the City, and their client, a Regional Councillor with the City. The subject matter of the memoranda pertains to a legal issue and the information conveyed in them may properly be described as legal advice for the purposes of section 12.

In the circumstances surrounding the giving of the advice, I cannot agree with the appellant's position that she can properly be described as a "client" of the City's solicitors. In fact, the advice contained in the records pertains to a matter in which the appellant clearly was adverse in interest to the City. This is further demonstrated by the fact that the appellant has retained her own counsel in the dispute with the City.

I have no difficulty in finding that the two memoranda which comprise the records in Group 2 qualify for exemption under Branch 1 of section 12 of the *Act*.

INFORMATION PUBLISHED OR AVAILABLE

The City maintains that the records which comprise Group 4, the "property files" relating to the three properties which are the subject of the request, are publicly available and are, therefore, exempt from disclosure under section 15(a) of the *Act*, which reads:

> A head may refuse to disclose a record if,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the City must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information [Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include:

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411, MO-1573]. However, the cost of accessing a record outside the *Act* may so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply [Order MO-1573].

The submissions of the parties

In order to assist in the determination of whether the section 15(a) exemption applies, it is necessary to examine the factual background to this request and appeal. It is common ground between the parties that the appellant attended at the City's Building Standards Department and filed three separate application forms requesting access to the property files maintained by the City relating to the three properties that are the subject of this request, paying the City its prescribed fee of $50 for each. In addition, the appellant completed three "Access to Building Standards Department Plans" forms for each of the three properties and paid the prescribed fee of $25 for each. It must be noted that these requests were not made pursuant to the access provisions in the *Act*, but rather through the long-standing access procedure available in most municipalities.

Rather than granting the appellant access to the records she paid for under the access regime that exists within the City outside of the *Act*, the City then took the position that it was unable to provide access because:

- the records are exempt under section 15(a);
- the exemption in section 8(1)(i) applies to drawings relating to one of the homes;
- the appellant did not obtain the permission of the owners of the properties other than her own; and
- copyright applies to the drawings for one of the homes

During the mediation of this appeal, the City provided the appellant with access to the drawings for two of the properties, including her own. In addition, with respect to the other property, the City granted access to certain architectural drawings, including a site plan. Apparently, however, further records relating to the third property have yet to be disclosed to the appellant. I assume that these are the records described as Group 1, which I ordered disclosed in my discussion of section 8(1)(i) above.

In its representations, the City states:

> A system of access exists by means of the Building Standards Department Records form and the Application for Information from Building Standards Department Records form. The property file information and architectural drawings are available to everyone. There is a pricing structure in the form of By-law 396-2002, which is applied to everyone who wishes to obtain the information at a standard price.

The City has not, however, explained the basis upon which it reconciles the statement that "the property file information and architectural drawings are available to everyone" with the fact that the appellant has not been given access to many of the records, particularly the drawings, that she paid for at the time of her visit to the Building Standards Department. Apparently, the City maintains an access process that operates outside the ambit of the *Act* and includes a pricing structure. In the present case, this access procedure did not, however, result in an applicant [the appellant] receiving all of the records contained in the files that she requested. The City apparently takes the position that it cannot grant access to records (in an access regime that exists outside the operation of the *Act*) because of the existence of the exemptions in the *Act*. This position is not only contradictory, it is also illogical.

In my view, serious flaws exist in the City's access procedure respecting property files and architectural drawings maintained by its Building Standards Department and in the inconsistent manner in which it is applied. As a result, I find that the requirements of section 15(a) have not been met by the City. While there may be a "system" in existence and it is supported by a pricing structure, records are not, in practice, made available to everyone. As a result, I find that the City does not maintain a "regularized system of access" for the purposes of section 15(a) and the exemption does not, accordingly, apply.

Because I have found that section 15(a) has no application to the Group 1 and Group 4 records that are responsive to the request, and no mandatory exemptions apply to the information which they contain, I will order the City to disclose them to the appellant.

I do not, as requested by the appellant, have the jurisdiction to order the City to refund the payments received from the appellant for access to records under the City's "system". Any such payments were made in furtherance of an access regime that falls outside the ambit of the operation of the *Act*. I would urge the City to consider doing so, however, in the interests of fairness.

ORDER:

1. I uphold the City's decision to deny access to the Group 2 records.

2. I order the City to disclose the Group 1 and Group 4 records to the appellant by providing her with a copy by **October 13, 2005.**

3. I order the City to undertake a search of its record-holdings for the following documents:

- Copy of permission notice for access to #36 [the appellant's own home], relating to noise violations;
- noise testing report for #26 (paper and electronic copies) conducted on August 23, 2001, by [two named individuals] and indicating a reading of 63 and 65 decibels;
- noise certificate for #26 or a letter requesting noise certificate;
- MTRCA [the Metropolitan Toronto Regional Conservation Authority] permits and accompanying drawings for #46 construction, summer 2004;
- all legal files for all three properties;
- documentation produced for the purchase of #26 (i.e. opinion sought from MTRCA for the sale, opinions from staff, report to the City Councillors and Mayor for the sale of the land, notice to adjacent properties of the pending sale and other documentation);
- copy of order issued on September 15, 2004, #46 to provide a permanent and secure fence – paper based and signed copy of order.

and provide both the appellant and myself with a letter describing the outcome of those searches, along with a decision letter respecting access to any responsive records which are located, using the date of this order as the date of the request and without recourse to a time extension under section 20 of the *Act*.

4. I further order the City to undertake a search of the record-holdings of the Mayor for access to records which fall within the ambit of the description of Group 3 documents and to provide both the appellant and myself with a letter describing the outcome of those searches, along with a decision letter respecting access to any responsive records which are located, using the date of this order as the date of the request and without recourse to a time extension under section 20 of the *Act*.

5. I reserve the right to require the City to provide me with a copy of the Group 1 and Group 4 records that are disclosed to the appellant pursuant to Order Provision 2.

Original signed by: September 21, 2005
Donald Hale
Adjudicator