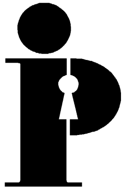

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2022

Appeal MA-040232-2

Town of Oakville

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NATURE OF THE APPEAL:

The Town of Oakville (the Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to four named individuals. Specifically, the requester sought access to information on how the individuals were hired by the Town, when they were hired, what the terms of their contracts are, including information such as renewal details, retainer details, payment schedules, and per diem allowances for gas and other expenses. The requester also sought access to the same type of information in relation to the role of one of the named individuals (the affected person) in a named realty appraisal firm.

The Town issued a decision letter claiming that the request was frivolous or vexatious under section 4(1) of the *Act*. The Town responded to some of the questions in the request and, in addition to its "frivolous or vexatious" claim, denied access to the responsive records pursuant to section 12 (solicitor-client privilege) and section 14(1) (invasion of privacy) of the *Act*.

The requester, now the appellant, appealed the Town's decision.

The Town subsequently issued a revised decision letter granting partial access to additional information. The Town responded to questions regarding the first three named individuals listed in the request and indicated that no records exist in relation to these three named individuals. In response to questions asked in the request about the fourth named individual, the Town provided the appellant with a Council Resolution dated June 26, 2000. The Town denied access to further records relating to the fourth named individual.

During mediation, the Town confirmed that it continues to rely on sections 12 and 14(1) in conjunction with section 14(2)(f) to deny access to records relating to the fourth named individual and maintains its position that no additional responsive records exist. As the appellant continued to believe that additional records might exist, the issue of reasonable search was added to the appeal.

Also during mediation, the Town reiterated its position that the request is frivolous or vexatious.

Further mediation was not possible and the file was transferred to the adjudication stage of the appeal process.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Town, initially. The Town chose not to submit representations. I also sent the Notice of Inquiry to the fourth individual named in the request (the affected person) as he may have an interest in the disclosure of the records and invited him to submit representations on issues A, E, and F. The affected person responded to the Notice of Inquiry with one sentence, stating briefly that "[t]he request was frivolous and vexatious". I then sent a Notice of Inquiry to the appellant who responded with representations.

RECORDS:

The records that remain at issue in this appeal are the following:

- Attachment 1 – an Agreement for Services between the Town and the affected person

- Attachment 3 – a confidential staff report dated June 19, 2000 with four appendices attached

- Any other records that may exist regarding any of the four named individuals (dealt with under "reasonable search", below).

DISCUSSION:

IS THE REQUEST FRIVOLOUS OR VEXATIOUS?

General principles

The provisions to be considered in determining whether a request is frivolous or vexatious are sections 4(1)(b) and 20.1(1) of the *Act* and section 5.1 of Regulation 823 made under the *Act*.

Section 4(1)(b) of the *Act* specifies that 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 the head of an institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. The onus of establishing that an access request falls within these categories rests with the institution (Order M-850).

Sections 20.1(1)(a) and (b) of the *Act* go on to indicate that a head who refuses to provide access to a record because the request is frivolous or vexatious must state this position in his or her decision letter and provide reasons to support the opinion.

Sections 5.1(a) and (b) of Regulation 823 provide guidelines for determining whether a request is frivolous or vexatious. They prescribe that a head shall conclude that a request for a record or personal information is frivolous or vexatious if:

> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

In Order M-850, former Assistant Commissioner Mitchinson observed that these legislative provisions "confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the *Act*", and that this power should not be exercised lightly.

The Town has not provided any representations to support its position that the request is frivolous or vexatious. Given that, as former Assistant Commissioner Mitchinson observes, the frivolous or vexatious provisions confer a significant discretionary power with serious implications that ought not to be exercised lightly, I find it surprising, to say the least, that the Town would make this claim and then provide no representations. The same situation occurred in Order MO-1949, which also involved the Town and the appellant.

The only basis for the Town's frivolous or vexatious claim is found in its decision letter, in which it states:

> Attempts to use the provisions of [the *Act*] to gain personal or pecuniary advantage in the ongoing litigation would amount to an abuse of process of the right of access. Furthermore, an attempt to use the provisions of [the *Act*] to obtain information for the sole purpose of using this information against the Town of Oakville in the litigation is inappropriate and may be considered as being done in bad faith.

Abuse of Process

The Town refers to the use of the *Act* in the context of litigation as an "abuse of process of the right of access". I will deal with "abuse of the right of access" in my discussion of section 5.1(a) of the Regulation, below. As stated in Order MO-1949, where the Town had made a similar argument, abuse of process is a common law concept that often refers to repeated or multiple proceedings. In the context of the *Act*, it has been associated with a high volume of requests, taken together with other factors. (See Orders M-618, M-796 and MO-1488). There is no evidence before me to substantiate an allegation of this nature. The use of the *Act* in the context of litigation is addressed in my discussion of section 5.1(b) of the Regulation, below.

Section 5.1(a) of Regulation 823

The allegation of an abuse of the right of access appears to be a reference to section 5.1(a) of the Regulation, which requires that the request be part of a pattern of conduct amounting to such an abuse, or that would interfere with the Town's operations. Although I am aware of the appellant having made another request for related information, culminating in Order MO-1949, these two requests provide no evidence of a "pattern of conduct amounting to an abuse of the right of access". In the absence of any other evidence or argument, I find that the requirements of section 5.1(a) are not made out in this case.

Section 5.1(b) of Regulation 823

Purpose Other than to Obtain Access

It might also be argued that intended use in litigation is "for a purpose other than to obtain access" as referenced in section 5.1(b) of the Regulation. When the appellant initially filed a

previous appeal with this office, she made a reference to litigation between herself and the Town which I addressed in my Order MO-1949.

As noted in Order MO-1949, I previously addressed an argument that intended use in litigation was "for a purpose other than to obtain access" in Order MO-1924:

> The [institution] also suggests that the objective of obtaining information for use in litigation with the [institution] or to further the dispute between the appellant and the [institution] was not a legitimate exercise of the right of access.
>
> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada* (Minister of Finance), [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
>
> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have "a right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

Also in Order MO-1924, I dealt with an argument concerning "expanded discovery" in litigation, which is relevant to the Town's argument that using information obtained under the *Act* in litigation is "inappropriate":

> I note that records protected by litigation privilege are subject to the solicitor-client privilege exemption at section 12. In addition, section 51 expressly addresses the relationship between the *Act* and the litigation process. This section states:
>
> > (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

> (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

The Legislature clearly considered the relationship between the *Act* and the litigation process, and could have chosen to go beyond the section 12 exemption to limit the application of the *Act* where the requester is engaged in litigation with an institution. It did not do so. In my view, the [institution]'s argument on this point is entirely without merit.

Senior Adjudicator David Goodis rejected a similar argument in Order PO-1688. In so doing, he provided a helpful summary of the jurisprudence on this issue:

> The application of section 64(1) [the equivalent of section 51(1) of the *Act* in the provincial *Freedom of Information and Protection of Privacy Act*] was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
>
>> ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [provincial Freedom of Information and Protection of Privacy Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …
>
> …
>
> In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the [Act] […]:
>
>> […] The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil

> Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

I went on to reach the following conclusion in Order MO-1924:

> Reinforced by the findings in Orders 49 and P-1688, as well as the reasons of Justice Lane in the *Doe* case, I find that any intention on the part of the appellant to use the requested information in furtherance of his dispute or his litigation with the [institution] is not a basis for me to find that there is a "purpose other than to obtain access".

I also dealt with a similar argument in Order M-906:

> In its submissions addressing this aspect of the matter, the City indicates (as noted above) that the appellant seeks access to assist him in taking action against it with respect to a number of land transactions. In the City's view, this means that the request was "for a purpose other than to obtain access". To support its position, the City relies on the appellant's complaints and litigation against it, as outlined above under "Pattern of Conduct that Amounts to an Abuse of the Right of Access". The City also refers to media reports that the appellant intends to "fight City Hall".
>
> In my view, the fact that once access is obtained, a requester intends to use the document for a particular purpose, for example, to substantiate a complaint against an institution, does not mean that the request is "for a purpose other than to obtain access" within the meaning of section 5.1(b) of the Regulation.
>
> As I noted in Order M-860:
>
>> ... if the appellant's purpose in making requests under the Act is to obtain information to assist him in subsequently filing a complaint against members of the Police, in my view this does not indicate that the request was for a purpose other than to obtain access; rather, the purpose would be to obtain access **and** use the information in connection with a complaint.
>
> …
>
> Moreover, in my view, to find that a request is "for a purpose other than to obtain access" and thus "frivolous or vexatious" on the basis that the requester may use the information to oppose actions taken by an institution would be completely

> contrary to the spirit of the Act, which exists in part as an accountability mechanism in relation to government organizations.

I found the analysis in these previous decisions applicable in Order MO-1949, and it is equally applicable here. I find that the appellant's involvement in litigation does not support a finding that the purpose of her request is "other than to obtain access" within the meaning of section 5.1(b) of the Regulation.

Bad Faith

The Town also makes passing reference to the other ground in section 5.1(b) of the Regulation, relating to a request made in "bad faith". Again, the Town apparently takes this position because of an alleged intention to use the records in litigation against it. In Order M-850, former Assistant Commissioner Mitchinson commented on the meaning of the term "bad faith". He indicated that "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral underhandedness. He went on to conclude that it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with secret design or ill will.

As I found in Order MO-1949:

> In this case, the fact that the appellant is engaged in litigation is obviously known to the Town, and I find that there is no evidence whatsoever to support any view that the appellant is engaged in "the conscious doing of a wrong because of dishonest purpose or moral underhandedness", or that she is "operating with secret design or ill will". I find that the appellant's request is not made in "bad faith".

In this appeal I also cannot find any evidence of "bad faith". Without any representations from the Town, I am satisfied that section 5.1(b) of the Regulation does not support a finding that the request is frivolous or vexatious.

To conclude, the Town has failed to meet its onus of demonstrating that the request is frivolous or vexatious, and I find that it is not. I will now turn to the remaining issues in the appeal.

PERSONAL INFORMATION

In order to qualify for exemption under section 14(1), a record must contain "personal information", as defined in section 2(1) of the *Act*. Under this definition, "personal information" means recorded information about an identifiable individual. The definition includes a number of examples of "personal information", such as information relating to "employment history" or "financial transactions in which the individual has been involved" (paragraph (b) of the definition), or the individual's name where it appears with other personal information relating to

the individual or where the disclosure of the name would reveal other personal information about the individual (paragraph (h)).

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Attachment 1 contains the name of the affected person along with his salary and the terms of his employment with the Town, including duration, termination notice, duties, a non-competition clause and a code of conduct. I find that Attachment 1 contains the personal information of the affected person as it includes both the affected person's name and other personal information about him, specifically this individual's salary and other benefits.

Attachment 3 is made up of two parts. The first two pages, CC-1 and CC-2 contain the name of the affected person in several places. References to the affected person in this record generally refer to his professional capacity as an employee of the Town, and do not qualify as his personal information. However, I find that several passages in this record that appraise his performance and make recommendations concerning him constitute his personal information.

Attachment 3 also contains four appendices. Appendix "A" is 8 pages in length and appears to be Town policies in respect to real estate and property management functions. Appendix "A" does not contain any personal information. Appendix "B" is a one page report and recommendations by a property management company. It also does not contain any personal information. Appendix "C" is a three page real estate activity summary listing various properties and locations. Some of the information in the record discloses the amounts apparently paid for particular properties by or to individual owners, and I find that this constitutes "personal information" (see Order PO-1786-F) in those cases where an individual owner sold or purchased a property. Appendix "D" is a four page copy of Attachment 1 which I found, above, to contain personal information.

In summary, I find that Attachment 1 contains personal information, as do pages CC-1 and CC-2 and Appendices "C" and "D" of Attachment 3. Appendices "A" and "B" of Attachment 3 do not contain any personal information. I also find that the records do not contain any personal information of the appellant.

I will now consider whether the portions I have found to qualify as personal information are exempt under section 14(1).

PERSONAL PRIVACY

Once it has been determined that a record contains personal information, section 14(1) of the *Act* prohibits disclosure of this information unless one of the six exceptions listed in the section applies. In the circumstances of this appeal, the exception at section 14(1)(f) may apply. That provision reads:

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

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) (Order P-1456, citing *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767). Section 14(4) identifies information whose disclosure is not an unjustified invasion of personal privacy, and where it applies, the information is not exempt under section 14.

Section 14(4)

Section 14(4) of the *Act* states:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> > (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; or
> >
> > (b) discloses financial or other details of a contract for personal services between an individual and an institution.

Attachment 1, in its entirety, is a contract for personal services between the affected person and the Town. Attachment 3, Appendix "D" consists of essentially the same document. I find that section 14(4)(b) applies to these records, and their disclosure is therefore not an unjustified invasion of personal privacy. Accordingly, I find that the section 14(1)(f) exception to the exemption applies to these records, and they are not exempt under section 14(1) of the *Act*. I will not discuss them further under this exemption.

I find that section 14(4) does not apply to the remaining personal information in the records.

Sections 14(2) and (3)

Sections 14(3)(f) and (g) provide:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

Some of the remaining personal information in the records consists of the dollar amounts paid by or to individuals for identified properties in Appendix "C" of Attachment 3. The amount received or paid for a property by an individual is clearly a financial transaction, which I would consider to be part of an individual's "financial activities". This information therefore falls within the section 14(3)(f) presumption. Disclosure of these figures is therefore presumed to be an unjustified invasion of personal privacy.

The only other personal information in the records relates to the affected person and appears on pages CC-1 and CC-2 of Attachment 3. As noted, this information relates to appraisals of the individual's performance and related recommendations. I find that this information falls squarely within the kind of information described in section 14(3)(g) and its disclosure is therefore presumed to be an unjustified invasion of personal privacy.

As noted, once a presumed unjustified invasion of privacy is established, it can only be rebutted by the application of section 14(4) or 16. I have already found that section 14(4) does not apply to the information that I have now found to be subject to sections 14(3)(f) and (g). The appellant does not expressly rely on the "public interest override" at 16 of the *Act*, but her representations do suggest that, in her view, there are public confidence and accountability issues relating to the information she has requested, suggesting a possible public interest in disclosure. In my view, however, the information that I am finding not to be exempt under section 14(1), which includes the affected person's employment contract in its entirety, as well as Attachment 3, a confidential staff report relating to the affected person's position (except the parts that are his personal information), is sufficient to address any such interest. I find that section 16 does not apply to the information that falls under sections 14(3)(f) and (g).

Accordingly, disclosure of the personal information that falls under sections 14(3)(f) and (g) would be an unjustified invasion of personal privacy. The exception to the exemption at section

14(1)(f) is therefore not established for that information, and I find that it is exempt under the mandatory exemption at section 14(1) of the *Act*.

The extent to which the figures in Appendix "C" of Attachment 3 constitutes personal information is not entirely clear from a review of the document. Some of the information apparently relates to business entities and this would not constitute "personal information". The information about business entities does not qualify for exemption under section 14(1). In the order provisions below I will require the Town to identify and withhold only the dollar amounts in Appendix "C" relating to transactions involving individuals.

SOLICITOR-CLIENT PRIVILEGE

The Town's decision letter asserts that "[i]nformation that you requested with respect to the Town's solicitors is exempt under section 12 of the [*Act*], as being subject to solicitor-client privilege."

Section 12 of the *Act* states:

> 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.

Of the four individuals referred to in the request, three were legal counsel retained by the Town, and the fourth was the affected person (who is not legal counsel). The Town indicates that, beyond the information provided in its letter to the appellant dated October 14, 2004, no further records exist with respect to the parts of the request dealing with the three lawyers. Nevertheless, the Town has not withdrawn its claim that section 12 applies.

The Town has provided no representations on this issue. I have examined the records not already found exempt under section 14(1), namely, Attachment 1, Attachment 3 and its Appendices "A", "B', "C' and "D" except the exempt parts of Attachment 3 and Appendix "C", and considered whether they provide any evidence to support the Town's claim that they are exempt under section 12.

Section 12 contains two branches as described below. The Town must establish that one or the other (or both) branches apply. For the reasons that follow, I find that it has failed to do so.

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

There is nothing to suggest that Attachment 1, an agreement between the Town and the affected person, is subject to solicitor-client communication privilege, and I find that it is not exempt under this aspect of section 12. Attachment 3 consists of a report, with four appendices, from the Legal Department to the Mayor and the members of council. It is marked "confidential". From the contents of this record, however, it is evident that it deals with staffing issues from a practical and operational perspective. It contains no legal advice, nor is any link to such advice evident from any of the material before me. In the absence of any submissions from the Town to explain or demonstrate any such link, I am unable to conclude that the record is a communication related to giving or receiving legal advice, nor that it falls within the "continuum" of solicitor-client communications relating to that purpose. Attachment 3 and its appendices are, therefore, also not exempt under this aspect of section 12.

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.*]. 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.)].

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. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

There is no evidence before me to suggest in any way that the records were prepared for the dominant purpose of existing or reasonably contemplated litigation, or selected for inclusion in a lawyer's litigation brief. I find that the records are not subject to the litigation privilege aspect of Branch 1.

Therefore, neither the solicitor-client communication privilege nor litigation privilege aspect of branch 1 applies in this appeal.

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

This aspect of 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." Similar to my finding about solicitor-client communication privilege under branch 1, the records themselves do not support a

conclusion that they were prepared "for use in giving legal advice". In the absence of any representations or evidence from the Town in this regard, there is no evidence before me to support the application of this aspect of section 12. I find that it does not apply.

Statutory litigation privilege

This aspect of 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." Similar to my finding on litigation privilege under branch 1, above, there is no evidence before me to support a conclusion that the records were prepared for use in or in contemplation of litigation. In the absence of any representations or evidence from the Town in this regard, there is no evidence before me to support the application of this aspect of section 12. I find that it does not apply.

Summary of Conclusions re: Section 12

I have found that no aspect of the section 12 exemption applies to the records I had not found exempt under the mandatory exemption in section 14(1).

SEARCH FOR RESPONSIVE RECORDS

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.

The Town was asked to provide a written summary of all steps taken in response to the request in affidavit form. The Town provided no representations, and I received no such affidavit. The Town did provide a letter from a law firm which employs two of the three lawyers named in the request, which states that no responsive records would exist relating to those lawyers.

In the appellant's representations she has identified specific records that, in her view, should have been included in the scope of the request. Specifically the appellant comments on a reference in the Town's amended decision of October 14, 2004, referencing a letter dated September 28, 2004 addressing terms of hiring a solicitor. She has not received the September 24, letter, nor has it been identified as a responsive record.

The Town's decision to provide no representations in this case makes it difficult for me to uphold the adequacy of its search. The information in the letter from its law firm consists of bare assertions and, in and of itself, is not sufficient for this purpose. Absent any representations from the Town, I am not satisfied that it has undertaken an adequate search for responsive records. In order to satisfy the requirements of section 17 the Town must provide a detailed explanation of the steps undertaken to locate records responsive to the appellant's request. Accordingly, I will order the Town to perform additional searches for records responsive to all aspects of the appellant's original request.

ORDER:

1. I order the Town to conduct a further search for records that are responsive to the appellant's request, as outlined in the request letter and to provide the appellant with a decision in accordance with the provisions of the *Act*, treating the date of this order as the date of the request, without recourse to a time extension. I further order the Town to provide me with a copy of its decision when it sends the decision to the appellant.

2. I uphold the Town's decision to deny access to the parts of Attachment 3 that are highlighted on a copy of this record that is being provided to the Town with this order. I order the Town to determine which of the dollar figures in Appendix "C" of Attachment 3 are amounts paid to or by individuals, as opposed to business entities, and I uphold the Town's decision to deny access to that information. I do not uphold the Town's decision to deny access to the remaining information. I order the Town to disclose the remainder of the records at issue (for greater certainty, Attachment 1, in its entirety, Attachment 3 in its entirety including all Appendices, except information highlighted on the copy referred to above, or the exempt parts of Appendix "C" of Attachment 3, as described above) to the appellant on or before **March 31, 2006** but not earlier than **March 27, 2006**.

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

Original signed by: February 24, 2006
John Higgins
Senior Adjudicator