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

INTERIM ORDER MO-2124-I

Appeal MA-030046-2

City of Toronto

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BACKGROUND:

The requester (now the appellant) has been in a dispute with the City of Toronto (the City) regarding the need for repairs to his property. The appellant's property is suffering from subsidence, which he attributes to ongoing damage as a result of a burst water main in the 1990s. Conversely, the City attributes the subsidence to structural problems at the appellant's property unrelated to the burst water main. In 1999, the City issued an Order to Comply on the appellant's property requiring the appellant to undertake repairs to his property at his expense. The appellant subsequently initiated a civil action seeking, among other things, injunctive relief requiring the City to carry out necessary inspections and repairs, at its expense, of the appellant's property, and also seeking damages. During the course of this inquiry the appellant confirmed that his action had been settled through mediation on April 26, 2005.

NATURE OF THE APPEAL:

This appeal concerns a decision of the City made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant made a request under the *Act* for

> …all information available (notes, memos, official documents, plans, permits, contracts, drawings, records, photographs etc.) regarding past construction, or repair, or plans of future work with regard to roads, sidewalks, water mains rivers and drainage, and buildings…[for a specified area in the City].

The City issued a decision letter granting partial access to 28 pages of records and denying access in full to more than 800 pages of records (the Group A Records). With respect to the 28 pages, the City denied access to portions of three pages as being non-responsive (pages 708-710) and relied on section 14(1) (personal privacy) to deny access to portions of 23 pages (pages 6, 9, 55-59, 62, 64-66, 706, 711, 715, 716, 730, 733, 779-783 and 786) and section 12 (solicitor-client privilege) to deny access to a portion of one page. One page (page 406) was disclosed to the appellant in its entirety. With regard to the more than 800 pages, the City denied access in full to all of these records pursuant to section 12 and, for one of the records (page 27), the City also denied access under section 7(1) (advice or recommendations).

In its letter the City stated that its decision covers responsive records from the Works and Emergency Services Division (Works and Emergency Services) and from the Legal Services Division (Legal Division). The City indicated that a separate decision letter would be issued pertaining to records located in the Buildings Division, South District (Buildings Division).

With respect to the 28 pages of records disclosed or partly disclosed, the City requested payment of a fee in the amount of $93.00, comprised of $30.00 for photocopying (150 pages @ $0.20 per page), $15.00 for severing (15 pages @ 2 minutes per page, @ $30.00 per hour), and $48 for the cost of two extra large drawings.

The appellant appealed the City's decision.

In his letter of appeal, the appellant indicated that the records at issue are essential for ensuring the health and safety of his neighbours, himself and the public, raising the possible application of section 16 (public interest override).

After filing his appeal letter, the appellant informed this office that he had requested a fee waiver with respect to the City's $93.00 fee, and that he wishes to pursue this issue on appeal.

The appellant also stated his belief that additional records exist, particularly additional records from Works and Emergency Services including engineering reports, additional work permits and maps and surveys.

During the mediation stage of this appeal, the City issued a second decision letter that addresses records located from the Buildings Division. The City located 238 pages of responsive records (the Group B Records) and granted access in full to pages 1-13A and partial access to the remaining pages, with severances made pursuant to section 14(1) of the *Act*. The City quoted a fee of $164.00 for processing the request, consisting of $45.00 for photocopies (225 pages @$0.20 per page) and $119.00 for severing costs (119 pages @ 2 minutes per page @ $30.00 per hour). The appellant paid the full fee and received partial disclosure of the relevant records.

Also during mediation, the City claimed the application of section 7(1) to a record (page 24 of the Group A Records) that it had initially agreed to disclose to the appellant. The mediator drew the City's attention to the fact that page 24 is identical to page 748 of the Group A Records, for which it had previously claimed the application of section 12. The City indicated that it wished to now claim both sections 7(1) and 12 for pages 24 and 748. The City was informed in the Confirmation of Appeal dated June 23, 2003 that since this is an appeal of a decision that arises from a deemed refusal appeal, the City is not permitted to claim any new discretionary exemptions. The City's desire to raise the application of section 7(1) late in the process gives rise to the issue of the late raising of a discretionary exemption. Although pages 24 and 748 are identical, page 24 is a stand alone document while page 748 is part of a larger document. Therefore, I will address them both in this appeal.

No further progress could be achieved through mediation and the file was then streamed to adjudication for an inquiry.

In reviewing the file I have confirmed that there are duplicate copies of some other Group A Records, identified by the City as being at issue. Specifically, I note that pages 730, 733, 669 and 811, 571, 779-783, 786, 832-834 and 876-878, 799, 803-805 and 849 are duplicate copies of pages 6, 9, 27, 43, 55-59, 62, 221, 789, 800-802 and 831 respectively. I see no reason to address both sets of pages in this appeal. Accordingly, I have removed pages 571, 669, 730, 733, 779-783, 786, 799, 803-805, 811, 832-834, 849 and 876-878 from the appeal.

I commenced my inquiry by first seeking representations from the City on the following issues:

- late raising of section 7(1) with respect to pages 24 and 748 of the Group A Records

- responsiveness of records with regard to pages 708-710 of the Group A Records
- reasonableness of the City's search for records responsive to the appellant's appeal
- fee waiver with regard to the City's $93.00 fee charged pursuant to its first decision letter
- application of section 14(1) to portions of the Group A Records and all of the Group B Records at issue
- application of section 7(1) to pages 24, 27 and 748 of the Group A Records
- application of section 12 to portions of the Group A Records
- application of the section 16 public interest override

The City submitted representations that address these issues and agreed to share them in their entirety with the appellant. In its representations the City states that it is no longer claiming the application of section 7(1) to pages 24, 27 and 748 of the Group A Records. Accordingly, the late raising of this exemption and the application of the section 7(1) exemption are no longer at issue in this appeal.

I then shared the City's representations with the appellant and sought and received representations from him.

RECORDS:

There are in excess of one thousand pages of records at issue in this appeal. Unfortunately, the City did not provide our office with a complete index, which in the circumstances would have been helpful. The records at issue can be categorized as follows:

Group A Records

- Correspondence between City solicitors, various City departments or the City's outside counsel
- Correspondence between City solicitors and/or its outside counsel and its corporate adjusters
- City lawyer's notes and draft correspondence
- Communications between the appellant or his legal counsel and other parties
- Internal City documents
- Memoranda prepared by the City's corporate adjuster
- Correspondence from a consultant to the City's corporate adjuster
- Legal accounts and related documents
- Documents pertaining to a broken water main incident in 1995 (including claims for compensation, service requests and reports)

Group B records

- Various letters, faxes, emails, memoranda and other correspondence
- Building Permit applications
- Plumbing Permit applications
- Inspector's Reports
- Enforcement Reports issued by the City's Building Inspections Branch
- Examiner's Notices issued by Department of Buildings in response to Building Permit Applications
- Sworn Declarations
- Progress Reports of Examination of Plans
- Notices of Hearing before the City's Department of Buildings and Inspections
- Committee of Adjustment decisions
- Complaints
- Orders to Comply
- Preliminary Zoning By-Law Review Notices and Applications
- General Inspection – Application Received
- Affidavit of Service
- Crown's Information
- Summons to a Person Charged with an Offence

DISCUSSION:

RESPONSIVENESS OF RECORDS

As mentioned above, the City takes the position that portions of pages 708-710 of the Group A Records are not responsive to the appellant's request. The Ministry states that the portions of these pages that have been removed as non-responsive "deal entirely with different addresses" than those for which the appellant is seeking information. The City submits that the scope of the appellant's request does not extend to the portions of the records that have been removed, since this information is "clearly non-responsive to the [appellant's] request."

The appellant does not offer any representations on this issue.

The issue for me to decide is whether the information at issue on pages 708-710 "reasonably relates" to the appellant's request [Order P-880].

On my review of the City's representations and the contents of pages 708-710, I find that the information at issue on these pages is not responsive to the appellant's request as it clearly deals with properties that are not the subject of the appellant's request.

SEARCH FOR RESPONSIVE RECORDS

As alluded to above, the appellant has raised a concern that additional records exist, particularly additional records from Works and Emergency Services.

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.

Parties' representations

The City was asked to provide a written summary of all steps taken in response to the appellant's request, including affidavits from the people who conducted the actual searches. The City has provided a brief summary of its search efforts in its representations, supported by the sworn affidavits of four City employees.

The City takes the position that reasonable searches were conducted for responsive records by "knowledgeable staff". The City states that during the mediation stage it worked with the appellant to clarify and narrow his request. Specifically with regard to records held by the Buildings Division, the City states that it provided indices of the building permit files that might contain responsive information and permitted the appellant to select the files to which he required access from the indices.

With regard to the searches conducted, the City has provided sworn affidavits of the following City employees:

- a solicitor (the solicitor) employed in the Corporate Services Department, Legal Division, Litigation Group

- a document management clerk (the clerk) in the Buildings Division, Urban Development Services

- a manager (the manager) with the Operations and Maintenance Section of the Water and Wastewater Division of Water and Emergency Services, South District

- an inspector (the inspector) with the Special Services Unit of the Transportation Services of Works and Emergency Services

The solicitor states in his affidavit that he has carriage of the Legal Division's file with respect to matters relating to the appellant's property, specifically providing legal advice to the City regarding the "unsafe condition" of the appellant's property and serving as litigation counsel with respect to a civil action commenced by the appellant and another named individual. The solicitor states that the Legal Division's file includes documents that he created or prepared as well as documents that have been sent to him by other City departments, solicitors for the appellant, engineers retained by the City, claims examiners acting on behalf of the City as well as documents sent to him by outside counsel retained by the City. The solicitor submits that after the appellant's request was made he was visited by an access and privacy officer employed by the City's Corporate Access and Privacy Office and that he and the officer reviewed the appellant's request. He states that subsequent to this meeting a "copy of [his] file was sent to the City's Corporate Access and Privacy Office." The solicitor states that he "believes that these were all the document's relating to [the appellant's property] which were located in the City's Legal Division at that time."

The clerk states that his responsibilities include "providing records to the City's Corporate Access and Privacy (CAP) Office, in response to access requests made pursuant to the [*Act*]." The clerk states that in response to a request from an access and privacy officer with the City's Corporate Access and Privacy Office, he conducted a search using the "Central Property Register, a Mainframe Application through which all building records are documented from 1970 to the present time." The clerk states that this is the City's "standard method of search for records after 1970." The clerk states that his search generated "twelve pages of records, which listed 36 permit application numbers. The clerk states he subsequently received an email from the access and privacy officer with a list of "14 permit numbers", advising that the appellant wanted copies of the records pertaining to those permit numbers. The clerk states that "following standard procedures" he ordered the requested records from the Records Centre Services of Corporate Records and Archives and "photocopied approximately 225 pages of records that corresponded to the list of permit numbers." The clerk states that he the forwarded the photocopied records to the Corporate Access and Privacy Office.

The manager states that upon receiving the appellant's request he instructed one of his staff, an inspector with the Water and Wastewater Division to conduct a search for responsive records. The manager states that he is aware that this staff person searched their offices and located the file pertaining to the addresses that are of interest to the appellant. Subsequently, the manager states that he received an email from the staff person who conducted the search in which he confirmed that he had "photocopied the entire Water and Wastewater file and sent it to [the access and privacy officer]. The manager states that there were "approximately 64 records in the file."

The inspector confirms that he was approached by the access and privacy officer and asked to conduct a search for records responsive to the appellant's request. The inspector states that he "searched for and located the file pertaining to the inspections conducted during the requested

time period." The inspector states that he then "photocopied and hand-delivered the entire file" to the access and privacy officer. The inspector states that he believes the documents he sent to the Corporate Access and Privacy Office are all the documents that are located in the Transportation Services Division relating to the appellant's request.

The appellant's representations do not address the reasonable search issue. The appellant's position on this issue, as set out above during mediation, is that additional records exist, particularly additional records from Works and Emergency Services including engineering reports, additional work permits, as well as maps and surveys.

Analysis and findings

Having carefully reviewed the City's representations, including the sworn affidavits of four individuals employed by the City who were involved in conducting the searches for responsive records, I find that the City has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records in accordance with its responsibilities under section 17 of the *Act*.

FEE WAIVER

General principles

The appellant is seeking a fee waiver of the $93.00 fee charged by City pursuant to its first decision letter.

Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering:
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.

> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F].

The onus is on an appellant in this type of case to provide evidence to support a claim for fee waiver [Order 31].

Accordingly, the appellant was asked to comment on the availability of a fee waiver with reference to the provisions of section 45(4) of the *Act*. However, the appellant's representations do not directly address the criteria under section 45(4). The appellant alludes to an ongoing civil litigation matter with the City and states that the appeal process has been daunting because he cannot afford legal counsel due to the costs of the ongoing litigation with the City.

The City provides detailed representations on the fee waiver issue. The City states:

> The appellant has indicated that he is seeking a fee waiver because:
>
> > Firstly…the information is required to ensuring the health and safety of my neighbours, the public, and myself who use the bus stop immediately in front of my building…Second, as a result of four years of exhaustive attempts to comply with orders issued by Urban Development Services, and legal fees and disbursements into the hundreds of thousands of dollars, the loss of my home and business, I now rely on legal aid to protect me.
>
> In denying the fee waiver, the City has considered the following:
>
> - No fees were assessed for search time, although it took an hour and a half for relevant staff to complete the searches for responsive records, i.e., the search fee of $45 has been waived.
>
> - The appellant has been granted access to records having paid the $93 fees.

- The appellant has not provided specific details as to how the dissemination of the records would benefit public health or safety. The subject matters of the records relate to private issues involving the appellant or other individual and do not relate directly to a public issue.

- Generally, a requester should provide details regarding his/her financial situation including information about income, expenses, assets and liabilities (Orders M-914, P-591, P-1393). The appellant, however, has not provided any details demonstrating that the payment of $93 has caused him financial hardship. Moreover, the appellant paid $164.00 (fees for access to Group B Records) but did not ask for a fee waiver of this amount in his letter of appeal.

The City submits that since the appellant has not advanced any grounds for the waiver of the $93.00 fee, his request should be denied.

The City adds that the denial of the fee waiver is fair and equitable given the following circumstances:

- The appellant's request was for a large number of records involving several properties, three different City departments and spanning more than 30 years. The City asserts that it worked constructively with the appellant to narrow his request by, for example, providing him with indices for files available in the Buildings Division so that he could identify those records of interest.

- The City offered the option of viewing the records, thereby reducing the photocopying costs.

- As stated above, the City absorbed the search fee costs.

As indicated above, the onus is on an appellant in this type of case to provide evidence to support a claim for fee waiver. In this case, it appears that the only possible basis for claiming a fee waiver is financial hardship or public health or safety.

Generally, when claiming financial hardship under section 45(4)(b) a requester should provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365, P-1393]. In this case, while the appellant may suggest that his difficulties with the City have caused him to suffer financially, he has not provided any details regarding his financial situation, including information about income, expenses, assets and liabilities. Accordingly, I find that the appellant has failed to establish that payment of the $93.00 fee will cause him financial hardship.

With regard to determining whether dissemination of a record will benefit public health or safety under section 45(4)(c), the following factors may be relevant:

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by

    (a) disclosing a public health or safety concern, or

    (b) contributing meaningfully to the development of understanding of an important public health or safety issue

- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

This office has found that dissemination of the record will benefit public health or safety under section 45(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- a proposed landfill site [Order M-408]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]
- safety of nuclear generating stations [Orders P-1190, PO-1805]
- quality of care and service at group homes [Order PO-1962]

While there is some suggestion that the records at issue are a matter of public interest, the evidence before on this point is vague and unsubstantiated. On my review of the parties' representations, I am satisfied that the appellant's interest in the records is private, relating to the appellant's private dispute with the City.

Finally, I am satisfied that the City's decision to deny a fee waiver was fair and reasonable in the circumstances, having demonstrated that it worked constructively with the appellant to narrow the scope of his request and reduce photocopying charges, in addition to waiving search fees.

In conclusion, I find that the evidence before me is not sufficient to provide grounds for a fee waiver. Therefore, I uphold the City's decision not to grant one.

PERSONAL INFORMATION

In this case, the City has raised the application of section 14(1) to deny access to portions of the Group A records and all of the Group B records. The City also relies on section 12 to deny access to a portion of the Group A records. As some of them appear to contain the appellant's personal information, the application of section 38(a), read in conjunction with section 12, may be a relevant issue. Accordingly, in order to determine whether section 14(1) and/or section 38(a), read with section 12, apply to any of the records, it is necessary to determine whether any of the records contain "personal information" and, if so, to whom it relates.

That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> …
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> …
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and

> (h) the individual's name if 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

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].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The City submits that the records at issue "include the names of property owners, complainants/requesters, their addresses, telephone numbers, the purchase prices of their properties, the amount of taxes paid, the cost of proposed alterations, their agreements, private or confidential correspondence from them, etc." The City states that this information falls under paragraphs (b), (d), (f) and/or (h) of the definition of personal information in section 2(1) of the *Act*.

The appellant does not address this issue in his representations.

On my review of the City's representations and the records at issue, I am satisfied that many of the Group A Records and all of the Group B records contain the personal information of individuals other than the appellant, within the meaning of paragraphs (b), (d), (f) and (h) of the definition of that term in section 2(1), including their names, addresses, information relating to financial transactions and various correspondence sent to the City. I also find that many of the Group A Records contain the appellant's personal information within the meaning of paragraphs (d), (e), (f), (g) and (h), including his name, address and telephone number, his personal views or opinions regarding his dispute with the City, correspondence sent by the appellant's legal counsel to the City outlining the appellant's position and demands, that is implicitly of a confidential nature, as well as the views or opinions of other individuals about the appellant. I am also satisfied that none of the Group B records contain the appellant's personal information.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR CLIENT PRIVILEGE

Introduction

Under section 38(a), the City has the discretion to deny the appellant access to his own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

Having found above that some of the Group A Records contain the appellant's personal information, I must consider the application of section 38(a), read in conjunction with 12 to that information. If section 12 applies to these records, then the City has the discretion to deny access on the basis of section 38(a).

In addition, because the City has raised the application of the section 12 to all of the Group A Records, I will also consider whether the Group A Records that do not contain the appellant's personal information are exempt under section 12 alone.

Under "Invasion of Privacy", discussed below, I will also consider the application of section 14 to the Group B records.

Section 12

Section 12 states as follows:

> 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 institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

General principles

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" refers to the substantive rule of law that protects the confidentiality of the solicitor-client relationship. Previous orders of this office found that common law litigation privilege was included in branch 1. However, Senior Adjudicator John Higgins recently issued two decisions in which he determined that branch 1 does *not* encompass litigation privilege [see Orders PO-2483, PO-2484. Order PO-2484 is the subject of a pending application for Judicial Review, Tor. Doc. 424/06 (Div. Ct.)]. In this case, common law litigation privilege does not apply in any event since the litigation is at an end [see Orders P-1551 and MO-1337-I].

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.)].

Representations

The City submits that all of the Group A Records at issue are contained in the files of a City solicitor in the litigation section of the City's Legal Division. The City states that this solicitor had carriage of the file in two capacities. First, as counsel to provide advice to the City's Urban Development Services Department with respect to the unsafe condition posed by the appellant's property and, second, as litigation counsel with respect to the appellant's action against the City commenced October 20, 2000.

The City describes some of the records as "exchanges of confidential emails between a City solicitor and various departmental staff concerning issues relating to the appellant's property, including matters giving rise to the Order to Comply." The City states that these records either "contain the specific advice provided" or "relate directly to the seeking, formulating or the giving of the advice and for use in litigation…"

The City categorizes another group of records as "notes or memoranda". The City describes pages 68-87 as "lawyer's notes" that were "made to record meetings where legal advice was discussed." The City submits that the notes were made "in the course of providing legal advice and for litigation." The City states that most of the remaining records in this grouping are "handwritten memos documenting telephone communications between the solicitor and various departmental staff." The City states that "[a]ll of these records" contain "specific advice

provided by legal counsel or relate directly to the seeking, formulating or giving of the advice or compiled for use in litigation."

The City describes pages 88-152 and 788-878 as "documents from the City's outside legal firm, specifically a lawyer who is the lead in representing the City in the litigation." The City states that "these documents are from his litigation file, copies of which were obtained by the City's solicitor for the purpose of providing advice and for assisting in the litigation."

The City states that pages 153-323 are records "provided to the City's solicitor in confidence by the City's [corporate adjuster]." The City states that these records comprise the corporate adjuster's file, compiled and created in contemplation of litigation or for use in litigation.

The City indicates that pages 657-720 are records provided by a departmental staff person to the City's solicitor.

The City states that pages 721-787 are "additional correspondence obtained or compiled by the solicitor in providing legal advice or for use in litigation."

In conclusion, the City states that "all of these records constitute the solicitor's working papers, were specifically requested obtained or compiled for the purpose of formulating or giving legal advice or for use in litigation."

The appellant does not address the application of the branch 1 solicitor-client common law communication privilege to these records.

Analysis and findings

I have carefully reviewed the City's representations in conjunction with the Group A Records at issue under section 12. I acknowledge that the City would like me to characterize, in some cases, large groupings of records as integrated pieces of correspondence or as reflecting a continuum of communications. Illustrative of the City's desired approach are many of the records it describes in its representations, namely, the documents provided by outside counsel to the City solicitor (pages 88-152 and 788-878), the contents of the corporate adjuster's file (pages 153-323) and records provided by a departmental staff person to the City solicitor (pages 657-720).

In my view, the branch 1 solicitor-client communication privilege exemption is not intended to provide "blanket" protection to groupings of records just because the institution has clipped them together or wrapped an elastic band around them and provided them to counsel. If these records were in fact provided as a group and were part of a continuum of communications whose purpose was giving or receiving legal advice, then privilege could attach to them in this way. Otherwise, they must qualify for privilege on an individual basis (*i.e.*, they must reveal solicitor-client communications, or be part of a continuum of communications as individual records, or constitute counsel's working papers in relation to giving legal advice).

Applied to this case, for the most part (with pages 88-152 and 721-787 the exceptions), I am not satisfied, on the evidence provided, that the City's characterization of the records reflects a continuum of communications for the purpose of obtaining or giving legal advice. Accordingly, I will view them as individual records to determine whether they qualify for privilege. However, with regard to pages 88-152 and 721-787, I am satisfied on my review of these groupings that they do constitute integrated pieces of correspondence or reflect a continuum of communications. In the case of pages 88-152, I am satisfied that this grouping comprises an integrated piece of correspondence or a continuum of communications between the City and its outside counsel regarding the litigation commenced by the appellant. With respect to pages 721-787, in my view, it is clear that this is a piece of correspondence with attachments regarding the appellant's property that was forwarded by a City employee to a City solicitor at the solicitor's request. Accordingly, I view this grouping as a continuum of communications made for the purpose of obtaining or giving professional legal advice.

Pursuant to my review, I make the following findings regarding the Group A Records to which the City has claimed the application of the solicitor-client communication privilege exemption in branch 1 of section 12:

Internal City documents

The records in this category include inter-departmental email communications (pages 25, 26, 153, 154, 158, 586 and 863), inter-departmental memoranda (page 24, 27, 54, 800-802 and 848), fax cover sheets pertaining to communication between City staff (pages 867 and 869), fax transmittal sheets (pages 790, 852, 866 and 868), handwritten notes generated by City staff (pages 405-406, 426, 657, 835, 851, 857, 864, 865 and 874), search results from City information management computer databases (page 550 and 672) and a computer generated property assessment document (page 836).

Having not received detailed representations from the City regarding the characterization of these documents as being solicitor-client communication privileged, I am left to assess the application of the branch 1 communication privilege exemption strictly on my assessment of the records. In my view, with two limited exceptions, all of the documents in this category are not solicitor-client communication privileged, as there is no evidence that they constitute direct communication of a confidential nature between solicitor and client nor do they reveal communication of a confidential nature between solicitor and client.

The two exceptions relate to a portion of page 27, a memorandum from a City employee to a former City councillor, and a portion of page 405, a note prepared by an employee of the City's Urban Development Services.

Regarding page 27, a paragraph of this memorandum contains the details of legal advice sought by the City employee from the City's Legal Division regarding matters relating to the appellant's property and his claims against the City. I am satisfied that this portion of the memorandum contains the details of direct communications of a confidential nature between a City solicitor

and a client. Accordingly, I find this portion of page 27 exempt under section 38(a), read with the branch 1 solicitor-client communication privilege exemption in section 12.

Regarding page 405, the portion at issue is a dated note setting out the details of a meeting between a City employee and a City solicitor and subsequent action to be taken. I am satisfied that this portion of the memorandum contains the details of direct communications of a confidential nature between a City solicitor and a client. Accordingly, I find this portion of page 405 exempt under the branch 1 solicitor-client communication privilege exemption in section 12.

I address below the application of the branch 2 statutory privileges to the rest of these records, including the remaining parts of page 27. With regard to page 405-406, I note that with the exception of the portion I have found exempt under section 12, the balance of this record has already been disclosed to the appellant. Accordingly, I will not consider the application of branch 2 of section 12 to it.

Correspondence between City solicitors, various City departments or the City's outside counsel

I am satisfied that, on their face, a significant number of the Group A Records constitute direct communications of a confidential nature between City's solicitors, various departments or divisions within the City and/or its outside counsel regarding the giving or receiving of legal advice. These records include letters from City solicitors to outside counsel, memoranda from City solicitors to staff within various City departments or divisions, emails between City solicitors to outside counsel and emails between City solicitors and staff within various City departments or divisions.

Falling into this category are pages 5, 8, 44-51, 88-152, 155-156, 161, 194, 324-325, 326-327, 328-331, 334, 335-338, 339-342, 347-348, 349, 350-351, 352-353, 354, 356-357, 358, 359, 360, 361, 366, 367-368, 371-372, 373, 376-381, 382-383, 385, 388, 389, 391-392, 404, 410-416, 417-421, 422-425, 429-432, 433, 434, 435, 436, 437-438, 441, 442-445, 455-456, 458, 461, 462-468, 469-473, 475, 476, 477, 481-486, 488, 489-493, 495-499, 503-505, 522, 524, 536, 537, 538, 539, 542-543, 544-549, 572-573, 574-581, 582-583, 584-585, 589-590, 600-604, 606, 608-611, 612-615, 616-617, 618, 620, 621-622, 623-625, 626-627, 629-630, 632-633, 635-645, 646-649, 655, 661-668, 670, 671, 673-676, 677-686, 721-787 (except pages 725-728, 730-731, 734-736, 738-746, 752-757, 779-787, which were disclosed in part), 791-798, 806-807, 812-813, 814-821, 839-845, 847, 853-856 and 871-873.

Regarding pages 721-787, I have excluded page 733 from consideration in this appeal since it is a duplicate of page 9. A severed version of page 9 was disclosed to the appellant and I find the non-disclosed information in that record exempt under section 14(1) (see discussion below). Therefore, I see no purpose in addressing page 733 under section 12. Moreover, since page 733 was disclosed in part to the appellant, in my view, it is a document that should have been included in the group of excluded pages and I view its absence from this group as an oversight by the City.

Subject to the issue of partial waiver with regard to pages 721-787, discussed below, I am satisfied that all of these records represent a continuum of communications made for the purpose of obtaining or giving professional legal advice. To the extent that the records in this category contain the appellant's personal information, I find them exempt under section 38(a), read with the branch 1 common law solicitor-client privilege exemption in section 12. Where the records do not contain the appellant's personal information, I find them exempt under the branch 1 common law solicitor-client privilege exemption in section 12 on its own.

Correspondence between the City lawyers and/or its outside counsel and its corporate adjusters

The records in this category consist of reports submitted by the City's corporate adjusters to the City's Legal Division (also copied to the City's outside counsel), reporting letters from the corporate adjusters to outside counsel, letters from outside counsel to the corporate adjusters and correspondence from the corporate adjusters to a City solicitor. The records that fall into this category are pages 159-160, 170-171, 173-174, 175, 176-177, 185-186, 187-188, 192-193, 198-323, 439-440, 501-502, 529-530, 532-533, 592-596, 823-824 and 825-830.

In order to determine the status of these records it is important to understand the nature of the relationship between the City's Legal Division and its corporate adjusters. During the course of this inquiry I invited the City to provide information regarding its insurance arrangements and the nature of its relationship with its corporate adjusters.

The City provided me with a Toronto City Council document that sets out its insurance arrangements for 2006-2007. While this document does not cover the period at issue in this claim, I do find the information contained within it instructive. Included in the document is an attachment that provides a breakdown of the City's various insurance policies, the insurer for each policy, coverage limits, and "self-insured retention/deductible" limits. In the property category there is a coverage limit of $500 million and a "self-insured retention/deductible" of $5 million. In explaining the meaning of the "self-insured retention/deductible", the City states that this means it self-administers the applicable policy up to the retention/deductible limit, which in the case of property claims for the 2006-2007 renewal period is $5 million.

From this, I conclude that the City self-administers its insurance in relation to the appellant's claims and related litigation. I have also found information contained in some of the Group A Records useful for the purpose of my assessing the City's relationship with its corporate adjuster. Two related records in particular - an invoice and covering letter submitted by the City's outside counsel to the City and a "Defence Payment Requisition Form" (Payment Requisition Form) prepared by the City - are revealing. The invoice is for services rendered by outside counsel and is issued to the City "care of" of the corporate adjuster. The completed requisition form confirms that the invoice was forwarded by the corporate adjuster to the City and paid by the City on a specified date. A third record, statement of account issued by the City's Legal Division lists its corporate adjuster as the "client".

In my view, all of the above information represents clear evidence that the corporate adjuster is the City's representative in the circumstances of this appeal, and that its responsibilities include reporting to and communicating with the City's Legal Division and outside counsel.

Accordingly, I find that all of the records in this category represent a continuum of communications between the City's corporate adjuster and its Legal Division and/or outside counsel aimed at keeping all informed so that advice may be sought and given as required. Therefore, to the extent that the records in this category contain the appellant's personal information, I find them exempt under section 38(a), read with the branch 1 common law solicitor-client privilege exemption in section 12. Where the records do not contain the appellant's personal information, I find them exempt under the branch 1 common law solicitor-client privilege exemption in section 12 on its own.

City lawyer's notes and draft correspondence

The records in this category include handwritten notes, handwritten and typed memoranda and draft correspondence prepared by a City solicitor. The records are comprised of pages 68, 69, 70, 71, 72-87, 332, 333, 343, 344, 345, 346, 355, 362-363, 364, 365, 369, 370, 384, 386, 390, 402-403, 427, 428, 457, 487, 500, 514, 515, 523, 526, 528, 531, 540, 541, 587, 588, 591, 597-599, 605, 607, 619, 628, 631, 634 and 656. I am satisfied that these records represent this solicitor's "working papers" directly related to the seeking, formulating or giving legal advice in respect of the appellant's issues with the City. Accordingly, to the extent that the records in this category contain the appellant's personal information, I find them exempt under section 38(a), read with the branch 1 common law solicitor-client privilege exemption in section 12. Where the records do not contain the appellant's personal information, I find them exempt under the branch 1 common law solicitor-client privilege exemption in section 12 on its own.

Communications between the appellant or his legal counsel and other parties

The records that fall into this category are wide ranging and include memoranda to file prepared by staff employed by the appellant's legal counsel transcribing telephone voicemail messages received from the appellant, letters between the appellant's legal counsel and the City, correspondence from an engineering consulting firm to the appellant, emails between the appellant's legal counsel and City solicitors, Orders to Comply issued by the City to the appellant and/or the appellant's spouse and fax correspondence from the appellant to the City. At issue are pages 34-43, 162-163, 189-191, 195, 221-223, 374-375, 387, 393-399, 407-409, 446-454, 459-460, 474, 478-480, 494, 506-510, 511-513, 525, 527, 534-535, 551-570, 788, 789, 808-810, 831, 837, 838, 850, 858-861, 862, 870 and 875.

The fact that these records appear in the City solicitor's file is not determinative of the issue. In my view, none of these records are protected by solicitor-client communication privilege as the records represent communications between parties outside the solicitor-client relationship, and the evidence does not satisfy me that they were provided as part of a continuum of communications between the City and its counsel. These records either emanated from or were received by the appellant or his legal counsel.

Accordingly, I find that these records are not exempt under the branch 1 solicitor-client communication privilege exemption in section 12. Subject to the application of the branch 2 statutory privileges, discussed below, I will order their disclosure.

Memoranda prepared by the City's corporate adjuster

There are two records in this category, a memorandum to file prepared by an employee of the City's corporate adjusters (page 157) and a memorandum prepared by the same employee to a City employee (page 172).

The City did not provide any representations regarding the characterization of these documents as solicitor-client privileged communications. On my review of these records, it is clear that neither one of them is a solicitor-client privileged communication as there is no evidence that they constitute direct communication of a confidential nature between a solicitor and client. In addition, on the evidence before me, I find that there is no basis to conclude that these records are privileged in some other way, for example, as part of a continuum of communications between the City and its counsel.

I find that that the branch 1 communication privilege does not apply to these records. Subject to the application of the branch 2 statutory privileges, discussed below, I will order their disclosure.

Correspondence from a consultant to the City's corporate adjuster

There is one record at issue in this category, a one-page letter prepared by an engineering consultant to the City's corporate adjuster (page 822). The letter is a supplementary report prepared by the engineering consultant for the corporate adjuster, correcting a typographical error contained in the original consultant's report and providing an opinion on the causes of subsidence in front of the appellant's property. The original report is contained within a communication package sent by the City's corporate adjuster to a City solicitor, which I have found above to be part of a continuum of communication between solicitor and client and, therefore, exempt under the branch 1 communication privilege exemption.

Once again, I do not have representations from the City on the application of the branch 1 communication privilege exemption to this record and must rely on my review of the record to conduct my analysis.

On my review, I find that while this supplementary report relates to an existing record, it is in its current form a stand alone record. In my view, it is clear that this letter is not a solicitor-client privileged communication as there is no evidence that it constitutes direct communication of a confidential nature between a solicitor and client made for the purpose of giving legal advice or that it forms part of a continuum of communications between the City and its counsel.

I find that that the branch 1 communication privilege does not apply to this record. Subject to the application of the branch 2 statutory privileges, discussed below, I will order its disclosure.

Legal accounts and related documentation

The following four records are at issue in this category:

- statement of account submitted to the City by its outside counsel, in care of the City's corporate adjuster (including cover letter, invoice setting out the particulars of work completed, who performed the work, date the work was performed, time expended, list of disbursements, amounts charged for fees, disbursements and GST, and total due) (account #1) (pages 179-184) (I note that pages 180-181 are duplicate copies of pages 182-183; accordingly, I have removed pages 180-181 from the scope of the appeal)

- Payment Requisition Form completed by the City in regard to payment of account #1 (page 178)

- statement of account submitted to the City by its outside counsel, care of the City's corporate adjuster (including cover letter, invoice setting out the particulars of work completed, who performed the work, date the work was performed, time expended, disbursements, amounts charged for fees, disbursements and GST, total due, and remittance copy) (account #2) (pages 164-169)

- statement of account issued by the City's Legal Division department to its corporate adjuster (including document setting out the names of City solicitors who provided services, their time billed, hourly rates, amounts billed, and total due) and detailed docket printout (account #3) (pages 658-660)

The treatment of records relating to legal fees and billings was dealt with by Senior Adjudicator John Higgins in two recent orders (PO-2483 and PO-2484). Order PO-2483 dealt with a request for records relating to money paid to external legal firms in regard to the Walkerton Inquiry. Order PO-2484 involved a request for access to records detailing the expenses billed to the Ministry of Health and Long Term Care in response to an appeal heard by the Health Services Appeal and Review Board (HSARB) relating to reimbursement medical testing for a rare form of eye cancer. In both cases the records at issue included statements of legal accounts charged for fees and disbursements.

Applying the principle that information as to the amount of a lawyer's fees is presumptively sheltered under solicitor-client communication privilege [see *Maranda v Richer*, [2003] 3 S.C.R. 193, followed by the Ontario Court of Appeal in Ontario *(Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (*Attorney General*) [2005] O.J. No. 941 (C.A.), in which it upheld the Divisional Court, reported at (2004), 70 O.R. (3d) 77, which in turn, had upheld Orders PO-1922 and PO-1952], Senior Adjudicator Higgins stated:

> …in determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any

> communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains. [Orders PO-2483 and PO-2484]

Unfortunately, the parties do not provide representations that address the application of the solicitor-client communication privilege exemption to the information at issue in this category. However, commenting on the operation of the presumption, Senior Adjudicator Higgins notes in Orders PO-2483 and PO-2484 that the "nature of the information and the circumstances and context of a particular case constitute evidence which might rebut the presumption."

I now turn to my analysis of the records at issue in the "legal accounts and related documentation" category.

Cover letters for accounts #1 and #2

With regard to the cover letters for these accounts, I am satisfied that the name and address of the City's outside counsel along with the identity and address of the City's corporate adjuster, as set out on the cover letter to these accounts, are well known to or attainable by the appellant. In addition I am satisfied that nothing in these letters would reveal the contents of direct communications of a confidential nature between solicitor and client. Accordingly, I find that, based on the evidence before me, the cover letters consist of neutral information and the presumption of privilege is rebutted with regard to their contents.

I find that that the branch 1 communication privilege does not apply to this record. Subject to the application of the branch 2 statutory privileges under section 12, discussed below, I will order the disclosure of the above cover letters.

Invoice portions of accounts #1 and #2

The invoice portions of these accounts reveal, among other things, narrative descriptions of professional services rendered, who performed them, when the service was provided, how much time was spent on each and summary of fees (including the identity of the "timekeeper", hours billed, hourly rate and amount billed). Following the reasoning and conclusions of Senior Adjudicator Higgins in Order PO-2483, I am satisfied that disclosing this information in its entirety could directly or indirectly disclose privileged communications between City lawyers, the City's outside counsel, its corporate adjuster and staff employed in other City departments. That said, the question is whether, based on the circumstances and evidence before me, the presumption of privilege is rebutted for any parts of the invoice portions of these accounts.

For the reasons that follow I have concluded, based on the circumstances in this case and the information before me, that with the exception of the narrative descriptions of the services provided and the corresponding dates on which they were delivered, there is no reasonable

possibility that privileged information could be revealed by disclosing the information at issue in the invoice portions of these accounts.

As stated above, the identities of outside counsel and the corporate adjuster as well as their respective addresses are either known to or attainable by the appellant.

I am also satisfied that the date of each invoice and the matter, claim and bill numbers do not reveal information that could reveal (even to the most "assiduous" requester) confidential solicitor-client communications in the particular circumstances of this case. This is, in my view, best characterized as "neutral" information.

With regard to the summary of fees (including the identity of the "timekeeper", hours billed, hourly rate and amount billed), in my view there is no "reasonable possibility" that any confidential solicitor-client communication could be revealed (again, even to the most "assiduous" requester) by disclosing this information, nor could this information be connected with other available information in order to draw accurate inferences about any such privileged information.

In Orders PO-2483 and PO-2484, Senior Adjudicator Higgins discusses two decisions of the British Columbia Supreme Court, *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (*Legal Services Society #1*) and *Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134 (*Municipal Insurance Assn.*), and one decision of the British Columbia Court of Appeal, *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (2003), 226 D.L.R. (4th) 20 (*Legal Services Society #2*).

Legal Services Society #1 relates to the amount of legal aid fees and disbursements paid to a lawyer for defending two accused individuals in separate criminal matters. *Municipal Insurance Assn.* relates to a lump sum amount of fees and disbursements paid on behalf of a municipality engaged in defending a lawsuit. Both cases conclude that the fee information is privileged. *Legal Services Society #1* essentially holds that any information about a retainer is privileged, and because information about legal fees charged and paid falls into that category, it is privileged. *Municipal Insurance Assn.* makes the same finding, and also concludes that information about the interim fees and disbursements paid on behalf of the municipality could reveal information about the state of readiness for trial, and other aspects of the retainer.

Legal Services Society #2 dealt with an access request for a list of the top five billing lawyers to the British Columbia Legal Services Society (the Society) in criminal and immigration law, arranged by name and amount billed. At the request stage, the Society disclosed the amounts but not the lawyer's names, on the basis that privileged information (i.e., the fact that certain clients' retainers were funded by legal aid) could be revealed by disclosing names. In finding that the lawyers' names were privileged, the Court of Appeal stated that "[a]n assiduous reporter who is aware of long proceedings in the public courts could easily put this information together with the billing reports and deduce that particular clients were funded by legal aid."

Commenting on the relevance of these decisions in Orders PO-2483 and PO-2484, Senior Adjudicator Higgins states:

> In my view, however, the Supreme Court's decision in *Maranda* implicitly limits the impact of *Municipal Insurance Assn*. and the two *Legal Services Society* cases. One common thread in all three cases is that information about a retainer is privileged, and since the payment of fees relates to the retainer, information concerning that subject is privileged. The Supreme Court could have applied this approach in *Maranda*, but did not do so. Instead, it set up a rebuttable presumption of privilege and with it, the inherent possibility that records relating to lawyers' billing information may *not*, in fact, be privileged. Therefore, in my view, it would not be appropriate to simply apply these cases to the facts before me and conclude here, as well, that the information relates to the retainer and is automatically privileged for that reason. Instead, I will apply the approach in *Maranda*, also taken by the Ontario Court of Appeal in [*Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 779]. This entails asking whether the presumption of privilege has been rebutted. In my view, the principal aspect of these decisions that remains pertinent is the discussion, in both *Municipal Insurance Assn.* and the British Columbia Court of Appeal's *Legal Services Society* decision, about the "assiduous" requester.

I concur with the analysis of Senior Adjudicator Higgins in Orders PO-2483 and PO-2484. In my view, rather than simply applying the above three British Columbia cases to the facts before me, I must consider the application of the rebuttable presumption in the circumstances of this case and the information at issue.

In this case, the "timekeeper" (the billing lawyer) is known to the appellant and, absent the narrative descriptions contained in these invoices and the corresponding dates when the work was performed, there is no basis to conclude, on the evidence before me, that the disclosure of the information contained in the summary of fees constitutes information that could allow even an assiduous requester to gain insight into or access to privileged information regarding the nature of the City's retainer with its outside counsel.

Accordingly, with the exception of the narrative descriptions of the work performed and the corresponding dates on which it was performed, which reveal solicitor-client communications and are exempt under branch 1 of section 12, I find that the remaining information contained in the invoice portions of these accounts is neutral and the presumption of privilege is rebutted in relation to it.

I find that that the branch 1 communication privilege applies with regard to the narrative portions of these records and the corresponding dates on which it was performed. Subject to the application of the branch 2 statutory privileges under section 12, discussed below, I will order the partial disclosure of the invoice portions of accounts #1 and #2.

Account #3

As described above, there are two sections to this account. The first section is a one-page document that sets out the names of City solicitors who provided services, their time billed, hourly rates, amounts billed, and total billed. Pages two and three provide a detailed printout of the dockets in support of the fee charged in the account. For the reasons set out above regarding the treatment of the invoice portions of accounts #1 and #2, I am satisfied that disclosing this record in its entirety could directly or indirectly disclose privileged communications between City lawyers and staff employed in other City departments.

However, consistent with my treatment of the invoice portions of accounts #1 and #2, I have concluded that severing all but the name and address of the City Solicitor, the identity of the corporate adjuster, invoice date, file, invoice number, GST reference number, matter name, and summary of fees (setting out the identity of each timekeeper, hours billed, hourly rate and amount billed) would protect confidential privileged information in the narrative descriptions and the corresponding dates when the work was performed, set out in the docket printout and avoid disclosures that could allow even an "assiduous requester" to gain access to privileged communications (such as, instructions given by a client). To conclude, I am satisfied that there is no reasonable possibility that any confidential solicitor-client communication could be revealed (even to the most "assiduous" requester) by revealing the aforementioned information, nor could this information be connected with other available information in order to draw an accurate inference about any such privileged communication. Accordingly, with the exception of the narrative descriptions and the corresponding dates when the work was performed, as set out in the detailed docket printout, I find that the information in this record is neutral and the presumption of privilege is rebutted in relation to it.

I find that that the branch 1 communication privilege applies to the narrative descriptions and corresponding dates on which the work was performed, as set out in the detailed docket printout. Subject to the application of the branch 2 statutory privileges under section 12, discussed below, I will order the partial disclosure of account #3.

Payment Requisition Form

This record appears to be a form generated by the City that it uses to requisition payment of accounts submitted to it through its corporate adjuster for the provision of legal services. In this case, it is clear that the form relates directly to account #1, as it sets out under the "amount" category the total charged by outside counsel in regard to that account. In addition to setting out the amount billed, the form provides the corporate adjuster's file number, the name of outside counsel and its file and invoice numbers, a City department code, the name of the person making the request for payment and the date it was made.

I am satisfied that nothing in this document would reveal the contents of direct communications of a confidential nature between outside counsel and the City. Accordingly, I find that, based on the evidence before me, the contents of the Payment Requisition Form contains neutral information and the presumption of privilege is rebutted.

I find that that the branch 1 communication privilege does not apply to this record. Subject to the application of the branch 2 statutory privileges under section 12, discussed below, I will order the disclosure of the Payment Requisition Form.

Loss of privilege

Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply under branch 1 where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication is made to an opposing party in litigation [Order P-1551]
- the document records a communication made in open court [Order P-1551]

As identified above, the City has disclosed portions of a record to the appellant and this raises an issue of waiver.

The record is comprised of pages 721-787 and consists of a piece of correspondence with attachments sent by a staff person with the City's Development Engineering Division to a City solicitor. I have confirmed through my review of the record that the City has provided partial disclosure of certain pages that are attachments to the letter (pages 725-728, 730-731, 734-736, 738-746, 752-757 and 779-787). The City denied access to the withheld portions of these pages under section 14(1), and I address the application of that exemption to this information below.

On the issue of waiver the City states that "there has been no waiver of the solicitor client privilege attached to the records." In a separate document, initially provided to this office at the outset of this appeal as a partial index of records, the City identifies this record as being comprised of "pages 721-787 (except pages 725-728, 730-731, 734-736, 738-746, 752-757, 779-787)".

The appellant does not make representations on the waiver issue despite being invited to do so.

Previous orders of this office have addressed the issue of whether partial disclosure can be regarded as waiver of privilege (see Orders MO-1172, MO-1714 and MO-1991). After reviewing a number of authorities respecting the issue of waiver, Adjudicator Laurel Cropley found in Order MO-1172 that the City of Vaughan did not intend to waive privilege with respect to a record by making the relatively minimal disclosure of a small portion of the "bottom line" of the legal advice contained in a legal opinion. The relevant portion of the record states:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege (S.&K. Processors Ltd. V. Campbell Avenue Herring Producers Ltd., [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) At 148 - 149 (C.P.C.)).
>
> …
>
> I have reviewed page 3 of Report No. 18 of the Committee of the Whole. I find that it contains a small portion of the "bottom line" of the advice provided to Council from the City's solicitor. It very briefly outlines the City Solicitor's view of what the City is entitled to do and what is required in order for it to do so. The bulk of the legal opinion deals with other aspect of this issue. In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication (Order P-1559).
>
> This issue was recently addressed by the Federal Court of Appeal in Stevens v. Canada (Prime Minister) (1998), 161 D.L.R. (4th) 85 at pp.108 -109. In this case, pursuant to an access request under the federal Access to Information Act, a federal institution provided partial access to legal accounts, severing out the narrative portion of the accounts while providing access to the dollar amount of the accounts. In dealing with the issue of waiver in the freedom of information context, Linden J.A. stated on behalf of the Court:

> In Lowry v. Can. Mountain Holidays Ltd. [(1984, 59 B.C.L.R. 137 (S.C.), at p. 143] Finch J. emphasized that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance.
>
> ...
>
> I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. **As I mentioned earlier, a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients**. [emphasis added]
>
> Although the matter in Stevens arose in the context of disclosure under the federal Act, in my view, the Court's rationale may be similarly applied to the disclosure, generally, made by government institutions of information in their custody or control. This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.
>
> In the circumstances of the current appeal, I am satisfied that in making the relatively minimal disclosure of a small portion of the "bottom line" of the advice, the City did not intend to waive privilege with respect to the record. Accordingly, I find that the City has not expressly waived privilege.

Adjudicator Cropley's reasoning has been applied in other similar cases (see, for example, Orders MO-1991, MO-1714 and PO-1937) and I find that it applies in the circumstances of this case, despite the fact that in this case I am not dealing with a legal opinion, but rather a piece of correspondence with attachments sent by a City employee to a City solicitor.

In my view, the reasons for finding that the City's partial disclosure did not constitute waiver are just as compelling as in the case of the legal opinion considered by Adjudicator Cropley. I note that the City describes the record at issue in its Index as being comprised of a certain number of

pages *except* those pages that it had disclosed to the appellant. In the circumstances of this appeal, I am satisfied that the City made a conscious decision to disclose portions of this record to the appellant - perhaps in the interests of transparency and being mindful of its obligations under the *Act* - but that, in doing so, it was not voluntarily intending to waive its privilege to the whole record.

Accordingly, I find that the disclosure of the information contained in this record did not constitute a waiver of privilege. I conclude that this record is exempt from disclosure under the branch 1 communication privilege exemption in section 12.

Branch 2: statutory privileges

General principles

Having addressed the application of branch 1 solicitor-client communication privilege to all of the Group A Records for which the City has claimed the section 12 exemption, I will now consider the application of branch 2 to those portions of the Group A records that I have found were not protected by branch 1 communication privilege.

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution use in giving legal advice or conducting litigation. It arises from the last part of section 12, which refers to records "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."

Records remaining at issue

As noted previously, section 12 has not been claimed for the Group B Records. However, the following Group A Records remain at issue, having found above that branch 1 communication privilege does not apply to them:

- Communications between the appellant or his legal counsel and other parties (pages 34-43, 162-163, 189-191, 195, 221-223, 374-375, 387, 393-399, 407-409, 446-454, 459-460, 474, 478-480, 494, 506-510, 511-513, 525, 527, 534-535, 551-570, 788, 789, 808-810, 831, 837, 838, 850, 858-861, 862, 870 and 875)

- Internal City documents (pages 24, 25, 26, 27, 54, 153, 154, 158, 426, 586, 657, 790, 800-802, 835, 836, 848, 851, 852, 857, 863, 864, 865, 866, 867, 868, 869 and 874)

- Memoranda prepared by the City's corporate adjusters (pages 157 and 172)

- Correspondence from a consultant to the City's corporate adjuster (page 822)

- Legal accounts and related documentation (pages 164-169, 178, 179, 182-184 and 658-660)

Representations

The City's submissions on the application of the branch 2 statutory privileges are set out above in the branch 1 discussion. The appellant does not provide representations that address the application of the branch 2 statutory privileges.

Analysis and findings

With one exception, I find none of the remaining Group A Records exempt under either the advice or litigation aspect of branch 2. With specific reference to the above categories, I make the following findings:

Communications between the appellant or his legal counsel and other parties

A significant number of the records in this category cannot be said to have been "prepared by or for counsel employed or retained by an institution" since they were prepared by the appellant or his legal counsel. To suggest otherwise would be absurd. Examples of these records are memoranda to file prepared by the appellant's counsel in regard to telephone calls made by the appellant, letters from the appellant's counsel to the City solicitor and expert reports prepared by consultants retained by the appellant. However, if these records did satisfy this requirement, there is no evidence that they were prepared "for use in giving legal advice" or "in contemplation of or for use in litigation".

On the other hand, I accept that some of the records in this category were prepared by or for counsel employed or retained by the City, to the extent that several of them comprise emails and letters that were prepared by a City solicitor and sent to the appellant's legal counsel. In Order PO-2484, Senior Adjudicator Higgins explored the meaning of the words "for use in" in relation to the application of the branch 2 statutory litigation privilege. In conducting his analysis, he compares the phrase "in relation to", which he examined in Order MO-2024-I with regard to the wording of section 52(3)1 of the *Act*. In that case Senior Adjudicator Higgins found that billing-related documents were not collected, prepared, maintained or used "in relation to" proceedings or anticipated proceedings relating to labour relations or to the employment of a person by the institution.

In comparing the phrases "in relation to" with "for use in", Senior Adjudicator Higgins makes the following statement in Order PO-2484:

> Although the phrase, "in relation to" proceedings is different than "for use in" litigation, I believe they are close enough in meaning to make an analogy possible. If anything, "in relation to" is broader than "for use in" and would therefore capture even more information. As in Order MO-2024-I, there is no obvious relationship between the records at issue and the actual conduct of the litigation in this case. In my view, the Ministry's argument that, without the funding provided by charging fees it would not be able to continue providing legal representation, is irrelevant. It does not go to the question before me,

> namely, whether the records were prepared "for use in" litigation. Another way of asking this question is: were the records prepared *to be used in* actual or contemplated litigation. In my view, they were not.

I agree with Senior Adjudicator Higgins' analysis and apply it in the context of this case. In my view, there is no evidence that these records were prepared *to be used for* giving legal advice or prepared *to be used in* actual or contemplated litigation. In fact, to suggest otherwise would be absurd since the records at issue involve communication either sent from the City lawyer to the appellant's counsel or sent from the City directly to the appellant.

Accordingly, I find that these records are not exempt under either the advice or litigation aspect of branch 2.

Internal City documents

With the exception of pages 153 and 154, the City has not commented on the application of the branch 2 privileges to the records remaining at issue in this category. The City asserts that pages 153 and 154 are records provided to the City's solicitor in confidence by its corporate adjuster. Page 153 is an internal email between two employees with the City. Page 154 is an email exchange between an employee with the City and employee with the corporate adjuster, which was then forwarded to another City employee. They are innocuous emails, which are essentially administrative in nature.

On their face, there is no evidence that any of these records, as they appear before me (including pages 153 and 154) 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. Nor does the City provide such evidence in its representations.

Accordingly, I find that these records are not exempt under either the advice or litigation aspect of branch 2.

Memoranda prepared by the City's corporate adjusters

These records comprise two pages. One (page 157) is a memorandum to file prepared by a representative of the City's corporate adjuster regarding attempts to reach an individual, the other (page 172) is a memorandum from the corporate adjuster to a City employee regarding the processing of an account received by the City's outside counsel. As above, the City submits that these records were provided to the City's solicitor in confidence by the City's corporate adjuster.

While it may be arguable that these records were prepared for counsel employed by the City, there is no evidence that they were prepared for use in giving legal advice or in contemplation of, or for use in, litigation.

Accordingly, I find that these records are not exempt under either the advice or litigation aspect of branch 2.

Correspondence from a consultant to the City's corporate adjuster

As described above, the record at issue in this category is a one-page letter from an engineering consultant to the City's corporate adjuster (page 822). The letter is a supplementary report prepared by the engineering consultant, correcting a typographical error in the initial report and providing an opinion on the causes of subsidence cracks in front of the appellant's property.

While the City does not make specific representations on the application of the branch 2 privileges to this record, on my review of it, I am satisfied that this record does meet the requirements of the branch 2 litigation privilege exemption.

In Order MO-1571 I found that a consultant's report, created in response to flooding that occurred as a result of a storm, was prepared on behalf of the Regional Municipality of Halton (the Municipality) for the dominant purpose of using it in reasonably contemplated litigation against the Municipality. In reaching this conclusion I found that the Municipality's insurer sought the report to assess the Municipality's liability, in possible future litigation, for damages caused by the storm. In making my finding I relied on previous orders of this office and, in doing so, I stated:

> Previous orders of this office have addressed the application of litigation privilege to reports prepared in similar circumstances. In Order M-285, Adjudicator Holly Big Canoe found that reports prepared by an insurance adjuster for the City of Kitchener in response to damage claims for flooded homes by homeowners met the dominant purpose test and fit within the scope of litigation privilege. Adjudicator Big Canoe found that the dominant purpose for the preparation of the reports in that case was to prepare for anticipated litigation between the City and the homeowners. In Order M-502, Adjudicator Donald Hale found that a report prepared by the City of Timmins' Public Works Department following two incidents in which the appellant's home was damaged by a sewer back-up, met the dominant purpose test. In that case, Adjudicator Hale found that the report was intended to inform the adjuster retained by the City's insurer of the occurrence and the possible cause of the problems with the sewer on the appellant's street. As the City had been put on notice by the appellant that a claim was being made, Adjudicator Hale found that there was a reasonable prospect of litigation at the time the report was prepared. Accordingly, Adjudicator Hale concluded that litigation privilege applied.

I recognize that these decisions (Orders MO-1571, M-502 and M-285) relate to the application of common law litigation privilege (which cannot apply in this case because the litigation is at an end), while in this case I am dealing with the branch 2 statutory litigation privilege. That said, I am satisfied that the principles expressed in these decisions are relevant to branch 2 litigation privilege. In my view, two questions must be answered: (1) was the record prepared by or for institution counsel for use in of litigation and (2) at the time the record was prepared was there actual litigation or a reasonable prospect of litigation.

Turning then to this case, the report addendum was prepared in December 2000. The evidence before me indicates that the appellant's counsel sent a letter to the City in May 2000 requesting it to take certain steps in regard to the appellant's property, threatening legal action if the City did not meet the appellant's demands. The appellant then delivered a Notice of Action to the City in October 2000. While the original consultant's report is dated August 29, 2000 and predates the Notice of Action, I am satisfied that at the time the original report was prepared there was a reasonable prospect of litigation in light of the appellant's demand letter. And, by December 2000 there was actual litigation because the appellant had served his Notice of Action. Therefore, I am satisfied that the December 2000 report addendum, and the opinion contained within it, were prepared for use in litigation and that at the time the addendum was prepared there was actual litigation. I do not need to address the status of the original report as it exists as a separate record which I found above to be part of a continuum of communications between solicitor and client and, therefore, exempt under the branch 1 communication privilege exemption.

In the circumstances, I am satisfied that the report addendum was prepared by or for counsel for the City in contemplation of or for use in litigation.

Accordingly, I find this record exempt under the statutory litigation privilege aspect of branch 2.

Legal accounts and related documentation

I have found accounts #1, #2 and #3 partially exempt under branch 1 communication privilege. I have also found that branch 1 communication privilege does not apply to the Payment Requisition Form.

The Payment Requisition Form appears to be an internal administrative document created by the City for use in the payment of outside lawyer's fees. That said, the City has provided no evidence about its creation. In my view, it cannot be said to have been prepared by or for counsel employed or retained by the City. However, even if the record did satisfy this requirement, there is also no evidence that it was prepared "for use in giving legal advice" or "in contemplation of or for use in litigation".

I accept that accounts #1, #2 and #3 were "prepared by or for counsel employed or retained by [the City]". Accounts #1 and #2 were prepared by the City's outside counsel. Account #3 was prepared by the City solicitor. In dealing with records of a similar nature in Order PO-2484, Senior Adjudicator Higgins states:

> While I agree with the Ministry that, but for the litigation, the records at issue would not have been created, this does not in my view lead to an automatic conclusion that they were prepared for use in giving legal advice or in contemplation of or for use in litigation. In my view, the conclusion on this point depends on the meaning of "for use in". I agree with the appellant that invoices are ancillary to the activities referred to in branch 2.

This conclusion is reinforced by my decision in Order MO-2024-I. In that case, I had to determine whether similar information was excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act* under section 52(3)1 of that statute, on the basis that the records were collected, prepared, maintained or used "in relation to" proceedings or anticipated proceedings relating to labour relations or to the employment of a person by the institution. The record at issue was a two-page document containing payments made to a law firm on a series of dates, including a total amount, with respect to an action against the City by a former employee. Based on the nature of the request, however, only the total figure was at issue. I stated:

> The question I must decide … is whether the connection between the record and the proceedings is strong enough to mean that the preparation or maintenance of the record was "in relation to" to the proceedings, which clearly hinges on the meaning of "in relation to".
>
> …
>
> In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.

Although the phrase, "in relation to" proceedings is different than "for use in" litigation, I believe they are close enough in meaning to make an analogy possible. If anything, "in relation to" is broader than "for use in" and would therefore capture even more information. As in Order MO-2024-I, there is no obvious relationship between the records at issue and the actual conduct of the litigation in this case. In my view, the Ministry's argument that, without the funding provided by charging fees it would not be able to continue providing legal representation, is irrelevant. It does not go to the question before me, namely, whether the records were prepared "for use in" litigation. Another way of asking this question is: were the records prepared *to be used in* actual or contemplated litigation. In my view, they were not.

I find that branch 2 does not apply to any part of the records.

I accept Senior Adjudicator Higgins' analysis and apply it in the circumstances of this case. In my view these accounts were not prepared "for use in" giving legal advice, or in actual or contemplated litigation. I therefore find that branch 2 does not apply to these invoices.

Exercise of discretion

The section 38(a) and section 12 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The City states that it has exercised its discretion to deny access to the records under section 12 "in accordance with the provisions and purposes of the *Act* and after specifically considering the nature of the information, i.e., the sensitivity of these documents and the impact their disclosure would have on the City's ability to prepare and defend its position in the ongoing litigation."

The appellant did not make representations on the City's exercise of discretion despite being invited to do so.

As is evident from the City's representations, the City's position on the discretion issue was predicated, at least in part, on the fact that the litigation between the appellant and institution was ongoing. However, in light of the fact that this litigation was settled during the course of this inquiry, I will return the matter to the City and ask that it reconsider its exercise of discretion with regard to the records found exempt under section 38(a), in conjunction with section 12, or under section 12 alone.

INVASION OF PRIVACY

Introduction

Section 14(1) is a mandatory exemption that may apply to records containing the personal information of individuals other than the appellant.

To the extent that any of the Group A Records that I found are not exempt under section 38(a), read with section 12, and ordered disclosed (see above), these records only contain the appellant's personal information. Because the records do not contain the personal information of other identifiable individuals, their disclosure cannot be an unjustified invasion of personal property and they are not exempt under section 14(1). Accordingly, I can see no basis for

withholding any of this information under the personal privacy exemption and I will not address them any further.

My focus will now turn to a rather small collection of Group A Records and another collection of Group B Records that contain the personal information of other identifiable individuals. These records are described above in the "Records" section of this order. The remaining Group A Records fall into the following two categories: "internal City documents" (page 836) and "documents pertaining to a broken water main incident in 1995 (including claims for compensation, service requests and reports) (pages 6, 9, 55, 56, 57, 58, 59, 62, 64, 65, 66, 706, 708, 709, 710, 711, 715 and 716). The Group B Records are broken down into various categories in the "Records" section and can be described generally as archival records dating from 1972 to 1981 and pertaining to the appellant's property, prior to his ownership, and other properties in the immediate vicinity. None of these records contain the appellant's personal information.

Operation of section 14

Having determined that these records contain the personal information of individuals other than the appellant, the mandatory exemption at section 14(1) requires that the City refuse to disclose this information unless one of the exceptions to the exemption at sections 14(1)(a) through (f) applies. In my view, the only exception which could have any application in the present appeal is set out in section 14(1)(f), which states:

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

Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy within the meaning of section 14(1)(f). Section 14(2) provides criteria 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 and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure in section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue falls within the ambit of section 14(4) or if the "compelling public interest" override provision at section 16 applies [*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The City takes the position that disclosure of the information in most of these records is presumed to constitute an unjustified invasion of privacy under the presumptions in sections 14(3)(b) and 14(3)(f) of the *Act*, which state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (b) is compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> …
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The City also relies on the application of the factors in section 14(2)(f) and (h), which state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> …
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Representations

The City states that information severed from some of the Group B Records (citing as examples pages 103, 109, 126, 127, 129, 130, 212-215, 218-222, 232, 235 and 236) is the personal information of the owners of properties who have been the subject of investigations by building examiners (or investigators) under the City's building code by-laws for building code violations. The City relies on past orders of this office, namely Orders M-722 and M-1209, in which the adjudicator in each case found that records compiled as part of an investigation into a possible violation of law under the *Building Code Act* were caught by the presumption in section 14(3)(b).

The City adds that information about individuals who have been the subject of investigations and charged is highly sensitive within the meaning of section 14(2)(f).

The City also submits that information severed from some Group A Records (citing as examples pages 9, 225, 715 and 716) and some Group B Records (citing as examples pages 14, 15, 33, 34, 37, 53 and 103) reveals financial information within the meaning of the presumption in section 14(3)(f). The City states that these records provide the names of individuals together with information relating to their financial activities, including the cost of proposed renovations to their properties, amounts they paid for their properties, taxes due on their properties, and amounts claimed and received as a result of property damage caused by a water main break.

The City adds that some of the information in the records (specifically pages 9 and 56 of the Group A Records and page 108 of the Group B Records) contains the names of complainants and claimants who provided their information regarding their circumstances to the City in confidence, within the meaning of section 14(2)(h).

Although not directly relevant to this issue, the appellant states that his "main concern [is] the [water main] bursts and [sidewalk and road] collapses that have occurred *since* 1998."

Analysis and findings

Based on my review of the records and the City's representations on the application of section 14(3)(b), I am satisfied that the City compiled the information at issue in some of these records as part of an investigation into a possible violation of law under the City's building by-laws, in force at the time in question.

I am also satisfied that some of the records describe various individuals' financial activities, as described by the City in its representations, within the meaning of section 14(3)(f).

Having found that the section 14(3)(b) and 14(3)(f) presumptions apply to certain records, I am precluded from considering any of the factors weighing for or against disclosure under section 14(2), because of the application of the *John Doe* decision in relation to those records. Accordingly, I find that the disclosure of the personal information at issue would be an unjustified invasion of the personal privacy of individuals other than the appellant under section 14(1).

With regard to the records to which the City raises the application of the factors in sections 14(2)(f) and 14(2)(h), I am satisfied on my review of these records that the information at issue in them is highly sensitive and was supplied in confidence to the City. I could speculate that the appellant may have sought this information in order to pursue a fair determination of his rights [section 14(2)(d)]. That said, the appellant has stated that his main interest is in records that address water main bursts and sidewalk and road collapses that have occurred since 1998. I note that all of the records remaining at issue under section 14(1) are pre-1995 and that the information at issue is limited to minimal personal information about individuals other than the appellant. In light of the appellant's stated interest and the nature of the personal information at issue in the records remaining at issue, I find that section 14(2)(d) does not apply. Accordingly, I find that the disclosure of the personal information at issue would be an unjustified invasion of the personal privacy of individuals other than the appellant under section 14(1).

Section 14(4) is not applicable in the circumstances of this case.

I note that the appellant has raised the application of the public interest override, which I address below.

Having found that disclosure of all the personal information in the records would constitute an unjustified invasion of personal property, I find that the section 14(1)(f) exception does not apply. The personal information at issue in this appeal is therefore exempt under section 14(1), subject to my determination regarding the application of the of the public interest override.

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. In my view, with one minor exception relating to page 836, the City has acted reasonably in this case, having provided the appellant with all of the information at issue in the records except for the exempt personal information of other individuals. Dealing then with page 836, once the personal information I have found exempt is severed, the balance of this record is not exempt and should be shared with the appellant. Accordingly, I will order the partial disclosure of page 836.

PUBLIC INTEREST OVERRIDE

The appellant has raised public interest in relation to this appeal.

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 16 does not apply to records exempt under section 12. Therefore, I am precluded from considering the application of the public interest override to the information I have found exempt under section 38(a), read with section 12, or under section 12 alone. I can only consider the application of section 16 to the very limited amount of personal information that I have found exempt under section 14.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that

in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The appellant states that the issues at stake raise "serious public health concerns" and in light of similar issues with neighbouring properties involving decisions in other civil lawsuits, he views his situation as one of public interest. At the time of making his representations (prior to the settlement of his civil case with the City) the appellant states that gaining access to information at issue "could allow the owners of all buildings involved to file a class action (public) suit against the City."

In response, the City states that the "information to which the section 14 exemption applies relates to private matters, not public ones." The City reiterates its description of the nature of the information at issue in these records, as set out in its representations above under "Invasion of Privacy", as a means of demonstrating the personal nature of this information. The City states that it does not believe there is a public interest in the disclosure of the personal information at issue under section 14 that would clearly outweigh the privacy concerns relating to its release. The City submits that section 16 does not apply.

I acknowledge the appellant's views. However, I reiterate that the only information that can be examined under section 16 is the limited amount of personal information at issue under section 14. I concur with the City that this is purely personal information of other individuals. The evidence before me, including the nature of this particular information, does not support a finding that there is a compelling public interest in its disclosure. Accordingly, I find that section 16 does not apply in the circumstances of this appeal.

ORDER:

1. I order the City to disclose the following records in their entirety to the appellant by **January 3, 2007** but not before **December 28, 2006**: 25, 26, 34-43, 153, 154, 157, 158, 162-163, 172, 178, 189-191, 195, 221-223, 374-375, 387, 393-399, 407-409, 426, 446-454, 459-460, 474, 478-480, 494, 506-510, 511-513, 525, 527, 534-535, 550, 551-570, 586, 657, 672, 788, 789, 790, 808-810, 831, 835, 837, 838, 850, 851, 852, 857, 858-861, 862, 863, 864, 865, 866, 868, 870, 874 and 875.

2. I order the City to disclose portions of pages 27, 164-169, 179-184 (except pages 180-181), 658-660 and 836 to the appellant by **January 3, 2007** but not before **December 28,**

2006, in accordance with the highlighted version of these records included with the City's copy of this order. To be clear, the City should not disclose the highlighted portions of these records.

3. I order the City to re-exercise its discretion with regard to the records I have found exempt under section 12 in accordance with my discussion of that issue, set out above, and to advise the appellant and myself of the result of this re-exercise of discretion, in writing. If the City continues to withhold all or part of the information, I also order it to provide the appellant and myself with an explanation of the basis for exercising its discretion to do so. The City is required to send the results of its re-exercise of discretion, and its explanation, no later than **December 7, 2006**. If the appellant wishes to respond to the City's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, the appellant must do so within 14 days of the date of the City's correspondence by providing me with written representations.

4. I remain seized pending the resolution of the issues set out in provisions 2 and 3 of this order. With respect to provision 2, I reserve the right to require the City to provide me with severed copies of the records ordered disclosed to the appellant.

Original signed by: November 23, 2006
Bernard Morrow