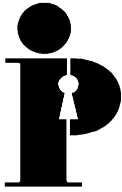

ORDER MO-2190

Appeal MA-050091-2

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request referred to in a meeting of the City's Administration Committee (the committee) held on a specified date. In particular, the request referred to a litigation matter discussed at the meeting, which involved a named individual who prepared a report concerning a redevelopment project. The requester had previously threatened legal action against the named individual, whose legal fees concerning this potential litigation were paid by the City.

The requester sought access to: (1) "communications [on two specified dates] from [a named lawyer]", and (2) "all other records regarding the indemnification of [the named individual] respecting a potential litigation matter" with respect to his legal expenses arising from the potential litigation, including but not exclusive to the reports from the City Solicitor, the Chief Financial Officer and the Treasurer. The committee minutes, which were enclosed with the request, refer to these individuals reporting to city council at its next scheduled meeting.

In response to this request, the City located a number of responsive records. The City decided to grant access to a number of records in full, and denied access to the other records in full under the following exemptions in the *Act*: section 7(1) (advice or recommendations), section 12 (solicitor-client privilege) and section 15(a) (information published or available). The City provided an index of the records listing the exemptions claimed for each record.

The requester, now the appellant, appealed the denial of access. In his letter of appeal, the appellant also contends that: (1) the City did not conduct a reasonable search for records, and (2) the City's decision in response to the request was inadequate.

The appeal was assigned to a mediator in an attempt to settle the issues. During mediation, the appellant accepted that section 15(a) applies to the records for which it is claimed, and accordingly, this exemption and the information for which it is claimed are no longer at issue in this appeal. Mediation did not resolve the remaining issues and the appeal therefore moved on to the adjudication stage of the appeal process, in which an inquiry is conducted under the *Act*.

This office initiated the inquiry by sending a Notice of Inquiry to the City, outlining the background and issues in the appeal, and inviting the City to provide representations. The City responded with representations. This office then sent the Notice of Inquiry to the appellant, along with the non-confidential portions of the City's representations, and invited the appellant to provide representations. The appellant responded with representations. This appeal was then placed on hold pending the resolution of two other appeals that raised related issues involving legal fees and solicitor-client privilege. These two appeals were resolved by the issuance of Orders PO-2483 and PO-2484.

Upon reactivation of the appeal, the City was invited to comment on the potential relevance of these two orders. In response, the City provided representations, but also indicated that it would disclose the total amount of legal fees, disbursements and GST paid to counsel for the identified individual, which would be done by releasing severed versions of the law firm's invoices. The City subsequently did so, and advised the appellant that it continues to deny access to the remainder of these records under section 12.

This office then wrote to the appellant referring to the additional disclosure, enclosing the City's representations concerning the potential relevance of Orders PO-2483 and PO-2484, and inviting his reply representations. The appellant did not provide reply representations. Subsequent to this correspondence, this appeal was re-assigned to me.

In the representations he provided in response to the Notice of Inquiry, the appellant accused the adjudicator originally assigned to this appeal, and this office generally, of bias in relation to him. This accusation was not the basis for re-assigning the appeal file. I will address the appellant's allegations of bias as an issue in this case (see below). The appellant's representations did not address any of the issues identified in the Notice of Inquiry.

RECORDS:

The following table outlines the records and exemptions remaining at issue.

Page No.	**Description**	**Exemption**	**Withheld in full or in part?**
10-11	Law firm invoice	s. 12	Withheld in part
20-21 (and duplicate pages 24-25 and 49-50)	Law firm invoice	s. 12	Withheld in part
26, 27	Two e-mails	s. 7(1)	Withheld in full
34-35	Law firm invoice	s. 12	Withheld in part
53, 54, 55, 56, 57-58, 59-60	Six e-mails	s. 7(1)	Withheld in full

Because pages 24-25 and 49-50 are duplicates of pages 20-21, I will not deal with them in this order, but will refer only to pages 20-21 in relation to that particular invoice. Pages 26, 27, 53, 54, 55, 56, 57-58 and 59-60, which consist of e-mails or e-mail chains, also contain some overlap but, because each record contains unique features (e.g. notations concerning who printed the particular e-mail), I will not treat this as duplication and will deal with each of these records.

DISCUSSION:

ADEQUACY OF DECISION LETTER

As noted, the appellant's letter of appeal contends that the City's decision letter was inadequate. The appellant complains that the City identified six records only as "e-mails" and there is no possibility for him to assess the applicability of the section 7(1) exemption the City claims for them. The City's decision letter states that "[s]ection 7 of the *Act* has been relied upon to deny access to a record, the disclosure of which would reveal advice or recommendations of an officer or employee of the City."

Section 22(1)(b)(ii) requires that, where access is denied to a record, the decision must explain "the reason the provision applies to the record." In my view, the City should have provided an explanation of this in response to the request. However, the City subsequently did so in its representations in this appeal. These were shared with the appellant, with severances of information that would reveal the contents of the records, and he was invited to comment at that time. In my view, this has corrected any deficiency in the original decision and no further action is necessary.

BIAS

The appellant's representations in response to the Notice of Inquiry consist of an accusation that the adjudicator formerly assigned to this appeal, and this office generally, are biased against the appellant.

With respect to the allegation that the previous adjudicator was biased, the appellant refers extensively to Order MO-1892, issued by that adjudicator, which related to notes taken by the named individual. In this part of the appellant's submissions, he takes issue with both the conduct and outcome of the inquiry that led to Order MO-1892. That order was also the subject of an application for judicial review (reported at [2006] O.J. No. 4351 (Div. Ct.)). In relation to this office generally, the appellant essentially submits that a decision has been made to thwart his appeals and privacy complaints.

In Order MO-1519, Adjudicator Laurel Cropley canvassed the law in relation to accusations that an adjudicator or a tribunal is biased:

> The rules of natural justice and procedural fairness emphasize the right to an unbiased adjudication in administrative decision-making. Allegations of bias on the part of the tribunal or a particular adjudicator are, therefore, very serious, and, as a consequence, should not be made lightly (Robert F. Reid & Hillel David, *Administrative Law and Practice* (2nd ed.), (Butterworth's: Toronto, 1978), at page 260).
>
> It appears well settled in law that it is not necessary to provide proof of "actual bias". Rather, the test most commonly applied by the courts is whether there exists a "reasonable apprehension of bias" (David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law* (2nd. ed.), (Carswell: Toronto, 1994) at pp. 361 – 363).
>
> Speaking for the majority in *Baker* v. *Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.) on this issue, L'Heureux-Dube J. stated:
>
>> The test for reasonable apprehension of bias was set out by de Grandpre J., writing in dissent, in *Committee for Justice and*

> *Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394, 68 D.L.R. (3d) 716:
>
> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information … that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> Commenting on this issue in *Administrative Law in Canada* (3rd. ed.), (Butterworth's, 2001), at page 106, author Sara Blake noted:
>
> There is a presumption that a tribunal member will act fairly and impartially, in the absence of evidence to the contrary. The onus of demonstrating bias lies on the person who alleges it … Mere suspicion is not enough …
>
> Taking this one step further, in my view, the onus is on the appellant (in this case) to provide a credible basis for the allegation.

In my view, no reasonable apprehension of bias is established in this case. Despite being stated in strong language, the appellant's arguments in relation to Order MO-1892 amount to disagreement with the manner in which that appeal was conducted and disagreement with the decision contained in the order. This is not a sufficient foundation for an allegation of bias. Essentially these same arguments were also made before the Divisional Court in the judicial review of Order MO-1892 (cited above), which upheld the decision.

As well, the appellant's position that he has a reasonable apprehension of bias, with respect to this office generally, is entirely without foundation. The allegations underlying this argument were also the basis for bias allegations made before the Divisional Court in another judicial review application. In its decision dismissing the application (reported at [2006] O.J. No. 4356), the Court found that there was no reasonable apprehension of bias.

In my view, an informed person, viewing the matter realistically and practically – and having thought the matter through – would not find it likely that this office would be unfair in deciding this appeal. I dismiss the appellant's bias arguments.

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the City, the issue to be decided is whether the City 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 City'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].

In this case, the letter of appeal cites "reasonableness of search" as one of the grounds for the appeal and goes on to state that "the record provided at page 67 is plainly incomplete and may be camouflaging another responsive record of the same date." Page 67, a letter bearing one of the dates mentioned in the request, was disclosed to the appellant at the request stage. But the notation "002/003", which is a fax machine stamp appearing at the top of the page, suggests that there was a page 1 and 3 that have not been addressed. The City's representations note that the other letter mentioned in the request (one page of which was disclosed at page 66) was disclosed in full at pages 28-30, but this does not, in my view, resolve the similar issue regarding page 67. I will order the City to search for the other two pages of that faxed letter.

As regards the City's search generally, I note that the request seeks correspondence and "all other records" regarding the indemnification. Significantly, although it refers specifically to reports from the City Solicitor, it also mentions reports from the Chief Financial Officer and the Treasurer. As noted previously, the committee minutes attached to the request refer to these individuals reporting to city council at its next scheduled meeting.

The City's representations on the search issue indicate that, according to the City Solicitor, she had "everything related to this [request]." Through her administrative assistant, the City Solicitor created a file that contained all the records concerning this matter. The administrative assistant confirmed that she had no records that were not in the file, and that no documents had been destroyed. Other records were located by the lawyer who was the project co-ordinator for the redevelopment, who reviewed her existing file and a general correspondence file. Though not explicitly stated, these searches all appear to involve the City's legal department.

But as I have just stated, the committee minutes also refer to reports to city council by the Chief Financial Officer and the Treasurer. In this circumstance, I find it surprising that no inquiries appear to have been made or searches conducted with respect to the preparation of reports by these two City officials. No explanation for this omission has been provided. I will therefore order the City to conduct further searches in that regard.

To summarize, I am not satisfied that the City conducted a reasonable search in relation to the remainder of the record of which page 67 comprises a part, nor in relation to the reports which were to be prepared and delivered to city council by the Chief Financial Officer and the Treasurer.

SOLICITOR-CLIENT PRIVILEGE

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 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2 arises from the latter part of section 12, and in particular, the reference to a record "…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." It is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

The City initially claimed that pages 10-11, 20-21 and 34-35 are exempt in their entirety under section 12 of the *Act*. These records consist of invoices for legal services that were sent to the City. The City's initial representations indicate that it relies on both branch 1 solicitor-client communication privilege and also that the records were "prepared by or for counsel … retained by an institution" under branch 2. I will begin by considering branch one solicitor-client communication privilege.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

As noted above under "Nature of the Appeal", I issued Orders PO-2483 and PO-2484 during the course of this appeal. Both deal with legal billing information. Order PO-2484 is the subject of a pending application for judicial review (Tor. Doc. 394/06 (Div. Ct.)). Order PO-2483 is not subject to such an application.

Both orders contain a detailed analysis of the state of the law in relation to common law solicitor-client communication privilege under branch 1 in relation to legal billing information. In particular, they address the presumption of privilege applied to legal billing information in *Maranda v. Richer,* [2003] 3 S.C.R. 193. *Maranda* held that legal billing information is subject to a rebuttable presumption of solicitor-client communication privilege. This presumption is rebutted where it can be shown that the legal billing information in question is "neutral", *i.e.*, it does not disclose confidential solicitor-client communications or other privileged information.

Although they differ in their particulars, Orders PO-2483 and PO-2484 both conclude by requiring disclosure of aggregated fees and disbursements. In Order PO-2483, I summarized the criteria to be applied to the issue of whether legal billing information is subject to the presumption of privilege set out in the *Maranda* decision, in the context of the application of common law solicitor-client privilege under branch 1:

> Accordingly, 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.

The City was invited to provide representations on the relevance of these two orders in the context of this appeal. The City's representations in response stated:

> Applying these standards to the records at issue [in Order PO-2483] and in particular to the Statements of Account, [Senior Adjudicator] Higgins agreed that

> the narrative descriptions of services rendered, identifying particular activities, who performed them and how much time was spent on each would reveal a privileged information.
>
> [Senior Adjudicator] Higgins concluded that severing all but the firm name, date and combined total for fees and disbursements in each invoice would protect confidential privileged information and would avoid disclosures that could allow even an assiduous requester to gain access to privileged communications such as, for example, instructions given by the client.
>
> The City has re-examined the invoices that are at issue in the current appeal and based on a careful consideration of the findings in Order PO-2483, has concluded that similarly the severing of all information in these records, with the exception of the name of the firm, date and the invoice and total fees, disbursements and GST, would protect solicitor-client privilege.
>
> ...
>
> The City is, therefore, prepared to disclose the Statements of Account to the appellant with the appropriate severances.

The City then granted partial disclosure of pages 10-11, 20-21 and 34-35 (and the duplicate pages identified in the list of records at the beginning of this order) to the appellant. I commend the City for taking this initiative. The information disclosed includes the firm name, invoice number, invoice date, a brief statement of the subject matter, the law firm's file number, beginning and end dates for the services provided, and the aggregate total of legal fees and disbursements in each invoice. The undisclosed information consists of the line-by-line narrative description of services rendered, and the fees charged for each.

In this case, counsel was retained by the City on behalf of the named individual and the invoices were addressed to the City for payment. In my view, this is analogous to the situation in *Descoteaux v. Mierzwinski*, [1982 S.C.J. No. 42], where the Supreme Court of Canada found that information provided to Legal Aid in connection with the retainer of a legally-aided lawyer was privileged because it fell within the "framework" of the solicitor-client relationship. I find that the same principle applies here.

In my view, disclosure of the undisclosed information in the invoices would reveal privileged information about the solicitor-client relationship, permitting inferences to be drawn about the instructions given, as well as revealing or permitting accurate inferences to be drawn about the precise legal services provided. All this information is subject to the solicitor-client communication privilege at common law, and I therefore find it to be exempt under branch one of section 12. Having made this finding, it is not necessary from me to consider branch 2.

ADVICE OR RECOMMENDATIONS

The city claims that the records comprising pages 26-27, 53, 54, 55, 56, 57-58 and 59-60 are exempt under section 7(1) of the *Act*. These records consist of e-mails.

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

These decisions also confirm that advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations, or
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.

In its representations concerning this exemption, the City states:

> The city submits that the emails either contain … suggested courses of action that were ultimately accepted or rejected by the recipient of the advice or recommendation or contain information that would permit one to accurately infer the advice or recommendation that was given.
>
> Specifically, in her emails, the City solicitor is seeking advice from other staff including the Commissioner of Corporate Services and the Director of Accounting Services as to how to meet the recommendations of Council

> regarding the reporting of legal fees incurred for services rendered relating to [the named individual] and possible litigation. One of the matters that the City Solicitor is seeking advice about is whether prior approval must be sought before the issuing of any payment.

The City goes on to identify examples from the records which, in its view, constitute advice or recommendations. The City then continues its representations as follows:

> The emails indicate that the City Solicitor followed the advice that she was given by other city staff. In addition, the emails between the City Councillor and the City Solicitor contain information that could reveal the advice or recommendation given to her.
>
> The City submits that in the circumstances of this appeal, the contents of the emails should not be disclosed, because such a disclosure would inhibit the city's decision-making and policy-making.
>
> ...
>
> The intention of the section 7(1) exemption is to allow a full and frank exchange. The City submits that its staff felt that their advice or recommendations would be disclosed to members of the public ... staff would be inhibited in providing such advice/recommendation and a full and frank exchange of ideas intended by the exemption would not occur.

I have conducted a detailed review of the records for which section 7(1) is claimed. I find that portions of pages 26, 54, 55, 57-58 and 59-60 reveal a recommended course of action by officers or employees of the City intended to be accepted or rejected by its recipient. I therefore find that this information is exempt under section 7(1) of the *Act*.

In its representations (reproduced above), the City refers to the possibility of accurate inferences being drawn about the advice given. In my view, a distinction must be drawn between advice or recommendations given, and other references to the course of action that is decided upon. Where the latter appears on its own in the records for which section 7(1) is claimed, I find that it neither consists of nor reveals, actual advice. Instead, it reflects a decision about how to proceed, and lacks any component that consists of, or reveals, "advice or recommendations".

The City also refers to protecting the free flow of advice, and although that is a relevant consideration, this exemption can only protect "advice or recommendations". Some of the information for which this exemption is claimed does not set out a "recommended course of action" and for this reason, it is not exempt under section 7(1).

To summarize, I find that certain parts of pages 26, 54, 55, 57-58 and 59-60 reveal recommended courses of action by officers or employees of the City, and these are exempt under section 7(1).

This information is highlighted on copies of these records that I will provide to the City with this order. I find further that pages 27, 53 and 56 in their entirety, and the portions of the other records that I have not highlighted on the copies sent to the City, do not reveal information that is exempt under section 7(1). As no other exemptions are claimed, I will order this information disclosed.

ORDER:

1. I order the City to conduct a further search for: (a) pages 1 and 3 of the record in which page 67 appears as page 2; (b) records relating to, and including, the reports to city council by the Chief Financial Officer and the Treasurer. I further order the City to send to the appellant the results of these further searches, and an access decision for any records located that complies with sections 19, 21, 22 and 23 of the *Act*, treating the date of this order as the date of the request, and without recourse to a time extension.

2. I uphold the City's decision to deny access to the undisclosed parts of pages 10-11, 20-21 and 34-35, and the portions of pages 26, 54, 55, 57-58 and 59-60 that are highlighted on the copies of these pages that I am sending to the City with this order.

3. I order the City to disclose pages 27, 53 and 56 in their entirety, and the portions of pages 26, 54, 55, 57-58 and 59-60 that are *not* highlighted on the copies that are being sent to the City with this order, by sending a copy to the appellant on or before **May 30, 2007**.

Original signed by: April 30, 2007
John Higgins
Senior Adjudicator