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

ORDER MO-2227

Appeal MA-050193-1

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*) for information relating to comments made by the City's Integrity Commissioner in an Interim Report to Toronto City Council dated April 11, 2005. The request is worded in the following manner:

> Please provide copies of all notes and records pertaining to [the *Act*'s] reach including but not exclusive to the "extensive discussions" of [the *Act*'s] potential impact on the functioning of [the incumbent City Integrity Commissioner]'s office and or his contractual relationship.

The City initially denied access in full to the records it identified as responsive. Some of the records were withheld under the exclusion from the scope of the *Act* found at section 52(3) (labour relations and employment-related records). The City cited sections 7 and 12 to deny access to the remaining records in their entirety.

The requester (now the appellant) appealed the City's decision, asserting that access to the records should be granted and, furthermore, that additional records which are responsive to his request should exist.

During mediation, the City decided to disclose some of the responsive records. Also during mediation, the City prepared and provided this office and the appellant with an index of the records remaining at issue. In a revised decision letter, prepared during mediation, the City applied section 52(3)3 of the *Act* to deny access to all of the remaining records, and advised that it would be relying upon the exemptions at sections 7, 12 and 14 "in the alternative."

The City disclosed the following records to the appellant during mediation: records 1, 20, 39-44, 53, 63, 67, 73, 74, 96, 97, 98, 106, 107, 112, 114, 115, 117, 122, 132, 150, 152, 154, 156, 164-169, 194 and 200-227. These records are therefore not at issue.

Also during mediation, the appellant made allegations of conflict of interest and bias against this office. After reviewing the Mediator's Report, and prior to this appeal moving to the adjudication stage of the appeal process, the appellant informed the Mediator that, in addition to his allegations against this office, he wished to add bad faith and abuse of discretion on the part of the City in the application of section 52(3) of the *Act* as issues for adjudication. The appellant also indicated that he intended to raise the application of section 16 (the "public interest override").

No further mediation was possible and this appeal moved to the adjudication stage. I commenced my inquiry by issuing a Notice of Inquiry to the City and the City's Integrity Commissioner, who was identified as an affected party, seeking representations. I received representations from the City in response to the notice. The Integrity Commissioner did not submit representations but he did advise that he adopted the representations of the City in their entirety. I then issued a Notice of Inquiry to the appellant, including a copy of the City's complete representations. The appellant responded with representations. Subsequently, I provided the appellant's representations to the City and the Integrity Commissioner, in full (with

identifying information severed from the copy given to the Integrity Commissioner) and invited them to provide reply representations. The City responded with reply representations.

I decided that the City's reply representations raised issues to which the appellant should have an opportunity to respond by way of sur-reply. I therefore provided a copy of the City's representations, with confidential information severed, and invited the appellant to provide sur-reply representations, which he did. The appellant's sur-reply representations were then provided to the City and the Integrity Commissioner, who were invited to respond. The City indicated that it would not provide further representations.

The Integrity Commissioner stated that he would not provide representations, but did provide information for my consideration in making my determinations in this appeal.

As discussed later in this order, seven of the records at issues in this appeal are also at issue in Order MO-2226, which is being issued concurrently.

RECORDS:

The records remaining at issue, and the City's basis for withholding each of them, are set out in the Index of Records attached to this order as Appendix A. They consist of e-mails, draft reports, draft agreements, memoranda and handwritten notes. Appendix A also identifies the corresponding record numbers in Order MO-2226 for the seven records that are also at issue in that case.

Unless otherwise stated in this order, any reference I make to a record shall be applied equally to its duplicate and near duplicate identified in the Index of Records in Appendix A. With the exception of the duplicates and near duplicates of record 108, I will not refer to the duplicate records in the main body of this order, or in the order provisions.

DISCUSSION:

REASONABLENESS OF SEARCH

Scope of the Request

In his representations, the appellant states that his request was not limited to the establishment of the incumbent Integrity Commissioner's office and that it applied equally to the establishment of the office of the City's "previous" Integrity Commissioner. This relates to the reasonableness of the search that was conducted by the City. Before I can determine whether the search was reasonable, I must address this argument which, in essence, relates to the scope of the appellant's request (the wording of which is set out above but repeated here for ease of reference):

> In his Interim Report to Toronto City Council, dated April 11, 2005, Toronto's Integrity Commissioner wrote the following:

> "During the first few months of my appointment, I was principally preoccupied with the setting up of my office.
>
> That involved extensive discussions about the most appropriate form of contractual relationship between the City and an Integrity Commissioner. A range of legal considerations affected these discussions, not the least of which was the reach of the [*Act*] and its potential impact on the functioning of my office."

Please provide copies of all notes and records pertaining to [the *Act*'s] reach including but not exclusive to the "extensive discussions" of [the *Act*'s] potential impact on the functioning of [the incumbent City Integrity Commissioner]'s office and or his contractual relationship.

In response to the appellant's position, the City submits:

> Not until the receipt of his representations, was the City made aware of the appellant's reason for making the request and his apparent belief that there is some "link" between the City's engagement of [a named individual] and the hiring of [the City's incumbent Integrity Commissioner]. However, even if this information had been available to the City at the time the request was made or when the appeal was filed or during mediation, it would have had no bearing on the City's searches for responsive records for the following reasons.
>
> [The City's incumbent Integrity Commissioner] is the City's first and only Integrity Commissioner. [The named individual] was not, as the appellant states, the City's "previous" integrity commissioner. As the appellant acknowledges in his representations, [the named individual] was engaged as an independent consultant "in a private capacity". He was not engaged as an integrity commissioner to deal with the issues relating to Union Station. The City did not receive input from [the named individual] on the roles and responsibilities of [the City's incumbent Integrity Commissioner].

In responding representations, the appellant states that the City has missed the link between its relationship with the named individual and the establishment of the Integrity Commissioner's function. In this regard, he refers to allegations that the City failed to meet its statutory obligations in relation to the activities of the named individual. These allegations were the subject of a privacy complaint that was dismissed by this office, and a related application for judicial review which was ultimately dismissed (reported at [2006] O.J. No. 4356 (Div. Ct.)). The appellant makes further submissions, addressed below, in relation to the reasonableness of the City's search.

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880]. In my view, the City's interpretation of the appellant's request was appropriate.

The request actually referred to the incumbent Integrity Commissioner by name, and asked for records including but not limited to the *Act*'s potential impact on the functioning of the incumbent Integrity Commissioner's office. As the City points out, the other named individual was *not* employed as Integrity Commissioner and one would therefore not expect the City to infer that records in relation to the "establishment of the office" of the named individual would be contemplated by the requester or "reasonably related" to the request. As well, the appellant's allegation (referred to above) that the City had failed to meet its statutory obligations in relation to the activities of the named individual was the basis of a privacy complaint to this office, which was dismissed. As already noted, this same allegation was also rejected by the Divisional Court in its reasons dismissing the related judicial review application (cited above).

Therefore, I do not accept the argument of the appellant that the request related in any way to the establishment of the office of the individual that he describes as the former Integrity Commissioner. This is distinct from discussions the incumbent Integrity Commissioner may have had with this individual in terms of establishing the incumbent Integrity Commissioner's office, which I will discuss below under the heading, "Did the City conduct a reasonable search for responsive records."

There is one further issue regarding the scope of the request and the responsiveness of records. After this file was moved to the adjudication stage of the appeal process, I wrote to the City requesting a copy of a contract-related record dated February 1, 2005. The City duly provided this record and I have numbered it as record 492 in Appendix "A". I invited the City to make submissions on the responsiveness of this record and the applicability of any exemptions. The City responded by submitting that the record was not responsive as it was dated after the date of the request. However, it did not make any representations on the possible application of exemptions.

I have reviewed the record and find that it is responsive to the request as it falls within the scope of the request and, contrary to the City's submission, it predates the date of the request. Although the City has not claimed any exemptions with respect to this record, I make findings below that this record contains personal information that should not be disclosed because it is subject to a mandatory exemption. However, no mandatory exemption in the *Act* applies to the remaining information in the record. As no other exemption has been claimed for this information, I will order the City to disclose this record to the appellant subject to the severances that should be made to the personal information in this record, as discussed further below.

Did the City conduct a reasonable search for responsive records?

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

The City provided detailed representations explaining the searches it conducted. The City indicates that it initially contacted six different staff members and asked those individuals to conduct a search for the responsive records. These individuals were employed in the following departments:

- the Integrity Commissioner's office
- the City Clerk's office (Corporate Services)
- the Corporate Access and Privacy office
- the City's Legal Department
- the Chief Administrative office (now the City Manager's office).

The City then asked three additional staff members to conduct searches of their files. Two of these staff members were employed in the legal department and the other in the Corporate Access and Privacy department.

The City states that responsive records were found by each of the staff members that were asked to conduct searches of their files. All of these records were reviewed, and duplicates and non-responsive records were identified and removed. The City submits that the searches that were conducted were extensive, were carried out by knowledgeable staff, no records were destroyed and that there are no additional records found.

The appellant submits that the search was not reasonable and notes that the City failed to provide the affidavits that were requested by me in this appeal. The appellant makes the following points concerning the reasonableness of the City's search for responsive records:

- the incumbent Integrity Commissioner's staff report covering the period from September 1, 2004 through December 31, 2005 states that he was "capably advised and assisted by the City Manager's Office" but it is not apparent that any search took place in that office;

- in a staff report covering the period from September 1, 2004 to December 31, 2005 the incumbent Integrity Commissioner states that, in setting up the office both physically and operationally, he benefited from discussions with the Integrity Commissioner for the Province of Ontario and the City's Auditor General;

- Record 20 (already disclosed to the appellant) "refers to a letter from [the incumbent Integrity Commissioner] to [the Mayor] regarding a "*reporting relationship for* [*MFIPPA*] dated on or before November 12, 2004, but that letter does not appear in the index of records";

- correspondence from the City's Chief Administrative Officer suggests that discussions likely took place with Ontario concerning possible exemptions from the *Act*, to be incorporated in the new City of Toronto Act in relation to the Integrity Commissioner, and no records relating to these discussions were reflected in the records identified as responsive;

- the City's decision letter and submissions suggest that these negotiations and the resulting statute "just happened spontaneously".

The appellant also noted that the City did not provide the requested affidavit outlining its searches, though I would observe that the City *did* provide representations on this issue which explained the nature of the searches it conducted.

Although invited to respond to the points raised by the appellant, summarized in bullet points above, the City did not do so. In my view, the City's earlier representations (referred to above) provide a sound basis for concluding that a search *was* conducted of the City Manager's office, and I do not accept the appellant's submission (summarized in the first bullet point, above) in that regard.

I also note that record 20, quoted by the appellant as a basis for concluding that additional records must exist (see the third bullet point, above), refers to both a supplementary memorandum and a letter. The supplementary memorandum is identified as record 21 on the index of records, but the letter referred to in record 20 does not appear on the index of records prepared by the City. Based on the contents of record 21, the letter appears to have been dated November 3, 2004 and although referenced in record 21 it has not been identified in the index of records as a responsive record. In my view, there is sufficient evidence to support the likely existence of this letter, which appears to be a responsive record, and I will therefore order that a further search be conducted for it.

In all of the circumstances, I have decided to order further searches for:

1) notes and other records relating to discussions between the incumbent Integrity Commissioner and (a) the Integrity Commissioner for the Province of Ontario; and (b)

the City's Auditor General; which were alluded to in the staff report mentioned by the appellant in his submissions (see second bullet point above);

2) records relating to discussions with Ontario of possible references to the Integrity Commissioner in the new City of Toronto Act (which was enacted as the *City of Toronto Act, 2006* and which does, in fact, contain references to the Integrity Commissioner); and

3) the letter referred to in Record 20.

In all other respects, I find that the City's search for responsive records was reasonable.

CONFLICT OF INTEREST/BIAS

The appellant alleges that the Information and Privacy Commissioner/Ontario is in a conflict of interest or is operating from a position of bias in adjudicating this appeal.

Conflict of interest arises when a decision-maker's private or personal interests take precedence over or compete with the decision-maker's adjudicative responsibilities. Conflict of interest may be real, perceived or potential.

Bias is a lack of neutrality or impartiality on the part of a decision-maker regarding an issue to be decided. A decision-maker must not be biased as "no one shall be a judge in his own cause." In other words, an individual with a personal interest in the disclosure or non-disclosure of a record must not be the decision-maker who makes the determination with respect to disclosure. A breach of this fundamental rule of fairness will cause a statutory delegate to lose jurisdiction. [Order M-1091]. Accordingly, there is a right to an unbiased adjudication in administrative decision-making.

It is not necessary to prove an "actual bias". The test most commonly applied by the courts is whether there exists a "reasonable apprehension of bias". The test for a reasonable apprehension of bias enunciated by the Supreme Court of Canada 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?" [Order MO-1519]

A recent statement of the law by the Supreme Court of Canada concerning allegations of bias against an adjudicator is found in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. In that decision, the court stated:

> In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpre J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:

> …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. In the words of the Court of Appeal, 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.
>
> …
>
> *The grounds for this apprehension must, however, be substantial*, and I … refuse to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

In Order MO-1519, Adjudicator Laurel Cropley quoted and adopted the following comment of author Sara Blake in *Administrative Law in Canada* (3rd. ed.), (Butterworth's, 2001), at page 106:

> 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 …

The City's representations on this issue state that it is more likely than not that the Commissioner or her delegate would decide this matter fairly but added that it was not in a position to provide answers to the specific questions regarding bias in the Notice of Inquiry.

The appellant did make representations on this issue. The appellant argues generally that this office has made decisions in the past that had the effect of shielding other parties, including the City, from accountability under the *Act*. In support of this the appellant gives a number of examples of what he feels are inconsistent findings of this office. He also relies on a number of concerns that he has with the processing of a previous appeal and privacy complaint that he filed. In addition, he refers to concerns about the processing by this office of another privacy complaint that was filed by another named individual. The appellant suggests that this office made legal and other errors in the processing of his complaints and that of the other named individual. He also criticizes submissions he alleges to have been made by this office in the judicial review applications that followed the decisions of this office in his previous appeal and privacy complaint, and the privacy complaint of the other individual. As well, the appellant states that further details of his apprehension of bias can be found in factums, records of proceedings and oral arguments in his judicial review applications (Court File Nos. 494/04 and 24/05) and that of the other named individual (Court File No. 485/04). Although the City was given an opportunity to respond to these allegations and arguments, it declined to do so.

The appellant's concerns regarding the processing of his previous access request and privacy complaint, and the privacy complaint of the other individual, were all before the Divisional Court in the judicial review applications referred to by the appellant in his submissions. As well, the submissions made on behalf of this office that he refers to were made to the Divisional Court in the course of those hearings.

As previously stated, two of these judicial review applications were brought by the appellant. The first of these related to a decision of this office not to investigate a privacy complaint filed by the appellant (Court File No. 494/04). The other related to Order MO-1892 which upheld a decision of the City to deny the appellant access to records that were in the custody and control of another individual (Court File No. 24/05). In this second application, the appellant sought an order quashing Order MO-1892 and a review of the conduct of the appeal by this office. The third application was an application for judicial review of the decision by this office not to investigate the privacy complaint of another named individual (Court File No. 485/04).

Judgment was issued in these three judicial review applications on October 30, 2006 after five days of argument from the appellant, the other named individual, the City and this office. In separate reasons written by Justice Lane, the Divisional Court dismissed the judicial review applications in all three cases. The Court found no error in the processes that were followed by this office in the processing of the privacy complaints of the appellant and the named individual and specifically stated that the process was fair. The court also found that there were no errors made in Order MO-1892.

In particular, the allegation of reasonable apprehension of bias was dealt with by the Divisional Court in Court File No. 485/04. In that case, Justice Lane considered the allegation by the other named individual that there was a reasonable apprehension of bias on the part of this office in the privacy complaint of the other named individual. Justice Lane stated:

> There is simply no evidence to give any substance to the allegation of reasonable apprehension of bias. An informed person, viewing the matter realistically and practically, and having thought the matter through, could not conclude that the applicant's allegations made it likely that … the Commissioner would not decide matters relating to her fairly.

As noted above, in the appellant's own judicial review application concerning his privacy complaint (Court File No. 494/04), he also argued that the process followed by this office relating to his privacy complaint was unfair and that there was a reasonable apprehension of bias on the part of this office. The decision in this file was also issued by Justice Lane, who stated:

> In the companion case of [the named individual], heard by us at the same time, the same submissions were made and both [the appellant] and [the named individual] addressed the issues in their respective cases before us. The decision in [the named individual's case] is being released concurrently with this decision

> and for the reasons in that case, we hold in this case that there is no duty on the part of the Commissioner to hear complaints and decide them.
>
> …
>
> *But, as in [the named individual's] case, the decision was made after hearing the applicant's submissions in full and the existence of the screening process was made known in advance and was conducted fairly. That [the appellant] does not agree with the result or with the reasoning does not make the process unfair.* [Emphasis added.]

Justice Lane did not expressly comment on the appellant's allegations of bias in his written decision in Court File No. 24/05 (the judicial review of Order MO-1892), although the appellant did present arguments on the issue in his factum. As noted above, this application for judicial review was also dismissed by the Divisional Court.

The dismissal of these applications and the Court's express and/or implicit rejection of the bias allegations put to it in written and oral argument are highly significant, as is the fact that the Court made no comment on the submissions or other conduct of this office in the hearing of the judicial review applications.

Applying the test enunciated in *Wewaykum* to the circumstances of this appeal, and giving serious consideration to the allegations that have been made by the appellant, I find that a reasonable person with knowledge of all of the facts would not conclude that I, or this office, would not decide the issues in this appeal fairly. Nor, in my view, is there any reasonable basis to conclude that I, or this office, have any conflict of interest in deciding the issues in this appeal.

In arriving at this conclusion, I have taken into account the fact that the allegations that are before me now were, for the most part, also before the Divisional Court in the three judicial review applications. In my view, the findings of the Divisional Court that the processes employed by this office were fair, and that the allegation of bias was not established by either the appellant or the other named individual, are persuasive, and to the extent that they deal with precisely the same allegations as those made by the appellant in this case, they are determinative. As well, from a purely factual perspective, I find that the appellant's allegations concerning conflict of interest and bias are entirely without foundation.

Accordingly, I am not satisfied that there is a conflict of interest or reasonable apprehension of bias concerning the adjudication of this appeal by me, or by this office generally.

ABUSE OF DISCRETION/BAD FAITH

I have the authority to review the City's exercise of discretion as it relates to the application of the discretionary exemptions found in sections 7 and 12 of the *Act*, and will do so after I have considered whether those exemptions apply. Here I will consider the argument of the appellant

that the City has abused its discretion and/or acted in bad faith by relying upon section 52(3)3 to exclude records from the scope of the *Act*.

In its representations, the City states that it did not exercise any reviewable discretion in its application of section 52(3)3 to the records in this appeal and that it did not respond to the appellant in bad faith. It also states that it reviewed the records at the time it issued its original decision letter and that during the mediation stage of the appeal process it agreed to review the records again. As a result of the City's second review of the records, an additional 65 records were released to the appellant.

With respect to the appellant's argument about abuse of discretion in the context of section 52(3)3, I note that this section has the effect of *excluding* the records from the scope of the *Act*. It is not a discretionary provision and I therefore agree with the argument of the City that its decision to rely on it is not an exercise of reviewable discretion and not similar to a decision to apply a discretionary exemption in the *Act*. However, because it is contrary to the public interest for public bodies to act in bad faith, I will address the appellant's arguments in that regard.

The common law concept of bad faith and its application in the context of a review of the activities of a municipal government was considered in *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304. The issue before the court in that case was the liability of a municipality for damages that were alleged by the appellant to have been a result of the passage of zoning by-laws. Justice Deschamps wrote the decision for the majority in that case. Justice Deschamps stated:

> [The concept of bad faith] is not unique to public law. In fact, it applies to a wide range of fields of law. The concept of bad faith is flexible, and its content will vary from one area of law to another. As LeBel J. noted in *Finney v. Barreau du Québec*, [2004] 2 S. C. R. 17, 2004 SCC 36, the content of the concept may go beyond intentional fault (at Para. 39):
>
> > Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Québec that was examined in *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised…
>
> Based on this interpretation, *the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical*

> *concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith.* What appears to be an extension of bad faith is, in a way, no more that the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it. (emphasis added)

The appellant states that his request was for access to records that relate to the impact of the *Act* on the office of the Integrity Commissioner and that these responsive records are not in relation to employment or labour relations matters. He argues that the City has used the *Act* to frustrate the public's right to know and that they have knowingly and falsely claimed the application of section 52(3)3.

The City responded to these arguments in the following manner:

> The City's relationship with the Integrity Commissioner (IC), like all employer/ employee relationships, exists within a legal context, i.e., it is subject to the terms and conditions of the contract of employment. The records do not specifically set out a "legal framework" for the IC's office although they are correspondence, memos and notes that speak to the IC's employment relationship with the City and the clarification of certain rights and obligations in respect of the IC's role and responsibilities.

The appellant replies, in part, as follows:

> The creation and development of a statutory office and considerations of MFIPPA's application to Toronto's activities are not "about labour relations or employment-related matters; any connection they might have to workforce-related issues is merely incidental. It is patently unreasonable that section 52 could apply to the whole of records responsive to the request. Furthermore, I see no evidence that Toronto has demonstrated any "interest" under section 52(3)3. Nor do I see any evidence from Toronto's submissions that Section 52(4)3 was considered.

At the heart of the appellant's argument on this issue is the belief that section 52(3)3 does not apply to the responsive records. Accordingly, my finding (set out below) that section 52(3)3 applies to some of the records is highly significant in addressing the appellant's bad faith argument. In my view, this finding demonstrates that the City did not act in bad faith because its decision to rely section 52(3)3 is, in some cases at least, sustainable in the eyes of the law. As I noted in Order MO-2049-F:

> The whole point of the appeal process conducted by the Commissioner and her staff is to provide an independent review of institutions' decision-making under the *Act*, as reflected in section 1(a)(iii). It is self-evident that one of the basic legislative reasons for setting out the appeal process (at sections 39 through 44 of

> the *Act*) is that institutions may at times claim exemptions that are not available. *Errors in decision-making are not, in and of themselves, indicative of bad faith or abuse of discretion.* [Emphasis added.]

Having carefully reviewed the representations of the appellant, the City and the responsive records, I am not satisfied that the City acted in bad faith when it relied on section 52(3)3 to exclude the responsive records from the scope of the *Act*. That is not to say that I am entirely in agreement with the position taken by the City. As noted earlier, the analysis below concludes that section 52(3)3 applies to some of the responsive records, but not to others. I also note that the City reviewed its original decision to rely on this provision, and disclosed a number of records for which it was originally claimed, which seriously undermines any possible argument that it acted in bad faith in this regard.

In the circumstances of this appeal, the evidence does not support a finding that the City acted deliberately with intent to harm, or recklessly, in deciding to rely on this provision. Nor was this decision "so markedly inconsistent with the relevant legislative context that [I] cannot reasonably conclude that they were performed in good faith" (*Entreprises Sibeca Inc.* (cited above)).

Accordingly, I do not accept the appellant's argument that the City acted in bad faith.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

As previously noted, the City has claimed the application of section 52(3)3 to all of the responsive records in this appeal. Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* , [2003] O.J. No. 4123 (C.A.)]

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2000), 55 O.R. (3d) 355 (C.A.), at para. 35].

If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

In my view, with one exception, none of the exceptions in section 52(4) describe any of the records at issue in this appeal. Although some of the records are draft contracts between the City and the Integrity Commissioner, they are not a final contract, but were the subject of discussion and debate as part of the process of arriving at a final contract, and it would not be accurate to describe any of them as "an agreement between an institution and one or more employees …", which in my view would apply to a final contract.

The exception is record 492, a letter altering the terms of the Integrity Commissioner's employment contract that clearly constitutes an agreement resulting from negotiation. In my view, section 52(4)3 applies to this record and it is therefore not excluded from the scope of the *Act* under section 52(3)3.

For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The City makes the following submissions:

> Requirements 1 and 2:
>
> The City collected, prepared, maintained or used the records at issue in relation to meetings, briefings, consultations, discussions or communications concerning the employment of the Integrity Commissioner.
>
> Therefore, requirements 1 and 2 have been met.
>
> Requirement 3:
>
> More specifically these meetings, briefings, consultations, discussions and communications are about contractual options for the Integrity Commissioner's employment, specific terms and conditions, protocols and procedures for his work, the specific impacts of the *Act* on his role and functions, the appropriateness of a designation as the officer responsible for the *Act*, etc.
>
> The City submits that clearly these matters are employment-related.
>
> The City further submits that it has certain legal obligations/requirements as an employer with respect to its employees. Therefore, the City has an interest in all of these employment-related matters which is not "mere curiosity" or "concern".
>
> Therefore, requirement 3 has been met.
>
> The City has considered the circumstances in section 52(4) and submits that none exists in this appeal. In summary, it is the City's view that section 52(3)3 applies and the records at issue fall outside the scope of the *Act*.

The City concludes its submissions by stating that these matters are employment related and that its interest is more than a mere "curiosity" or "concern".

The representations of the appellant regarding this issue are closely linked with his representations regarding allegations of abuse of discretion by the City. As noted above, the appellant submits that section 52 does not apply to the records at issue and that it is an abuse of discretion to rely upon section 52 when the appellant did not request any employment or labour related records. The appellant states:

> It is a disgrace to accountable government that the City of Toronto has used the Act to frustrate the public's right to know for almost a year. They have knowingly and falsely claimed that records outlining the authorities, duties and limitations on the functioning of the office of Toronto's Integrity Commissioner constitute human resources, staff relation or collective bargaining records.

Analysis and Findings

I have reviewed the records at issue in this appeal and the representations of the parties. For the reasons that follow, I have found that section 52(3)3 of the *Act* applies to some of the records at issue in this appeal but it does not apply to all of them.

At the outset of this discussion, it is important to note that the application of section 52(3)3 to seven of the records in this appeal were also under consideration in Order MO-2226. I found that the section did not apply, and for reasons explained below, I make the same finding here.

Requirements 1 and 2

Based on my review of the records and the representations provided to me by the parties, I am satisfied that all of the records at issue in this appeal were collected, prepared, maintained or used by the City, meeting requirement 1. It is also abundantly clear that this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions and/or or communications, meeting requirement 2.

Requirement 3

In Order MO-2226, I found that the records at issue there, which as noted are also at issue in this appeal, did not fall within the ambit of section 52(3)3 because they relate to meetings, consultations, discussions or communications about organizational matters rather than employment-related ones. I stated:

> I agree with the approach taken in Order MO-1711 [which reviews this office's approach to the difference between organizational and employment-related matters] and the other orders it cites. … [A]bsent a labour relations component, or one relating specifically to the terms upon which an individual may be employed, the assignment of roles to a particular City official is organizational, and not employment-related within the meaning of section 52(3)3. If a broad interpretation of this term is applied, virtually all records within the custody or control of an institution could be considered employment-related.

In Order MO-2226, I concluded that the meetings, consultations, discussions and/or communications reflected in all seven records at issue were about organizational matters, rather than employment-related ones, and do not relate to the terms of employment of the Integrity Commissioner. I had also found that the meetings, consultations, discussions and/or communications in question were not about labour relations. In short, I found that requirement 3 was not satisfied.

I have reached the same conclusion concerning these seven records in this appeal and expressly adopt my reasons for this conclusion set out in Order MO-2226.

However, and by contrast, some of the additional records at issue in the present appeal were clearly prepared, used and/or maintained in relation to meetings, consultations, discussions and/or communications about the terms of employment of the Integrity Commissioner, which is clearly an employment-related matter. In particular, meetings, briefings, consultations, discussions and communications about contractual options for the Integrity Commissioner's employment, dealing with specific terms and conditions, protocols and procedures for his work, are "about an employment-related matter", *i.e.*, the terms of employment of the Integrity Commissioner.

Some of the records contemplate the possibility that the Integrity Commissioner would be an independent contractor rather than an employee, but this course was not followed. One might argue that records used, prepared, etc. in communications or meetings in which the discussion focused on making the Integrity Commissioner an independent contractor, would not be about an "employment-related matter" and therefore requirement 3 would not be met for those records. For the reasons that follow, I have concluded that this approach is not viable.

In my view, the fact that the Integrity Commissioner is a City employee is determinative, and it would not be defensible to find that discussions or communications leading to that eventual outcome are anything other than "employment-related." In reaching this conclusion, I note that the Ontario courts have overturned interpretations of this provision that apply technical meanings to the legislative text in favour of non-technical readings. For example, in *Ontario (Minister of Health and Long-Term Care v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123, the Court of Appeal found that records about negotiations between the Ontario government and physicians of Ontario were "about labour relations" within the meaning of this section even though physicians, whose compensation was being negotiated, are not government employees. And in *Ontario (Solicitor General)*, (cited above), the Court of Appeal rejected a time-limited interpretation of the equivalent provision found at section 65(6)3 of the provincial *Freedom of Information and Protection of Privacy Act*.

Turning to the question of whether the terms of employment of the Integrity Commissioner are an employment-related matter in which the City "has an interest", I note that in *Solicitor General*, the Court of Appeal stated as follows (at para. 35):

> Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records *to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters*". [Emphasis added.]

As noted earlier, the Court also took the view that an "interest" must "… refer to more than mere curiosity or concern" (at para. 34 of the judgment). Given that the City was preparing to enter into a contract with the Integrity Commissioner to govern the employment relationship, and given that the signed agreement would be enforceable against the City, and relates to a member

of its "own workforce", I am satisfied that the City's stake was more than "mere curiosity or concern" and that, in fact, this is an employment-related matter in which the City "has an interest".

Accordingly, I find that records reflecting meetings, consultations, discussions and/or communications about the terms of employment of the Integrity Commissioner meet requirement 3. Having met all three requirements under this provision, these records are excluded from the scope of the *Act* by section 52(3)3. These records include draft contracts as well as other communications and notes concerning the proposed terms. This finding applies to records 70-72, 76, 77-95, 128, 133-134, 235-251, 252-270, 291-292, 315-320, 321-322, 324-325**,** 344-348**,** 349-382, 383-386**,** 387-404, 405-406, 407-444, 445-446, 447-480, 481-482 and 484-488.

The remaining records deal with organizational issues, like the seven records that are also at issue in Order MO-2226, and for the reasons explained above, and in Order MO-2226, I find that the meetings, consultations, discussions and/or communications they relate to are not about a labour relations or employment-related matter. Accordingly, they do not meet requirement 3 and are not excluded from the scope of the *Act* under section 52(3)3.

Based on this finding, and the application of section 52(4) to record 492, the following records are *not* excluded from the scope of the *Act* by section 52(3)3: records 2-7, 8-14, 15-19, 21, 22-26, 27-29, 30-31, 32-33, 34-38, 45-46, 47-49, 52, 75, 99-100, 103-105, 108, 118, 119, 120-121, 123-127, 129-131, 135-136, 137-149, 158-159, 160-161, 170, 171-176, 177-181, 182-183, 184-186, 188-189, 193, 195, 197-199, 228-234, 271, 272-290, 323, 483, 489-491 and 492.

I will now consider whether the records which are not excluded under section 52(3)3 are exempt under any of the provisions the City has claimed in the alternative. As a prelude to this discussion, I note that the records at issue in Order MO-2226, which I ordered disclosed in that appeal because section 52(3) did not apply and no exemptions were claimed in that case: 2-7, 15-19, 21, 22-26, 27-29, 52, 99-100. In this appeal, the City has claimed exemptions for these records, as discussed below. I will return to the discrepancy in the claimed exemptions in the discussion of "Exercise of Discretion" below.

EXEMPTIONS

The City has applied three exemptions to records or portions of records "in the alternative" to the application of section 52(3)3: the mandatory exemption found at section 14(1) (personal privacy) and the discretionary exemptions at sections 7 (advice or recommendations) and 12 (solicitor-client privilege).

PERSONAL INFORMATION

The City has claimed the application of section 14(1) of the *Act* to portions of records 52, 70 -72, and 76. Of these, I have found that record 52 is not excluded by the application of section

52(3)3. I found records 70-72 and 76 *are* excluded by section 52(3)3 and will therefore not consider them further.

In order to determine whether section 14(1) applies to the portions of record 52 for which it is claimed, I must first consider whether those portions consist of "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,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (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].

The City makes the following representations on this issue:

> The information contained in the record includes: the name of an individual and the substance of a privacy complaint that they filed with the IC; the name of an employee and the reasons for their absence; the financial information of the IC..."
>
> The City submits that this information meets the requirements of the above–noted paragraphs of the definition of "personal information" in section 2(1) of the *Act*. The City further submits that it is the personal information of individuals other than the appellant.

The appellant provided no representations of the issue of whether the information in the records identified by the City is personal information.

I have reviewed record 52 and find that it contains, in part, personal information of someone other than the appellant. The information is an individual's name that appears with other personal information relating to that individual and disclosure of that information would reveal other personal information about the individual (paragraph (h)). Accordingly, I find that portions of record 52 contain personal information as that term is defined in the *Act*, and that it is the personal information of individuals other than the appellant.

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. Section 14(1)(f) provides that personal information is not exempt from disclosure if disclosure would not be an unjustified invasion of privacy.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. If no section 14(3) presumption applies, section 14(2) lists various factors that may be

relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The appellant states that he has no interest in any personal information unless it "sheds light on MFIPPA concerns" although he does ask for an independent review of the City's application of section 14 by this office.

I have carefully reviewed record 52 and the representations of the parties. I find that the personal information that has been identified by me in this record does not shed any light on issues that relate to the *Act* and its application to the office of the Integrity Commissioner and, in view of the comments made by the appellant in his representations, this information therefore falls outside the scope of this appeal.

Although the City states that record 52 contains the personal information of another individual, it made no representations on the application of section 14(1) to that information. There is a personal comment at the top of this record that is not responsive to the request and it should be severed from the record. As well, this information clearly does not shed any light on the *Act* and the office of the Integrity Commissioner, information the appellant says he does not want.

For the sake of completeness, I also note that for the reasons that follow, disclosure of the remaining personal information in record 52 would constitute an unjustified invasion of privacy and that none of the exceptions to the exemption in section 14(1) of the *Act* apply to this information.

I find that none of the presumptions in section 14(3) applies to the remaining personal information in record 52, which relates to a complaint made to the Integrity Commissioner. However, in order to apply the section 14(1)(f) exception to the mandatory section 14(1) exemption, I must be satisfied that disclosure would *not* constitute an unjustified invasion of personal privacy. Having reviewed the representations of the parties and the record itself, I am not satisfied that any factor or circumstance favouring disclosure under section 14(2) is established. As well, section 14(4), which identifies circumstances where disclosure would not be an unjustified invasion of personal privacy, does not apply. In the absence of any basis for finding that disclosure is not an unjustified invasion of personal privacy, the exception at section 14(1)(f) is not established and I find this information exempt under section 14(1).

In summary, I find that part of record 52 is non-responsive, and other parts of this record are exempt from disclosure under section 14(1) of the *Act*. The parts of these records that should be withheld are highlighted in a copy of the records enclosed with this order. The City has also claimed the application of the discretionary exemption in section 7 of the *Act* to record 52. It is therefore necessary for me to consider the application of that section to the information that remains at issue in this record.

SOLICITOR-CLIENT PRIVILEGE

The City has claimed the application of section 12 of the *Act* to the following records 34-38, 75, 77-95, 99-100, 103-105, 118, 119, 120-121, 123-127, 128, 129-131, 133-134, 135-136, 137-149, 158-159, 160-161, 170, 171-176, 177-181, 182-183, 184-186, 188-189, 193, 195, 197-199, 228-234, 235-251, 252-270, 271, 272-290, 291-292, 315-320, 321-322, 323, 324-325, 344-348, 349-382, 383-386, 387-404, 405-406, 407-444, 445-446, 447-480, 481-482, 483, 484-488 and 489-491. I have found that records 77-95, 128, 133-134, 235-251, 252-270, 291-292, 315-320, 321-322, 324-325, 344-348, 349-382, 383-386, 387-404, 405-406, 407-444 , 445-446, 447-480, 481-482 and 484-488 are excluded from the *Act* under section 52(3)3 and therefore I will not be considering the application of this exemption to those records or portions of records.

Accordingly, I will consider the City's claim to the application of section 12 to the following records: 34-38, 75, 99-100, 103-105, 108 and its duplicates and near duplicates (as explained below), 118, 119, 120-121, 123-127, 129-131, 135-136, 137-149, 158-159, 160-161, 170, 171-176, 177-181, 182-183, 184-186, 188-189, 193, 195, 197-199, 228-234, 271, 272-290, 323, 483 and 489-491.

Section 12 states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel 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

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)]. In this appeal, only solicitor-client communication privilege could apply.

Common law 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.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. This branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies. In this appeal, the City refers only to branch 2 "statutory solicitor-client communication privilege", which applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Application to the Records

Although the City's representations indicate that it relies on branch 2 "statutory solicitor-client communication privilege", its representations actually address the application of common law privilege, which is encompassed within branch 1, as noted above. The City submits:

> Records 75, 118, 120-127, 135-136, 171 to 176, 177 to 181, 182 to 183, 228 to [2]34, 271 (duplicate 313), 272-91, 314, 321-324, 344-48, 383 to 386, 405, [4]45-[4]46, 481 to 88 are all e-mails to/from and between the City Solicitor and/or other legal staff members and/or program areas with respect to matters relating to the work of the IC. These records contain confidential legal advice relating to work of the IC, including whether or not his records, protocols for his work,

> advice on his web-site, summaries of discussions contain specific legal advice about his employment contract, etc.
>
> Records 170, 184-189, 197-99, 489-91 are all handwritten legal notes created by the City solicitors that summarize the substance of meetings and the legal advice provided at those meetings.
>
> …
>
> The City submits that all of the records at issue contain or would reveal the substance of legal advice that was provide by legal staff in confidence to either the IC or the program areas or they are records that are in solicitors' files that are directly related to the seeking, formulating or giving of legal advice relating to the IC's employment with the City.

The appellant filed representations in response to those of the City on this issue. He submitted that the City's representations disclose no reason for applying the discretionary exemption. In particular he stated:

> I see no useful purpose to concealing procedural choices or protocols made by legalists when the whole thrust of the exercise is to improve accountability. Who is the client if not the public?
>
> Toronto's statement that disclosure "*could significantly hamper the City's ability to determine in confidence the roles and responsibilities of its employees including those in unique and high profile positions*" is fatuous. In this statement, Toronto proposes to improve public accountability and political debate by means of concealing information and accountability from the public regarding the establishment of the Integrity Commissioner. The public consideration of "*roles and responsibilities*" is what democratic debate and discourse is all about! The Act's purpose of institutional accountability to the public through access to records is negated by this abuse of discretion.

The City was given an opportunity to respond to the representations of the appellant and it declined.

Based on my review of the representations of the parties, and my independent review of the records, I have concluded for the reasons set out below that some of the records are subject to solicitor-client communication privilege at common law and are exempt under branch 1 of section 12.

Records 34-38, 75, 118, 120-121, 123-127 (and an attachment to 123-127 which is record 129-131), 135-136, 160-161, 171-176, 177-181, 182-183, 193, 195, 228-234, 271, 272-290, 323 and 483 are all e-mails exchanged either between counsel or between counsel and other staff at the

City. They are part of a continuum of communications between various counsel and their clients on the legal issues surrounding the establishment of the office of the Integrity Commissioner for the City. I find that these communications were intended to be confidential and were conducted for the purpose of obtaining legal advice regarding the Integrity Commissioner's functions and responsibilities. I find that these records are confidential solicitor-client communications directly related to the seeking or giving of legal advice and therefore subject to common law solicitor-client communication privilege. They are therefore exempt under branch 1.

Records 99-100, 103-105, 119, 137-149, 158-159, 170, 184-186, 188-189, 197-199 and 489-491 are handwritten or typewritten notes prepared by counsel in attendance at meetings with other City staff, or handwritten notes prepared by other staff members who were present at the same meetings. I have carefully reviewed these handwritten notes and I find, with the exception of record 99-100 discussed below, that they record discussions of legal issues in which legal advice was given. In that regard, they are part of the "framework" of the solicitor-client relationship referred to in *Descôteaux* (cited above), where the Supreme Court of Canada stated:

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, *all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship*, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established. [Emphasis added.]

In addition, notes prepared by legal counsel represent part of the solicitor's "working papers" that are directly related to seeking, formulating or giving legal advice and are also exempt on that basis [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

I therefore find, with the exception of record 99-100, that the records consisting of handwritten or typewritten notes prepared by counsel in attendance at meetings with other City staff, or prepared by other staff members who were present at the same meetings, and listed above, are subject to common law solicitor-client privilege and they are therefore exempt under branch 1 of section 19.

I have reached a different conclusion regarding record 99-100, which consists of handwritten meeting notes. The City's representations do not specifically address this record, and based on its contents, I am not satisfied that it reveals legal advice. It is not clear who made the notes, and the evidence is insufficient to qualify it as a lawyer's "working paper", or to bring it within the "framework" of the solicitor-client relationship. I therefore find that the notes described as record 99-100 are not exempt under branch 1. As well, it is not clear that they were prepared "by or for" counsel for the City, and therefore branch 2 also does not apply. I should note that the

City's representations relating to the application of section 7 do deal with this record. I will consider the claim to section 7 as it relates to this record below. In these circumstances, I find that this record does not qualify for exemption under section 12.

There are several additional records for which section 12 is claimed. All of these records are copies of an agenda that appears to have been prepared in relation to a meeting between City staff, the Integrity Commissioner and legal counsel. Although the City did not claim the application of section 12 to record 108, 113 and 116, it did make that claim with respect to its duplicates and near duplicates 187 and 196. I will therefore consider the application of section 12 to records 108, 113, 116, 187 and 196, all of which are versions of this agenda.

The records that I have identified as near duplicates vary from record 108 in two respects. Record 108 contains some handwritten notes that do not appear on some of the duplicates. I find that the handwritten notes are not subject to section 12 of the *Act*. Record 113 is a near duplicate of record 108. It contains two bulleted points in paragraph three of the agenda while record 108 only contains one. I find that the information in the second bullet is not exempt under section 12 of the *Act*. I find that the disclosure of the first bullet under paragraph 3 which appears in record 108 and in all of the duplicates would reveal the substance of the legal advice that was given by the legal counsel at that meeting. Accordingly, this portion of record 108 and its duplicates is subject to solicitor-client communication privilege and exempt under section 12. The remaining portions of these records do not qualify for solicitor-client communication privilege and they are therefore not exempt under branch 1. As well, I have not been provided with specific evidence that they were prepared by or for counsel for the City. Based on the information provided to me, including the contents of these records, I find that they are not exempt under branch 2. As the City also claims that the remainder of these records is exempt under section 7, I will consider whether that section applies later in this order.

In summary, I find that the following records, listed in numeric order, qualify for exemption under section 12 of the *Act*: 34-38, 75, 103-105, part of 108 (and part of its duplicates and near duplicates), 118, 119, 120-121, 123-127, 129-131, 135-136, 137-149, 158-159, 160-161, 170, 171-176, 177-181, 182-183, 184-186, 188-189, 193, 195, 197-199, 228-234, 271, 272-290, 323, 483 and 489-491.

ADVICE TO GOVERNMENT

The City claims, in the alternative, that section 7(1) of the *Act* applies to the following records at issue in this appeal: 2-7, 8-14, 15-19, 21, 22-26, 27-29, 30-31, 32-33, 34-38, 45-46, 47-49, 52, 103-105, 108 in part, 129-131, 171-176, 177-181, 182-183, 184-186, 188-189, 193 and 195, as well as their duplicates. I have already found that records 34-38, 103-105, 108 in part (and its duplicates and near duplicates, in part), 129-131, 171-176, 177-181, 182-183, 184-186, 188-189, 193 and 195 qualify for exemption under section 12 of the *Act*. It is therefore not necessary for me to make any determination on the exemption of these records (or the parts previously found exempt) under section 7 of the *Act*.

I am therefore considering the City's claim that the following records qualify for exemption under section 7 of the *Act*: records 2-7, 8-14, 15-19, 21, 22-26, 27-29, 30-31, 32-33, 45-46, 47-49, 52, 99-100 and parts of record 108 (and parts of its duplicates and near duplicates).

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.

Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7.

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 or recommendations may be revealed in two ways:

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

[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]

"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 applied for S.C.C. 31226; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal applied for S.C.C. 31224].

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, 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]

The City submits that all the records for which it has claimed the application of section 7 contain suggested courses of action that were intended to be ultimately accepted or rejected by the recipient of the advice or recommendations. The City states:

> Records 2-7; 8-14; 15-19; 21 and its duplicate 54; 22-29 and their duplicates 55-59 relate to the seeking of advice by the Mayor and the provision of advice by the IC relating to his designation and whether his roles and responsibilities should encompass [other areas].
>
> Some of the records, such as Records 2 to 7, contain both the options and the specific recommended courses of action.… Other records do not include the advice or recommendation but nevertheless the information they contained would reveal the specific advice or recommendation that was ultimately provided by the IC and accepted by the Mayor.
>
> Records 30-31 and their duplicates 45-46 (with the additional handwritten advice from the City Clerk); 32-33 and their duplicates 50-51 and 68-69; 47-49; 60-62; 99-105, 108 in part and its near duplicates 113 and 116 (without handwritten notes), all deal with the IC's request for advice on how to handle certain aspects of his work.… These records also contain the advice or recommendation provided to the IC by staff or would reveal such advice, for example, Record 47, the IC outlines the advice provided by Council and Support Services with respect to his function of providing advice:…or advice provided by the IC to staff.… Much of the advice is to be found in the protocols and notes that are subsequently created after the discussions/meetings that the IC had with staff.
>
> …

> Past orders of the IPC have acknowledged that disclosure to an appellant is "disclosure to the world". If relevant City staff are unable to determine in confidence, the appropriateness of the work of [an]employee, particularly one in a high profile and significant position and to provide advice/recommendation on how best to proceed in setting out the terms and conditions of employment etc., this will inhibit frank discussions on these matters and will be detrimental to the City's ability to administer and manage its work force. Further, even though some of the advice noted above was not specifically legal advice provided by City solicitors, some of the advice or recommendations, nevertheless, can be linked broadly to legal advice that was given.

The appellant made representations in support of his position that section 7 of the *Act* does not apply to the responsive records. The appellant submits:

> Determining legal capacities and boundaries is not an exercise in policy making or political choice. Municipalities do not have authority to choose if MFIPPA applies or not to the current functioning of the Integrity Commissioner's office. The individuals named in the Index of Records are not policy makers nor are they providing advice or recommendations to policy makers or heads.
>
> Comments about the merits of a proposed project and the alternatives available should the government decide to support the proposal constitute opinion or factual material and do not suggest a recommended course of action.
>
> In Ontario (Ministry of Northern Development and Mines) v. Mitchinson, the Commissioner also referred to the policy rationale in the Williams Commission Report for including the exemption and the fact that the exemption was not designed to protect analytical discussion of factual material or the assessment of various options relating to a specific factual situation.
>
> It is therefore my view that Section 7 exemptions likely do not apply to all of the responsive records so exempted.
>
> While it is difficult to make section 7 arguments without seeing the records themselves, the descriptions do suggest some possibilities:
>
> In Record 21-29, a record of a public servant who seeks information is not exempt. (Order P-233)
>
> In Record 2-7, the recipient of record 2-7 stated in record 1 that "this memorandum responds thoroughly to my concerns." A record disclosing "concerns" of a civil servant does not constitute "advice or recommendations." The reference to a "concern" does not suggest a course of action, which can be accepted or rejected during the deliberative process. (Order M-523)

> Regarding Records 8-14, 32-33, 47-49, 52, a letter exchanged between two managers in an institution which clarifies the role of an investigator did not contain "advice or recommendations." (Order M-523) A record relating to administrative matters that was directional, i.e. on how to proceed, and not advisory in nature was not exempt. (Order MO-1285)
>
> In Records 15-19, 30-31, … drafts are not by their very nature recommendations. Recommendations are suggested courses of action that will ultimately be accepted or rejected during the deliberative process. (Orders P-434, P-480, P-493)
>
> There is no evidence that Toronto considered the application of Section 4(2) or Section 7(2) to the records.

Although the City was given an opportunity to respond to the representations of the appellant on this issue it declined to do so.

I have carefully considered the representations of the parties, and the records remaining at issue for which this exemption is claimed. I have concluded that parts of the following records set out a recommended course of action provided by City employees that would ultimately be accepted or rejected during deliberations: records 2-7, 8-14, 15-19, 22-26, 32-33, 47-49, and duplicates. None of this information is subject to the exceptions to the exemption listed at section 7(2) or (3).

In my view, the remaining records and portions for which this exemption is claimed do not set out a recommended course of action, and I find that they are not exempt under section 7(1). Included in this group are several items marked "draft" (e.g. records 30-31). I agree with the appellant that noting "draft" on a record is not sufficient to invoke the application of this exemption, and I have been provided with no further basis for finding that these records constitute or reflect a recommended course of action by a City employee.

In summary, only portions of records 2-7, 8-14, 15-19, 22-26, 32-33, 47-49, and their duplicates, qualify for exemption under section 7(1). I will provide copies of these records to the City with this order, in which the exempt portions are highlighted. The remaining records and portions are not exempt under any section claimed by the City (except part of record 52, which I have found non-responsive and/or exempt under section 14(1), and part of record 108 and its duplicates and near duplicates which I have found exempt under section 12), and I will order them to be disclosed.

EXERCISE OF DISCRETION

As the City has claimed the application of the discretionary exemptions found in sections 7 (advice to government) and 12 (solicitor and client privilege) to a number of the records remaining at issue, I must now turn to consider the exercise of discretion by the City.

As noted, the section 7 and 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

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 in exercising its discretion with respect to the discretionary exemptions in this appeal it considered all relevant factors including:

- The purposes and principles of the *Act* including that the information should be available to the public and exemptions should be specific and limited;
- The purposes of the exemptions;
- Whether the requester has a sympathetic or compelling need to receive the information;
- Whether disclosure will increase public confidence in the operation of the City;
- The nature of the information and to the extent to which it is significant and/or sensitive;
- The historic practice of the institution with respect to similar information.

The City submits that it properly exercised its discretion, took into account all relevant factors in doing so and acted in good faith. It submits that the information in the records is sensitive, that disclosure of the information would hamper its ability to determine in confidence the roles and responsibilities of its employees and that it does not believe that the appellant has a sympathetic or compelling need to receive the information or that disclosure would enhance public confidence in the operation of the City.

Throughout the appellant's representations he makes reference to the fact that the City has abused its discretion in the application of the discretionary exemptions under the *Act*. He submits that there is no evidence that the City applied section 7(2) of the *Act* which includes exceptions to the exemptions that relate to advice to government, or section 4(2) of the *Act* which provides that the City must disclosure as much of the record that can reasonably be severed from a record that might be subject to an exemption. (I found, above, that section 7(2) did not apply to the information I found exempt under section 7(1), and I have also applied severances as required under section 4(2) in relation to records that are only partly exempt.)

A significant aspect of my review of the City's exercise of discretion relates to records 2-7, 15-19 and 22-26, which are ordered disclosed in Order MO-2226 because they are not subject to the

section 52(3)3 exclusion, and the City claimed no exemptions in the alternative in that appeal. I have found, above, that portions of records 2-7, 15-19 and 22-26 are exempt under section 7. (For ease of reference, I note that records 2-7, 15-19 and 22-26 are identified in Order **MO-2226** as, respectively, records 1, 2, and 4 – as also noted in Appendix A.)

Record 52 was also at issue in Order MO-2226 (where it is identified as Record 6) and parts were found non-responsive. I have not upheld a discretionary exemption for any part of this record, and it is therefore not to be considered in relation to the exercise of discretion.

If I upheld the City's exercise of discretion to withhold the whole or portions of records 2-7, 15-19 and 22-26 in this appeal, while the exemptions applied here were not claimed in Order MO-2226, and the information is therefore ordered disclosed in that case, I would be upholding a manifestly unfair exercise of discretion. Given that disclosure of the records I ordered disclosed in Order MO-2226 is disclosure to the world (see Order M-96), and the City provides no representations to explain this different treatment, it is difficult, if not impossible, to avoid the conclusion that it is not now open to the City to exercise its discretion by refusing to disclose these same records to the appellant. Accordingly, I will order that the City re-exercise its discretion with respect to these records. In doing so, the City must take into account the fact that disclosure to one appellant is disclosure to the world and in view of the fact that Order MO-2226 requires that these records be disclosed to the appellant in that appeal, there appears to be no reasonable basis for withholding them in this appeal.

I now turn to consider the City's exercise of discretion with respect to the application of sections 7 and 12 to the records that are not in common with Order MO-2226.

I have carefully reviewed the City's representations and those of the appellant. I am satisfied that the City took into account relevant considerations, specifically the nature of the specific advice given in the record, and the circumstances surrounding the preparation of the records and properly exercised its discretion to withhold these records in the circumstances of this case.

PUBLIC INTEREST OVERRIDE

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.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)*, [2007] O.J. No. 2038 (application for leave to appeal filed, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act*, which are equivalent to sections 8 and 12 of the *Act*, are to be "read in" as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

I now turn to consider the application of section 16 to the records that I have found to be exempt under sections 7, 12 and 14(1).

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.

Compelling public interest

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].

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.)].

The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

As noted above, the appellant stated that he is not interested in access to any personal information and having found that the personal information is outside the scope of the request, in addition to being exempt under section 14(1), it is not necessary for me to consider the application of section 16 to that information. However, the City stated in its representations that there is no public interest in the disclosure of the personal information that is at issue in this appeal and I agree with that position.

I now turn to consider the application of section 16 to the records that I have found to be exempt under sections 7 and 12 of the *Act*.

I gave the City the opportunity to respond to the appellant's extensive representations on this issue and it declined to do so.

The appellant states:

> This access request concerns the legal relationship and operation of a provincial statute of quasi constitutional status in conjunction with a newly emergent municipal public office that in the words of Toronto's Mayor "will play a crucial role in maintaining the public's confidence in City Hall and in ensuring that the codes of behaviour and ethics governing elected officials are objectively communicated and applied."
>
> …
>
> The public interest inherent in Toronto's Integrity Commissioner is well described by the Integrity Commissioner:
>
> > *Toronto is the first municipality in Canada to establish the office of Integrity Commissioner. I am honoured to be the initial holder of that position.*
> >
> > *The Integrity Commissioner's principal function is the cultivation of an increased awareness on the part of City Councillors of their legal and ethical responsibilities as contained principally in the City's Code of Conduct.*
> >
> > *To promote the achievement of that goal, City Council has charged me with providing Councillors with educational opportunities to better familiarize themselves with the details of the Code of Conduct, and with being available to give advice to Councillors individually and collectively as to their obligations under that Code. In very large measure, the success of the office depends on how well I fulfill these two roles.*
> >
> > *However, I am responsible for responding to complaints by members of the public, City staff, and Councillors that elected officials may have violated the terms of the Code of Conduct. In that capacity, I investigate complaints coming within my jurisdiction, and report my findings (along, where necessary, with recommendations) to Council as a whole."*
>
> ….
>
> The Commissioner and the Courts have long recognized in numerous orders and publications, the inherent public interest in the preservation of access rights and the protection of personal information to promote the vitality of our systems of democratic governance. Recognizing the threat to the public interest, the

> Commissioner has also commented unfavourably when the legislature has removed institutions from the scope of the *Act*.
>
> In my view, any record that sheds light on the jurisdiction of *MFIPPA*, especially when that jurisdiction is the subject of administrative interpretation, determination or discussion, creates a compelling public interest outweighing the purpose of an exemption.

The appellant continues in his representations to make submissions to support his position that there is a public interest in the issues surrounding the jurisdiction of the *Act* and that the public interest is compelling. The appellant states:

> In promoting civic engagement, the privacy provisions are supremely important because not only does it in theory restrict institutions from pillorying those who wish to hold them to account but it also provides a means of redress at little or no cost to those employees and citizens who have been harmed by the punitive disclosure of personal information.

The appellant also argues that there is a compelling public interest in the records which contain policies, principles, rules or guidelines in accordance with which decisions are made affecting the public. He argues that the public interest in this information outweighs the purpose of the exemptions.

I have carefully reviewed the portions of the records that I have found to be exempt under sections 7 and 12 of the *Act* and the representations of the appellant. Although I accept that there may be a public interest in the functioning of the office of the Integrity Commissioner and the access and privacy rights of individuals in their dealings with the Integrity Commissioner in general, there is insufficient evidence before me to support a finding that there is a compelling public interest in the kind of information that I have found to be exempt under sections 7 and 12. In my view, the exempt information does not reveal any significant public policy or related reasoning in relation to the arrangements surrounding the Integrity Commissioner's role, and while there may be public curiosity about the information, it does not "rouse strong interest or attention" (Order P-984) and is therefore not "compelling".

As well, I note that the records and portions I am ordering disclosed do provide information about the discussions that took place concerning the operational functions to be assigned to the Integrity Commissioner, and in my view, the disclosure of this information meets the public interest identified by the appellant. I also note that the office of the Integrity Commissioner is now governed by the *City of Toronto Act* which was proclaimed in force on June 12, 2006. That legislation defines the role of the Integrity Commissioner and the application of the *Act* to the Integrity Commissioner's office.

Having found that a compelling public interest in the disclosure of the portions of the records which qualify for exemption does not exist, it is not necessary for me to determine whether the public interest clearly outweighs the purpose of the section 7 and exemptions.

ORDER:

1. I order the City to conduct additional searches for:

   a) notes and other records relating to discussions between the incumbent Integrity Commissioner and (a) the Integrity Commissioner for the Province of Ontario; and (b) the City's Auditor General; which were alluded to in the staff report mentioned by the appellant in his submissions;

   b) records relating to discussions with Ontario of possible references to the Integrity Commissioner in the new City of Toronto Act (which was enacted as the *City of Toronto Act, 2006* and which does, in fact, contain references to the Integrity Commissioner); and

   c) the letter referred to in Record 20.

   These additional searches are to be completed within 21 days after the date of this order. In the event that additional records are located, I further order the City to issue an access decision to the appellant, with a copy to me, in accordance with sections 19, 21 and 22 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 records 34-38, 70-72, 75, 76, 77-95, 103-105, 118, 119, 120-121, 123-127, 128, 129-131, 133-134, 135-136, 137-149, 158-159, 160-161, 170, 171-176, 177-181, 182-183, 184-186, 188-189, 193, 195, 197-199, 228-234, 235-251, 252-270, 271, 272-290, 291-292, 315-320, 321-322, 323, 324-325, 344-348, 349-382, 383-386, 387-404, 405-406, 407-444, 445-446, 447-480, 481-482, 483, 484-488 and 489-491, in their entirety. I further uphold the City's decision to deny access to the portions of records 8-14, 32-33, 47-49, 52 and 108 and its duplicates and near duplicates that are highlighted on copies of these records that are being sent to the City with a copy of this order. The highlighted portions of the records are *not* to be disclosed.

3. I order the City to disclose to the appellant records 21, 27-29, 30-31, 45-46, 99-100 and 492, in their entirety, and the parts of records 2-7, 8-14, 15-19, 22-26, 32-33, 47-49, 52 and 108 and its duplicates and near duplicates that are *not* highlighted on copies of these records that are being sent to the City with a copy of this order, by sending copies to him on or before **October 15, 2007**.

4. I order the City to re-exercise its discretion to withhold the parts of records 2-7, 15-19 and 22-26 that I have found to qualify for exemption in this order, and to consider the discussion of this issue, above, in doing so, on or before **October 15, 2007**, and to send a new decision letter to the appellant, with a copy to me, on or before that date, if it decides to change any aspect of its decision concerning access to the undisclosed portions of these records. If the City continues to deny access to this information, I order it to provide me with representations concerning its re-exercise of discretion on or before **October 15, 2007**. I remain seized of this appeal for that purpose, if necessary.

5. I reserve the right to require a copy of the records sent to the appellant pursuant to order provision 2, above.

Original signed by: September 21, 2007
John Higgins
Senior Adjudicator

Appendix A

Record Number	Description	Exemptions claimed (in the alternative to section 52 (3)3	Record number in Order MO-2226 (as applicable)
2-7	Memo from Integrity Commissioner (IC) to Mayor about IC's possible responsibilities under MFIPPA, dated March 3, 2005	7	1
8-14	Memo from IC to Mayor about code of conduct and role of the IC, dated Feb. 8, 2005	7	
15-19	IC's draft report on his designation, dated Nov. 1, 2004	7	2
21 (duplicate 54)	Memo to IC from Mayor re IC's role under MFIPPA, dated Nov. 12, 2004	7	3
22-26 (duplicate 55-59)	Discussion points for IC's memo of Nov. 12, 2004	7	4
27-29 (duplicate 60-62)	Notes from Discussions on Access and Privacy and Role of IC, undated	7	5
30-31	Draft Protocol for disclosure of information to IC, undated	7	
32-33 (duplicates 50-51, 68-69)	Memo from IC to CAP staff and legal re: protocol for conducting investigations, dated Sept. 13, 2004	7	
34-38	Various e-mails relating to Legal and CAP's recommendations for IC's website, 11/16/04, 11/17/04	7, 12	
45-46	Duplicate of 30-31 with additional notes	7	
47-49 (duplicate 64-66)	Memo to Council & Support Services staff from IC regarding protocol for dealing with requests, undated	7	
52	Memo from IC to City Clerk, dated 1/05/05 re: his role	7, 14 in part	6
70-72	Memo from IC to Manager Corporate Policy dated 9/19/04	14 in part	

75	E-mail from City Solicitor to legal staff re: IC, dated 24/08/04	12	
76	E-mail from legal staff to City Solicitor dated Aug. 24/04 re: IC	14 in part	
77-95	Draft contract	12	
99-100 (duplicates 101-102)	IC's handwritten notes of meeting, undated	7, 12	7
103-105 (duplicates 109-111)	IC's handwritten notes of meeting, undated	7, 12	
108 (duplicates and near duplicates 113, 116, 187, 196)	Agenda for IC briefing on Sept. 1/04 with handwritten notation	7 in part, 12	
118	E-mail from legal to CI and others dated 3/1/05	12	
119	Handwritten notes – City Lawyer	12	
120-121	Various e-mails between legal staff 11/19/04	12	
123-127	Various e-mails between legal staff 11/16/04	12	
128	Handwritten notes – City Lawyer, dated Sept. 22/04	12	
129-131 (duplicates 190-192)	Report excerpts – Interim procedures relating to IC and legislation, dated May 15/02, with attached notes on questions and answers	7 & 12	
133-134	Handwritten notes – City Lawyer, Sept. 04	12	
135-136	Various e-mails between legal staff, 8/31/04	12	
137-149	Handwritten notes – City Lawyer, Sept. 04	12	
158-159	Handwritten notes – 2nd City Lawyer, Jan 25/05	12	
160-161 (duplicates 162-163)	E-mails from 2nd City Lawyer to other legal staff re: IC	12	
170	Handwritten notes – 2nd City Lawyer	12	
171-176	E-mails from City lawyer to CAP	7 & 12	

	staff re: recommendations for IC's website, 11/16/04		
177-181	E-mail from CAP staff to various City staff including Legal re: recommendations for IC's website, 11/16/04	7 & 12	
182-183	E-mails from 2nd City Lawyer to various City staff re: summary of discussions on IC, 3/1/05	7 & 12	
184-186	Handwritten notes – 2nd City lawyer, Sept. 15/04	7 & 12	
188-189	Handwritten notes of City lawyer	7 & 12	
193,195	E-mail from consultant to various City staff re: access and privacy principles and agenda	7 & 12	
197-199	Handwritten notes – 2nd City lawyer, dated Aug. 27/04	12	
228-234	E-mails between 2nd City Lawyer and various staff about IC and his employment; various dates	12	
235-251	Draft CI employment agreement	12	
252-270 (duplicates 293-312, 326-343)	Draft CI employment agreement	12	
271 (duplicate 313)	E-mail from City lawyer to staff member re: draft contract, 8/24/04	12	
272-290 (314 is a duplicate of 272)	Various e-mails between legal staff and legal staff and other City staff re: employment contract (includes a number of blank pages)	12	
291-292	E-mail to City lawyer 8/24/04	12	
315-320	Draft IC Employment agreement (includes blank page)	12	
321-322	E-mails between various legal staff, 8/27/04, 8/26/04	12	
323	E-mail between legal staff	12	
324-325	E-mail between legal staff	12	
344-348	Various e-mails between Legal and other City staff on IC's contract 8/31/04, 8/30/04	12	
349-382	Drafts of Employment agreement	12	
383-386	Various emails between legal and	12	

	other city staff on IC's contract 8/30/04 (includes blank page)		
387-404	Drafts of employment agreement (includes blank pages)	12	
405-406	E-mail to IC from City staff re: contract 9/3/04 with cc. to City lawyer (406 is a blank page)	12	
407-444	Drafts of employment agreement, duplicates (includes blank pages)	12	
445-446	E-mail from City lawyer to staff 9/01/04	12	
447-480	Drafts of employment agreement, duplicates (includes blank page)	12	
481-482	Various e-mails between legal staff on agreement, 9/01/04	12	
483	E-mail regarding IPC order	12	
484-488	E-mail between legal staff	12	
489-491	Housekeeping notes in City lawyer's file	12	
492	Letter dated February 1, 2005	none	