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

ORDER MO-2471

Appeal MA08-78

City of Guelph

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NATURE OF THE APPEAL:

The City of Guelph (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to a specified area quarry. The requester expressed particular interest in "correspondence, reports, internal memoranda, notes, records of telephone conversations and published data" dated from 1995 to present regarding:

1. water taking and water taking permits associated with the quarry;

2. applications to amend or expand the license or tonnage limits pursuant to the *Aggregate Resources Act* relating to the quarry; and

3. any potential or actual impacts on municipal water supplies attributed to the quarry.

The City notified the requester that it was extending the time limit for responding to the request pursuant to section 27 of the *Act*. Following two additional time extension notices under section 27, the City issued an interim decision and a fee estimate on January 31, 2008, advising that it was granting full access to some responsive records, but denying access to others pursuant to sections 7(1), 9, 10(1), 12, 14(1) and 15 of the *Act*. The City also advised the requester that it had forwarded the request to three other institutions (under section 18 of the *Act*) regarding seven additional records on the basis that those institutions had a greater interest in those particular records. Accordingly, the transferred parts of the original request do not form part of this appeal.

The City provided a fee estimate of $1,988.60 and the following breakdown of the fee:

743 copies @ $.20 per page	$148.60
28 hours for search and preparation of records @ $7.50 for each 15 minutes:	$840.00
Costs incurred by consultant in locating, retrieving, processing and copying records, as invoiced to the City:	$1,000.00
Total:	$1,988.60

The requester (now the appellant) appealed the City's interim decision and fee estimate to this office, which appointed a mediator to explore resolution of the issues. The appellant advised that although he had paid the full estimated fee in order to get prompt access to the records the City had agreed to disclose, he had not received them. In addition, the appellant advised that he had requested a fee waiver from the City.

Upon being contacted by this office about the disclosure of the records, the City issued a final decision dated April 3, 2008, which was accompanied by an index of records. The City granted complete access to 211 records, but denied access to the remaining 61 records in full, or in part, pursuant to certain exemptions in the *Act* that were identified in the index of records. The City's

decision letter provided the web links for those records which had been denied under section 15(a) (publicly available information) of the *Act*. The City also advised the appellant that it was denying the request for a fee waiver, and provided additional information on the costs incurred in processing the request. The final fee was outlined in the following manner:

691 copies @$.20 page	$138.20
28 hours for search and preparation of records @ $7.50 for each 15 minutes	$840.00
Costs incurred by consultant in locating, retrieving, processing and copying records, as invoiced to the City	$1,000.00
Postage	$9.50
	$1,987.70

Further mediation was successful in narrowing the scope of the appeal to include only those records withheld under sections 7(1) (advice or recommendations), 9 (relations with other governments), and 12 (solicitor-client privilege) of the *Act*. Accordingly, sections 10(1) (third party information), 14(1) (personal privacy), and 15(a) of the *Act* were thereby removed from the scope of the appeal. However, the appellant is appealing the component of the fee charged to him for the City's payment of $1,000.00 to a "consultant" who assisted the City in responding to the request.

Following a teleconference facilitated by the mediator, the City reconsidered its access decision and issued a revised decision dated July 11, 2008, granting partial access to four additional records, and full access to another. The City provided an amended index of records to the appellant with the revised decision letter.

As a complete mediated resolution of the appeal was not possible, it was transferred to the adjudication stage of the appeal process where it was assigned to me to conduct an inquiry. I commenced my inquiry by sending a Notice of Inquiry outlining the facts and issues to the City, initially, seeking representations on the exemption claims and the fee component disputed by the appellant. I received representations from the City.

I then sent a modified Notice of Inquiry, along with the complete representations of the City, in order to seek representations from the appellant, which I received. Upon review of the appellant's representations, I determined that it would be necessary to seek representations in reply from the City, which I subsequently did. On March 13, 2009, the City provided representations to this office and concurrently issued a revised decision to the appellant in which it disclosed additional responsive records, either partially or in their entirety.

Lastly, I wrote to the appellant with respect to the City's revised decision and to clarify the appellant's position on access to any personal information that may appear in the remaining responsive records. I also sought sur-reply representations from the appellant regarding the solicitor-client privilege exemption claim and the fee issue. The appellant submitted sur-reply representations for my consideration.

RECORDS:

There are 36 records remaining at issue, and these consist of various memoranda, emails and notes, which are described more fully in the City's revised March 13, 2009 index of records.

DISCUSSION:

PRELIMINARY ISSUE – PERSONAL INFORMATION

As previously stated, records that had been withheld by the City under certain exemptions were removed from the scope of this appeal during the mediation stage. The mediator confirmed that the appellant was no longer pursuing access to records withheld under sections 10(1) (third party information), 14(1) (personal privacy) or 15(a) (publicly available information). However, my review of the records during this inquiry revealed that some of the records remaining at issue may contain personal information about identifiable individuals. Accordingly, in seeking sur-reply representations from the appellant, I noted that since section 14(1) is a mandatory exemption, confirmation was required as to whether the appellant wished to seek access to any personal information that may appear in the records. The appellant subsequently confirmed that he did not wish to seek access to any personal information appearing in the records still at issue.

Accordingly, I will highlight information that qualifies as "personal information" under the definition of the term in section 2(1) of the *Act* so that it will be removed (as non-responsive) from any records ordered disclosed as a consequence of this order.

ADVICE OR RECOMMENDATIONS

The City claims that section 7(1) applies to exempt Records 5, 13, 14, 15, 17, 20, 35, 38, 43, and 60, either in part, or in their entirety, from disclosure.

Section 7(1) states:

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

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

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised. Furthermore, advice or recommendations may be revealed in two ways: either the information itself consists of advice

or recommendations or 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].

Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [see Order PO-2681]. Sections 7(2) and 7(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.

Representations

According to the City, the records withheld under section 7(1) contain advice and recommendations offered by its consultants with respect to the City's groundwater supply and, specifically, the potential impact on the quality and quantity of water from City wells located near the quarry site as a consequence of the quarry owner's Permit To Take Water (PTTW) application to the Ministry of the Environment. The City submits that it relied on this advice and recommendations in opposing the PTTW application.

The appellant submits that the City has failed to demonstrate why the records qualify for exemption under section 7(1). In responding to the City's submission that the records contain advice and recommendations offered by the City's consultants, the appellant states that the City provided insufficient detail about the content of the records to support the contention that the records contain more than "mere information." However, based on the descriptions provided, the appellant notes that Records 5 and 43 are documents exchanged between consultants, while Records 14 and 17 are emails exchanged between the City's own staff which, it is implied, does not support the application of section 7(1). According to the appellant, the simple assertion by the City that it retained the consultant to assist it in formulating a response to the quarry owner's PTTW application does not meet the burden of establishing that disclosure of the records would reveal advice or recommendations.

The appellant also submits that:

> … [N]otwithstanding that some of the above records may contain advice and recommendations, the City should only exercise its discretion to withhold disclosure of the records where their release would inhibit the purpose of the section 7 exemption, which is to the ensure that persons employed in the public are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making… As stated by [former Assistant] Commissioner Mitchinson in Order M-83…

> Section 7 is not intended to exempt all communications between public servants despite the fact that many may, broadly speaking, be viewed as advice and recommendations… Section 1 of the Act stipulates that exemptions from the right of access should be limited and specific…

The City's reply representations with respect to the application of section 7(1) merely reiterate its initial brief submissions.

Analysis and Findings

As previously stated, in order for the information to qualify as "advice or recommendations", it must suggest a course of action that will ultimately be accepted or rejected by the person or decision-maker being advised. For the reasons that follow, I find that section 7(1) does not apply to any of the records for which the exemption is claimed by the City.

The rationale for what was to be the section 7(1) exemption was canvassed in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), as follows:

> Although the precise formula for achieving a desirable level of access for deliberative materials has been a contentious issue in many jurisdictions in which freedom of information laws have been adopted or proposed, there is broad general agreement on two points. First, it is accepted that some exemption must be made for documents or portions of documents containing advice or recommendations prepared for the purpose of participation in decision-making processes. Second, there is a general agreement that documents or parts of documents containing essentially factual material should be made available to the public. If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, it is essential that the information underlying decisions taken as well as the information about the operation of government programs must be accessible to the public. We are in general agreement with both of these propositions [page 288].

Based on my review of the records, I find that the records the City claims are exempt under section 7(1) contain "mere information" consisting of background, factual, contextual or evaluative information, which does not qualify as advice or recommendations for the purposes of section 7(1).

Record 5 is a 2004 memorandum containing the minutes of a meeting between the City and an engineering consulting firm, which outlines the terms of the project undertaken at that time by the consulting firm with regard to the City's groundwater supply. The record, which was prepared by the consulting firm, describes the project's schedule, scope, payment for services, and action items. The latter portions of the record reflect the added participation of the new owner of the Guelph quarry site at the meeting. On my review of it, this record contains no

advisory content whatsoever, and certainly not a suggested course of action that may constitute advice or recommendations for the purpose of section 7(1).

The records that follow are those created within an 11-month timeframe some two-and-a-half years later. After the quarry developer posted its proposal on the Ministry of the Environment's Environmental Bill of Rights (EBR) registry, the City sought to retain the same engineering consulting firm to evaluate the proposal. For example, the information withheld from Records 14 and 20 in large part merely outlines the City's project requirements for the purpose of responding to the EBR posting and PTTW application. These same records also contain the consultants' proposal in response to the request for it by the City. However, neither the emailed request for a proposal nor the proposal delivered in response contain a suggested course of action for City decision-makers, at least in the sense contemplated for protection under section 7(1). In my view, these records represent the negotiation of the terms of the project retainer, not the deliberative process of government decision-making or policy-making. Similarly, Record 17 contains the "initial comments" of the consultants with respect to the developer's PTTW application, while Record 13 merely contains an earlier version of Record 17. The referenced memo is not attached and there is no content that is suggestive of advice or recommendations under section 7(1).

Record 15 consists primarily of an email from the City's Director of Environmental Services to the Mayor providing an update on the developer's PTTW application. No course of action is suggested. Rather, it appears as though this email was sent to the Mayor to provide background information and an update on the process.

Record 38 consists of the typed notes of the City's Water Supply Program Manager prepared for the City's Director of Environmental Services for the purpose of providing background information about the history of the PTTW and its progress through the regulatory process between November 2006 and February 2007. My review demonstrates that no course of action is suggested to the Director in this record.

Record 43 represents an email exchange between the City's Water Supply Program Manager, the Director of Environmental Services and the external consultants regarding an impending regulatory deadline for the PTTW application. In my view, the record does not provide a suggested course of action, or decision-making on the part of the City. Rather, the record reveals the intention to arrange to discuss the City's position on the PTTW application.

In addition to the terms of the consultants' project scope and retainer in Record 20 as described above, that record and Record 35 contain information that may be characterized, in my view, as "options." In the case of Record 20, the options appear in the form of the Water Supply Program Manager's "brainstorming" about the City's options and desired method of communicating the City's position regarding the proposed quarry development, while Record 35 contains City staff's comments and response to a press release by the quarry developer. Past orders of this office have addressed the question of whether "options" constitute advice or recommendations for the purpose of section 7(1) [Orders PO-2355, PO-2028, P-1631, P-1037, P-1034 and P-529].

In Order PO-2355, Adjudicator Bernard Morrow adopted the approach taken by former Assistant Commissioner Mitchinson in Order PO-2028 to analyze whether comments made by staff of the Ministry of the Environment about a proposal by a company to expand its licensed lime quarry constituted advice or recommendations. Adjudicator Morrow found that the information did not constitute advice or recommendations because:

> [T]he author of the options has not set out a suggested course of action to the decision-maker. What the author has done is provide the decision-maker with a list of four "alternative" options with modest discussions of the benefits of implementing one option over another and the implications or consequences of choosing to do so or not. However, the author does not expressly identify a preferred option and one cannot be inferred from the information. I cannot discern from the options a suggested course of action. Therefore, I conclude that the information … should be characterized as "mere information" since none of the information at issue actually advises the decision maker on a suggested course of action.

In Order PO-2400, Adjudicator John Swaigen elaborated upon the distinction between presenting options in an informative context and recommending a specific course of action:

> **[**A] moderate degree of discussion, assessment, comparison or evaluation of options or alternatives does not necessarily constitute "advice". There is a fine line between description and prescription. Whether discussion of options crosses that line and becomes a blueprint or road map directing the decision-maker to a preferred option may depend to some extent on matters such as whether the number of options identified is large or small, the tone of the language used to describe and discuss each of them, the strength of the views expressed, and whether the discussion is balanced or skewed.

In rejecting the City's section 7(1) exemption claim respecting Records 20 and 35, I have adopted the reasoning articulated by Adjudicators Morrow and Swaigen in Orders PO-2355 and PO-2400. Although Records 20 and 35 may include "modest descriptions" of the Water Supply Program Manager's observations about the possible consequences of one or two of the "brainstorming" options, the section 7(1) exemption claim is not established, in my view, because there simply is no preferred or suggested option identified [see also Order P-1037].

The final record withheld under section 7(1) is Record 60, which is described in the index as "briefing memo" from the Water Supply Program Manager to the City's Director of Environmental Services. Past orders of this office have found that such briefing memos do not qualify for exemption under section 7(1) because they constitute mainly factual material that does not fall within the deliberative process of government [see Orders P-1137 and PO-1678]. From my review of Record 60, I agree. This record contains a summary of issues and identifies questions to be raised with the Ministry of Natural Resources and the quarry developer. In my view, the record contains background factual information and a brief discussion of the groundwater supply issues raised by the quarry development proposal aimed at informing the City's Director of Environmental Services. The record contains no suggested course of action to

be accepted or rejected by that individual or any other decision-maker, and as such it does not qualify for exemption under section 7(1).

In summary, as I have concluded that none of the records withheld under section 7(1) contain a suggested or preferred course of action, I find that they do not qualify for exemption. In view of this finding, it is unnecessary for me to review the mandatory exceptions to section 7(1) that are listed in section 7(2).

RELATIONS WITH OTHER GOVERNMENTS

The City claims that section 9 applies to Records 18, 19, 22, 25, 26, 28, 29, 30, 31, 34, 41 and 46 either in part, or in their entirety. It appears that the City is mainly relying upon sections 9(1)(b) and/or 9(1)(d).

The relevant parts of section 9 state:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (b) the Government of Ontario or the government of a province or territory in Canada; …
>
> (d) an agency of a government referred to in clause (a), (b) or (c); …
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" [Order M-912].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

For a record to qualify for this exemption, the institution must establish that:

1. disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section; and
2. the information was received by the institution in confidence [Orders MO-1581, MO-1896 and MO-2314].

The focus of this exemption is to protect the interests of the supplier, and not the recipient. Therefore, the supplier's requirement of confidentiality is the one that must be met. However, some orders refer to a mutual intention of confidentiality [Order MO-1896].

Representations

The City submits that the records it has withheld under section 9 represent City staff's exchange of information with staff from various ministries (Natural Resources; and Environment and Energy, as the latter was then known) and the Grand River Conservation Authority (GRCA). According to the City, the GRCA is an agency of the Ministry of Natural Resources. The City submits that:

> Ministry and GRCA staff have responded to inquiries made by the City with respect to the [PTTW] application and the potential impacts of further water taking by the quarry operation on the City's municipal supply wells. The expectation of the staff in responding to inquiries was that their comments would remain confidential. The Ontario government requires municipalities and conservation authorities to work together to develop future environmental policy and to support the development of effective groundwater protection strategies. It is reasonable to expect that disclosure of these records could result in future reluctance on the part of these Ministries and the GRCA to provide the city with information in response to our inquiries. Without this flow of information, the quality and quantity of the City's water supply will be negatively impacted.

The appellant maintains that the City has failed to meet the burden of proof in establishing the application of section 9 of the *Act* to the records. Based on the description of the records in the index provided to the appellant, he submits that most of the email records at issue do not involve correspondence exchanged between the City and the ministries or the GRCA, but rather between City employees and their consultants. Further, the appellant submits that if the disclosure of the records would nevertheless reveal information received by the City in confidence from the government or government agencies, then the City was required to provide detailed and convincing evidence to that effect, which it has failed to do.

According to the appellant, the "mere assertion" by the City that Ministry and GRCA staff responded to inquiries by City staff with the expectation that their comments would remain confidential and that disclosure could result in reluctance on their part to communicate with City staff in the future does not amount to detailed or convincing evidence. The appellant submits that the City's position that these parties would be unwilling to supply information to the City in the

future amounts to "mere speculation" which is not sufficient justification for denying access. In addition, the appellant submits that since the City appears not to have sought consent for disclosure from the ministries or the GRCA for the purpose of section 9(2), this should mean that the City's assertions respecting the harms said to result from disclosure of the records should be given less weight.

The City's reply representations essentially restate the initial submissions provided respecting the application of section 9.

Analysis and Findings

As previously noted, the purpose of the section 9 exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" [Order M-912]. Based on the evidence before me, I find that section 9 does not apply in the circumstances of this appeal.

In considering the possible application of section 9, the first question to be addressed is whether the information in question came from one of the entities listed in the exemption, specifically paragraphs (b) or (d) as claimed by the City. First, I accept that the Ministry of the Environment and Energy (as it was then known) and the Ministry of Natural Resources represent the Government of Ontario for the purposes of section 9(1)(b) of the *Act*. In addition, I note that the GRCA operates under the *Conservation Authorities Act of Ontario* (R.S.O. 1990, CH. C.27), an instrument through which various municipalities manage the water and natural resources in the area. The Minister of Natural Resources is the minister responsible for that statute and, through it, the GRCA. In the circumstances, therefore, I am also satisfied that the GRCA is an "agency" of the provincial government for the purposes of section 9(1)(d) of the *Act*.

The next question for me to address is whether the information was "received in confidence" by the City. Past orders have found that for information to "have been received in confidence" there must be an expectation of confidentiality on the part of the supplier and the receiver of the information [Orders MO-1896 and MO-2314]. To begin, I am not persuaded by the evidence that there was an explicit, or implicit, expectation of confidentiality regarding the exchange of the information at issue on the part of the ministries and GRCA *or* City staff.

I accept the appellant's submission that some of the withheld portions of the records actually consist of City staff's responding comments to ministry or GRCA staff, which means that it was not received *from* them, as required by section 9. Moreover, I am also not persuaded by the City's representations that any information received from ministry or GRCA staff carried an expectation of confidentiality, or that such an expectation, even if it existed, would have had a reasonable or objective basis. The considerations applicable to the determination of whether an expectation of confidentiality is reasonable and objective were initially articulated in the context of this office's orders on section 10 of the *Act* – the exemption for confidential third party business information. However, this office has held that these considerations are equally applicable to the determination of whether information was received in confidence under section 9 [Orders MO-1896 and MO-2314].

As outlined by Senior Adjudicator John Higgins in Order MO-2314, in determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all of the circumstances of the case, including:

- the nature of the information;
- whether the information was prepared for a purpose that would entail disclosure;
- whether the information was communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- whether the institution receiving the information agreed explicitly or implicitly to accept it on the basis that it was confidential and that it was to be kept confidential;
- whether the government agency that supplied the information treated it consistently in a manner that indicates a concern for its protection from disclosure prior to communicating it to the institution;
- whether the institution that received the information treated it consistently in a manner that indicates a concern for its protection from disclosure after receiving it; and
- whether the information was otherwise disclosed or available from sources to which the public has access, either before or after the government or government agency provided it to the institution.

As the City has indicated, the withheld information consists of communications between City water management staff, their external consultants and staff from several ministries and the GRCA with respect to the PTTW application and "the potential impacts of further water taking by the quarry operation on the City's municipal supply wells." From my review of the records, there is nothing on the face of them to suggest that the emails were sent in confidence by ministry or GRCA staff or that they were received by City staff on that basis. None appear to be marked or "flagged" as confidential. Similarly, I have insufficient evidence before me to suggest that staff from the ministries and the GRCA treated their responses to City inquiries "consistently in a manner that indicated a concern for its protection from disclosure." In fact, I note that City staff circulated or forwarded several of the emails to their external consultants, apparently in an effort to keep them apprised of the progress of the inquiries. However, no mention is made in these forwarding emails of any concerns with the confidentiality of the information. Still other information withheld appears to have been disclosed in other records, namely information about the PTTW application in Record 30, which was forwarded to the City by the Ministry of the Environment. On my review, much of this information would also have been available from the on-line EBR Registry, a source to which the public has access.

In summary, the evidence before me is simply not sufficient to demonstrate that disclosure of the email records at issue could reasonably be expected to reveal information the City has received in confidence from the Government of Ontario or one of its agencies, the GRCA. Accordingly, I find that the records, or portions of records, withheld on this basis are not exempt from disclosure under either of sections 9(1)(b) or 9(1)(d) of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

The City claims that Records 32, 33, 39, 40, 45, 50, 51, 54-59 are exempt in their entirety pursuant to the solicitor-client privilege exemption. The City also claims that part of Record 42 is exempt under section 12.

Section 12 of the *Act* states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches. Branch 1 arises from the common law. Branch 2 is a statutory privilege. The onus is on the City to establish that at least one branch applies. Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Representations

The City's initial representations regarding the possible application of the solicitor-client privilege exemption to the records are brief. The City submits that legal advice was sought from its in-house legal counsel, as well as from outside legal counsel regarding the PTTW application and the City's options in responding to it. According to the City, it would not be able to obtain "effective professional service" from its legal counsel without full and unreserved communication between them and with City departmental staff.

The appellant responded to the City's representations by noting that the City had not specified the basis of its claim under section 12, that is, whether the claim is based on common law or statutory privilege, solicitor-client communication privilege or litigation privilege. However, notwithstanding this omission, the appellant argues that the City has not demonstrated that the records are directly related to seeking, formulating or giving legal advice or that they were confidential, as required to establish solicitor-client communication privilege.

The appellant refers specifically to Records 40, 50 and 56, emails exchanged between the City's solicitors and the Water Supply Program Manager ("the City Consultant"), as follows:

> That City has failed to demonstrate why these third party communications ought to be privileged. The law is clear that not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)]. Communications between the solicitor and a third party, characterized as an agent or representative of the client, is only privileged where the third party is retained to perform a function which is essential to the existence or operation of the solicitor-client relationship [*Chrusz, supra*, at pp. 352 and 356].

Also based on the brevity of the City's initial representations, the appellant submits that to the extent that the emails or notes in question may have been disclosed to third party recipients, privilege has been waived in relation to them.

The City provided significantly more detailed representations in response to this office's request for reply to the appellant's submissions. To begin, the City clarified that it is relying on both branches of section 12 in denying access to the records. Specifically, the City submits that both solicitor-client communication privilege and litigation privilege apply.

The City submits that the records constitute communications either to or from various internal and external legal counsel representing the City respecting the PTTW application. According to the City, all of the email correspondence is directed at seeking or receiving legal advice from one or more of the City's legal counsel, which is "self-evident" from a review of the records themselves. The City submits that these email communications were intended to be confidential and "have remained so to date." In addition, the City notes that the Water Supply Program Manager is not, as the appellant suggests, a "third party." Further, the City submits:

> He is retained by the City to perform a function that is essential to the existence or operation of the solicitor-client relationship in this matter. … [A]lthough not hired by the City in a traditional employee/employer relationship, [he] is retained by the City under a long-term service contract to be the City's Water Supply Program Manager. [His] participation in all of these records is in this role – as part of the City's management of this issue. … He is not a "third party," as alleged by the appellant, within the meaning of this solicitor-client privilege exemption – he is an inherent and central part of the City's staff in this respect.

To further support its position that the Water Supply Program Manager is an integral part of City staff, the City refers to the content of Record 56, where this individual summarizes the issues for legal counsel and requests a legal opinion, "continually refer[ring] to the City and himself as if one entity…" The City also notes that the Water Supply Program Manager's responsibilities include briefing and instructing legal counsel for the City "on the very issue of concern to the appellant."

The City refutes the appellant's claim that it has not established that the records are directly related to the seeking, formulating or giving of legal advice, and argues that the records are exempt from disclosure as part of a "continuum of communications" between solicitor and client, as discussed in *Balabel v. Air India* and Order P-1409. In addition to quoting from *Balabel*, the City submits that:

> … it is not required that the request be explicit for the exemption to apply. In some instances, legal briefing and advice may be sought indirectly, as part of such a "continuum of communications". Group email communications are common among members of a team of individuals responsible for developing the advice and recommendations that will eventually be made to a municipal Council regarding a complex matter. Email technology has blurred the distinction that the appellant seeks to advance. A solicitor often functions as part of a "team" that is

> jointly formulating advice that will be given to Council. …[The] mechanism of including legal counsel in circulations of email memos created a clear expectation on both parts that legal counsel was being briefed and was implicitly requested to provide legal advice as necessary.

Regarding the claimed application of litigation privilege to the records, the City submits that it applies because all of the records were created for the dominant purpose of existing or reasonably contemplated litigation, either civil or administrative. According to the City, it was "reasonably anticipating" such litigation relating to the subject matter of these records at the time of the creation of the first of the records for which litigation privilege is claimed. Referring to the dominant purpose test set out in *Waugh v British Railways Board* [[1979] 2 All E.R. 1169 (H.L.)], the City states that the fact that it retained two different outside legal counsel "regarding its litigation options is clear evidence that the necessary test for exemption of these records due to litigation privilege is met."

The City also suggests, without further elaboration in its representations, that litigation privilege applies "to all of the other records that are in issue in this appeal."

In his sur-reply representations, the appellant maintains that the "mere fact that the City's solicitor was one of the recipients" of a record does not render it privileged. Respecting the City's clarification of the privilege claim for Record 51, in which an exchange of emails culminates in a conclusion that a legal opinion needs to be sought, the appellant states:

> The mere fact that a client concludes that he or she needs to obtain legal advice is not sufficient to exempt from disclosure records relating to the matters of which that conclusion is reached, notwithstanding that those records are subsequently sent to the client's solicitor. … [Records] that pre-existed that process of seeking and giving legal advice are not protected by solicitor client privilege.

The appellant refers to Order M-69 in which Inquiry Officer Holly Big Canoe rejected an institution's argument that solicitor-client privilege extended to all ongoing correspondence between the institution and its legal counsel on the basis that the document in question contained only the factual background upon which the legal advice was being sought. In addition, the appellant refutes the City's claim that the advent of email technology and the use of group emails has had an impact on establishing the application of the exemption. Specifically, the appellant submits that:

> The email technology has not modified any of the requirements that must be met for successfully claiming solicitor-client privilege. The burden still lies on the City to show that it has met all of those requirements … [S]olicitor-client privilege requires more than the presence of a lawyer. It is not enough that legal counsel was included in email circulations, as contended by the City. Rather, the City must establish that communications were exchanged between the City and its lawyers for the purpose of seeking or providing legal advice.

Finally, with regard to the City's claim of litigation privilege, the appellant submits that the City has failed to specify the nature of the litigation it was contemplating when the records were created. The appellant argues that even if the records were created for the dominant purpose of reasonably contemplated litigation in 2007, there is no evidence to suggest that litigation is pending or continues to be reasonably anticipated. Moreover, the appellant argues that litigation privilege ends with termination of the litigation for which documents were prepared or the absence of reasonably contemplated litigation.

Analysis and Findings

The discretionary exemption in section 12 contains two branches. Given the City's indication that it is relying on both branches of the exemption to deny access to certain records, it was required to establish that one or the other (or both) branches apply. Based on the City's representations, and my own review of the records at issue in this appeal, I will uphold the City's claim under section 12, in part.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)]. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

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. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

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.)].

The circumstances of this appeal and the records indicate that in responding to the PTTW application of the quarry developer, the City retained the services of two outside law firms and also relied on its own in-house legal counsel to provide advice. In doing so, both internal and

external counsel prepared or responded to email correspondence with senior management and program staff from several City departments, including Environmental Services and Planning. Legal counsel also generally advised the City regarding related matters under the *Aggregate Resources Act*, the *Environmental Bill of Rights Act* and other associated legislation. The records at issue under section 12 include these communications between counsel, both inside and outside the City, and various City staff. With three exceptions, I am satisfied that these records, therefore, form part of the "continuum of communications between a solicitor and client."

Specifically, based on my review of the records, I find that Records 32, 33, 39, 40, 42, 51, 55, 56, and 58 qualify for exemption under the solicitor-client communication privilege component of section 12. Each of these records represents a confidential communication between a solicitor, either employed by the City or on retainer with the City, and a client, namely a City lawyer or employee. Further, these communications pertain to the legal issues surrounding the PTTW application, possible effects on the City's groundwater supply, and potential remedies available to the City. I am satisfied that these records are directly related to the seeking, formulating or giving of legal advice. Accordingly, I find that all of the records listed above are exempt from disclosure under the solicitor-client communication privilege component of section 12.

Further, I am satisfied that Records 54 and 59 meet the criteria outlined in *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 and form part of a City's solicitor's "working papers." With regard to whether a record may be considered to be the working papers of legal counsel, I adopt the following reasoning of Adjudicator Steven Faughnan in Order MO-2231:

> It is only where a record contains or would reveal the contents of a communication between the solicitor and client that it would so qualify. For example, where a record reveals the thought processes of the lawyer in formulating legal advice, such as the lawyer's notes of his or her research or comments on or legal impressions concerning the subject matter of the advice, it would qualify under the working papers component of solicitor-client communication privilege.

Records 54 and 59 are the handwritten notes of two of the City's legal counsel, and I find that these two records are their "working papers" as they are directly related to seeking, formulating or giving legal advice.

I have concluded, however, that Records 45, 50 and 57 do not qualify for exemption under the solicitor-client communication privilege component of section 12. On my review of these records, they do not form part of the "continuum of communications" between legal counsel and their City clients as they were neither prepared for, nor provided to, legal counsel for the purpose of obtaining legal advice. I have concluded that Records 45, 50 and 57 do not reflect written communications between a solicitor and client, nor do they contain legal advice subject to privilege. Accordingly, I find that they are not subject to common law solicitor-client communication privilege and are not, therefore, exempt on this basis.

In light of this finding, I will now consider whether Records 45, 50 and 57 are exempt on the basis of litigation privilege.

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)]. The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*, cited above, and Order PO-2006 [aff'd, [2003] O.J. No. 3522 (Ont. Sup C.J.].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

For Records 45, 50 or 57 to be exempt under this component of section 12, three requirements must be satisfied:

1. The record must have been created with existing or contemplated litigation in mind.

2. The record must have been created for the dominant purpose of existing or contemplated litigation.

3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension of litigation [Order MO-1337-I].

In my view, the City has failed to establish that any of the three requirements of the "dominant purpose" test are met with respect to Records 45, 50 or 57. I have reached this conclusion respecting the three remaining records of the group of records over which the City originally asserted a claim of privilege, and with respect to the City's claim for the first time – and without elaboration – in its reply representations that litigation privilege applies "to all of the other records that are in issue in this appeal." Given my finding on solicitor-client communication privilege, it is not necessary for me to comment on the application of litigation privilege to the

records I have found to be exempt above and I will not do so. Moreover, although the City argued that the records were created for the dominant purpose of existing or reasonably contemplated litigation of a civil or administrative nature, nothing beyond this vague and unspecified description of the proceedings was provided to substantiate the position. This lack of specificity regarding the "existing or reasonably contemplated litigation" must, in my view, result in the failure of the City's claim of litigation privilege. As I have not been provided with sufficient evidence to establish that litigation existed or was reasonably contemplated at the time of the records' creation, I find that litigation privilege does not apply to the records at issue in this appeal more generally, or to Records 45, 50 and 57, specifically.

In summary, I find that Records 32, 33, 39, 40, 51, 54, 55, 56, 58 and 59, as well as the withheld one-page portion of Record 42, are exempt under branch 1 of section 12. I am satisfied that in withholding these records under section 12, the City exercised its discretion properly and with due consideration of the interests the solicitor-client privilege exemption seeks to protect. In addition, I find that Records 45, 50 and 57 do not qualify for exemption under either branch of section 12 and must be disclosed to the appellant.

FEES

The disputed component of the fee charged by the City in this appeal is the $1000.00 amount billed by the City's "consultant" for "locating, retrieving, processing and copying records, as invoiced to the City."

General Principles

Section 45 of the *Act* authorizes the charging of fees, and more specific provisions regarding those fees are found in section 6 of Regulation 823 made under the *Act*. This office has the power to review an institution's fee to determine whether it complies with the fee provisions in the *Act* and Regulation 823. In conducting this review, I may uphold the fee or vary it.

Section 45(1) states:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and

> (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in section 6 of Regulation 823, which reads:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

Representations

Although the issue of the fee was included in the initial Notice of Inquiry, the City did not provide representations in response. The appellant submits that because the City did not consult with him prior to incurring the consultant's fee of $1000 and has not provided an itemization of that cost, it should be disallowed. Further, the appellant submits:

> Charging $1,000 in consultant costs over and above $840 for only providing access to about 217 records is unreasonable.
>
> Section 6 of Regulation 823 allows an institution to charge fees for costs that the institution incurs in locating, retrieving, processing and copying the records if those costs are specified in an invoice that the institution has received. However, as evidenced from Order P-1536… in order for invoiced costs to be recoverable, fees for the activities for which the institution is invoiced must also be

> recoverable under the *Act* if performed by the institution's employees. Since the City has not provided any details regarding the $1,000 consultant's fee, it is impossible to assess whether this amount would be otherwise recoverable.

In reply to the appellant's representations, the City provided submissions on the fee issue which essentially reiterate the description of its response to the "very broad" request provided in the April 3, 2008 final decision. The City also explains that its search identified 752 records, "the majority of which were produced by the City's consultant." According to the City,

> [this individual] is retained by the City under a long-term service contract to be the City's Water Supply Program Manager. [His] contractual arrangement with the City provides for an hourly rate of $83.34, and the time spent by him in producing the records sought by the appellant was 12 hours. [He] has invoiced the City for his time spent in searching for and producing the records, and the City has made payment.

The City submits that the 28 hours for search and record preparation given in the estimate, and re-stated in the final decision, is considerably less than the time actually spent in producing the records and then reviewing them to determine responsiveness and then eliminate duplication, given the number of staff and departments involved. The City suggests that by eliminating the duplicate copies of records, the number of final copies "was reduced by at least half." The City adds that the two claimed time extensions for response to the request provide an indication of the time and effort required. The City's representations conclude with the following statement:

> Considerable time is still being spent by City staff, City consultants and legal counsel with respect to this appeal, and the City has no ability to recover these costs.

In his sur-reply representations, the appellant submits that the fact that the City incurred higher costs in preparing the records for disclosure than what it can claim from the appellant under the fee provisions in the *Act* is irrelevant to the determination of the proper fee. The appellant takes the position that the City has failed to provide sufficient evidence to establish whether the consultant spent any of his time on work for which costs are recoverable under the *Act* and Regulations, and points to the lack of a detailed breakdown of the tasks performed and the costs incurred by the consultant. Furthermore, the appellant submits:

> Where costs are specifically set out in the legislation, the City cannot charge more merely on the basis that a higher amount has been invoiced. For example, the City may only charge $0.20 per page for photocopying a record and only $7.50 for each 15 minutes of search and preparation time, notwithstanding that the photocopying or the search and preparation is done by a consultant and invoiced [Orders P-1536 and M-1090]. … Even if [the consultant] spent all of his time searching and preparing records for disclosure, the maximum fee that the City would be able to charge for 12 hours of his time would be $360. …

> Further, the Appellant notes that the City's submissions relating to the role of [the consultant] in the context of the fees issues are inconsistent with its submission on the applicability of the section 12 exemption. While the City has characterized [this individual] as its consultant for the purpose of charging the Appellant the $1,000 fee, in its submission on the issue of solicitor-client privilege, the City went to great lengths in arguing that despite [his] contractual arrangement with the City, he was not a third party but rather "an inherent part of the City's team". The City noted that "[the consultant] is provided with an office, office facilities, overhead and staff by the City and his email address and correspondence is undertaken internally as part of the City's email system." If those assertions are accepted then the City is precluded from charging a $1,000 fee under the guise of "costs incurred by consultant."

Analysis and Findings

The issue before me is whether the City's fee is reasonable and is calculated in accordance with the *Act*. As noted previously, the appellant has only appealed the portion of the fee charged by the City for consultant's costs pursuant to section 6.6 of Regulation 823. Accordingly, I will not be reviewing the $987.70 charged to the appellant by the City for photocopying ($138.20), search and preparation time ($840.00) and postage/shipping ($9.50).

Based on my review of the evidence and past orders, I will not uphold the $1000.00 fee levied by the City for its consultant's costs. I agree with the appellant that Order M-1090 is instructive in the circumstances of the present appeal. In that order, Inquiry Officer Laurel Cropley reviewed the fees charged to an appellant by the Peel District School Board for services rendered by lawyers retained specifically for processing the request. The Board relied on an invoice provided by the lawyers, which included costs for retrieving, reviewing and determining access to responsive records, as well as photocopying. Referring to paragraph 6 of section 6 of the Regulation which contemplates recovery of costs by an institution for "locating, retrieving, processing and copying a record if those costs are specified in an invoice received by the institution," the Inquiry Officer stated:

> In Order P-1536, Assistant Commissioner Tom Mitchinson addressed the issues arising in a similar situation, that is, where an invoice is submitted to an institution for the processing of an access request. He found that in cases where a cost is not recoverable by an institution under the *Act*, any distinction based on the fact that an activity was done by an outside source and billed to the institution, was not supportable. In this regard, he stated that "the Ministry is not permitted to recover costs through invoiced charges for activities which would be ineligible for cost recovery if performed internally by Ministry staff." I agree with the Assistant Commissioner's interpretation of this section.

I also agree with this reasoning and have applied it in reaching my decision in the present appeal.

The City claims that the consultant "invoiced the City for his time spent in searching for and producing his records," but no copy of that invoice was provided to this office in support of the

City's payment. The City also did not make submissions as to whether the invoice it received contained details about, or an itemization of, the charges by the consultant for "locating, retrieving, processing and copying" as these services were described in the fee outline provided to the appellant in the decision letter. Without any additional information from the City with respect to this component of its fees, it is not possible to determine precisely what the City is charging the appellant for in this regard, particularly as regards the "processing" item.

In my view, several questions arise regarding these charges as described. To begin, previous orders have found that the time spent reviewing records for release is not an allowable charge under the *Act* [Orders 4, M-376, P-1536 and MO-1380]. Similarly, charges for the time spent determining what information should or should not be disclosed is not allowable when included on an invoice [Order MO-1380] though it may be allowed separately as part of the "preparing the record for disclosure" component under section 45(1)(b) [Order M-203]. In addition, charges for identifying and preparing records requiring third party notice, as well as identifying records requiring severing, are not permitted under the *Act* as these activities are viewed as representing an institution's general responsibilities under the Act, and are not specifically contemplated by the words "preparing a record for disclosure" under section 45(1)(b) [Orders P-1536 and MO-1380].

Based on the orders described above and the lack of specific evidence regarding the invoice received by the City, I will disallow the $1000 charge to the appellant for the consultant's involvement. Notwithstanding the City's view that it "has no ability to recover these costs," this fact does not support the attempt to realize recovery through charging for items or fees not otherwise recoverable under the fee provisions established by the *Act* and Regulations [see Order P-1536].

On this point, I note that the City has referred to the consultant's invoice as including a charge for copying records. In my view, there is nothing in the fee provisions of the Act, or past orders of this office, that would support charging the appellant twice for photocopying one set of records. The City has already charged the appellant for photocopying 691 pages at $0.20 per page for a total of $138.20. The costs associated with photocopying may only be charged once in accordance with paragraph 1 of section 6 of the Regulation [see Orders 184, M-360 and MO-1380]. Furthermore, it is also well established that copying charges for "feeding the machine" cannot be passed on to an appellant. Accordingly, I will not uphold the copying component of the consultant's fee.

Further, the City has provided no evidence which might clarify how much time the consultant spent copying the records, or how many copies were produced. However, I note that the City has stated in its representations that its search "actually generated 752 records, the majority of which were produced by [the consultant]." In my view, one could assume that a reasonable figure for "copying" in these circumstances would be one and a half hours, and I will deduct this figure from the 12 hours charged overall for the consultant's time. I will, therefore, permit the City to charge the appellant for a total of 10.5 hours for the consultant's time.

Moreover, the City may not pass on the consultant's usual hourly rate of $83.34 to the appellant. Instead, the City may charge the appellant for the consultant's search and preparation time at the rate of $7.50 for each 15 minutes, as contained in paragraphs 3 and 4 of section 6 of the Regulation.

In summary, I do not uphold the disputed portion of the City's fee for its consultant's work in responding to the request. Instead, I will allow the City to charge 10.5 hours to the appellant for the consultant's search and preparation work, pursuant to fees set out in section 45(1)(b) and paragraphs 3 and 4 of section 6 of Regulation 823 for a total of $315.00.

The appellant paid the City's fee estimate of $1988.60 in full, and as noted in the April 3, 2008 decision letter, its final fee was $1987.70. Accordingly, based on that discrepancy and my findings in this order, I will order the City to issue a refund to the appellant in the amount of $685.90.

ORDER:

1. I order the City to disclose Records 5, 13 - 15, 17 - 20, 22, 25, 26, 28-31, 34, 35, 38, 41, 43, 45, 46, 50, 57, and 60 in their entirety to the appellant by **December 4, 2009**. The City must sever the non-responsive personal information of identifiable individuals in the records, as highlighted in orange on the copy of the records provided with this order. Only copies of the non-exempt records, or portions of records, that contain personal information are provided to the City with this order for this purpose.

2. I uphold the decision of the City to deny access to 32, 33, 39, 40, 42, 51, 54 - 56, 58 and 59 pursuant to section 12 of the *Act*.

3. I do not uphold the City's fee decision, and I order the City to issue a refund to the appellant in the amount of $685.90.

4. In order to verify compliance with Order Provision 1, I reserve the right to require the City to provide me with a copy of the records that I have ordered disclosed to the appellant.

Original Signed by: October 29, 2009
Daphne Loukidelis
Adjudicator