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

ORDER MO-2481

Appeal MA08-231

City of Waterloo

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NATURE OF THE APPEAL:

The City of Waterloo (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records:

> All legal costs for the City to fight FOI [Freedom of Information] requests by the Appellant in 2004 for legal costs in the City's RIM Park lawsuits.

To be clear, in the request that is being dealt with in this order, the appellant seeks access to legal costs incurred by the City in responding to his earlier access requests involving the City. These requests were dealt with in Order MO-2294, and were requests for the City's legal costs in its RIM Park lawsuits. That information was ordered disclosed in Order MO-2294, which is the subject of an application for judicial review by the City which remains pending. Both the appellant and this office are respondents in that application. The appellant is *not* a party to the RIM Park lawsuits, which are, in fact, actions launched by the City against other parties in connection with the RIM Park land development project.

For the purposes of this order, it is important to note that the request at issue here was for legal costs *relating to requests made under the Act*. These costs are quite distinct from those that were the subject of Order MO-2294, which pertained to the City's legal costs in its RIM Park litigation.

The City appears to have created a record containing the requested information, consisting of a single dollar figure, and issued a decision letter denying access to it on the basis that the information was exempt pursuant to sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(c), (d) and (e) (economic and other interests) and 12 (solicitor and client privilege). In its decision letter, the City stated:

> The City has filed a Notice of Application to the Divisional Court for Judicial Review to quash Information and Privacy Commission (IPC) Order MO-2294, relating to a 2004 request for legal billing information. Until such time as this appeal process and/or subject lawsuits have been concluded, the City will continue to deny access to the requested records pursuant to the Act.

The requester (now the appellant) appealed the City's decision to this office.

After reviewing the request and the decision, the appeal file in this matter was streamed directly to the adjudication stage of the appeal process as it was apparent that, based on the position taken by the City in its decision, no useful purpose would be served by mediation. In the adjudication stage of the appeal process, an adjudicator conducts an inquiry under the *Act*. The appeal was assigned to me to conduct the inquiry.

I began the inquiry by issuing a Notice of Inquiry to the City, describing the facts and issues in the appeal and inviting the City to submit representations. I received representations from the City. As the City's representations include an argument that this appeal amounts to an abuse of process, I added that as an issue in this appeal. The City also clarified that it is no longer claiming that the exemption in section 6(1)(b) applies and it did not submit any representations on this issue as a result. Therefore, section 6(1)(b) is no longer an issue in this appeal.

I then issued a modified Notice of Inquiry to the appellant inviting him to submit representations on the facts and issues in the appeal. I also sent a copy of the City's representations to the appellant in their entirety, and invited him to respond to them. I subsequently received brief representations from the appellant.

Prior to the commencement of the inquiry in this appeal, the City wrote to this office requesting that several appeals, including this one, be stayed pending the outcome of the judicial review proceedings relating to Order MO-2294. In response, this office did place several appeals on hold, in whole or in part, because the information at issue in them consists of legal costs associated with the City's RIM Park litigation, and that information is directly related to the outstanding judicial review of Order MO-2294. One of the "on hold" appeals (MA08-232) was filed by the appellant in this case. This office advised the parties that these appeals were being placed on hold, but indicated that this appeal (MA08-231) would not be placed on hold because the subject matter of the request is different.

In its representations, the City reiterated its request that this appeal be stayed. I responded to that request by letter, and stated:

> … you repeat your request that this appeal be stayed pending the outcome of the application for judicial review of Order MO-2294, issued under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). You refer to your previous letter of September 22, 2008. In that letter, you stated:
>
> > You are well aware that all of the Appeals relate to the same issue, namely the RIM Park Litigation.
>
> I disagree with this statement, which, in my view, overbroadly defines the "RIM Park Litigation." As outlined below, there is a distinction to be drawn between legal expenses for the RIM Park civil litigation in which your client has been engaged, on the one hand, and legal expenses for "the City to fight FOI requests by the [appellant] in 2004," which is the subject of this appeal, on the other. …
>
> Appeals that are directly related to legal fees paid by the City in relation to the RIM Park civil litigation have all been placed on hold as a result of your application for judicial review of Order MO-2294. Given the strong link in subject matter, the outcome of that application may have a bearing on the outcome of those appeals. For that reason, it was deemed administratively efficient and beneficial both for the parties and for the orderly processing of appeals under the *Act* to take this step.
>
> By contrast, the appeal under consideration here, that is, Appeal MA08-231, relates to a request for the amount expended by the City in relation to legal expenses relating to the [appellant's] FOI requests. Factual issues relating to the amount of fees in relation to the [appellant's] freedom of information requests are

distinct from those relating to the legal fees paid by the City in the RIM Park civil litigation.

In view of this distinction, it is not necessary to await the outcome of the judicial review of Order MO-2294 in order to adjudicate the issues in this appeal. The law in relation to freedom of information requests for information about legal fees is well settled, being the subject of two previous judgments [*Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.) and *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.)], including one by the Ontario Court of Appeal. In these two judgments, four previous orders of this office concerning legal fees were all upheld. The outcome of the judicial review of Order MO-2294 will be an application of this previous jurisprudence to the facts of that case.

Moreover, and for the same reason, (*i.e.* the law in this area is well settled), this office is not placing a general hold on requests for legal fee information. Except for appeals directly relating to legal expenses for the RIM Park civil litigation, these appeals are proceeding.

In your repeated request for a stay, you refer to a "wave of requests" by the appellant, and also allege that even responding to the request visits a "manifest unfairness" on the City. These arguments suggest, without saying, that the appeal is an abuse of process, an argument you expressly make later in your representations. I will determine that issue in my eventual order disposing of this appeal. It is a substantive issue in Appeal MA08-231, and not a basis to stay the appeal pending the outcome of the judicial review of Order MO-2294.

As far as the "wave of requests" is concerned, I would refer you to section 4(1)(b) of the *Act* and the corresponding provisions of section 5.1 of Regulation 823. Again, even if those provisions were applicable, this is not a basis to stay the appeal. As regards "even responding to the request", I note that your client has, in fact, already done so without making this argument.

For all of these reasons, your request for a stay is denied.

Before concluding the background section of this order, there is one other issue to address. In the appellant's representations, he responded to a comment in the City's representations, in which the City described the subject matter of the request as the amount spent by the City "in 2004" in relation to the appellant's earlier access requests. The appellant clarified that he seeks all such costs, and the reference to "2004" was included only to specify when the requests were initially made.

My reading of the request, whose wording is quoted at the beginning of this order, accords with the appellant's interpretation. However, I note that the record identified by the City as responsive, and apparently created by the City in response to the request, refers to costs "as of May 5, 2008" (the date of the appellant's request), and is not, in fact, restricted to costs incurred in 2004. Accordingly, this record is fully responsive to the appellant's request. I will not deal with this issue further.

On a point of clarification, and given that the City's application for judicial review in relation to Order MO-2294 was issued on May 23, 2008, I asked an Adjudication Review Officer with this office to contact the City to ascertain whether any of the legal costs reflected in the record relate to the application for judicial review, in which this office is a respondent. Those costs would be responsive in the context of this appeal if they had been billed prior to May 5, 2008. The City advised that the dollar amount named in the record does not include any costs in relation to its application for judicial review.

RECORD:

The record is a single sheet of paper setting out the total dollar amount, as of May 5, 2008, that the City had spent on legal costs in relation to the appellant's FOI requests that had been made in 2004.

DISCUSSION:

ABUSE OF PROCESS

Under the heading, "Response in Brief," the City submits as follows:

> In our respectful view, the Appeal should be denied. The Appeal has nothing to do with any public interest in disclosure and everything to do with inappropriate attempts by [the appellant] to obtain privileged material through [the *Act*]. The exemptions contained in the Act … grant the City the express ability to deny the Request(s).
>
> The Appeal should also be denied or stayed on the basis that it constitutes an abuse of process, given the multiplicity of proceedings through which the [appellant] and [other requesters] seek to obtain privileged information.

This submission sets out underlying assumptions about the *Act*, its function and purposes that must be addressed.

Although transparency and accountability are important purposes of access-to-information legislation, the right of access is not predicated upon the "public interest in disclosure." That topic is expressly addressed under section 16 of the *Act*, which provides an override where a

compelling public interest in disclosure outweighs the purpose of an exemption that would otherwise apply.

The broad right of access to government information is explained in *Public Access for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (Toronto: Queen's Printer, 1980) (the "Williams Commission Report"), whose recommendations provided the framework for the *Act* (at vol. 2, p. 233):

> The central and animating principle of a freedom of information law should be that the individual is, as of right, entitled to obtain access to government information. …
>
> …
>
> We think it unwise to restrict access to persons who can demonstrate a need for the information in question. We accept as a basic premise underlying freedom of information laws the proposition that members of the public should be entitled to have access to government information simply for the purpose of scrutinizing the conduct of government affairs. …

This principle led to the inclusion of the right of access as a fundamental purpose of the *Act*, as indicated in sections 1(1)(a)(i) and (ii). These sections state:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, …

In addition, the right of access is broadly expressed in section 4(1), which states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Thus, the right of access exists independent of the need for it to be justified by a demonstrated need for the information, and if a request is made for "privileged material," that does not, *per se*, render it an abuse of process. Rather, the proper response to a request for material that an institution believes to be "privileged" is to claim an exemption, as the City has done here by relying on section 12, which protects information that is subject to solicitor-client privilege. Moreover, under section 39 of the *Act*, requesters are entitled to appeal from such an exemption claim, as the appellant has done in this case. None of this renders the request an abuse of process.

In addition, the City's reference to the fact that others have made similar requests is irrelevant. In considering the City's arguments in relation to abuse of process, the only relevant facts pertain to requests made by the appellant or any individual acting in concert with the appellant. There is nothing before me to suggest that anyone acted in concert with the appellant. As well, I have not been provided with evidence to suggest that anyone other than the appellant has requested the type of information at issue here, namely, information about legal fees incurred in relation to the appellant's access requests under the *Act*. With respect to the City's argument that the appellant himself has made a "multiplicity of requests," I will address that in my discussion of section 4(1)(b) of the *Act* below, and in particular, whether the request is part of a pattern of conduct that is an abuse of the right of access.

In that regard, although it was open to the City to claim that the appellant's request was frivolous or vexatious under section 4(1)(b), I note that the City has not done so. Instead, it alleges that the request is an "abuse of process."

The particular grounds advanced by the City in relation to this allegation are as follows:

1) parties other than the appellant have asked for the same information that was at issue in Order MO-2294;

2) the City has refused these requests on the basis of privilege;

3) the defendants in the RIM Park litigation are seeking to compel the production of information that is at issue in Order MO-2294 through a motion in that litigation; and

4) there is a real risk of inconsistent decisions by the Court and this office in respect of whether the City can be compelled to produce "the documentation and information," and this "… could prejudice the City and the Court/FOI processes."

As I have already noted, the behaviour of parties other than the appellant is irrelevant in relation to the City's allegation that the appellant's request is an abuse of process. This addresses points (1) and (3).

With respect to point (2), the City's claim for privilege in response to a request under the *Act* is properly addressed in the context of its reliance on the section 12 exemption, which I will consider below.

Turning to point (4), I note that Order PO-1688, issued by Senior Adjudicator David Goodis, discussed the relationship between access under the *Act* and the discovery process. In that case, a third party appellant had argued that it was improper, in circumstances where the requester has commenced litigation against it, for the requester to utilize the access to information process under the *Act* as opposed to the discovery process under the Rules of Civil Procedure. He rejected this argument, and provided a helpful summary of the jurisprudence on this issue:

> The application of section 64(1) … was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
>
> > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …
>
> …
>
> In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the Act's municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:
>
> > The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the Municipal Freedom of Information and Protection of Privacy Act legislation, nor ban the publication of the contents of police files required to be produced under that Act. … In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. *The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so,*

> *then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.* [Emphasis added.]

As well, it is important to note that the information referred to in the City's submission on a possible "inconsistent outcome" as between this appeal and matters before the Court appears to be the City's costs in its RIM Park litigation. As already noted, appeals resulting from requests by the appellant and others for information about the City's RIM Park litigation have been placed on hold because of the link between that information and the subject matter addressed in Order MO-2294, pending the outcome of the City's application for judicial review of that order.

More importantly, that information is a completely distinct set of legal costs from the information at issue in this appeal, which is the City's legal costs in addressing the appellant's previous requests that became the subject of Order MO-2294. For that reason, based on the facts, there is no risk of inconsistent decisions being made about the same information.

Although that is sufficient to dispose of the City's argument in point (4), it is also to be noted that the question of whether legal account information should be disclosed under the *Act* has been expressly addressed by the courts in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.) and *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769 (Div. Ct.). I will mention these two judgments a number of times in this decision and will refer to them, respectively, as "*Attorney General, 2005*" and "*Attorney General, 2007*." The guidance provided by these decisions is followed by this office in all appeals relating to the disclosure of legal account information, and for that reason, appeals that relate to legal costs other than those incurred by the City in its RIM Park litigation, including the present appeal, are proceeding.

Before concluding this discussion, however, for the sake of completeness in addressing the City's abuse of process argument, and because of the strong relationship between the doctrine of abuse of process and the "frivolous or vexatious" provisions found in section 4(1)(b) of the *Act* and section 5.1 of Regulation 823, I will consider whether these provisions assist the City in its argument that the request is an abuse of process. As I have already noted, the City did not raise these provisions in its decision or its representations, although it was open to it to do so.

Section 4(1)(b) states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

With respect to the whether the request is part of a "pattern of conduct that amounts to an abuse of the right of access" under section 5.1(a) of the Regulation, I am aware of four access requests made by the appellant. These consist of:

- the two requests addressed in Appeals MA-040339-1 and MA-040386, which were addressed in Order MO-2294, now the subject of an application for judicial review;
- the request in Appeal MA08-232, which is currently on hold at the City's request; and
- the request that led to the current appeal.

In my view, these requests do not demonstrate a "pattern of conduct" that amounts to an abuse of the right of access. Rather, they represent a modest number of requests, two of which were made in 2004, and two in 2008, for information about the expenditure of public funds. The fact that they are requests for information that the City considers to be exempt is irrelevant in this context; that issue is properly addressed by testing the applicability of the claimed exemptions, as I will do later in this order.

The City also states that "these requests drain the City's resources." The City does not explain further how four access requests for very limited information would, to use the language of section 5.1(a) of the Regulation, "interfere with" the City's operations, nor is there any evidence before me to substantiate this claim. The nature of the requested information, and the responsive records produced by the City, point to the opposite conclusion. I am not persuaded that the appellant's requests amount to a pattern of conduct that would interfere with the City's operations.

I am also not persuaded that the request was made in bad faith. I have already addressed the City's arguments that the appellant's requests, taken together, represent an "inappropriate attempt" to gain access to material that the City claims is privileged, and that there is no public

interest in the requested information. As I have already stated, the right of access exists independent of the need for a request to be justified by a demonstrated need for the information, and if a request is made for "privileged material," that does not, *per se*, render it an abuse of process. Nor does it demonstrate that the request was made in bad faith. As well, the remedy for an institution believing that information responsive to a request is privileged is to claim an exemption such as section 12, as the City has done here.

In addition, there is, in my view, no evidence to suggest that the request is for a purpose other than to obtain access.

For all these reasons, I conclude that the request is neither an abuse of process nor "frivolous or vexatious" within the meaning of section 4(1)(b) of the *Act*. I will therefore proceed to consider whether the exemptions claimed by the City are applicable.

ADVICE TO GOVERNMENT

General principles

Section 7(1) states:

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

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

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

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]

In its representations concerning this exemption, the City states:

> As determined by the courts, legal billing information enjoys near absolute protection. The [r]equest, if successful, would reveal communications between the City, its' employees and the legal counsel it has retained with respect to the [l]itigation.
>
> The billings information requested would enable the [appellant] to determine the extent of that communication, which would allow the [appellant] to discern the City's litigation strategies.
>
> The protected communications involved the provision of advice and the obtaining of instructions.
>
> Release of the information requested would thus inhibit the free flow of advice/recommendations to local government and would further inhibit the ability of Council to conduct the [l]itigation or … undertake any other legal action, since the precedent set would mean that no advice/recommendations could be protected. This would act as a clear deterrence to the provision of advice/recommendations on matters otherwise considered to be confidential and protected.

The City's representations expressly define "the litigation" as the "RIM Park litigation." As I have noted previously, the requested legal cost information pertains to the appellant's previous access requests, and not to the City's legal costs in the RIM Park litigation. Disclosure of the fee amount would not disclose anything about the City's strategy in the RIM Park litigation. Moreover, if any information could be inferred from the record, it would only be exempt under section 7 if it revealed a suggested course of action.

The record does not set out a suggested course of action, nor in my view is it possible to infer any such information from the record, which simply contains the total dollar amount expended on legal fees in relation to the appellant's previous access requests submitted in 2004.

The City's response to those requests entailed a denial of access pursuant to sections 7(1), 11(c) and (d), 12 and 52(3) of the *Act*, as has already been conveyed to the appellant in the City's decision letters responding to these requests. The record itself does not give rise to any possible inference about the nature of the advice given by the City's legal counsel.

I find that section 7(1) does not apply.

ECONOMIC AND OTHER INTERESTS

The City claims that sections 11(c), (d) and (e) apply to the record. These sections state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

The purpose of section 11 is to protect certain economic interests of institutions. The Williams Commission Report, which is also cited above, explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) or (d) 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.)].

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these

economic interests or competitive positions [Order P-1190].

Section 11(c) is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [PO-2014-I].
In order for section 11(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution. [Order PO-2064]

Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Order PO-2064].
The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

The City's representations concerning sections 11(c), (d) and (e) state as follows.

> The [r]equest could jeopardize the City's position(s) in the [l]itigation since the parties opposite in the [l]itigation may be able to use that information to undermine the City's position in the [l]itigation, which could reasonably be expected to prejudice/injure the City's competitive/financial interests.
>
> A mediation session has already taken place on December 10, 2007 in the [l]itigation and an additional mediation session of at least one day has been ordered by the court. Granting the [r]equest would prejudice/injure the City's ability to engage in negotiations during the course of the [l]itigation.
>
> The test of "reasonable expectation of harm" through the release of the records is met here: should the [Appellant] obtain the information requested, defendants in the [l]itigation would be put at a significant advantage over the City, whose interests may be correspondingly damaged.

Paragraphs 1 and 3 of the quoted representations relate to sections 11(c) and (d), which exempt information whose disclosure could reasonably be expected to prejudice the City's economic interests or competitive position (section 11(c)) or be injurious to its financial interests (section 11(d)). In essence, the City argues that the information could be used against it in the RIM Park

litigation. As already noted, the record at issue in this appeal sets out a total dollar figure representing the legal costs the City incurred, up to and including the date of the request, in responding to the previous access requests by the appellant. The City does not explain how those legal costs could possibly be used against it in the RIM Park litigation. Based on the information provided to me, I am unable to draw any inference to that effect. It is, moreover, hard to imagine how the information at issue in this appeal could possibly be considered relevant in that litigation, to which the appellant is not even a party.
The City's submissions and evidence regarding section 11(c) and (d) fall far short of the "detailed and convincing" evidence required to support the application of those exemptions, and I find that they do not apply. Nor does the requested information have any bearing on the City's ability to earn money in the marketplace, or to compete for business with other entities. I find that these sections do not apply.

With respect to section 11(e), the wording of the section itself indicates that, in order for it to apply, the record must actually *contain* "positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution."

I have carefully reviewed the record, and find that it clearly does not contain "positions, plans, procedures, criteria or instructions." The record simply contains the amount of money spent on legal fees by the City in relation to requests under the *Act*, and nothing more. Accordingly, I find that section 11(e) of the *Act* does not apply.

SOLICITOR-CLIENT PRIVILEGE

Section 12 states as follows:

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

Section 12 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2 arises from the latter part of section 12, and in particular, the reference to a record " … that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." It is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting

litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

The City submits that the record at issue is exempt in its entirety under section 12 of the *Act*. As previously described, the record consists of the total amount of money, as of the date of the request, spent in legal costs for the City in relation to the appellant's previous requests made under the *Act* in 2004. As the request was made in 2008, the single dollar figure shown in the record represents legal fees over a period of four years.

Early on in its representations, the City states that:

> … it is trite law that lawyers' billings fall within the category of information protected by solicitor-client privilege. The protection afforded to such accounts must therefore be near absolute.

In *Maranda v. Richer*, [2003] 3 S.C.R. 193, the Supreme Court of Canada held that legal billing information is subject to a rebuttable presumption that it is subject to solicitor-client communication privilege. That privilege can be rebutted where it is determined that the billing information does not disclose confidential solicitor-client communications, and is in fact "neutral," concepts that will be explored further below.

More importantly, in relation to the passage just quoted from the City's submission to the effect that the law pertaining to lawyers' billing information is "trite" (which I take it means that, in the City's view, the ultimate application of privilege to any such information is obvious), I must respectfully disagree. For example, in *Attorney General, 2005* and *Attorney General, 2007*, both of which considered *Maranda* extensively, the Ontario Court of Appeal and Divisional Court, respectively, upheld four previous orders of this office which found, on the facts, that the presumption of privilege regarding the legal billing information at issue had been rebutted. I also note that in reaching these conclusions, both courts applied correctness as the standard of review, and therefore found that outcome in each of the four orders was correct.

Accordingly, the issue of whether the presumed application of solicitor-client communication privilege is rebutted must be determined in assessing whether section 12 applies in this case. Specifically, this question relates to whether branch 1 solicitor-client communication privilege applies.

The submissions of the City on section 12 relate primarily to the issue of the rebuttable presumption of privilege as outlined in *Maranda*, and accordingly, to branch 1 solicitor-client communication privilege, but at the conclusion of its argument, the City states that "… the requested records fall under both heads of privilege, common-law (solicitor-client and litigation) and statutory privilege." Accordingly, I will consider whether the total dollar amount of legal fees set out in the record is exempt under any aspect of branch 1 or 2 of the exemption.

To reiterate, the only legal billing information that has been requested, and the only information shown in the record, is the total dollar amount of legal fees expended by the City in relation to the appellant's access requests made in 2004, up to the date of the request that is under consideration in this appeal. There is only one dollar figure named. No legal invoices were specifically requested, and the record is not a law firm's invoice. It is a single piece of paper that appears to have been created for the purpose of the request, showing this one figure, without any narrative account or other details of the services provided.

Branch 1 – Common Law Solicitor-client communication privilege

At 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.)].

The City submits that lawyers' billings fall within the category of information protected by solicitor-client privilege, and that the protection afforded to such accounts must be "near absolute."

In its representations, the City summarizes the position of the Supreme Court of Canada and the Ontario Court of Appeal on this issue. The City cites the Supreme Court of Canada in *Maranda* (cited above), *Stevens v. Canada*, (1998) 161 D.L.R. (4th) 85 (F.C.A.), and *Attorney General, 2005*.

In particular, the City quotes part of the following passage from *Maranda* (found at para. 33 of the Court's judgment):

> In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls prima facie within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum.…

In this part of its submissions, the City also states:

> As the information requested relates to on-going litigation, it does not fall within any of the (limited) exemptions carved out by the courts. It is not a statement of fact, but protected communication: see for example [*Stevens*, cited above, which found that] matters relating to the giving of advice fall within the area of privilege, [and] they are not statements of fact.

The City does not specify how the request in this case would reveal privileged communications relating to on-going litigation. As I have already observed, the City's representations define "the litigation" as the City's RIM Park litigation. The request is for information about legal fees in relation to the appellant's access requests in 2004, and *not* to the City's legal costs in the RIM Park litigation, which was the subject of those earlier requests. As well, as already noted, the City has affirmed that no part of the legal fees at issue in this case pertain to its judicial review application concerning Order MO-2294.

As regards the City's reliance on *Stevens*, the following passage from *Attorney General, 2007*, is pertinent. Lederman J., writing for the Court, stated (at paras. 16-19):

> Writing for the majority in *Maranda*, LeBel J. observed that courts have been divided on the question of whether information contained in legal billings is privileged. One line of cases supported the proposition that the amount of fees, with nothing more, is not a "communication" but rather a "fact" which is not subject to privilege unless the context dictated otherwise. Another line of cases, including *Stevens v. Canada*, held that a lawyer's bill is a communication expressive of the relationship between the solicitor and client and the amount of fees should always be protected by a blanket privilege given the ability of

> opposing counsel to sometimes extract privileged information from apparently neutral billing amounts.
>
> *With respect to such information, the Supreme Court rejected the fact/communication dichotomy and clearly established a new test for solicitor-client privilege for this kind of information. LeBel J. in Maranda, at paras. 28 to 34, in effect abandoned the absolutist approach taken by each line of cases and, instead, developed the "rebuttable presumption of privilege" test when a disclosure of lawyer's billing information is sought.*
>
> *It is clear that Maranda overrules Stevens to the extent that the latter purported to recognize a blanket privilege for billing information.*
>
> Rather, because the fact of billing information arises out of the solicitor-client relationship and of what transpires within it, and is so clearly connected, the Supreme Court held that that approach to be taken is that solicitor's bills of account will be prima facie protected by privilege. However, the presumption of privilege can be rebutted where the disclosure of the information would not violate the confidentiality of the solicitor-client relationship by revealing directly or indirectly any communication protected by the privilege. [Emphases added.]

From this, it is clear that the City's arguments based on the view that legal billing information is, by definition, a "communication," and therefore subject to a blanket privilege as held in the *Stevens* case, are not persuasive. Rather, the approach taken in *Maranda*, and the judgments of the Ontario courts in *Attorney General, 2007* and *Attorney General, 2005*, set out the applicable law.

The City goes on to argue that the appellant must rebut the presumption of privilege:

> This jurisprudence apparently informs the view of the IPC, as set out in Decision MO-2294, that billing information can be ordered released if it can be proven to be "neutral." At law the onus is on the requester to demonstrate this.

The City submits that the appellant has not met the onus of demonstrating that the information contained in the record is "neutral." According to *Maranda*, if information is found to be neutral, the presumption of privilege is rebutted. In my view, this is a determination to be made on the facts. As several of the cases demonstrate, it is not necessary for the appellant to rebut the presumption through argument, which would be difficult when, in the context of an appeal under the *Act*, he is not aware of the exact content of the record.

In *Attorney General, 2007*, Lederman J. made several observations that are pertinent to the question of how this determination is to be made. As noted in the passage just quoted, Justice Lederman stated that "…the presumption of privilege can be rebutted where the disclosure of the information would not violate the confidentiality of the solicitor-client relationship by revealing

directly or indirectly any communication protected by the privilege." He went on to state:

> In [*Attorney General, 2005*], the Ontario Court of Appeal addressed the application of this "rebuttable presumption of privilege" test in the context of an access to information request. At issue were two disclosure orders made by the IPC regarding legal fees paid by the Attorney General to outside counsel in two separate criminal proceedings. In dismissing the Attorney General's application for judicial review, the Ontario Court of Appeal held the following at paragraph 9:
>
> > Assuming that *Maranda v. LeBlanc, supra*, at paras. 31-33 holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. *The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege*. [Emphasis added.]

I addressed the question of onus in Orders PO-2483 and PO-2484. Order PO-2484 was upheld on judicial review in *Attorney General, 2007*.

In Order PO-2483, I stated:

> … while the Court of Appeal did indicate in [*Attorney General 2005*] that "the onus lies on the requester to rebut the presumption", I also note that in the same case at Divisional Court, Carnwath J. found it "open to the court to rebut the presumption". The Divisional Court's decision that the presumption had been rebutted was upheld by the Court of Appeal. The entire discussion of the presumption and its rebuttal in that case was first developed by the Divisional Court, since this analysis arises from the Supreme Court's decision in *Maranda* which had not yet been released when the orders giving rise to these judgments were issued. The Divisional Court's decision, upheld by the Court of Appeal, is based on the nature of the information itself, not on any argument by the requester. (In fact, in one of the orders under review in [*Attorney General, 2005*], the requester had not provided representations at all – see Order PO-1922.) *This demonstrates that the nature of the information and the circumstances and context of a particular case constitute evidence which might rebut the presumption. The fact that the appellant did not submit representations does not, in my view, remove the possibility that the presumption can be rebutted based on the totality of the evidence before the Commissioner*. [Emphasis added]

I adopted the same approach in Order PO-2484. I referred to the excerpt from PO-2483 set out above, and then stated:

> In my view, similar considerations apply where the appellant has provided representations on the issue, but the records themselves are a source of important information. Even if the appellant participates in the appeal, as in this case, his or her ability to provide the necessary evidence and argument to rebut the presumption is hampered by not having seen the records. In this situation, in my view, the Commissioner must review the records and consider the evidence they provide on this point, just as the Court of Appeal did in [*Attorney General, 2005*]. Any other approach would be unfair to the appellant.

In *Attorney General, 2007,* the Divisional Court upheld my decision in Order PO-2484 that the bottom line legal fee amounts appearing on legal accounts were not exempt under the solicitor-client privilege exemption at section 19 (the equivalent to section 12 of the *Act* in the *Freedom of Information and Protection of Privacy Act*).

Turning to the specific criteria to be applied in determining whether the presumption of privilege has been rebutted, I note that in applying *Maranda* in *Attorney General, 2005,* the Court of Appeal commented as follows:

> The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire Act.

In Orders PO-2483 and PO-2484, I summarized the above-noted approach as follows:

> Accordingly, in determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous

> inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

As identified above, Order PO-2484 was upheld by the Divisional Court in *Attorney General, 2007*.

On the specific question of whether the presumption of privilege is rebutted, the City submits:

> In this regard, the accepted test is that of whether an assiduous inquirer, aware of the background information, could use the information requested to deduce or otherwise acquire communication protected by privilege.
> The [r]equest will violate confidentiality and pierce privilege by revealing (a) communications between lawyer and client, and (b) the extent of the communication. The [Appellant] is already very informed about the [RIM Park litigation], and will be able to use the information sought to deduce the communications the City has had with its' legal counsel and staff with respect to the City's position on the [o]riginal [r]equest.
>
> Moreover, the [r]equest is not a one-time request, but part of a series of requests for privileged information that, individually and collectively, may wholly expose the City's approach and strategy in the (continuing) [RIM Park litigation]. This could reasonably be expected to undermine the City's ability to litigate, which is exactly why the privilege should not be pierced.

Throughout its argument in this appeal, the City continually conflates the request at issue here, namely one for legal fees paid by the City in relation to the appellant's access requests made in 2004, with the completely separate issue of legal fees paid by the City in relation to its RIM Park litigation, to which the appellant is not a party. Seen in this light, the City's arguments that this request is part of a "series of continuing requests that, individually and collectively, may wholly expose the City's approach and strategy in the (continuing) [RIM Park litigation]" are not persuasive. The information here has nothing to do with the City's costs or legal strategy in its RIM Park litigation. The legal fees requested in this case simply do *not* relate to the City's RIM Park litigation, no matter how many times the City asserts that they do.

On this basis, the argument that the legal costs paid by the City in relation to the appellant's 2004 access requests would reveal *any* information about its strategy in the RIM Park litigation must be rejected. In addition, although the appellant has made requests about the costs of the RIM Park litigation in the past, even if that information were disclosed (which it has not been due to the judicial review litigation concerning Order MO-2294 and the placing of related appeals "on hold"), this would reveal no information that could add to the appellant's ability to glean privileged information from the information at issue here, which concerns the City's legal costs in relation to the appellant's 2004 access requests. As I have stated many times in this order, the

issue of the RIM Park litigation costs is totally separate.

It is possible that the appellant may make future requests for information about the City's legal costs in responding to his previous access requests, such as the City's legal costs in the judicial review of Order MO-2294, in which case the impact of that additional request would have to be considered in the City's response to it. The mere possibility of such a request being made in the future does not enhance the likelihood that disclosing the information at issue here would reveal privileged communications. As stated by the Divisional Court in *Attorney General 2007* (at para. 24):

> In the instant cases, there were not repeated requests for incremental billings. Even if multiple requests could be made in the future, the IPC is capable of viewing such further requests in light of any prior disclosure that had been ordered to determine whether there is a heightened risk of inferring privileged information.

The fact of the matter is that the appellant has made *one* access request for information about the City's legal costs in relation to the appellant's 2004 requests, and there is *one* record that sets out a single dollar amount covering fees over a period of four years, beginning with the date of the access requests in 2004 and continuing through to the date of the request for legal fees expended in relation to those requests, which was submitted in 2008. In my view, there is no reasonable possibility that *any* privileged communication could possibly be revealed, even inferentially, by disclosing the record at issue in this appeal. In my view, the evidence before me calls for the same analysis as was given by the Court of Appeal in *Attorney General, 2005* (at para. 13):

> We see no reasonable possibility that any client/solicitor communication could be revealed to anyone by the information that the IPC ordered disclosed pursuant to the two requests in issue on this appeal. The only thing that the assiduous reader could glean from the information would be a rough estimate of the total number of hours spent by the solicitors on behalf of their clients. In some circumstances, this information might somehow reveal client/solicitor communications. We see no realistic possibility that it can do so in this case. For example, having regard to the information ordered disclosed in PO-1952, we see no possibility that an educated guess as to the amount of hours spent by the lawyers on the appeal could somehow reveal anything about the communications between Bernardo and his lawyers concerning the appeal.

Based on the circumstances of this appeal, I find that there is no reasonable possibility that the disclosure of the record could directly or indirectly reveal any communication protected by solicitor-client privilege.

In addition, the information requested in this appeal is a one-time request. It is not a request for "running totals" or a series of requests from which additional information may be gleaned. Moreover, as explained above, I find that an awareness of information regarding the RIM Park

litigation could not assist the appellant in drawing inferences about any privileged information as a result of the disclosure of the record at issue in this case.

Accordingly, based on the nature of the information contained in the record and all of the evidence, I find that this information is neutral information, and that the presumption of privilege is rebutted. As a result, the record is not exempt under branch 1 solicitor-client communication privilege.

Branch 1 – Common Law Litigation Privilege

As noted above, the City submits that the record is subject to common law litigation privilege under branch 1. It also submits that the information requested "pertains to communication between the City and its legal counsel pertaining to the [l]itigation" and that "[t]he communication clearly relates to existing litigation."

Common law 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.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] 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.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In this case, as I have repeatedly observed, the legal fees at issue pertain to the legal costs incurred by the City in relation to the appellant's 2004 access requests. As I have already noted,

the City's representations define "the litigation" as meaning its RIM Park litigation. These fees have nothing to do with the City's costs in the RIM Park litigation, to which the appellant is not even a party.

The City does not identify any other "litigation" to which these fees relate, and as observed earlier, the City indicates that the fees do not include an amount referable to its application for judicial review of Order MO-2294. In fact, the record appears to have been prepared to respond to the appellant's access request. Even if an underlying invoice did pertain to litigation, this would not meet the "dominant purpose" test. In my view, invoices for litigation services are prepared for the dominant purpose of collecting fees, rather than to be used "…in order to obtain legal advice or to conduct or aid in the conduct of litigation," to use the language of the Court in *Waugh* which I have quoted above.

On this basis, I find that the record at issue was not created for the dominant purpose of existing or contemplated litigation.

Nor is there any evidence to suggest that the record at issue in this case could have any connection to counsel's need for a "zone of privacy" in relation to the conduct of litigation, or that the record was selectively copied for a lawyer's litigation brief, both of which might indicate that the record could qualify for common law litigation privilege (see *General Accident Insurance Co. v. Chrusz*, and *Blank*, both cited above).

Based on the evidence, I am therefore not satisfied that the record is subject to common law litigation privilege, which therefore provides no basis for finding it exempt under branch 1.

Branch 2 – Statutory Privilege

As already noted, branch 2 applies to a record "that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation."

In my view, it cannot be said that legal billing information is prepared "for use in giving legal advice." Rather, its purpose is to collect legal fees for providing legal advice. It is particularly clear that this record, which contains no more than a dollar figure charged for legal services in relation to the appellant's 2004 access requests, was not prepared for use in giving legal advice. It appears to have been created to respond to the appellant's request, but even if it were not, it is not the sort of record counsel would refer to or use in connection with giving legal advice, and was therefore not prepared "for use in" giving legal advice. Accordingly, I find that the record is not exempt under the "legal advice" aspect of branch 2.

Turning to the litigation privilege aspect of branch 2, I repeat the analysis above, to the effect that this record has nothing to do with the legal costs incurred by the City in its RIM Park litigation. Moreover, and for reasons substantially similar to those set out above, I am also not satisfied that information about legal fees could be said to have been prepared "for use in, or in

contemplation of, litigation" (see also Order PO-2483).

I therefore find that the record is also not exempt under the "litigation privilege" aspect of branch 2.

Conclusion

Having found that the record is not subject to exemption under branch 1 or branch 2 of section 12, I find that section 12 does not apply. As none of the claimed exemptions apply, I will order the record disclosed.

ORDER:

1. I order the City to disclose the record, in its entirety, to the Appellant by **December 31, 2009**.

2. In order to verify compliance with this order, I reserve the right to require the City to send me a copy of the record disclosed pursuant to order provision 1.

Original Signed By: November 30, 2009
John Higgins
Senior Adjudicator