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

ORDER MO-2474

Appeal MA08-256

City of Kitchener

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BACKGROUND OF APPEAL:

In August 2007 a land developer (the affected party) purchased a decommissioned tire plant and surrounding lands located in Kitchener, Ontario. It sold a portion of the site to the City of Kitchener (the City). The public website of the City states:

> City council approved the business case to build a new consolidated maintenance facility (CMF) at 131 Goodrich Dr., in November 2007. The decision was based on the following reasons:
>
> - Many of the city's current facilities are aging, inefficient, inappropriately sized and configured for modern equipment.
> - The city will be required to vacate some of the current facilities in the coming years.
> - A new CMF will improve service delivery to residents and operational efficiency and help to address the growth in demand for city services.
>
> The CMF will bring a number of municipal operations and services under one roof, including: road maintenance, snow clearing, watermain and sewer maintenance, gas-line works/utilities, parks and woodland maintenance, fleet repair, city facilities management; as well as the city's corporate call centre, stockrooms, salt storage, bulk material storage and greenhouses.

In addition, the City posted the following information about the land and building it purchased from the land developer:

> **Land Purchase:**
>
> In December 2007, the city entered into an agreement to purchase 45 acres of land and a 300,000 square foot building on the former BFG property from [the affected party], at a cost of $20.27 million.
>
> …
>
> While the agreement of purchase between the City of Kitchener and [the affected party] wasn't specifically divided into per acre and per square foot costs, the following cost breakdown demonstrates the value the city received for its money.

Land (45 acres, guaranteed to be clean, $250,000 per acre*)	$11.25 million
Building (300,000 square feet, fully cleaned, painted and portions demolished that were not needed, lighting, sprinkler, security and mechanical systems included, $30.07 per square foot**)	$9.02 million
Total price to be paid by the City to [the affected party]	$20.27 million

The City advises on its website that it made a strategic decision to not purchase the entire 103-acre property the affected party offered to sell. On December 19, 2008, the City became the owner of approximately 45 acres of land and a 300,000 square foot building.

The request in this appeal seeks access to records relating to the purchase and sale of the subject property.

NATURE OF THE APPEAL:

The City received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a reporter who works at a local newspaper for access to records relating to the purchase and sale of the subject property between the City and the affected party.

Within a week of receiving the request, the City wrote to the requester to confirm the parameters of the appellant's clarified request, as follows:

> 1. The agreement of purchase and sale between the City of Kitchener and [the affected party] regarding the sale of part of the former … site to the City.
>
> 2. Any hardcopy correspondence, including emails, related to the sale of part of the former … site by [the affected party] to the City. The timeframe: June 1, 2007 to November 30, 2007.
>
> 3. Any emails related to the sale of part of the former … site by [the affected party] to the City for the following individuals: [named Mayor, two identified Councillors; and 3 named City staff]. The timeframe: June 1, 2007 to November 20, 2007.

In the same letter, the City issued a fee estimate to the requester. The City's fee estimate letter advised the requester that "accessing the hardcopy correspondence along with the active e-mails is much easier and more straight-forward. Accessing the deleted e-mails is a more involved process for which we've provided an explanation." The City estimated that the cost of processing the request would be $2,520.00, broken down as follows:

• Estimated search and preparation time	12 hours at $7.50 per 15 minutes	360.00
• Estimated restoration of deleted e-mails	36 hours at $15.00 per 15 minutes	2160.00
• Estimated photocopying	Unknown at $.20 per page	n/a
Total Estimated Cost of Request		$2520.00

The City advised that a deposit of $1,260.00 was required in order to process the request. The City's fee estimate letter did not indicate whether the City was prepared to provide full or partial access to any responsive records located.

The City subsequently wrote to the requester to confirm its receipt of the requester's $1,260.00 deposit. The City advised that it had begun to search and prepare responsive records, but that it required additional time to issue an access decision to address technical issues related to the retrieval of e-mails from the back-up tapes.

The City subsequently issued its access decision within the timeframe set out in its previous letter to the requester. The City's access decision granted the requester partial access to 10 documents totalling 15 pages. The City denied access to the remaining responsive 198 records pursuant to sections 10(1)(third party information), 11(c) and (d) (economic and other interests) and 12 (solicitor-client privilege) of the *Act*. The City's decision letter also requested payment of the outstanding balance.

The requester paid the outstanding balance and obtained access to the 10 documents identified in the City's access decision. The requester (now the appellant) subsequently appealed the City's access decision to this office. The appeal letter stated that the "fee should be drastically reduced to something less than $300.00" and that the "agreement of purchase and sale, and all of the e-mails I am seeking should be provided to me."

During mediation, the City advised the mediator that it was not prepared to release any records relating to the purchase and sale of the subject property, as the sale transaction had not been finalized. The appellant advised the mediator that the public interest override in section 16 of the *Act* applies in the circumstances of this appeal. At the end of mediation, the appellant confirmed that he continues to seek access to the withheld records and that he takes the position that the fee charged by the City is excessive.

The appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I decided to commence my inquiry by sending a Notice of Inquiry setting out the facts and issues in dispute and seeking the representations of the City and the affected party, initially.

Both the City and the affected party provided representations and the non-confidential portions of their representations were provided to the appellant, along with a Notice of Inquiry. The appellant provided representations in response, which were then provided to the City, who responded with reply representations.

I wrote to the City recently to inquire about the status of the sale transaction. The City responded that the sale/purchase of the property in question has been completed. The City also confirmed that it no longer relies on sections 11(c) and (d) to withhold Records A to M.

This order will address the reasonableness of the City's fee and the application of section 10 (third party information) and section 12 (solicitor-client privilege) to the records at issue.

RECORDS:

The records remaining at issue consist of 198 documents.

Record	Description	Exemption	
Document A	Letter of intent signed by the affected party, dated June 14, 2008	Section 10	4 pages
Document B	Addendum to the letter of intent, dated June 19, 2008	Section 10	1 page
Document C	Addendum to the letter of intent, dated June 22, 2008	Section 10	1 page
Document D	Draft letter of intent, dated June 6, 2007	Section 10	4 pages
Document E	Draft schedule "B" to draft purchase and sale agreement, dated May 23, 2007	Section 10	1 page
Document F	Draft purchase and sale agreement dated May 2007, including schedules	Section 10	14 pages
Document G	Draft purchase and sale agreement dated November 2007, including schedules	Section 10	15 pages
Document H	Draft purchase and sale agreement dated December 2007, including schedules	Section 10	17 pages
Document I	Purchase and sale agreement executed December 20, 2007, including schedules	Section 10	15 pages
Document J	Amending Agreement, executed February 25, 2008	Section 10	2 pages
Document K	Second Amending Agreement, executed April 24, 2008	Section 10	2 pages
Document L	Third Amending Agreement, executed May 9, 2008	Section 10	3 pages
Document M	Fourth Amending Agreement, executed May 21, 2008	Section 10	2 pages
Documents 1 to 185	Various correspondence and e-mails from the City Solicitor's file	Section 12	n/a

DISCUSSION:

The City and the affected party claim that Documents A to M contain confidential third party information and thus qualify for exemption under the mandatory exemption at section 10(1). The appellant takes the position that these records are contracts and thus cannot qualify as third party information under the section 10(1) exemption.

In addition, the City argues that the Documents 1 to 185 contain solicitor-client privileged information and thus qualify for exemption under section 12. As the section 12 exemption is discretionary, the City must also demonstrate that it properly exercised its discretion to deny the appellant access to these records.

The appellant claims that the public interest override at section 16 applies to any records found exempt under sections 10(1) and/or 12.

I will first consider whether the City's fee should be upheld, and then whether the mandatory exemption at section 10(1) applies to Documents A to M. Finally, I will consider the City's claim that the discretionary exemption at section 12 applies to Documents 1 to 185.

FEES

Where the fee is $100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records [Order MO-1699].

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699].

The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].

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

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

Representations of the parties

The City takes the position that it provided the appellant with sufficient information to allow him to make an informed decision on whether or not to pay the fee.

With respect to the issue of whether the City's fee estimate provided an indication as to whether the appellant would be granted access, the City states that it "did not specifically indicate to the appellant at the time that the fee estimate was provided whether it would or would not grant access to the records because the City was unsure at that time for various reasons."

The City submits that no fees were assessed to locate records responsive to the first part of the request (Documents A to M). The City advises that these records "were easily accessible and represented very little in the way of time spent to search and retrieve records."

The City submits that its estimated and actual fee represents its search and preparation time to search for records responsive to the second and third parts of the appellant's request. The second part of the appellant's request sought access to hardcopy correspondence, including e-mails related to the sale and purchase of the subject-property between June 1, 2007 and November 30, 2007. The City's representations state:

> The second part of the request was broad in its scope with very little specifics given other than the timeline. With so many members of City staff involved with the CMF project in general, there was no way to know who may have received or sent correspondence from/to the Vendor and if the correspondence related to the request. It was known that correspondence had been received/sent between the City and [t]he Vendor; however, without undertaking a detailed search it wasn't known if these records would be released in whole or in part or held under one the exemptions allowed. This information only came to light when the responsive records were reviewed by the City Clerk after the issuance of the fee estimate letter.

The search which the City describes above located 185 records in the City Solicitor's files. The City indexed these records as Documents 1 to 185 and denied access to them in their entirety pursuant to section 12 (solicitor-client privilege). With respect to these records, the City's representations state:

> The records to which access was denied under Section 12 (Documents 1 to 185), were only found as a result of the detailed searches undertaken by the record holders. The offer to sell the property in question was received by the City shortly before June 2007 and following that, the vast majority of correspondence was between the City Solicitor and the Vendor and/or representatives. It was impossible to know in advance that these records existed or what the nature of their content was in order to inform the appellant beforehand in the fee estimate letter that access might be denied under [s]section 12. Had the appellant, for example, specifically requested the City to search the files and email records of the City Solicitor, the City might reasonably have been able to say in advance that access might be denied under Section 12.

The third part of the request sought access to any e-mails related to the sale and purchase of the property in question between six named individuals for the period of time between June 1, 2007 and November 30, 2007. The City's representations state:

> In regard to the third part of the request, the City was diligent and persistent in informing the appellant on how searches of backed-up emails would be undertaken. The City stated clearly that back-ups from the email server only happened on the last day of the month and only those emails that had not been deleted by the individual on the day of the back-up, would be available. This information was conveyed to the appellant in written correspondence from the City Clerk and in telephone conversations. The only way to know exactly what records would be found and if those records, if any, would be released or exempted was to undertake the time consuming and costly task of restoring the back-up tapes and conducting a search for the records responsive to the request. As it turned out, all records pertaining to the request found by way of the back-up tapes were released to the appellant.

The appellant does not challenge the City's calculation of its fee. Rather, the appellant argues that by failing to advise him whether access would be granted or not, the City failed to provide sufficient information to allow him to make an informed decision on whether or not to pay the fee. The appellant's representations state:

> The [C]ity did not provide [the newspaper] with an opinion about whether the records sought would be released. This is a requirement under the [*Act*]. The [C]ity attempts to justify this violation of the [*Act*] by saying it had to first locate the records before it could make a determination about whether the records sought could be made public. The [*Act*] does not make allowances for the inefficient methods of storing and retrieving records. Had [the newspaper] known in advance it would receive only 15 emails it would not have agreed to pay nearly $2,500. In our view the fees should be drastically reduced.

With respect to the appellant's concerns that only 15 e-mails were released to him, the City's reply representations state:

> It should be clear that [the appellant] was advised on several occasions both verbally and in writing, that only those emails related to his request that were not deleted on the day of the back-up took place, would be available. It was his decision to move forward knowing the risk.
>
> The fees allowed under the [*Act*] are for search and preparation and are not based on [the] volume of records released. [The appellant] states quite clearly had the City undertaken the expensive (the cost being far more than the fee collected) and time-consuming search of backed-up emails prior to providing him a fee estimate, he would have simply amended his request, removing those records as the search did not produce what he was looking for. This is an example of a fishing expedition and if allowed, every reporter and others in the Province will tie-up institutions subject to the [municipal and provincial Acts], fishing for information they're [unsure] exists, knowing it will not cost them financially, only the taxpayers of this Province.

Decision and Analysis

First, I will determine whether the City's fee was calculated in accordance with the *Act*. I will then consider the appellant's argument that the City's fees should be discounted to remedy the City's failure to issue an access decision with its fee estimate.

Should the City's fees be upheld?

Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> 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 sections 6, 6.1, 7 and 9 of Regulation 823. Section 6.1 has no application in this appeal as the request does not seek access to the appellant's personal information. The City claims that it relies on section 6.1, 6.3, 6.4 and 6.5 to calculate its fee. These sections state:

> 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.
>
> …
>
> 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.

In his appeal letter, the appellant submits that the City's fee should be reduced to something less than $300.00. The City's representations clarified that its actual fee of $2,855.00, was calculated as follows:

• Search	19.5 hours at $7.50 per 15 minutes	585.00
• Preparation	5.5 hours at $7.50 per 15 minutes	165.00
• Restoration of deleted e-mails	30 hours at $15.00 per 15 minutes	1800.00
• Photocopying	15 pages at $.20 per page	3.00
		$2850.00

I carefully reviewed the representations of the parties and find that the only portion of the City's fee estimate which is in accordance with the *Act* is the $3.00 charge for photocopies, the City

Clerk's search time at $180.00 and computer costs at $1800.00, for a total of $1983.00 for the following reasons:

a) Manual search time

The City submits that it charged the appellant $585.00 at a rate of $7.50 per 15 minutes as prescribed by Regulation 823, section 6.3 to manually search its hardcopy files, active e-mail server and backup tapes to locate records responsive to the second and third part of the request (section 45(1)(a)).

In its representations, the City states that the "second part of the request required a great deal of time to search files for hard copy records and electronic folders for any records that may be responsive to the request." The City advises that this process resulted in 13.5 hours of search time undertaken by 5 staff members. The City located 185 records as a result of this search. The City withheld access to all of these records from the appellant and claimed that the records contain solicitor-client privileged information. All of these records were located in the City Solicitor's files. The City advises that it did not charge for the time which it required to decide whether or not to claim the solicitor-client privilege exemption. However, previous decisions from this office have held that institutions cannot charge a fee for the time required to decide whether or not to claim an exemption [Orders P-4, M-376 and P-1536].

I have carefully the reviewed the City's representations along with the 185 records. Given that all of the 185 records were located in the City Solicitor's files, I find that 13.5 hours is not a reasonable amount of time to locate records maintained in one location. The City claims that some of its search time was divided among five staff members searching other locations for responsive records. However, the City's evidence did not explain how it keeps and maintains hardcopy and electronic correspondence related to the sale transaction, nor did it identify the other locations that were searched. The City also did not explain what actions were necessary to locate such records or the actual amount of time each action involved. In addition, the City offers no explanation as to why no other records were located, given its advice that many staff members were involved with the project. Given that there is no evidence before me which identifies locations or record holders, other than the office of the City Solicitor, I find that the City search fee of $405.00, representing 13.5 hours of search time, is not in accordance with the *Act*.

With respect to its manual search for records responsive to the third part of the request, the City advises that the third part of the request required the retrieval of the back-up digital tapes of its e-mail servers for the months June to November 2007. The City advises that once the back-up tapes were converted into a readable file, the City Clerk searched the six accounts for the six individuals for key words in order to locate responsive records. The City advises that the City Clerk spent one hour on each of the six files for a total of six hours of search time. Having regard to the City's evidence, I am satisfied that the City's search fee of $180.00, representing the City Clerk's search time is in accordance with the *Act*. The City's evidence in support of this fee provided a description of what actions were necessary to locate the responsive records along with the actual amount of time involved in each action.

b) Preparation time

The City submits that it charged $165.00 at a rate of $7.50 per 15 minutes as prescribed by Regulation 823, section 6.4 to prepare records for disclosure (section 45(1)(b)) and for other costs incurred in responding to a request for access to a record (section 45(1)(e)).

The City indicates that 4.5 hours was spent "preparing the records such as photocopying, organizing and physically preparing the documents." In addition, a further one hour was spent for "general administration such as consulting with IT on the requirement for preparing the machine readable records, ascertaining and advising the correct staff and preparing the records."

Previous decisions from this office have held that Section 45(1)(b) includes, although not necessarily limited, to severing exempt information from records [See for example Order P-4 and PO-2829] or for a person running reports from a computer system [Order M-1083]. Based on the evidence provided by the City, I find that the City's fee of $135.00 to prepare the records it disclosed to the appellant is not in accordance with the *Act*. In making my decision, I note that none of the e-mails released to the appellant were severed. Further, time spent for photocopying is not properly to be included as part of the time preparing a record for disclosure pursuant to Regulation 823, section 6.4. In any event, the City already charged the appellant a $3.00 photocopying charge. Finally, having regard to the fact that fees for preparation time apply only to the actual records to be disclosed, I find that 4.5 hours to organize and physically prepare a total of 15 pages disclosed to the appellant is excessive and not in accordance with the *Act*.

Section 45(1)(e) is intended to cover general administrative costs resulting from a request which are similar in nature to those listed in paragraphs (a) through (d), but not specifically mentioned [Order MO-1380]. In this case, the City claims that it incurred general administrative costs to consult its internal Information Technology staff (IT) and to coordinate staff to prepare the records. However, the City's evidence is that its consultation with IT revealed that the Manager of Client Services in the City's IT Division had conducted previous searches and based his advice about what would be required to restore the deleted e-mails on that past experience. Accordingly, in my view there is insufficient evidence to find that the City incurred administrative costs to consult with IT. In addition, it is not clear what costs the City incurred as a result of "ascertaining and advising the correct staff" to prepare records, given that the records disclosed to the appellant were not severed and the City already charged a search fee to locate these records. Accordingly, I find that the City's general administration fee of $30.00 to prepare the records it disclosed to the appellant is not in accordance with the *Act*.

c) Restoration of deleted e-mails

The City submits that it charged the appellant $1800.00 at a rate of $15.00 per 15 minutes as prescribed by Regulation 823, section 6.5 for computer and other costs incurred in retrieving the e-mails responsive to the third part of the request (section 45(1)(c)).

The City advises that its estimate was based on 1 hour for each of the 6 accounts times 6 months resulting in 36 hours. The City explains that the June 2007 tape could not be loaded and as a

result no fees were charged for that month. Accordingly, the City's final fee is based on 5 months, which resulted in a total of 30 hours of IT time.

The $1800.00 fee charged by the City for its computer costs is prescribed by Regulation 823, section 6.5 for "developing a computer program or other method of producing a record from a machine readable record." I have carefully reviewed the City's representations, I accept the City's evidence that it took 30 hours to retrieve the back-up e-mails and produce a readable file which could be searched by the City Clerk. Accordingly, I find that the City's fee for its computer costs is in accordance with the *Act*.

d) Photocopying

The City charged the appellant $3.00 at a rate of $.20 per page for the 15 pages of records it released to the appellant. This charge is prescribed by Regulation 823, section 6.1 and is in accordance with the *Act*.

Should the City's fee be discounted?

The appellant submits that I should discount the City's fee on the basis that its fee estimate failed to provide him with sufficient information to allow him to make an informed decision on whether or not to pay the requested fee.

Where the interim decision is found to be inadequate, this office may order the institution to:

- issue a revised interim access decision;
- undertake additional work for the purpose of issuing a revised interim access decision; or
- issue a final access decision; or disallow some or all of the fee [Order MO-1614].

Given that the City has already completed all the work and has issued its final access decision, the only remedy available to the appellant at this juncture is a determination which disallows some or all of the fee paid by him.

I have carefully reviewed the City's fee estimate letter and am satisfied that the City's fee estimate is based on the advice of individuals who are familiar with the type and content of the records requested by the appellant. I also note that the City did not conduct any actual work to search or prepare records until it received the deposit from the appellant.

Previous decisions have held that in cases where institutions choose not to do the actual work necessary to respond to the request, it must issue an interim access decision with its fee estimate [Order MO-1699]. In Order PO-2686, Adjudicator Catherine Corban stated:

> Under the *Act*, an institution must issue a fee estimate together with an access decision within 30 days of receiving a request, unless a time extension is requested or a notice to affected parties is required (sections 19, 20, and 21 of the *Act*). It cannot simply issue a fee estimate and refuse to provide any indication of whether access will be granted to the responsive records. This office has recognized, however, that it may be unduly expensive for an institution to respond to a request that involves a large number of records that require a significant amount of search and/or preparation time. As a result, this office has developed an interim decision process that permits an institution to give a requester an idea of what information he or she is likely to obtain, and at what cost, without the institution having to do all the work necessary to respond fully to the request. Therefore, if denial of access in whole or in part is contemplated, the institution must either indicate which exemptions apply to what information and why (final decision), or address the extent to which access is likely to be granted based on the possible application of specific exemptions (interim decision).
>
> The purpose of the interim access decision and fee estimate is twofold: to permit an institution to meet its obligations to a requester under the [*Act*] while not putting it to the expense of searching, preparing and making a final access decision for a large number of records and to give the requester sufficient information to make an informed decision on whether or not to pay the fee and to pursue access to the requested records [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699 and PO-2299]. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].
>
> However, if an institution wants to take advantage of this procedure, the interim decision must meet certain minimum standards established in a line of decisions starting with Order 81, issued by former Commissioner Sidney Linden. In that order, Commissioner Linden set out the procedures to be followed. These procedures contemplate that an interim access decision is based on a review of a representative sample of the requested records and/or the advice of an individual who is familiar with the type and content of the records and that the decision should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fee.

In the circumstances of this appeal, the City did not issue an interim access decision with its fee estimate. The City's position regarding access was not communicated to the appellant until the City completed its search for responsive records. The City submits that at the time it issued its fee estimate, it was unable to predict whether any of the responsive records which it located would be released to the appellant. In addition, the City argues that had it undertaken to calculate its fees on actual work done to respond to the request, it risked undertaking time-consuming searches without a guarantee of future payment if the request was abandoned by the requester.

The concerns raised by the City are the same type which led this office to develop the interim decision process described above in Order PO-2686. For instance, in an effort to guard against the expense of completing all the work necessary to issue a final access decision without a guarantee of payment, the City could have based its fee estimate on a review of a representative sample of the responsive records. This approach would have enabled the City to place itself in a position to answer the questions it identified in its representations; such as which of its employees may have received or sent correspondence to the affected party, identify what records could be expected to be found and if those records would be released or found exempt under the *Act*. Instead, the City based its fee estimate on the advice of individuals who were familiar with the type and content of the records, but could not answer these questions.

Having regard to the above, I find that the information the City provided the appellant with its fee estimate failed to provide him with sufficient information to make an informed decision on whether or not to pay the fee and pursue access. By failing to provide the appellant with this information, the appellant ended up paying over $2,500 to obtain 10 records totalling 15 pages, though a total of 198 records were located. I have carefully reviewed the representations of the parties and am satisfied that had the appellant been advised about the likelihood of exemptions being claimed to withhold the vast majority of the responsive records, he may not have paid all or part of the requested fee. Accordingly, I find that the circumstances of this appeal is one in which it is appropriate to discount the City's fee.

The portion of the City's fee I found was calculated in accordance to the *Act* is $1983.00. The appellant does not take the position that the City's entire fee should be denied. Rather, the appellant's position is that he should not be charged for more than $300.00.

Having regard to the circumstances of this appeal, I have decided to discount the City's $1983.00 by 50 per cent. Accordingly, the appellant shall be responsible for $991.50 of the allowable amount. As the appellant has already paid the City $2850.00, I will order the City to refund $1858.50 to the appellant. In my view, the appellant should be responsible for a fee greater than $300.00, taking into consideration the City's advice to him that the portion of his request that sought access to deleted e-mails was not as straight-forward as the remainder of his request. The City's fee estimate advised the appellant that it would have to restore the back-up tapes to get access to the e-mail accounts and that this information would have to be reformatted to create a readable record that could be searched for responsive information. Given that the bulk of the City's fee represents its computer costs and that all of the records disclosed to the appellant where located as a result of the City's efforts to restore the deleted e-mails, I am satisfied that a $991.50 fee is reasonable.

THIRD PARTY INFORMATION

The City and the affected party take the position that the third party information exemption at section 10(1) applies to Documents A to M. Both parties take the position that these records contain confidential commercial and financial information which, if disclosed, would prejudice the affected party's competitive position or interfere with its ongoing negotiations to develop remaining lands. They also claim that the disclosure of the information in the records could

reasonably be expected to result in an undue loss to the affected party. Sections 10(1)(a) and (c) encompass the harms contemplated by the City and the affected party. These sections state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

As previously stated, the City and affected party claim that Documents A to M contain commercial and financial information. This type of information has been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have

> monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The City's representations state:

> The requested records contain both financial and commercial information. The financial information pertains to the eventual purchase price of the property/buildings and arrangements for: other costs; who pays what; and, when and how financial transactions will take place.
>
> The buildings require reconstruction and the property, including acreage outside of the City's 45 acres, require remediation in order to meet various standards. The Agreement contains clauses that relate to due diligence conditions, Vendor's work and environmental matters and representations and warranties of the Vendor. In light of the fact that the Vendor is planning to sub-divide and offer for sale the remaining portion of lands, parts of the terms and conditions of the City's purchase would be considered as commercial information.

The affected party provided confidential representations in support of the City's position. The appellant's representations did not specifically address the issue as to whether Documents A to M contain commercial or financial information. However, the appellant attached a land registry document to his representations which identified the purchase price the City paid for the subject property. Also attached to the appellant's representations are documents which indicate that the environmental remediation of the subject property is to be completed prior to closing and that the remediation was being completed by the former owner of the subject property, pursuant to the terms of the purchase of sale agreement between the affected party and the former owner.

The first four documents (Documents A to D) comprise the draft and executed letter of intent to enter into a purchase and sale agreement and two addendums to the letter of intent. The documents confirm that the affected party is prepared to enter into an agreement with the City and specifies various terms and conditions to be contained in the agreement, including the purchase price. The following four documents (Documents E to H) are comprised of various drafts of the purchase and sale agreement. The next document is the executed purchase and sale agreement (Document I). Finally, the last four documents (Documents J to M) are amendments to the executed sale and purchase agreement.

Having regard to the representations of the parties and the records themselves, I am satisfied that the 13 records, indexed as Documents A to M, contain commercial and financial information. In making my decision, I note that the records contain financial information relating to the purchase price. I also note that the records contain the terms, conditions, warranties and representations

which form the agreement between the City and the affected party and this qualifies as "commercial information" for the purposes of section 10(1).

As I have found that these records contain commercial and financial information, I find that part 1 of the test for the application of section 10(1) has been met.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by an affected party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and an affected party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.)]

There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products. [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above)]

Representations of the parties

As previously stated, the appellant takes the position that the records are contracts and thus cannot qualify for exemption under section 10(1). In his representations, the appellant states:

> This is not a competitive situation. There are no contract negotiations under way with individuals, groups or organizations that could be harmed by the disclosure of the documents. There are no trade or scientific secrets at issue here. The negotiations are done. The deal is signed. The agreement of purchase and sale is

> a mutually generated document, and not a document that was supplied in confidence to the [C]ity.

Despite being given an opportunity to reply to the appellant's representations, the representations of the City and the affected party do not specifically address the "supplied" component of part 2 of the section 10(1) test. Instead, their representations only addressed the "confidence" component of the test. In this regard, both parties submit that the affected party had a reasonable expectation of confidentiality, implicit and explicit, at the time the information at issue was provided to the City.

Decision and Analysis

I have carefully reviewed the representations of the parties and there is no dispute between the appellant and the parties resisting disclosure that the information at issue comprises the contractual terms between the affected party and the City for the purchase and sale of the subject property. In my view, Documents A to M cannot be described as having been "supplied" by the affected party to the City. These records are comprised of the mutually generated terms which form the agreement between the parties. In making my decision, I also took note that some of the information at issue consists of draft documents, such as the draft letter of intent (Document D), draft schedule to the agreement (Document E) and draft purchase and sale agreements (Documents F to H).

The issue of whether the information contained in draft agreements satisfy the "supplied" component of part two of the section 10(1) test has been discussed in previous orders. In Order MO-1684, Former Assistant Commissioner Tom Mitchinson found that the draft agreements and related documents in that appeal did not satisfy the "supplied" component of part two of the section 10(1) test. The former Assistant Commissioner found that the draft text or proposed changes could not be attributed to either party with any certainty and that the various drafts exchanged between the parties and the related correspondence reflected the "give and take" of the ongoing negotiation process. In making his decision, the Assistant Commissioner referred to Order P-1105, in which Adjudicator Anita Fineberg stated:

> I do not find that the status of an agreement as either a draft or a final document impacts on the determination of the "supply" issue. At any stage of the negotiations between an institution and a third party, the agreement may contain information that was supplied by the third party to the institution. For example, in Order P-807 the record at issue was a **final**, "single source" contract which contained the specific details of the terms and conditions offered by the third party to the Ministry. Both the Ministry and the third party had submitted evidence to indicate that most of the information contained in the agreement was not the result of a negotiating process. Rather, the agreement contained the information provided to the Ministry by the third party. Therefore, Inquiry Officer Mumtaz Jiwan found that the information was "supplied" to the Ministry for the purposes of section 17(1) of the *Act*.

> In my view, the fact that the negotiations between the Ministry and the Corporation have not yet resulted in a final agreement does not affect my decision on the supply of information contained in the draft agreements.

I agree and adopt the approaches taken in Orders P-1105 and MO-1684. Having regard to the representations of the parties, I find that the draft agreements and related documents at issue in this appeal are similar in nature to the records at issue in Order MO-1684. In making my decision, I carefully reviewed the draft documentation at issue and am satisfied that they reflect the "give and take" of the ongoing negotiation process undertaken by the City and the affected party. Accordingly, I am satisfied that the draft and executed documents relating to the purchase and sale transaction are the mutually generated terms of the contractual arrangement between the parties. As previously stated, as a general rule the contents of a contract involving an institution and an affected party will not normally qualify as having been "supplied" for the purpose of section 10(1).

As noted above, one of the exceptions to this general rule is the "inferred disclosure" exception which applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. Though the affected party's representations did not specifically address the "supplied" component, it submits that disclosure of the information at issue would permit its competitors to gain access to its confidential information. The affected party's representations state:

> Having a detailed breakdown and understanding of the agreement with the City will provide all future purchasers with an unfair and undue advantage [against the affected party] in the negotiations and ultimate agreement with these purchasers. In this regard, it is important to note that [the affected party's] business is the purchase and sale of lands. Any disclosure of the detailed results of a specific transaction will have a significant detriment to [the affected party's] competitive position *vis-à-vis* other transactions in its primary business.
>
> …
>
> Finally, we note that it has always been recognized between [the affected party] and the City that certain information relating to the transactions will get disclosed as part of City Council's deliberation on the matter. We understand that the City has, therefore, already disclosed the information that could and should be disclosed while ensuring that they have protected the detailed confidential commercial and financial information that directly prejudices [the affected party's] core business as outlined above.

Having regard to the affected party's representations, I find that the inferred disclosure exception does not apply to the information contained in Documents A to M. The affected party's position is that its core business is the purchase and sale of lands. Accordingly, disclosure of information about its role in the purchase and sale of the subject property would lead to the drawing of accurate inferences regarding its "negotiating strategies" regarding this and future projects. It

appears that the affected party's main concern is that disclosure of the terms of its contractual arrangement with the City may negatively affect its plans to subdivide and offer for sale the remaining portions of land it purchased from the former owner. However, the evidence the affected party provided to me did not specify which portions of the records contain information about its negotiating strategies or how disclosure would reveal how it conducts its business. The affected party also did not identify the portions of the records which contain information that, if disclosed, would thwart its efforts to subdivide the remaining lands.

The representations of the City suggest that the representations and warranties contained in the agreement which identify the work the affected party must complete prior to closing constitutes the affected party's confidential information. I disagree. In my view, the portions of the agreement which describe the work the affected party agreed to complete in exchange for the purchase price merely identifies one of the agreed terms between the parties.

Having regard to the above, I find that Documents A to M are comprised of mutually generated contractual terms. Given that I have not been provided with sufficiently detailed evidence demonstrating that the "inferred disclosure" exception or any other exception applies to the information at issue, I find that this information has not met the "supplied" component of the three-part test under section 10(1). Accordingly, this information cannot qualify for exemption under section 10(1).

As a result of my finding, it is not necessary that I also consider whether the "in confidence" portion of part two of the three-part test has been met; nor is it necessary that I determine whether disclosure of the information at issue could reasonably be expected to lead to the harms contemplated in sections 10(1)(a) and (c).

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. Branch 1 arises from the common law and Branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply. In this appeal, the City submits that both branches apply to Documents 1 to 185.

I will first consider whether Branch 1 applies to Documents 1 to 185. If Branch 1 applies to any of these records, it is not necessary for me to determine whether Branch 2 also applies.

Branch 1: common law privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of

these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Under Branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

Branch 2: statutory privileges

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.

The application of Branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

Representations of the parties

The City made the following arguments in support of its position that the solicitor-client communication privilege in Branch 1 and 2 applies to Documents 1 to 185:

- The documents consist of correspondence and e-mails to and from the City Solicitor for the purposes of providing legal advice to the City

- The documents were generated and or exchanged by/with the City Solicitor for the purposes of giving and formulating legal advice with respect to the acquisition of the subject property

- The documents relate to confidential communications between the City Solicitor and the City and its employees involved in the transaction in addition to communication between the City Solicitor and the affected party's lawyer

- All communications were made with an expectation of confidentiality

- The City has not waived any privilege contained in the documents or the advice contained in the documents

The appellant does not dispute that a solicitor-client relationship exists between the City and the City Solicitor, the individual who prepared or received most of the records indexed as Records 1

to 185. Based on my review of the records, it appears that the only record not prepared or received by the City Solicitor is Record 137. The appellant also does not challenge the City's position that the records contain solicitor-client privileged information or that any privilege that may attach to the records has not been waived. The appellant's representations state:

> As for the documents exempted under communication privilege, the parties to the transaction signed an agreement of purchase and sale. It is difficult to see how the release of these documents can now impact that deal. Neither the City nor [the affected party] explains how the release of the information could hurt the agreement of the purchase and sale.

The appellant's understanding of the application of section 12 to the records is incorrect. Section 12 provides that for a record to qualify for exemption, it must be 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. Accordingly, the City is not required to provide evidence demonstrating that disclosure of the information at issue "could hurt the agreement of purchase and sale" or result in other harm to the City. Rather, it is only required to demonstrate that the records meet the criteria established for the exemption.

In *Ontario Freedom of Information and Protection of Privacy Co-ordinator, Ministry of Finance v. Ontario (Assistant Information and Privacy Commissioner)* (1997), 102 O.A.C. 71, 46 Admin. L.R. (2d) 115 (Div. Ct.), the Divisional Court found that solicitor-client privilege is a "class-based" privilege that protects the entire communication and not merely those specific items which involve actual advice. Once it is established that a record constitutes a communication to legal counsel for advice, the communication in its entirety is subject to privilege.

Accordingly, the principal set out in section 4(2) that institutions should disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions only applies to those records which combine communications with counsel for the purpose of obtaining legal advice with communications which are clearly unrelated to legal advice [*Ontario Freedom of Information and Protection of Privacy Co-ordinator, Ministry of Finance v. Ontario (Assistant Information and Privacy Commissioner)*(same as above)].

Do the records falls within the ambit of solicitor-client communication privilege under Branch 1?

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 [*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.)].

Decision and Analysis

I have carefully reviewed Records 1 to 185 and note that, but for Record 137, all of the records consist of e-mails and correspondence sent to or received by the City Solicitor regarding the sale transaction. It appears that these records comprise the City Solicitor's entire physical file relating to the sale transaction, along with the e-mails located as a result of the City's search of active e-mails.

I note that many of the e-mails duplicate information contained in other e-mails as a result of one individual responding to an e-mail, thus creating an e-mail chain. Some of the e-mails have documents attached. Due to the number of individuals involved in the CMF project and sale transaction some of the e-mail chains are quite lengthy, which contributes to the voluminous nature of the records.

The remaining records are comprised of correspondence and documents exchanged between the City Solicitor and other individuals employed by the City. Most of these records consist of communications between the City Solicitor and the Director of Project Administration & Economic Investment (Project Director). It appears that these two individuals were the primary individuals at the City responsible for the sale transaction, which included the execution of the agreements and the preparation of various reports for Council. These individuals were also responsible for coordinating various approvals and other matters relating to the project. Accordingly, some of the e-mails contain information relating to administrative matters, such as scheduling meetings and site visits as opposed to matters directly related to the formulating or giving of legal advice.

I find it helpful to organize the 185 records in five broad categories which capture communications:

- between the City Solicitor's office and the City, including other City employees and City Council

- between the City Solicitor's office, the City and the City's consultants
- between the City Solicitor and an external law firm
- between City staff and/or City Council, but not the City Solicitor's office
- between the City Solicitor's office and the affected party/affected party's lawyer

1. Communication between the City Solicitor and the City

These records are comprised of e-mails, correspondence and attachments, including draft agreements and reports, exchanged between the City Solicitor and the City Solicitor's office and staff of the City, including City Council:

> Records 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 27, 28, 29, 30, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51, 52, top portion of 53, 54, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 78, 80, 81, 83, top portion of 86, 88, 89, 90, 91, 92, 93, 94, 105, 106, 107, 108, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 129, 130, 131, 132, 133, 134, 135, 136, 141, 142, 143, 145, 152, 153, 154, 155, 156, 157, 160, 163, 170, 171

I have carefully reviewed the records and am satisfied that the above-referenced records represent privileged solicitor-client communications about legal issues and fall within the ambit of privileged communications. In particular, I am satisfied that these records were aimed at keeping both the City and its solicitor informed so that advice may be sought and given as required. Most of these records consist of communications between the City Solicitor and the Project Director. Some of the records are e-mails between the City Solicitor, Project Director, Council members and City employees, which attach draft documents, such as staff reports. In my view, the draft documents, like the e-mails, were sent or received by the City Solicitor so that his legal advice may be sought and given as required.

Having regard to the nature of information contained in the above-referenced records and the City's representations, I find that the records contain confidential communications between the City Solicitor and the City about legal matters. In my view, these portions of the records cannot reasonably be severed from the portions which refer to administrative matters. Accordingly, I find that all of these records qualify for exemption under section 12.

2. Communications between the City Solicitor, the City and its consultants

These records are e-mails exchanged between the City Solicitor, the City and its outside consultants:

> Records 109, 144, 147, 148 and 149

The City did not provide representations specifying the terms of its retainer with the consultant companies. However, having regard to the content of Records 109, 144, 147, 148 and 149, I am

satisfied that City and the consultants shared a common interest and that the consultants were engaged by the City to assist it in completing the CMF project and sale transaction.

I have carefully reviewed these records and am satisfied that the information exchanged was aimed at keeping the City and its solicitor informed so that the City Solicitor's advice could be sought and given. Accordingly, I am satisfied that these records represent confidential solicitor-client communications about a legal matter. Therefore, these records fall within the ambit of the solicitor-client communications aspect of Branch 1 and are exempt under section 12.

3. Communication between the City Solicitor and an external law firm

These records are e-mails and attachments exchanged between the City Solicitor and a lawyer at an external law office.

Records 72 and 98

The City did not provide representations confirming that it retained the external law firm. However, given the content of Records 72 and 98 it appears that the City and the external law firm shared common interests. I have carefully reviewed these records and I find that the information was exchanged between the City Solicitor and the external law firm and was made in order that advice could be sought and given. Accordingly, I am satisfied that these records represent direct communications between counsel of a confidential nature for the purpose of obtaining or giving legal advice. As a result, I find that these records fall within the ambit of the solicitor-client communication privilege under Branch 1 thus qualifying for exemption under section 12.

4. Communications that do not involve the City Solicitor

Record 137 is the only record not sent to or received by the City Solicitor or the City Solicitor's office. It is an e-mail the Project Director sent to Council and a number of City employees. Previous decisions from this office (see for example Order PO-2624) have recognized that communications which are not sent directly to legal counsel but which refer to the subject matter for which legal counsel had been consulted can form part of the "continuum of communication" recognized in *Balabel*. However, in this case I find that this record does not contain legal advice. In making my decision, I considered the content of the e-mail and find that it does not represent a communication related to the giving or receiving of legal advice. In addition, I note that the City did not make the argument that the content of the Project Director's e-mail was put before its solicitor at another time for the purpose of obtaining legal advice.

I will consider whether Branch 2 applies to Record 137 below.

5. Communication between the City Solicitor and the affected party

These records consist of e-mails, correspondence and attachments, such as draft and final reports and agreements, exchanged between the City Solicitor or the City and the affected party. In

some cases, other parties, such as the external law firm retained by the City were also copied on the communication.

> Records 1, 2, 6, 16, 17, 18, 22, 23, 24, 25, 26, 31, 32, 33, 49, 50, bottom portion of 53, 55, 56, 57, 58, 59, 65, 71, 73, 74, 75, 76, 77, 79, 82, 84, 85, bottom portion of 86, 87, 95, 96, 97, 99, 100, 101, 102, 103, 104, 126, 127, 128, 138, 139, 140, 146, 150, 151, 158, 161, 162, 165, 166, 167, 168, 169, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185

As noted above, solicitor-client communication privilege under Branch 1 protects communications of a confidential nature between a solicitor and client. The City and the affected party do not share a solicitor-client relationship. The City is the purchaser and the affected party is the vendor in this transaction. Their lawyers represent their clients' adverse interests in the purchase and sale transaction. Accordingly, these records cannot be described as communications between a solicitor and a client.

I find that these records do not fall within the ambit of the solicitor-client communication privilege under Branch 1.

I will consider whether the above-noted records qualify for Branch 2 below.

Do the remaining records fall within the ambit of solicitor-client privilege under Branch 2?

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."

The City claims that Records 1 to 185 fall within the ambit of solicitor-client communication privilege under both Branches 1 and 2. However, since I found above that most of these records fall within the scope of solicitor-client communications under Branch 1, I need only consider whether Branch 2 applies to the following records:

- Project Director's e-mail to Council and City employees (Record 137)

- E-mails and other documents exchanged between the City and the affected party

The Project Director's e-mail was not prepared by or for the City Solicitor. Furthermore, the City did not adduce any evidence which would demonstrate that the record was provided to the City Solicitor for use in giving legal advice. Having regard to the above, I find that this record does not fall within the ambit of Branch 2.

I find that the records representing communications exchanged between the City and the affected party/affected party's lawyer also does not fall within the ambit of the solicitor-client communication privilege under Branch 2. Given that these records represent communications

exchanged between parties adverse in interest, I am not satisfied that the records were "prepared by or for counsel … for use in giving legal advice."

Accordingly, I find that Record 137 and the group of records representing communications between the City and the affected party do not fall within the ambit of the solicitor-client communication privilege under Branch 2. As a result, these records do not qualify for exemption under section 12. As the City has not claimed that any other exemption applies to these records, I will order the City to disclose them to the appellant.

EXERCISE OF DISCRETION

The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

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

The City submits that it properly exercised its discretion to withhold the records for which it claims contains solicitor-client privileged information. In support of its position, the City states that throughout the sale transaction "… efforts were made to make as much general information public as possible while still preserving the integrity of the legal process as it applies to the transaction keeping the details confidential and all the while complying with the municipality's obligations to protect confidential information as required by the [*Act*]."

The appellant does not claim that the City exercised its discretion in bad faith or for an improper purpose. Rather, the appellant submits that the City should not rely on the discretionary exemption at section 12 to withhold records on the basis that "the agreement of purchase and sale was approved and signed more than a year ago." In support of his position, the appellant argues that there is a public interest in the disclosure of information. I will address the appellant's submission that the public interest override in section 16 applies below.

I have reviewed the representations of the parties and am satisfied that the City properly exercised its discretion and in doing so took into account relevant considerations. I am also satisfied that the City did not exercise its discretion in bad faith or for an improper purpose, nor did it take into account irrelevant considerations. In fact, the City provided evidence that it took

into account that one of the purposes of the *Act* is that information should be available to the public. In making its decision to claim section 12, it appears that the City also considered the confidential nature of the information at issue and the extent to which it is significant and sensitive to it.

Having regard to the wording of the section 12 exemption and the interests it seeks to protect, I am satisfied that the City properly exercised its discretion to withhold the information I found represents privileged communications between the City and its solicitor.

PUBLIC INTEREST OVERRIDE

Section 16 states:

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

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act*, which are equivalent to sections 8 and **12** of the *Act*, are to be "read in" as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

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

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

Representations of the parties

The appellant submits that disclosure of the records would "explain and illuminate":

- whether the former owner, the affected party or the City should bear the costs to remediate the subject property

- why the value of the subject land escalated so quickly in the weeks prior to the City entering the purchase and sale agreement with the affected party
- why the City paid so much for the land

In support of his position, the appellant provided copies of comments the newspaper received in response to articles published about the sale transaction.

The City does not dispute that the CMF project continues to attract considerable public interest. The City states:

> The [CMF] project that the City initiated in 2004 is of considerable public interest. It represents the expenditure of $30-$80M by the City to house in one location its Outside Operations staff and equipment. Since 2004 the CMF project has been in the public realm through public meetings of Council to discuss staff reports on the initial idea, various options, benefits and costs and eventually, reports and public discussion on possible sites.

In addition, the City made the following arguments in its representations:

- While the CMF project in general is of public interest, the records requested are not.

- Council meetings, public open houses and website information relating to the CMF project addresses public interest considerations

- There has been and continues to be wide public coverage and debate of the issue; however, the requested records will not shed further light on the matter

Decision and Analysis

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

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

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

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

Having regard to the representations of the parties and the records themselves, I find that the public interest override found at section 16 does not operate to override the solicitor-client privilege exemption.

Previous decisions from this office have held that a public interest is not automatically established where the requester is a member of the media [Orders M-773 and M-1074]. In this case, the requester is a reporter and submits that disclosure of the exempted records would serve to inform or enlighten the citizenry about the City's activities relating to the sale transaction. Though I am satisfied that the appellant's interest in the records is not a private one, I am not satisfied that disclosure of the information I found exempt under section 12 would serve the purpose of shedding light on the City's activities. In fact, the withheld information does not contain information about who should bear the costs of remediation or how the parties arrived at the purchase price. Instead, the information at issue is comprised of e-mails, correspondence and other documents created after the City made key decisions about the project and made an offer to purchase the subject property.

With respect to the need to make public general information regarding the CMF project, I note that the City has already made this information available to the public through its website and public consultation process. Further, I have ordered the City to disclose the draft and/or executed letters of intent, addendums, sale and purchase agreement and schedules that were not attached to e-mails or correspondence found to contain solicitor-client privileged information.

Having regard to the above, I find that the circumstances of this appeal do not give rise to a "compelling" public interest.

In any event, even if a "compelling" public interest in the disclosure of the information at issue were to exist, for the section 16 override provision to apply, the compelling public interest must clearly outweigh the purpose of the solicitor-client privilege exemption. In this case, the purpose of section 12 is to protect confidential communications between a solicitor and his or her client. In my view, the appellant has not adduced sufficient evidence to demonstrate that the public interest he identified clearly outweighs the purpose of the solicitor-client privilege exemption in the circumstances of this appeal.

Accordingly, I find that the public interest override at section 16 does not apply to the information I found exempt under section 12.

ORDER:

1. I order the City to refund the appellant $1858.50 by **December 10, 2009**.

2. I order the City to disclose Records A to M, Record 137 and the records representing communications exchanged between the City Solicitor and the affected party/affected party's lawyer (Records 1, 2, 6, 16, 17, 18, 22, 23, 24, 25, 26, 31, 32, 33, 49, 50, bottom portion of 53, 55, 56, 57, 58, 59, 65, 71, 73, 74, 75, 76, 77, 79, 82, 84, 85, bottom portion of 86, 87, 95, 96, 97, 99, 100, 101, 102, 103, 104, 126, 127, 128, 138, 139, 140, 146, 150, 151, 158, 161, 162, 165, 166, 167, 168, 169, 172, 173, 174, 175, 176, 177, 178, 179, 180,

181, 182, 183, 184, 185) to the appellant by **December 10, 2009** but not before **December 4, 2009**. For the sake of clarity, I have highlighted the top portions of Records 53 and 86 that **should not** be disclosed, in the copies of those records enclosed with this Order to the City.

3. I uphold the City's decision to withhold the remaining records.

4. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the City pursuant to order provisions 1and 2 to be provided to me.

Original signed by: November 5, 2009
Jennifer James
Adjudicator