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

ORDER MO-1372

Appeal MA_990306_1

City of Port Colborne

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NATURE OF THE APPEAL:

The appellant made a request to the City of Port Colborne (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> . . . . all correspondence between the City of Port Colborne or any representatives, divisions or affiliates thereof, including without limitation the Parks and Recreation Department, the Planning Department and in particular, [three named individuals], (collectively the "City") and any of the following persons and entities. Please also provide access to any reports, applications or other records provided by the City to any of the following persons or entities or by any of the following persons and entities to the City: [the appellant listed a number of individuals and business entities, some of which are not corporations. I will refer to these individuals and business entities collectively as the affected persons].
>
> I confirm that this request is intended to be a very broad one. It is intended to cover all documents, records and correspondence between the City and the listed persons and entities and it is intended to go back in time as far as the City's records are available.
>
> Please be advised, however, that we are primarily interested in any matters relating to the farming operations of the above listed persons and entities. In addition, we are interested in a proposed subdivision of property owned by the above listed persons and entities as well as any documents or records relating to Official Plan Amendment #38. According to our records, the property to be subdivided is generally identified as "Part Lots 23 and 24, Concession 2 S/S Hwy #3" or "Proposed Subdivision - south of Hwy #3 and east of Hydro Power Line, east of Elizabeth Street, City of Port Colborne, Regional Municipality of Niagara."

The appellant then provided a list of municipal addresses and legal descriptions of the properties owned by the affected persons.

The appellant also requested access to "correspondence, reports and other records between the City and agents acting on behalf of the above listed persons and entities with respect to the proposed subdivision." The appellant named in particular [an engineering firm and a named engineer] with respect to file no. 88107 and [a second engineering firm] with respect to file no. EO92622.

The appellant asked that the request, if granted, continue to have effect for two years pursuant to section 24 of the provincial *Act*.

The City advised the appellant that it had a number of variance and development files relating to the affected persons and their land. It advised the appellant that while these files may not include any and all documents provided to the City by the affected persons and vice-versa, they probably contained most of the information the appellant requested. The City advised the appellant that it could locate and retrieve this information within sixty days and that the fee for this more limited search was estimated at $1000. The City advised that costs would also be affected by whether or not the appellant wanted copies of the documents produced or simply access to the originals. The City asked the appellant for clarification on her request for files related to the engineering firms.

The appellant agreed that the City should "proceed with the search of the variance and development files relating to the [the affected persons], their businesses, their properties and their proposed subdivision." The appellant requested that the search "include a review of the files of the Planning Department, the Parks and Recreation Department and the files of [three named individuals]." The appellant narrowed the search with respect to the subdivision of the [affected persons'] property to go back to 1983. The appellant stated that "the search should also include a review of reports, correspondence and other records between the City of Port Colborne and agents acting on behalf of the [affected persons] with respect to the proposed subdivision, namely [the named engineering firms]." The appellant clarified that the records requested "with respect to [the engineering firms] deal specifically with the [affected persons] and the subdivision of property owned by the [affected persons] as well as any documents or records relating to Official Plan Amendment No. 38." The appellant provided $500 to cover 50% of the City's estimated fee.

The City then notified third parties whose interests may be affected by the release of the records. The appellant requested that her identity as the requester not be revealed to the third parties.

After considering the responses received from third parties, the City denied access, in part, to the requested records, pursuant to sections 6(1)(b), 10(1), 11(e), 14(1), and 12 of the *Act*. The City provided the appellant with an index of records setting out its decision with respect to each of 215 records and any exemptions applied.

The appellant appealed the City's decision to deny access to those responsive records which were not disclosed.

During the mediation stage of the appeal, the City clarified that it had denied access to Record 34, in its entirety, under section 14(1) of the *Act*. Records 45 and 46 were also denied, in part, pursuant to section 14(1). Record 141 was denied in full, pursuant to section 10(1). Record 142 was disclosed in its entirety and the explanation contained in the City's index of records respecting this record should have read "meets none of the tests."

The City also clarified that where it has claimed section 10(1) of the *Act*, it is relying on paragraphs (a) and (c).

In her letter of appeal, the appellant indicated that she is no longer seeking access to Records 43, 78, 131A, and 193. The appellant also indicated that she would be willing to consider acceptance of the severed versions of Records 30, 31, 32, 75, 76 and 77 to the extent that the information which would identify the requester is deleted from the records. The appellant also stated that if Record 77 related only to the fee for the request, she would not appeal the decision to deny release of that record.

During mediation, the appellant also indicated that she is no longer seeking access to Records 8, 9, 12, 13, 15, 19, 22, 23, 35, 45, 46, 54, 55, and 79. She also agreed that certain records which are duplicates could be eliminated from the appeal, specifically, Records 131, 194, 197, 199, 208, 209, 211, and 215.

In her request letter, the appellant asked that the request, if granted, continue to have effect for two years pursuant to section 24(3) of the provincial *Act*. During mediation, the appellant was apprised of the fact that no comparable provision exists in the municipal *Act*. Accordingly, a requester is required to submit a new request to cover any records created after the date of the original request. The appellant has indicated that she does not wish to pursue this issue.

Upon receipt of notice of the appeal, the City advised the Commissioner's office that it had located two additional records responsive to the request. The City requested that these records be dealt with in conjunction with this appeal and the appellant agreed. On August 1, 2000, the City issued to the appellant a supplementary decision denying access to portions of these additional records under sections 10(1) and 14(1). The appellant has since advised that the undisclosed portions of these documents are not at issue. I will not, accordingly, consider them further in this decision.

I decided to seek representations from the affected persons and the City, initially. I received submissions on behalf of both and I provided a copy of the City's representations, in their entirety, to the appellant, along with a severed version of the affected persons' representations. Portions of the affected persons' submissions were not disclosed because of concerns about their confidentiality.

In their representations, the affected persons indicated that they have no objection to the disclosure to the appellant of Records 1-9, 11, 12, 16-27, 36, 37, 39, 40, 41, 42, 45-74, as well as any public documents which may be included in Records 80-215, along with the attachments thereto.

The appellant also made submissions in response to the Notice of Inquiry which I provided to her. The appellant advised that access to certain records was no longer being sought, thereby removing them from the scope of this inquiry. The records remaining at issue, in accordance with the index provided by the City to the parties, consist of:

- Records 10, 11, 17, 27 and 28, to which the City has applied the discretionary exemption in section 11(e) of the *Act*;

- Records 14 and 28, to which the City has applied the discretionary exemption in section 12 of the *Act*;

- Record 28, to which the City as applied the discretionary exemption in section 6(1)(b) of the *Act*;

- Records 29, 30, 31, 32, 34, 75, 76 and 77 to which the City has applied the mandatory exemption in section 14(1) of the *Act*; and

- Records 92, 122, 124, 127, 133-135, 137, 139, 141, 144, 150, 157, 159-163, 168-170, 187-191 and 203 to which the City has applied the mandatory exemption in section 10(1) of the *Act*.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

The City submits that Records 10, 11, 17, 27 and 28 are exempt from disclosure under the discretionary exemption found in section 11(e), which reads:

> A head may refuse to disclose a record that contains,
>
> > 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;

For a record to qualify for exemption under section 11(e), each part of the following test must be established:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**

3. the negotiations must be carried on currently, or will be carried on in the future; **and**

4. the negotiations must be conducted by or on behalf of an institution.

[Order M-92]

In response to the Notice of Inquiry with respect to the application of this exemption to the records, the City simply states that these documents disclose:

> the positions, plans, procedures, criteria or instructions concerning negotiations carried on by or on behalf of the City by its solicitor with respect to the production of documents. Since the matter of litigation is not yet concluded, the City considers that the matter is on-going.

The appellant argues that none of the four parts of the test enumerated above have been satisfied by the City. The records represent communications between the solicitors for the City and those of the affected parties relating to the production of documents by the City in a proceeding before the Ontario Municipal Board.

I agree with the position taken by the appellant in this regard. The records do not relate to any on-going negotiations in which the City is involved. The contents of Record 28 would demonstrate that questions surrounding the production of documents were resolved in June 1999 and cannot be said to remain on-going or to be carried on in the future. In my view, none of the criteria described in the above-noted test for section 11(e) has been met and these records do not qualify for exemption under this section.

SOLICITOR-CLIENT PRIVILEGE

The City claims the application of the solicitor-client privilege exemption in section 12 to apply to Records 14 and 28 which consist of an Affidavit of Documents and the subsequent productions themselves, respectively, prepared by the City in response to a proceeding before the Ontario Municipal Board (the OMB) which was initiated by the affected persons. I note that each of these documents, and the attachments to them, were provided by the City to counsel for the affected persons pursuant to its disclosure obligations in that appeal proceeding.

Section 12 of the *Act* reads:

> 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.

This section consists of two branches, which provide an institution with discretion to refuse to disclose:

1. a record that is subject to common law solicitor-client privilege (Branch 1); and

2. a record which 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 (Branch 2).

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 [the equivalent provision to section 12 in the provincial *Act*] was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is . . . . In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)].

Thus, section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, the City must demonstrate that one or the other, or both, of these heads of privilege apply to the records.

The City states that:

> these documents were created or gathered by the City with the advice of counsel and expressly for use by counsel employed by the City in contemplation of or for use in litigation (that is an Ontario Municipal Board hearing) that has not yet been concluded. The subsidiary documents [the attachments to Records 14 and 28] are those documents which were released to [the affected parties'] counsel **subject to an undertaking of confidentiality** and without regard for Freedom of Information and Protection of Privacy issues of which there are many. I consider that it is appropriate that these documents be accessed through the arena for which they were produced, that is, the Court process. [the City's emphasis]

Because the City uses language in its representations which suggest that both litigation and solicitor-client communication privilege may apply, I will consider the application of each, with reference to the common law.

Litigation privilege

Introduction

In Order MO-1337-I, Assistant Commissioner Mitchinson discussed the scope of litigation privilege, particularly in light of a recent landmark decision of the Court of Appeal for Ontario in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321:

> In *General Accident*, the majority of the Court of Appeal questioned the "zone of privacy" approach and adopted a test which requires that the "dominant purpose" for the creation of a record must have been reasonably contemplated litigation in order for it to qualify for litigation privilege . . .
>
> . . . . .
>
> 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.
> >
> > The test really consists of three elements, each of which must be met. First, it must have been *produced* with contemplated litigation in mind. Second, the document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation - in other words for the dominant purpose of contemplated litigation. Third, the prospect of litigation must be *reasonable* - meaning that there is a reasonable contemplation of litigation.

> Thus, there must be more than a vague or general apprehension of litigation.

Applying the direction of the Courts and experts in the area of litigation privilege, in my view, a record must satisfy each of the following requirements in order to meet the "dominant purpose" test:

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

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

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

In applying this test, it is necessary to bear in mind the time sensitive nature of this type of privilege, and the fact that, even if the dominant purpose for creating a record was contemplated litigation, privilege only lasts as long as there is reasonably contemplated or actual litigation.

In Order MO-1337-I, Assistant Commissioner Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief. This aspect of litigation privilege arises from a line of cases that includes *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) and *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.). As the Assistant Commissioner points out in his analysis, the test for this aspect of litigation privilege from *Nickmar* was quoted with approval by two of the three judges in *General Accident*. As a result, the Assistant Commissioner concluded that this aspect of privilege remains available after *General Accident*, and he adopted the test in *Nickmar*:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

The Assistant Commissioner then elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as

> "documents which can be obtained elsewhere," and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief." Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation under the *Nickmar* test and should be tested under "dominant purpose."

I agree with the Assistant Commissioner's approach to litigation privilege as set out above, and I will apply it for the purpose of this appeal.

Records 14 and 28 were created by the City in the course of the OMB appeal proceeding involving the affected persons and the City. The attachments to these records represent a wide range of documents which were compiled by the City and includes some documents which are publicly available, such as City Council meeting minutes, newspaper clippings, decisions, Official Plan amendments and so on. Accordingly, I find that the publicly-available attachments to Records 14 and 28 which were clearly not created with litigation in mind that "found their way into the lawyer's brief" qualify for litigation privilege under the *Nickmar* test.

I also find that the Affidavit of Documents itself which comprises Record 14 and the covering letter in Record 28 were created for the dominant purpose of the OMB litigation. As such, these records also qualify for exemption under the litigation privilege portion of section 12.

The attachments also consist of a large number of records which are not publicly available, including various correspondence dating back some 65 years. In my view, it cannot be said that these records were created for the dominant purpose of the present litigation before the OMB. As they are not "publicly available" documents, they do not qualify for litigation privilege under the *Nickmar* test.

Solicitor-Client Communication Privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. 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).

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the

> privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P_1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to 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, cited in Order M-729].

As noted above, Records 14 and 28 consist of an Affidavit of Documents with a large number of attachments and other documents disclosed by the City to counsel for the affected persons pursuant to its disclosure obligations in an appeal proceeding before the Ontario Municipal Board. These records do not represent a communication between solicitor and client, nor can it be said that they represent the working papers of the City's counsel which is directly related to the seeking formulating or giving of legal advice. I find, therefore, that Records 14 and 28 and the attachments thereto, do not qualify for exemption under solicitor-client communication privilege.

Waiver

I have found that Records 14 and 28, and many of the attachments to them are subject to litigation privilege. I must also determine whether that privilege has been waived in the circumstances. Waiver of common law solicitor-client privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [(*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C. S.C.); Order P-1342].

In Order M-260, former Adjudicator Anita Fineberg considered the issue of waiver of solicitor-client privilege:

> Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.
>
> In the recent text *Solicitor-Client Privilege in Canadian Law*, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:
>
> > Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
> >
> > Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.
> >
> > . . . . .
>
> In *S. & K. Processors Ltd.* … McLachlin J. noted:
>
> > However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require …
> >
> > In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)
>
> The following passage from *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), as set out in *The Law of Evidence in Canada* (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the

recent case of *Piché v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

In my view, by providing Records 14 and 28 to counsel for the affected persons as part of its disclosure obligations in the Ontario Municipal Board appeal proceeding, the City waived any privilege which may have attached to these records, and the attachments to them.

This conclusion is consistent with the finding of Adjudicator Holly Big Canoe in Order P-1342. In that case, the Adjudicator found that disclosure of otherwise privileged material by a Crown Prosecutor to the Law Society of Upper Canada constituted waiver. This decision was upheld by the Divisional Court in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495.

In conclusion, I find that Records 14 and 28, and the attachments thereto, are not exempt from disclosure under section 12.

CLOSED MEETING

The City has applied the discretionary exemption in section 6(1)(b) to two of the attachments to Record 28, designated as Records 28(8) and 28(9). These records are minutes of *in camera* meetings of the Council of the City of Port Colborne held on April 7, 1997, August 6, 12 and 26, 1996, September 30, 1996 and November 4 and 25, 1996. The City has not provided me with any representations with respect to the application of this exemption to these records.

In order to qualify for exemption under section 6(1)(b), the City must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; and

2. that a statute authorizes the holding of this meeting in the absence of the public; and

3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102, M-219 and MO-1248]

The first and second parts of the test for exemption under section 6(1)(b) require the City to establish that a meeting was held and that it was held in camera. Based on my review of the records themselves, it is clear that meetings were held on the dates indicated and that these meetings were held in the absence of the public.

I am unable to determine, however, in the absence of any submissions from the City on this point, whether the disclosure of the records would reveal the actual substance of the deliberations of the meetings. It is not clear from the face of the records themselves that their disclosure would reveal the contents of the discussion which occurred at the meetings. Accordingly, I am unable to find that the exemption in section 6(1)(b) properly applies to Records 28(8) and 28(9).

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

"Personal information" is defined in section 2(1) of the *Act*. Only information which fits the definition can qualify for exemption under section 14.

> It is clear from the wording of the statute that the list of examples of personal information under subsection 2(1) is not exhaustive. This leaves it open for [the person who will be making the decision in this appeal] to decide whether or not information contained in the records which does not fall under subsections (a) to (h) ... constitutes personal information.
>
> [Order 11]

Records 30, 31, 32, 34, 75, 76 and 77 are correspondence and an attachment to and from the City and one of the affected persons. These records indicate the name, telephone number and address of this individual. I find that this information qualifies as personal information as that term is defined in section 2(1)(d) of the *Act*. In addition, each of these records also indicates that the affected person has submitted one or more requests for access to information under the *Act*. I find that this fact qualifies as the personal information of this individual under section 2(1)(h) of the *Act*.

Record 29 is a letter from the City to one of the affected persons. I find that the contents of this record is implicitly of a private or confidential nature, thereby qualifying as the personal information of the affected party under section 2(1)(f) of the *Act*.

Record 150 is a list of landowners and the assessment roll numbers for various properties in the vicinity of that of the affected persons. Attached to the list is a site plan containing handwritten notes regarding the current landowners and their assessment roll numbers. I

find that this information qualifies as the personal information of the property owners under section 2(1)(c).

INVASION OF PRIVACY

Once it has been determined that a record contains personal information, section 14(1) of the *Act* prohibits the disclosure of this information except in certain circumstances. Specifically, section 14(1)(f) of the *Act* reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2).

The affected persons submit that the information contained in Records 29-34 and 75-77 is highly sensitive (section 14(2)(f)) and was submitted to the City in confidence (section 14(2)(h)).

The appellant's submissions on this issue focus primarily on what she perceives to be the inadequacies of the City's decision letter regarding the application of this exemption.

In my view, the personal information contained in Records 30, 31, 32, 34, 75, 76 and 77 is "highly sensitive" within the meaning of section 14(2)(f). The disclosure of these records would reveal not only that an identifiable individual made a request to the City under the *Act* but would also reveal the nature of that request and the motivation behind it. I also find that the personal information contained in these records was provided to the City by the affected person with an expectation that it would be treated in a confidential manner. This is in keeping with the obligations of institutions when faced with a request under the *Act*. In the absence of any factors favouring the disclosure of the records, and balancing the appellant's right of access against the affected persons' right to privacy, I have no difficulty in finding that Records 30, 31, 32, 34, 75, 76 and 77 qualify for exemption under section 14(1).

I find that the personal information relating to the property owners contained in Record 150 is subject to the presumption in section 14(3)(e) as it was "gathered for the purpose of collecting a tax," in this case, property taxes. Accordingly, I find that Record 150, in its entirety, is exempt from disclosure under section 14(1).

Record 29 similarly contains personal information which meets the criteria of the presumption in section 14(3)(e) as it was gathered for the purpose of collecting a tax. I find that Record 29 is, therefore, properly exempt under section 14(1).

By way of summary, I find that Records 29, 30, 31, 32, 34, 75, 76, 77 and 150 are exempt from disclosure under section 14(1).

THIRD PARTY INFORMATION

The City and the affected persons take the position that Records 92, 122, 124, 127, 129, 130, 133-135, 137, 141, the attachments to Record 144, and Records 157, 159-163, 168-170, 187-191 and 203 qualify for exemption under section 10(1)(a) or (c) of the *Act*. These records relate to a subdivision project which was proposed to be constructed on land belonging to the affected persons. They include the necessary documentation for an amendment to the City's Official Plan, an Application for a Plan of Subdivision and various secondary plan requirements. The City advises that although the Official Plan amendments necessary to effect the subdivision plan has received Ministerial approval in 1993, formal approval has not been given with respect to the plan of subdivision or the secondary plan.

For a record to qualify for exemption under sections 10(1)(a)or (c), the City and/or the affected parties 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 (a), (b) or (c) of subsection 10(1) will occur.

[Orders 36, P-363, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P_373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had

> been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

Part One of the Test - Types of Information

The affected parties object to the disclosure of the above-noted records on the basis that they contain

> commercially sensitive information relating to the relative feasibility, cost and potential of the project.

The City also submits that the records contain "technical information" pertaining to the proposed subdivision and secondary plan.

In Order P-454, former Assistant Commissioner Irwin Glasberg defined the term "technical information" for the purposes of section 17(1) of the provincial *Act* (the equivalent provision to section 10(1) of the municipal *Act)* as follows:

> Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)of the Act.

The term "commercial information" was succinctly defined by former inquiry Officer Anita Fineberg in Order P-493 as follows:

> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

I adopt these definitions for the purposes of determining whether the information in these records meets the requirements of part one of the test under section 10(1).

Records 92, 122, 124, 127, 129, 130, 133-135, 137, 141, the attachments to Record 144, and Records 157, 159-163, 168-170, 187-191 and 203 relate to the proposed subdivision of certain lands owned by the affected persons. These records consist of site plans, meeting notes, correspondence to and from the City and the affected persons' counsel and engineers and other documents pertaining to the affected parties' application for an amendment to the City's Official Plan, the original subdivision plan and the secondary subdivision plan. In my view, all of these records address the technical requirements necessary to effect the proposed development of the affected persons' lands.

In Order M-668, former Adjudicator Holly Big Canoe found that engineering reports relating to the subdivision of land which had been prepared by the property owner prior to its development describing water management issues on the land qualified as technical information within the meaning of section 10(1). Similarly, I find that the engineering reports, drawings, site plans and the correspondence related thereto which comprise Records 92, 122, 124, 127, 129, 130, 133-135, 137, 141, the attachments to Record 144, and Records 157, 159-163, 168-170, 187-191 and 203 contain information which may properly be characterized as "technical information" for the purposes of the first part of the section 10(1) test.

I further find that other, discrete portions of the records which address the costs associated with the subdivision plan qualify as "commercial information" within the meaning of section 10(1). This information relates directly to the buying, selling or exchange of merchandise or services.

In conclusion, I find that the first part of the section 10(1) test has been met with respect to Records 92, 122, 124, 127, 129, 130, 133-135, 137, 141, the attachments to Record 144, and Records 157, 159-163, 168-170, 187-191 and 203.

Part Two of the Test - Supplied in Confidence

In order for this part of the section 10(1) test to be met, the information must have been supplied to the City in confidence, either implicitly or explicitly. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the City.

Supplied

In support of its contention that the information contained in the records was supplied to the City by the affected persons with an implicit expectation of confidentiality, the City submits that:

> While it is recognized that there is a public side to planning processes, it is the City's practice not to distribute reports and plans submitted by a developer to another party unless permission has been obtained. In this instance [the records] were prepared for the purposes of an official plan amendment, application for plan of subdivision and secondary plan requirements. While the official plan amendment (No. 38) received Ministerial approval on 1993-05-14, formal approval has not yet been given with respect to the plan of subdivision or the [secondary plan].

The City then makes reference to Orders M-668 and M-1143 in support of its argument that documents submitted by a developer in support of an application for a plan of subdivision are generally supplied with an expectation that they will be treated in a confidential fashion by the municipality involved. The City concludes its submissions on this point by arguing that:

> . . . the third parties in this instance could reasonably have concluded that the technical information supplied with respect to the development process would have been supplied implicitly in confidence and that only that information necessary to satisfy the public aspects of the process would be released to the public.

The affected persons do not directly address this part of the section 10(1) test in their submissions.

Based on my review of the records themselves, it is clear that the majority of them were provided to the City by the affected persons, the engineering firms which they engaged and their counsel in support of the amendment to the Official Plan application and the subdivision and secondary plan applications made to the City. Other records at issue, however, consist of correspondence from the City to the affected persons and their agents or notes taken at meetings involving the engineering firms, the affected persons and the City. Each of these documents, however, contain comments and describe to varying degrees the information contained in the records which were provided to the City by the affected persons and their consulting engineers. I find that the disclosure of these documents could reasonably be expected to permit the drawing of accurate inferences as to the nature of the information which was actually supplied to the City.

Accordingly, I find that Records 92, 124, 129, 134, 135, the draft secondary plan contained in the attachments to Record 141, the attachments to Record 144, Records 159, 161, 169 (with the exception of the attachment), 187, 188, 189, 191 and 203 were provided to the City by the affected parties or their engineers. Records 127, 133, 137,

141, 157, 160, 162, 163, 168 and 170 are records which were generated by the City. In my view, however, they contain information whose disclosure would permit the drawing of accurate inferences as to the information which was supplied to the City by the affected persons. As such, I find that the information contained in all of the records, with the exception of the attachment to Record 169, was "supplied" to the City within the meaning of section 10(1). The attachment to Record 169 is a report prepared by the Ontario Ministry of the Environment, a copy of which was provided by the affected persons to the City. Because this record originated with the Ministry, I am of the view that it cannot be said to have been "supplied" to the City by the affected persons for the purposes of section 10(1).

In Confidence

The affected persons did not address this aspect of the section 10(1) test in their submissions. I have referred above to the representations of the City in this regard. Based on my review of the records themselves and my understanding of the process involved in obtaining an amendment to an Official Plan and subdivision plan approval, I find that the affected persons supplied this information to the City with a reasonably-held expectation that it would be treated in a confidential fashion by the City. While I have not been provided with any evidence to substantiate a finding that the information was supplied with an explicit expectation of confidentiality, it is clear from the nature of the records themselves that they were provided implicitly in confidence.

I am supported in this view by the comments of former Adjudicator Big Canoe in Order M-668. In that case, as is the situation in the present appeal, an application for the subdivision of certain lands was made, though final approval for the plan had not been granted. Adjudicator Big Canoe found that:

> It is clear that formal subdivision approval has not been granted, and none of the records are public records at this point. While the goal of the process is formal approval, which entails publicizing the approved plan, the process will involve the submission of plans, drawings, etc. which either are not ultimately approved or do not form part of the approved plan and, therefore, never become public. I am satisfied that it is reasonable for a party to have had an expectation of confidentiality with respect to the records it submitted while the process was underway, and I find that the second part of the test has been met for the records submitted by parties other than the appellant.

I find that, in the circumstances surrounding the affected persons' subdivision plan application, there existed a similar implicit expectation of confidentiality surrounding the documents which were produced to the City.

Part Three of the Test - Harms

In support of their contention that the disclosure of the records could reasonably be expected to result in harm to their competitive position, the affected persons have provided me with no specific or detailed submissions as to how this harm might reasonably be expected to result from the disclosure of the records.

The City notes that the Official Plan Amendment has received Ministerial approval and that those records relating to that process "cannot reasonably meet the harms test." However, the City argues that the plans, reports and specifications relating to the proposed development are commercially valuable. It also acknowledges that the likelihood of harm to the affected person' competitive position is slight so long as the lands which were the subject of the application remain in the hands of the affected persons. However, the City indicates that it is of the view that prejudice to the affected persons' competitive position could reasonably be expected to occur if the land were to be sold to another party. It argues that the disclosure of the records would result in undue gain to that party if the commercially valuable documents were released under the *Act*.

The appellant submits that:

> in order to discharge the burden of proof under the third part of the test, the parties opposing disclosure must present evidence that is detailed and convincing and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information is disclosed.

The appellant goes on to argue that the City and the affected persons have failed to provide me with the kind of detailed and convincing evidence required to satisfy the third part of the section 10(1) test.

I find that the City and the affected persons have failed to provide the kind of evidence of harms which is required to uphold the exemption in section 10(1) with respect to Records 92, 122, 124, 127, 129, 130, 133-135, 137, 141, the attachments to Record 144, and Records 157, 159-163, 168-170, 187-191 and 203. I find that the disclosure of these documents could not reasonably be expected to result in significant prejudice to the affected persons' competitive position, as contemplated by section 10(1)(a) or to result in undue loss or gain under section 10(1)(c).

All three parts of the test under section 10(1) must be met in order for a record to qualify for exemption under that section. Accordingly, I find that Records 92, 122, 124, 127, 129, 130, 133-135, 137, 141, the attachments to Record 144, and Records 157, 159-163, 168-170, 187-191 and 203 are not exempt under section 10(1). As no other exemptions have been claimed for these documents and they are not subject to any other mandatory exemptions, they should be disclosed to the appellant.

By way of summary, I find that Records 29, 30, 31, 32, 34, 75, 76, 77 and 150 are exempt from disclosure under section 14(1). None of the remaining records at issue in this appeal are exempt from disclosure, however, and I will order that they be disclosed to the appellant.

ORDER:

1. I uphold the decision of the City to deny access to Records 29, 30, 31, 32, 34, 75, 76, 77 and 150.

1. I order the City to disclose all of the remaining records to the appellant by providing her with a copy by **January 8, 2001** but not before **December 29, 2000**.

2. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: November 29, 2000
Donald Hale
Adjudicator