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

ORDER MO-1374

Appeals MA-990232-1 and MA-990295-1

The Corporation of the City of Oshawa

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NATURE OF THE APPEAL:

The appellant submitted two requests to The Corporation of the City of Oshawa (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). Each request was dealt with separately by the City and both decisions were appealed to this office. Because the parties are the same and the issues are similar, I have decided to dispose of the issues raised in both appeals in this order.

Appeal MA-990232-1

The appellant requested copies of all information, documentation, memoranda and other materials relating to the passage of City By-Law 56-99 on June 7, 1999.

The City identified 86 responsive records and granted access in full to 42, partial access to six and denied access to the remaining 38 records in their entirety. For those records to which access was denied either in whole or in part, the City claimed exemptions pursuant to sections 6(1)(a) and (b), 8(1)(a), (c) and (g), 12 and 14(1) of the *Act*. The City further claimed that some of the information severed from Records 82, 83, 84, 85 and 86 was not responsive to the request. The City provided the appellant with an index which described the records and the exemptions claimed for each. I will use the City's numbering scheme for the purpose of this inquiry.

The appellant appealed the City's decision.

During mediation, the City disclosed the attachments to Record 80 to the appellant and the appellant agreed not to pursue access to Records 10, 14, 82, 83, 84, 85, 86 and the remaining portions of Record 80. Therefore, these records are no longer at issue in this appeal. Because sections 8(1)(a), (c) and (g) were claimed only for Record 10 and section 14(1) was claimed only for Record 14, these sections are also no longer at issue in this appeal. As a result, the exemptions at issue in Appeal MA-990232-1 are:

- draft by-law - section 6(1)(a);
- closed meeting - section 6(1)(b); and
- solicitor-client privilege - section 12.

Appeal MA-990295-1

The appellant requested access to "all information, documentation, memorandum and other materials ... in possession of the City of Oshawa relating to the passage of By-law 37-93 Schedule 'P'." The appellant also requested "all information, documentation, memorandum and any and all other materials relating to By-law 6-96." The appellant clarified that the request included but was not limited to "all documents from the Durham Regional Police Service to the City of Oshawa and vice versa, all reports prepared internally or publicly by the City of Oshawa, by the Department of Developing and Planning Services, by the Public Security Panel, by the Development and Corporate Services Community, any and all documents relating to the By-law which were produced prior to its enactment and subsequent thereto to the present day."

The City located 122 responsive records and granted access to 84 of them. The City denied access to the remaining records pursuant to sections 6(1)(a) (draft by-law) and 12 (solicitor-client privilege) of the *Act*. The City also charged a fee of $115.60 which the appellant paid.

The appellant appealed the City's decision.

Notices of Inquiry and Representations

I sent two Notices of Inquiry to the City but subsequently advised it that the two appeals would be combined and dealt with together. During the inquiry stage, the City reconsidered its decision in Appeal MA-990232-1. In a decision letter to the appellant, the City indicated that it decided to disclose Records 36 and 38 to him. Therefore, these two records are no longer at issue.

The City submitted representations for both appeals jointly and consented to sharing them with the appellant in their entirety.

In its representations, the City indicates that it withdraws its reliance on the exemption in section 6(1)(a) for the attachment to Record 86, which is a draft by-law, as it was considered at a meeting open to the public (section 6(2)(a)), and to Record 87, which is a duplicate of this attachment (in Appeal MA-990295-1). Also, the City indicates that upon review, it has decided that Records 92, 100, 101, 118 and page 1 of Records 90 and 93 in Appeal MA-990295-1 do not reveal any privilege and therefore, no longer relies on the application of section 12 for them. As a result, Records 87, 92, 100, 101, 118, page 1 of Records 90 and 93 and the attachment to Record 86 are no longer at issue in this appeal and should be disclosed to the appellant. The City notes further that Records 90 and 91 contain, in addition to a draft by-law, a draft report which it indicates is a duplicate of Record 85. Accordingly, any decision I make regarding Record 85 will also be applicable to the draft reports in Records 90 and 91.

In addition, the City raises the possible application of section 6(1)(a) for Record 62 in Appeal MA-990232-1 for the first time in its representations. Previous orders issued by the Commissioner's office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to limit the time-frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter (Orders P-658 and P-901).

As part of its efforts to expedite the processing of access appeals and in order to sensitize institutions about the prejudice which accrues to appellants when discretionary exemptions are not applied promptly, the Commissioner's office issued an *IPC Practices* publication in January 1993, entitled "Raising Discretionary Exemptions During an Appeal". This document, which was sent to all provincial and municipal institutions, established a 35-day time limit for the raising of new discretionary exemptions; the time to begin running as of the date of confirmation of the appeal.

In the Confirmation of Appeal that was sent to the City on August 26, 1999, it was advised that it would be permitted to raise any new discretionary exemptions up to October 1, 1999. The City has not indicated why it has decided to rely on a new discretionary exemption (as it relates to this record) so late in the appeal process. However, because of the manner in which I have disposed of this record in the discussion below, it is not necessary for me to deal with the possible application of

section 6(1)(a) to it in any event. Therefore, I decline to address the late raising of a new discretionary exemption as an issue in this appeal. Since the City had claimed section 6(1)(a) only for Record 38 (in Appeal MA-990232-1), this section is no longer at issue in that appeal.

I subsequently sent the two Notices of Inquiry to the appellant together with the City's representations. The appellant did not submit representations.

During the course of this appeal, the Court of Appeal issued its decision in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.). This case dealt extensively with the law of litigation privilege. I sent a Supplementary Notice of Inquiry to the City, providing it with an opportunity to provide representations on the impact of *General Accident* on the litigation privilege component of section 12. The City provided representations in response.

RECORDS:

Appeal MA-990232-1

There are 34 records remaining at issue consisting of handwritten meeting minutes, "reports", e-mails, transcribed voice mails, draft by-laws, draft "reports", handwritten and typewritten notes, memoranda and various other related documents.

Appeal MA-990295-1

The records at issue are set out in the City's index of records sent to the appellant with its decision letter dated October 4, 1999. Specifically, the City withheld Records 85 through 122 in the index (with the exception of Records 87, 92, 100, 101, 118, page 1 of Records 90 and 93 and the attachment to Record 86). The records consist of reports, memoranda, draft by-laws, telephone messages, legal research and correspondence.

DISCUSSION:

DRAFT BY-LAW

The City claims that section 6(1)(a) applies to Records 85 (90 and 91), 89, 108-111, 113, 122 and the remaining portion of Record 86 (in Appeal MA-990295-1).

Section 6(1)(a) of the *Act* provides:

> A head may refuse to disclose a record,
>
> > that contains a draft of a by-law or a draft of a private bill;

Records 89, 108, 109, and the attachments to Records 90, 91, 110, 111, 113 and 122 clearly on their face consist of draft by-laws. Each record or attachment contains either a "draft" notation, or

handwritten comments or suggested changes, and sets out a proposed by-law to amend City By-Law No. 37-93. Therefore, these records fall within the scope of section 6(1)(a).

The City released the first page of Record 90. However, the primary covering memorandum for this record, the remaining portion of Record 86, Record 85 and the covering memoranda for the attachments to Records 91, 110, 111, 113 and 122 do not contain drafts of the by-law *per se*, but rather contain references to, and comments about, the draft by-laws by the City's solicitor.

In previous appeals the City has had with this office, it has taken the position that if it is not required to release a draft by-law then it is not required to release the comments made by staff on the by-law. It maintains that to do so would indirectly disclose the contents of the by-law or some of its provisions (Orders M-394 and M-521). Although the City does not make similar submissions in the current appeals, it continues to maintain, generally, that these portions of the records are properly withheld under section 6(1)(a).

In Order M-394, former Adjudicator Anita Fineberg stated:

> The wording of the draft by-law exemption in section 6(1)(a) may be usefully contrasted with that of the "closed meeting" exemption in section 6(1)(b) which states:
>
> > A head may refuse to disclose a record,
> >
> > > that **reveals** the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public. [emphasis in the original order]
>
> Likewise, the analogous provision to section 6(1)(a) of the *Act*, section 12(1)(f) of the provincial *Freedom of Information and Protection of Privacy Act*, states:
>
> > A head shall refuse to disclose a record where the disclosure would **reveal** the substance of deliberations of the Executive Council or its committees, including, draft legislation or regulations. [my emphasis]
>
> In both of these instances, the wording of the exemption, by the inclusion of the word "reveal", is broader than that in section 6(1)(a) of the *Act*. In my view, the use of the term "reveal" means that the exemption in which it appears will apply to records from which accurate inferences can be drawn about the types of information described in these sections. By contrast, the wording of section 6(1)(a) applies to records which actually contain a draft of a by-law.

> In my view, section 1(a)(ii) of the *Act* is also a relevant factor in the interpretation of the section 6(1)(a) exemption. That section sets out one of the major purposes of the *Act* and states that necessary exemptions from the right of access should be limited and specific. Accordingly, I find that the wording of the draft by-law exemption is not broad enough to bear the meaning which the City would ascribe to it. Rather, I am of the view that it only applies to records which actually **contain** the draft by-law.

I agree with former Adjudicator Fineberg's analysis and find that it is applicable in the current appeal. Accordingly, I find that Record 85 and the covering memoranda to Records 86, 90, 91, 110, 111, 113 and 122 are not exempt under section 6(1)(a).

Section 6(2)(a) contains an exception to the draft by-law exemption. The exception states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> > in the case of a record under clause (1)(a), the draft has been considered in a meeting open to the public;

The City states generally that:

> The municipality has legislative authority to pass by-laws from time to time governing or regulating various subject matter. Many of the draft by-laws which form part of the Records in issue are not in a form which was ever presented to a meeting of committee or Council and are in fact "works in progress". By-laws in draft form are evidenced by handwritten notations or changes contained thereon. In the alternative, the Record may be a draft which was presented to committee of Council for consideration in a meeting closed to the public.

The City notes that upon further review, it determined that the draft by-law which was attached to Record 86 was considered at a meeting open to the public and has agreed to disclose this portion of the record to the appellant as section 6(2)(a) applies to it.

With respect to the remaining drafts, it indicates that Records 89, 108 and 109 and the attachments to Records 90 and 91 are clearly drafts of the by-law which contain hand-written changes/corrections and are not in a form which was ever before committee or Council. The City indicates further that Record 122 relates to other matters but was contained in the lap dancing licensing file as it sets out some legal principles relevant also to lap dancing. The City states that this record was not deliberated in any open meeting of committee or Council.

The City states that Record 111 was tabled at an *in camera* meeting of the Fire Protection and General Purpose Committee of December 11, 1995 (as confirmed by the minutes of this meeting found on Record 58 which was disclosed to the appellant). The City states further that Record 113 is an earlier draft of Record 111.

Finally, the City indicates that Record 110 is "a copy of a draft confidential report and by-law which was faxed to another solicitor outside of the City confidentially, for discussion purposes in the course of legal research in order to provide legal advice to Council".

In the circumstances, I am satisfied that the draft by-laws contained in Records 89, 108, 109, and the attachments to Records 90, 91, 111, 113 and 122 were not considered in a meeting open to the public. Accordingly, I find that the section 6(1)(a) exemption applies to them.

As I indicated above, Record 110 was sent to a solicitor employed outside the City. The solicitor was employed by another municipality. It is apparent from the record itself that the record was requested by the outside solicitor.

In the discussion above, I noted that the wording of section 6(1)(a) was very specific and intended only to apply to records which actually contained drafts of a by-law. In my view, section 6(2)(a) is equally as specific in that the draft must have been considered "in a meeting open to the public". The phrase "meeting open to the public" is not defined in the *Act*, nor has its interpretation been considered in previous orders of this office. The legislative authority for municipalities to pass by-laws and hold meetings is set out in the *Municipal Act*. Section 55(1) of the *Municipal Act* defines "meeting" as:

> In this section,
>
> > "meeting" means any regular, special, committee or other meeting of a council or local board.

Section 55(3) of the same Act provides:

> except as provided in this section, all meetings shall be open to the public.

The *Municipal Act* does not provide sufficient guidance on the manner in which "open to the public" should be interpreted. However, a plain reading of the term "public" is of assistance. The Concise Oxford Dictionary (8th edition) defines "public" in the context of a "public meeting" as, "open to or shared by all the people".

In my view, the legislature's intention in including the exemption in section 6(1)(a) is to protect a particular type of record, a draft by-law, which relates to the "works in progress" of the City's law making powers. In my view, the rationale for this exemption is to enable the City to fulfill its law making mandate unencumbered. Where the City chooses to consider drafts in a public forum, or where it reaches a point at which public debate is desirable or required, the legislation dictates that confidentiality of the draft by-law is lost, but only if the particular draft has been considered at a meeting open to the public.

In my view, the *Act* contemplates that a "meeting" within the meaning of section 6 should be interpreted in a manner consistent with its definition in the *Municipal Act* which refers to a regular,

special, committee or other meeting of, in this case, the council itself. Taking a plain reading of "open to the public" further qualifies the exception as meaning that the meeting be open to or shared by all people. With respect to Record 110, I find that although communications about the draft by-law with an individual who is not an employee or member of Council of the City have taken place, such communications did not take place in a meeting open to the public within the meaning of the exception in section 6(2)(a). Therefore, I find that the exception does not apply to it and Record 110 is also exempt under section 6(1)(a).

CLOSED MEETING

The City claims that the discretionary exemption in section 6(1)(b) applies to Record 33 (in Appeal MA-990232-1). This section provides:

A head may refuse to disclose a record,

> that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

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

1. a "closed" or "*in camera"* 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.

[Order M-64]

Requirements 1 and 2

The City describes Record 33 as handwritten minutes of the Development and Corporate Services Committee, dated May 31, 1999. The City indicates that this record is the handwritten notes taken by the Secretary of the Development and Corporate Services Committee at the meeting held May 31, 1999 which was held *in camera* as evidenced by the official minutes of the meeting which are contained in Record 32 (which was disclosed to the appellant).

The City indicates further that the meeting of the committee of Council was held in the absence of the public pursuant to section 55(5)(f) of the *Municipal Act*. Section 55(5)(f) of the *Municipal Act* provides that a meeting may be closed to the public if the subject matter being considered is "the

receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose".

I accept that a closed meeting of the Development and Corporate Services Committee took place on May 31, 1999 and that it was properly authorized by section 55(5)(f) of the *Municipal Act*, thereby satisfying the first two requirements of section 6(1)(b).

Requirement 3

"Substance" has been defined in previous orders as "the 'theme or subject' of a thing" (Order M-196). "Deliberations" has been interpreted as meaning "... discussions which were conducted with a view towards making a decision" (Order M-184). I adopt these interpretations for the purpose of this appeal.

The record identifies the date and location of the meeting and those in attendance. The remaining portions of the record contain the notes made by the secretary of the discussions held during the meeting. In Order MO-1344, Assistant Commissioner Tom Mitchinson considered various types of information contained on a record of an *in camera* meeting. Adopting the reasoning of a recent decision of the British Columbia Information and Privacy Commissioner David Loukidelis (Order 00-14), in which he dealt with a similar type of record, Assistant Commissioner Mitchinson found that disclosure of the date of the meeting and the identities of those individuals attending and not attending an *in camera* meeting would not disclose the substance of the deliberations of a board of education at the meeting. Applying the severance principle in section 4(2) of the *Act*, the Assistant Commissioner found that this information was not exempt and should be disclosed to the appellant.

In my view, this reasoning should be similarly applied in the current appeal. The City has not provided any evidence to support a finding that disclosure of information pertaining to the date, location and attendees would disclose or reveal the substance of deliberations of that meeting. On the contrary, the City's representations openly identify the names of the individuals responsible for the preparation or receipt of the records at issue in this appeal which, in my view, supports a finding that there is no sensitivity to the identities of any individual involved in the development of the by-law. Accordingly, I find that the information at the top of the first page of this record which I have highlighted in yellow on the copy of this record that I am sending to the City's Freedom of Information and Privacy Co-ordinator is not exempt under section 6(1)(b).

The remaining portions of the handwritten minutes of the May 31 *in camera* meeting indicate that the substance of the discussions which took place during the meeting focussed on an in-depth examination of the proposed by-law in light of the legal advice the committee had received from its solicitor with a view to making a decision on the provisions to be contained in it. I am satisfied that disclosure of this information would reveal the substance of the deliberations of that meeting of the Development and Corporate Services Committee and the third requirement has been met.

Section 6(2)(b) provides:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> > in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public.

The City states that the subject matter of the deliberations was not considered in a meeting open to the public. In the absence of any evidence to the contrary, I accept the City's submission in this regard. Accordingly, I find that the non-highlighted portions of Record 33 (in Appeal MA-990232-1) are exempt under section 6(1)(b).

SOLICITOR-CLIENT PRIVILEGE

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 the 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 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.). This case dealt with section 19 of the provincial *Freedom of Information and Protection of Privacy Act*, the equivalent provision to section 12 of the municipal *Act*.)

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 applies to the records at issue.

Appeal MA-990295-1

The City has claimed the application of both solicitor-client communication privilege and litigation privilege for Records 85, 86, 88, 90, 91, 93-99, 102-107 110-117 and 119-122. Since I have found that the attachments to Records 90, 91, 110, 111, 113 and 122 are exempt pursuant to section 6(1)(a) of the *Act*, I will not consider the application of section 12 to these portions of the records.

In its representations, the City has addressed the records in Appeal MA-990295-1 first as these records concern the development of the by-law dealing with adult entertainment parlours. It has provided "general submissions" relating to these records as well as specific submissions regarding each record. The City then turns to Appeal MA-990232-1 as the records in this appeal concern regulations made under the by-law.

Appeal MA-990232-1

The City has made specific submissions on each record at issue in this appeal, some of which only appear to address solicitor-client communication privilege. It does not refer back to any of the previous discussion regarding the records in Appeal MA-990295-1. However, as I noted above, in that previous discussion, the City raises "general submissions" regarding the application both heads of privilege under section 12 of the *Act*. It appears that these submissions may also be applicable to the records at issue in Appeal MA-990232-1. Because there may be some confusion resulting from dealing with both appeals together, I have decided to incorporate the general submissions made under the discussion in Appeal MA-990295-1 into the discussion under Appeal MA-990232-1. On this basis, the City has claimed the application of both solicitor-client communication privilege and litigation privilege for Records 33, 43-56, 58, 59, 62-68, 70-77, 79 and 81. Since I have found that Record 33 is exempt pursuant to section 6(1)(b) of the *Act*, I will not consider the application of section 12 to it.

I will consider solicitor-client communication privilege, and then (if necessary) litigation privilege, to the relevant remaining records.

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 or legal assistance [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

The City's general submissions on solicitor-client communication privilege

The City states generally that its Legal Services Branch provides legal services and legal advice to the City, including its Mayor and Council, staff within the corporation and its various local boards. The City states further that when by-laws are contemplated by committee or Council, its Legal Services Branch provides legal advice with respect to the validity of the by-law, its enforce ability, its legislative authority and its wording, as well as legal opinions on the direction of Council and theories and advice with respect to the benefits or drawbacks of matters contemplated by Council. In addition, the City states that all documents reviewed, circulated for input/comment, generated or created in this context represent working papers created during the formulation of legal advice for the client.

The City also made specific representations with respect to each record and I will deal with each one in turn:

Appeal MA-990295-1

Records 85 (duplicate Records 90 and 91) and 86

Records 85 and 86 are "Confidential Reports" dated January 19, 1996 and February 13, 1996, respectively, to the Fire Protection and General Purpose Committee from the City's solicitor relating to the draft Lap Dancing By-law. The City submits that these records are confidential communications between a client (the Committee and Council of the City) and its solicitor and are directly related to the giving of legal advice relating to the passage of the by-law.

I accept the City's submissions regarding these records. They are written communications between a solicitor and her client. I accept that at the time they were written and communicated to the client, these records were confidential and that the subject matter of these two records relates directly to the giving of legal advice regarding legal issues concerning the development of the by-law.

Records 88, 97 and 117

Record 88 is a handwritten memorandum dated February 26, 1996 from the City's solicitor to a paralegal/prosecutor also employed by the City under the supervision of the solicitor. The City submits that this record is part of a legal advisor's working papers in that it contains communications to the paralegal directly related to the giving of legal advice.

Record 97 is a memorandum from the paralegal to a former solicitor and Director of the Legal Services Branch of the City. The City submits that this memorandum represents a solicitor's working papers, being legal research conducted by the paralegal as directed by the solicitor, directly related to giving legal advice.

Record 117 is a handwritten note to file dated October 17, 1995 and made by the City's solicitor. The City states that the note relates to a telephone conversation she had and is relevant to the provision of legal advice to her client (City Council). The City submits that this record is part of the solicitor's working papers related to the formulation of legal advice.

I accept that the communications between the solicitor and the paralegal in Records 88 and 97 are directly related to the giving of legal advice to the City with respect to the development of the by-law and that this communication forms part of the solicitor's working papers in this regard. Further, I find that the solicitor's handwritten notes to file in Record 117 also qualify as her working papers related to the formulation of legal advice.

Record 93

Record 93 is a letter from the Legal Services Branch to a law firm, with a facsimile confirmation

sheet attached dated April 22, 1996. The City does not state, nor even suggest, that it had a solicitor-client relationship with the law firm. As I indicated above, the City no longer objects to the disclosure of page 1 of this record. The City states:

> The other 2 pages, being the fax cover sheet and confirmation sheet, contain information which would reveal the substance of legal research conducted by a solicitor for a client in order to formulate legal advice - such research constituting part of a solicitor's working papers relating to the giving of that advice. These are properly withheld, in our respectful opinion, as being solicitor-client privilege (Branch 1) pursuant to s.12 of the Act. Privilege has not been waived as the information was sent confidentially to a solicitor who was also researching this issue.

The record itself clearly establishes that the recipient of the record was, in fact, acting for another municipality and that the purpose of sending the record to this individual was to share information relating to the development of a by-law dealing with lap dancing. It may be that the solicitor sent the letter to the law firm in confidence. However, I find that the City has failed to establish that it was a communication between the solicitor and her client. Moreover, even if I were to find that the content of the record was created by the solicitor as part of her working papers relating to the giving of legal advice, the fact that she wrote the letter to a party outside of the solicitor-client relationship is an indicator that there was no intention of solicitor-client confidentiality. Accordingly, I find that Record 93 does not meet the requirements of solicitor-client communication privilege and it is not exempt from disclosure under section 12.

Records 94, 95, 96, 98, 103-107 and 121

All of these records consist of legal research composed of case law and a digest excerpt some of which are marked with the paralegal's handwritten notes. The City states:

> Each of the above Records are either a summary of a reported court decision or the full text of a reported court decision. Reported court decisions are public and readily available from many official and unofficial sources. The handwritten notes referred to in the description of two of the above Records are actually not particularly sensitive ... However, it is our submission that legal research, including copies of reported court decisions contained within the solicitor's file, constitute working papers gathered in the course of formulating legal opinion and advice and should be withheld pursuant to s. 12 of the Act pursuant to common law solicitor-client communication privilege. Certain sensitive information concerning the nature of the issues examined by legal counsel on behalf of a client (City Council) in the course of formulating legal advice may be extrapolated from knowledge of which reported decisions were examined and reviewed.

I accept that the legal research conducted by the solicitor (or the paralegal) forms part of the solicitor's working papers relating to the formulating and provision of legal advice.

Records 99 and 102

Record 99 is a telephone message to the City's solicitor from a City Councillor dated February 23, 1996. Record 102 is a handwritten note from the Mayor to the solicitor. The City submits that both records relate directly to communications between the solicitor and client (a Council member) and thus qualify for privilege under section 12.

I am satisfied that these two records are confidential communications between a solicitor and client directly related to the seeking and giving of legal advice.

Records 110, 112 and 114

Record 110 is a draft confidential report, draft by-law, with attached facsimile confirmation dated January 19, 1996. The City describes this record as:

> [A] copy of a draft confidential report and by-law which was faxed to another municipal solicitor outside of the City (but within Durham Region) confidentially, for discussion purposes in the course of legal research in order to provide legal advice to Council. Solicitor-client privilege was not waived. It is therefore withheld pursuant to s. 12 of the Act as being common law solicitor-client communication privilege (Branch 1) and further represents working papers created in the course of formulating legal advice (Branch 2).

Record 112 is a facsimile cover sheet from the Legal Services Branch dated December 13, 1995 which is attached to a duplicate of Record 111. Record 114 is a facsimile cover sheet from the Legal Services Branch along with a confirmation slip. The City submits that:

> Record 112 also contains fax cover and confirmation sheets and enclosures addressed to another municipal solicitor outside of the City (but within Durham Region) confidentially, for discussion purposes in the course of legal research in order to provide legal advice to Council. Solicitor-client privilege was not waived. Record 114 is another fax cover and confirmation sheet also to the same solicitor again, for discussion purposes in the course of legal research in order to provide legal advice to Council. Solicitor-client was not waived. They are both therefore withheld pursuant to s. 12 of the Act as being common law solicitor-client communication privilege (Branch 1). Further, they represent working papers created in the course of formulating legal advice (Branch 2).

I accept that at the time the draft confidential reports and draft by-law were prepared, they were done so within the confidential framework of the solicitor-client relationship (as I have found to be the case with the other draft versions of the report). I also accept that they were privileged at the time they were created. I will address the sharing of the report below under the heading "waiver". As far as the facsimiles are concerned, however, my comments regarding Record 93 are similarly

applicable to these parts of the records and they, therefore, do not meet the requirement of confidentiality necessary to fall within the section 12 exemption.

Records 111 and 113

Records 111 and 113 are confidential solicitor's reports dated December 11, 1995 and November 29, 1995, respectively, with a draft by-law attached to each one. Only the reports are at issue in this discussion. The City explains that:

> The confidential solicitor's report dated December 11, 1995 (Record 111) addresses proposed lap dancing regulations, legal advice and annexes a draft by-law. This report was an "in camera" item at the meeting of the Fire Protection and General Purpose Committee of December 11, 1995 (see Record 58, disclosed), at which time it was tabled. Record 113 is a draft of the report dated December 11, 1995 (Record 111) and consequently both of these records are withheld pursuant to s. 12 of the Act as they represent common law solicitor-client communication privilege (Branch 1). [City's emphasis]

I find that Record 111 is a confidential communication between a solicitor and client directly related to the seeking and giving of legal advice. Record 113 forms part of the solicitor's working papers directly related to the formulation of this legal advice. Although these records meet the threshold requirement for solicitor-client communication privilege under section 12, a final determination of their status will be made following the discussion of waiver.

Records 115, 116, 119 and 120

Record 115 is a facsimile cover sheet and attached report to the City's solicitor dated October 17, 1995. Record 116 is a facsimile from the City of Toronto directed to the City's solicitor. The City submits that these two records were sent to its solicitor and that she considered them in the course of formulating a legal opinion to her client (City Council). The City submits further that they represent a part of a solicitor's working papers and are thus subject to privilege under section 12.

Record 119 is a facsimile cover sheet from the Metropolitan Toronto Clerk to the former City solicitor with attachments and Record 120 is a facsimile from the Metropolitan Toronto Clerk to the former solicitor. The City submits that both of these records represent documents gathered by a solicitor in the course of formulating a legal opinion to his client (City Council) and consequently represent part of a solicitor's working papers which are privileged under section 12.

In Order M-729, Adjudicator Donald Hale considered the application of section 12 to a legal opinion and correspondence received by the institution in that appeal from legal counsel of another municipality. He concluded:

> The City relies on Branch 1 of the section 12 exemption for both records and argues that they were supplied to the Oshawa City Solicitor by the Kitchener solicitors for his use in preparing a legal opinion to the City of Oshawa concerning a "No Loitering" bylaw. In *Susan Hosiery Limited* v. *Minister of National Revenue* [1969], 2 Ex. C.R.27, the criteria for the first part of the common law solicitor-client privilege are described as follows:
>
> > ... all communications, verbal or written, of a confidential character between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal advisor's working papers directly related thereto) are privileged ...
>
> It is clear from the submissions of the City and Kitchener that the Oshawa City Solicitor sought, obtained and made use of Records 88 and 89 for the purposes of preparing the legal opinion which his client, the City of Oshawa, had asked him to provide. I find that I have been provided with sufficient evidence to demonstrate that these records were obtained and used directly in the preparation of legal advice which was then communicated to the client. Accordingly, I find that Records 88 and 89 constitute part of the solicitor's working papers within the meaning of the criteria expressed in *Susan Hosiery*. As such, Records 88 and 89 satisfy the requirements of the first part of the solicitor-client privilege test and are exempt from disclosure.

In my view, this reasoning is similarly applicable to the circumstances relating to Records 115, 116, 119 and 120. I am satisfied that these records were received and considered by the City's solicitor in the course of formulating her legal opinion to her client. Accordingly, I find that they constitute part of the solicitor's working papers as contemplated by *Susan Hosiery*.

Record 122

Record 122 is a memorandum dated January 10, 1995 to a staff member of the City from the City's solicitor relating to the licensing and regulation of public garages. The City submits that:

> This document relates to matters other than lap dancing, however it was contained in Legal Services' lap dancing licensing file as it sets out some legal principles relevant also to lap dancing. The memorandum contains confidential legal advice to a staff member of the City (client) ... may be properly withheld pursuant to section 12 of the Act...

I accept that Record 122 is a confidential written communication between a solicitor and the client relating to the giving of legal advice. This record, in the context of the subject by-law, also forms part of the solicitor's working papers relating to the formulating of legal advice.

Appeal MA-990232-1

Record 33

I found that the majority of Record 33 which, as I indicated above, consists of the handwritten minutes of an *in camera* meeting of the Development and Corporate Services Committee of May 31, 1999 is exempt from disclosure under section 6(1)(b) of the *Act*. However, I also found that the date of the meeting and the identities of those in attendance are not exempt under that section. The City claims that solicitor client privilege attaches to this record in its entirety.

The City submits that the meeting was closed to the public for the specific purpose of receiving legal advice and thus contains information which represents a communication between client and solicitor, being a dialogue between them during which legal advice was sought and given.

In Order P-1363, former Commissioner Tom Wright reviewed in-depth, the authorities governing a situation where counsel is present at a meeting and offers legal advice on the legal issues which arise in the course of the meeting. The following principles were enunciated to provide guidance as to the application of solicitor-client communication privilege to such circumstances:

> Having considered all these authorities, I have concluded that the following principles which flow from them are particularly applicable in the circumstances of this appeal:
>
> - communications between a solicitor and client for the purpose of obtaining legal advice, broadly construed, attract solicitor-client privilege;
>
> - the mere presence of the solicitor at a meeting does not automatically spread an "umbrella of privilege" over all of the proceedings and in some instances it would be appropriate to recognize the claim as to some portions and disallow it as to others [see: *Nova Scotia Pharmaceutical Society v. R.* (1988) 225 A.P.R. 70 (N.S.T.D.) at p. 73];
>
> - in some instances, it is appropriate to edit documents so that the non-privileged parts may be obtained or disclosed; and
>
> - decisions about which parts of meeting minutes attract solicitor-client privilege and which parts do not should be made with great care, so that privilege may be preserved where appropriate, in order to permit frank exchanges between solicitor and client in relation to legal advice.

> Turning to the record at issue, I accept that one of the purposes of the meeting was to obtain legal advice. It is equally clear, however, that the meeting had a broader purpose. This purpose involved information sharing, general discussion of what actions might be taken to resolve the issues presented by the occupation of the [Ipperwash Provincial Park], and the formulation of recommendations in that regard. In my view, the aspect of the meeting relating to obtaining legal advice was a secondary purpose, while the broader objective described in the preceding sentence was the primary purpose of the meeting. Discussions aimed at this broader purpose are not privileged unless they are directly related to seeking, formulating or giving legal advice.

With respect to Record 33, it is apparent from the minutes themselves that the purpose of the meeting was for the members of the Committee to review and discuss the provisions to be incorporated into the by-law in light of the legal advice it received from the City's solicitor. Accordingly, I find that disclosure of the notes taken during the meeting of these discussions would reveal confidential solicitor and client communications.

The Commissioner's orders have held that severance applies in the context of section 12. As stated in Order P-1363 concerning the application of sections 10(2) and 19 of the provincial *Act* (which are similar to sections 4(2) and 12 of the *Act*):

> ... the principle of severance, as expressed in section 10(2) of the *Act*, does not play a role in determining which parts of a record are subject to solicitor-client privilege, and thus qualify for exemption under Branch 1 of section 19. Section 10(2) merely indicates that parts of a record requested under the *Act* which are not subject to an exemption are to be disclosed.
>
> The question of what is exempt under Branch 1 must be determined in the context of the law of solicitor-client privilege. A number of court decisions support the view that at common law, solicitor-client privilege may attach to some parts of a document, but not to other parts.
>
> [See also Order P-1409]

Further, in the context of a judicial review application of Order P-771, the Divisional Court stated:

> Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.
>
> I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I

> would also emphasize that the privilege protects only the communication to legal counsel.
>
> [*Ontario (Minister of Finance v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71; see also the following cases cited in Order P-1409: *Peaker v. Canada Post Corp.*, [1995] O.J. No. 2282 (Gen. Div.); *Law Society of Upper Canada v. Baker* , [1997] O.J. No. 69 (Div. Ct.); *Re Sokolov* (1968), 70 D.L.R. (2d) 325 (Man. Q.B.)]

In Order P-1363, former Commissioner Wright noted:

> In an additional argument under Branch 1, [Ontario Native Affairs Secretariat] maintains that the record itself is a communication which was used to convey legal advice to, and seek instructions from, senior government officials and staff. I do not agree. Judging from the contents of the document, my assessment is that its primary purpose was to serve as a record of the discussions which took place at the meeting. Moreover, the only parts of the document which relate to legal advice (except the portions subject to waiver, referred to above) have already been exempted in the preceding analysis.

Similarly, in the current appeal, although the members of the Committee considered the legal advice provided by its Legal Services Department, the purpose of the meeting was to discuss the provisions to be incorporated into the by-law and the primary purpose of the minutes was to record the discussions which took place at the meeting. In my view, the identities of the individuals who attended this meeting do not relate directly to the legal advice that was provided at the meeting and, therefore, do not qualify for exemption under solicitor-client communication privilege in section 12.

Record 43

Record 43 is a draft adult entertainment parlour by-law prepared by the Durham Regional Police Service (the Police) with handwritten notes and changes to the document made by a former solicitor employed by the City and the paralegal. The City submits that this record is part of the solicitor's working papers related to the formulation of legal advice to his client (the Committee and Council).

Similar to my findings with respect to Records 115, 116, 119 and 120 in Appeal MA-990295-1, I find that this record constitutes part of the solicitor's working papers as contemplated by *Susan Hosiery*.

Records 44-48

Records 44-48 consist of various e-mails between several City solicitors and the paralegal and other internal City staff who were working on a draft adult entertainment parlour by-law. The City submits that these records are internal communications between solicitor-client and/or are consider

part of a solicitor's working papers generated in the course of formulating legal advice.

I accept that these records form part of the continuum of confidential communications between the City's solicitors and the client group and/or constitute part of the solicitor's working papers in formulating their legal advice to the client.

Records 49-53 and 77

Records 49-53 consist of the transcripts of various voice mail messages between the paralegal, an Inspector employed with the Police and a City Councillor/Chair of the Police Services Board. The City states that the Police are responsible for the enforcement of its adult entertainment by-law. The City submits that these records are internal communications between solicitor and client and/or are a solicitor's working papers generated in the course of formulating legal advice. Further, the City states that the communications between the solicitor's office and the enforcement agency was a necessary step in formulating an enforceable by-law and constitute research by the solicitor in formulating legal advice to her client.

Record 77 is a memorandum dated December 30, 1998 from the paralegal to two City staff members and a Constable with the Police, with a draft new adult entertainment parlour by-law attached. The draft by-law also contains the paralegal's handwritten notes. The City submits that this record forms part of the solicitor's working papers created in the course of formulating legal advice to the client.

In Order M-739, Assistant Commissioner Mitchinson considered whether the exemption in section 12 applied to a communication between a city solicitor and her client relating to a by-law passed by the city in that case to deal with lap dancing that was also copied to a regional police officer. He commented as follows on the issue whether disclosure of a record to someone outside the city is sufficient to negate what would otherwise constitute solicitor-client privilege:

> Manes & Silver, make the following point at page 207 of *Solicitor-Client Privilege in Canadian Law* (1993):
>
> > In essence, where the client authorizes the solicitor to reveal a solicitor-client communication, either it was never made with the intention of confidentiality or the client has waived the right to confidentiality. In either case, there is no intention of confidentiality and no privilege attaches. For example, it has been held that documents prepared with the intention that they would be communicated to a third party, or where on their face they are addressed to a third party, are not privileged. *[Nova Scotia Pharmaceutical Society v. R.* (1988), 88 N.S.R. (2d) at 72-75 (T.D.), ([1988] N.S.J. No, 444).
>
> In the *Nova Scotia Pharmaceutical Society* case, Burchall J. made the following statements in relation of a certain group of records at issue in that case:

> The five remaining items bear dates in the year 1974 but in each instance there is an indication on the face of the document that it was addressed to a third party and, accordingly, the claim of privilege is also rejected as to these items because they manifest an intention that the contents would be communicated to a third party.

It is possible for two or more parties to have a joint interest in a record which could have an impact on solicitor-client privilege. In *Johal v. Billan* [1995] B.C.J. No. 2488 (B.C.S.C.) the court found that a husband and wife who had consulted the same solicitor for the purpose of drafting wills had waived the privilege between themselves, but maintained this privilege against third parties who did not share a joint interest with one or both of them. This judgement makes reference to this interest being supported by Mr. Justice Sopinka in the text *Law of Evidence in Canada*, at page 638:

> Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication. ... Moreover, a client cannot claim privilege as against third persons having a joint interest with him in the subject-matter of the communication passing between the client and the solicitor.

Applying this reasoning to the circumstances of the present appeal, in my view, I have not been provided with evidence sufficient to establish a "joint interest" between the City and the police officer for the purposes of solicitor-client privilege. The City Solicitor clearly was not retained by the police officer, and her professional responsibilities relate exclusively to the City. Based on the representations submitted by the City, I am not convinced that the interests of the City and the police officer in regards to the lap dancing by-law are sufficiently connected to be accurately characterized as a "joint interest".

Having reviewed the representations and considered the circumstances of this appeal, I find that the copying of Record 16 to the police officer is either evidence that the document was not intended to be treated confidentially, or evidence that any solicitor-client privilege that might attach to the record has been waived. Therefore, Record 16 does not qualify for exemption under the first part of Branch 1 of section 12, and should be disclosed to the appellant ...

> In my view, this reasoning applies to Record 77. I accept that communications between the solicitor and the enforcement agency may be well advised in the formulation of the by-law, but the desirability of such communications is not sufficient to bring the Police within the client group for the purposes of solicitor-client communication privilege. Consequently, the fact that the memorandum is addressed to the Police Constable is evidence that there was no intention of confidentiality vis-a-vis the solicitor-client relationship. As a result, I find that Record 77 is not privileged and section 12 does not apply to it.

With respect to the voice-mail messages, I find that Record 49 reflects a communication between the paralegal and the Police Constable during which information relating to the by-law was exchanged between the two individuals. It may well be that the information obtained as a result of this conversation was used by the solicitor in formulating her legal advice to the client. However, this communication involved a considerable exchange of detailed information between the two individuals. For this reason, I find that there was no intention of solicitor-client confidentiality as regards this communication. Therefore, it fails to meet the confidentiality requirement for the application of section 12.

Record 53 contains an e-mail from the paralegal to a number of City staff and councillors with a response from the Mayor attached. I accept that the attached response is a confidential communication between a solicitor and client and this portion of the record is exempt under section 12. However, the original e-mail was copied to members of the Police. In my view, the reasoning in Order M-739 is directly applicable to this portion of the record and it is, therefore, not privileged as the paralegal intended to communicate the information contained therein to a "third party".

I am satisfied that the remaining e-mails consist of confidential communications between the solicitor and client and/or form part of the solicitor's working papers generated in the course of formulating legal advice. Therefore, Records 50, 51 and 52 are exempt under section 12.

Records 54-56, 62, 63, 64-67 and 72

Records 54-56 consist of various draft excerpts or full copies in draft form of confidential reports to the Development and Corporate Services Committee from a solicitor employed by the City. The City notes that these records are clearly in draft form as they contain handwritten notes and changes and are marked "draft". The City indicates that these versions of the reports were not presented to the client but represent part of the solicitor's working papers generated in the course of formulating legal advice to his client (the Committee and Council).

Record 62 is a draft Adult Entertainment Parlour By-law on which the City's solicitor has made handwritten notations. Record 63 is a handwritten note from the paralegal to the solicitor dated March 15, 1999 which accompanied Record 62. The City submits that these records form part of the solicitor's working papers created in the course of formulating legal advice to the client.

Record 64 is a draft "four" of a report to the Development and Corporate Services Committee prepared by the City Clerk who is responsible for business licensing within the City. The draft also contains the paralegal's handwritten notes. Record 65 contains a solicitor's handwritten notes dated March 10, 1999 along with a memorandum from the paralegal to the solicitor and a copy of Record 64 with the solicitor's handwritten comments. As well, this record has a draft of a new adult entertainment parlour by-law with the solicitor's handwritten notes. Records 66 and 67 are undated drafts of a new adult entertainment parlour by-law prepared by the paralegal. Record 72 is a second draft of a new adult entertainment parlour by-law prepared by the paralegal. Records 67 and 72 also contains the paralegal's handwritten notes.

The City submits that all of these documents are contained in the solicitor's working file and consist of advice to the client (as evidenced by the handwritten notes on Record 64) and/or internal communications and documents generated in the course of formulating legal advice to the client.

It is apparent on the face of these records, and as acknowledged by the City, that none of these records was provided to the client by the solicitor. However, I am satisfied that, with two exceptions, they represent the solicitor's working papers in formulating and preparing her legal advice to the client.

Record 65 contains the notes of a meeting held by the Adult Entertainment Parlour Group (the AEP). The membership of this group consists of the paralegal, City staff and a member of the Police. Attached to Record 65 is a memorandum which has been copied to the Police Constable. In my view, it was the intention of the City to communicate the contents of all of the information in Record 65, and thus Record 64 to a third party. Accordingly, I find that these records lack the requisite confidentiality to bring them within solicitor-client communication privilege. I find this despite the notations made on these two records by the solicitor and paralegal. It is apparent from the memorandum that the purpose of the meeting was to review, discuss and make changes to the drafts. Since the changes to these records reflect the results of this meeting, they are not privileged under section 12.

Records 58 and 59

Record 58 contains the paralegal's handwritten notes regarding "response to delegate" by the Police. Record 59 are her typed notes with handwritten notations regarding "legislative authority". The City states that the paralegal prepared these notes under the supervision of its solicitors in the course of assisting them in formulating legal advice to the Committee and Council and thus they form part of the solicitors' working papers.

Similar to my findings above regarding work performed by the paralegal with respect to the development of the by-law, I am satisfied that these records were prepared to assist the City's solicitor in formulating her legal advice to the client and thus forms part of the solicitor's working papers in this regard.

Record 68

This record is an e-mail from an employee of the City's Buildings Branch to the paralegal dated January 22, 1999. The City notes that this employee had input into the draft by-law. The City submits that this record contains a request for legal advice from the employee (the client), as well as the responses given by the solicitor and paralegal and thus qualifies under section 12 as confidential communications between the solicitor and client related to the seeking and giving of legal advice.

I find that this record constitutes a direct written communication between a solicitor and client directly related to the seeking and giving of legal advice.

Records 70, 73, 76 and 81

Records 70, 73 and 76 comprise excerpts from legislation on which the paralegal has made handwritten notes. The City states that these records represent confidential legal research and constitute the solicitor's working papers created in the course of formulating legal advice for the client. The City submits further that:

> Although legislation is publicly available information, knowledge of the various elements or aspects of legislation examined by counsel when formulating legal opinion together with the margin notes made would infringe upon solicitor-client privilege ...

Record 81 is a file which contains full or partial text of various court decisions, together with handwritten notes or commentary by the paralegal. The City states that the paralegal was directed by the solicitor to examine various court decisions in order to aid in the delivery of and formulation of legal advice to the client. The City states further:

> Reported court decisions are public and readily available from many official and unofficial sources. The handwritten notes referred to the description of most of the cases referred to in the above Record are sensitive in terms of identifying the particular issue examined and the comments on the impact of those issues. It is our submission that legal research, including copies of reported court decisions contained within the solicitor's file, constitute working papers gathered in the course of formulating legal opinion and advice and should be withheld pursuant to s. 12 of the Act pursuant to common law solicitor-client communication privilege. Certain sensitive information concerning the nature of the issues examined by legal counsel on behalf of a client (City Council) in the course of formulating legal advice may be extrapolated from knowledge of which reported decisions were examined and reviewed.

I find that the photocopied pages of legislation and case law form part of the solicitor's working papers as they consist of legal research relating to the formulation and provision of legal advice. Therefore, Records 70, 73, 76 and 81 qualify for exemption under section 12.

Record 71

Record 71 is a facsimile to the paralegal from a Constable employed by the Police dated January 15, 1999. The City submits that this record is an internal communication generated in the course of formulating legal advice for the client.

Although I do not accept that the relationship between the Police and the City are such that the Constable would fall within the "client group", which in this case is comprised of the City's elected officials and employees, I am satisfied that the paralegal received the information in Record 71 on behalf of the solicitor for the purpose of formulating her legal advice to the client. Therefore, I find that this record qualifies for exemption under section 12.

Records 74, 75 and 79

These three records are the paralegal's handwritten notes relating to meetings held on February 5, 1999, January 7, 1999 and November 2, 1998, respectively. The City states that they are the paralegal's rough notes taken during meetings at which various staff were present to discuss the proposed new adult entertainment parlour regulations and draft by-law. The City states further that the paralegal was present at the meeting under the direction of the City's solicitor to provide legal assistance to the staff and to communicate the solicitor's legal advice to this group. The City submits that the notes constitute the solicitor's working papers created in the course of formulating legal opinion and advice to the client.

Similar to my findings above regarding Record 65, the notes were made in connection with meetings of the AEP. As this group consists of individuals outside of the client group, I find that there was no intention that the information communicated therein be confidential within the client group. Accordingly, Records 74, 75 and 79 are not exempt under section 12.

Records disclosed to the Police in Appeal MA-990232-1

I have noted a number of occasions where the information in the records or the records themselves have been communicated to one or more members of the Police, in particular, as part of the AEP. These records cannot be exempt under solicitor-client communication privilege as there can be no intention of solicitor-client confidentiality where information has been disclosed outside of that relationship. It may well be that many other records have been disclosed to the Police. However, I have nothing before me that leads me to draw such a conclusion. In the absence of evidence to the contrary, I find that the records other than those I have already identified have not been communicated outside the solicitor-client relationship and they are exempt under section 12.

Loss of Privilege

Waiver

The actions by or on behalf of the institution and/or another party may constitute waiver of

solicitor-client communication privilege or litigation privilege. As stated in Order P-1342:

> ... Common law solicitor-client privilege can also be lost through a waiver of the privilege by the client. Waiver of 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] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148-149 (C.P.C)]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669. See also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Strictly speaking, since the client is the "holder" of the privilege, only the client can waive it. However, the client's waiver of the privilege can be inferred from the actions of the client's solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client's privilege. [J. Sopinka et. al., *The Law of Evidence in Canada* at p. 663. See also: *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211 (S.C.C.); *Derby & Co. Ltd. v. Weldon (No. 8)*, [1991] 1 W.L.R. 73 at 87 (C.A.)].

Waiver has been found to apply where, for example:

- the record was disclosed to the requester [Order P-341; upheld on judicial review in *General Accident Assurance Co. v. Ontario (Information and Privacy Commissioner)* (March 8, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)];

- the record was disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)];

- the communication was made to an opposing party in litigation [Order P-1551]; and

- the document records a communication made in open court [Order P-1551].

I found above that the City had failed to establish the requirements for solicitor-client communication privilege with respect to a number of records. In the event that disclosure of these records discloses information that was previously privileged, I will also consider whether or not waiver applies to them. I also noted above, that although Records 111 and 113 and part of Record 112 in (Appeal MA-990295-1) met the threshold under section 12, a final determination of their status will be made following the discussion of waiver.

The City submits that it has not waived privilege in any record. In particular, with respect to Record 93 (Appeal MA-990295-1), the City states "privilege has not been waived as the information was sent confidentially to a solicitor who was also researching this issue".

Regarding Records 110, 111 and 112 (Appeal MA-990295-1), the City indicates that the confidential report was sent to another municipal solicitor outside of the City confidentially and for discussion purposes in the course of legal research in order to provide legal advice to Council. On this basis, the City submits that solicitor-client privilege was not waived.

I do not accept the City's submissions regarding these records. It is clear from the records themselves that they were sent to the other municipalities at their request. Even if they did form the basis for discussion between solicitors for different municipalities, in my view, the fact that they were sent to an outside party is clear evidence of an intention to waive privilege on behalf of the client (Order P-1342).

Records 85 (90 and 91) are duplicates of Record 110 and my findings regarding Record 110 are equally applicable to the duplicates. I have reviewed Record 113 which is a draft of Record 111. The content of these two drafts is quite different and I have no evidence before me which indicates that Record 113 has been disclosed to any other party. In these circumstances, I find that the information in Record 113 has not been waived and this information is exempt under section 12.

Summary

To summarize my findings thus far under section 12, I find that the following records are exempt under section 12 on the basis of solicitor-client communication privilege:

MA-990295-1

Records 86, 88, 94, 95, 96, 97, 98, 99, 102, 103-107, 113, 115, 116, 117, 119, 120, 121 and 122.

MA-990232-1

Records 43, 44-48, 50, 51, 52, 53 (in part), 54-56, 58, 59, 62, 63, 64-67, 68, 70, 71, 72, 73, 76 and 81.

The following records do not qualify for solicitor-client communication privilege as they do not meet the confidentiality requirement:

MA-990295-1

Records 93, 112 (in part) and 114.

MA-990232-1

Records 33, 49, 53 (in part), 64, 65, 74, 75, 77 and 79.

The City has waived privilege in the following records and they are, therefore, not exempt under section 12:

MA-990295-1

Records 85 (90 and 91), 93, 110, 111 and 112.

As no other exemptions apply to Records 85 (90 and 91), 93, 110, 111 and 112, they should be disclosed to the appellant.

I will now consider whether the other records which are not exempt under solicitor-client communication privilege are nevertheless exempt under litigation privilege.

Litigation Privilege

Dominant purpose

In Interim 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.

The City's general submissions on litigation privilege

The City states, generally, that:

> A municipal by-law, when passed, carries with it penalties for violations of its terms,

> the consequences of which are offences prosecuted pursuant to the Provincial Offences Act. By-law prosecutions may be, and are, defended in various ways, including attacking the validity of the by-law. Subsequent by-law prosecutions are always reasonably contemplated as a consequence of passing any by-law or by-law amendment. It is our expectation that by-law prosecutions would follow as a result of passage of this by-law and in fact many charges have been processed through the courts and are ongoing to this day. In addition, as the validity of any by-law may always be subject to an Application in court attacking its validity (in Superior Court of Justice, for example), the legal advice given to Council always contemplates such a possibility.

The City notes that the appellant represents an adult entertainment parlour licensed pursuant to the "lap dancing" by-law which is the subject matter in Appeal MA-990295-1 and that his client made "strenuous objections before committee to this by-law prior to its passage". The City states that from the outset of its development, it was anticipated that litigation would follow as a result of the passage of the by-law. The City indicates that numerous alleged by-law offence charges have, in fact, been brought against this establishment and are currently before the courts.

The City indicates that the 1999 amendments to the 1996 by-law are the subject matter of Appeal MA-990232-1. The City states that the appellant advised its solicitors in June 1999 that he intended to bring an Application in the Superior Court of Justice attacking the validity of the by-law. The City attached a copy of the Application, dated June 7, 2000 to its supplementary representations.

The City's representations in response to *General Accident*

Dominant purpose

The City seeks to distinguish the facts of this appeal from *General Accident* with respect to the nature of the documents for which it claims litigation privilege. In this regard, the City states:

> Rather than the document(s) being one which may establish *factual evidence* or real evidence directed to the merits of a case (as in *General Accident*), the documents in this appeal concern legal research and working papers relating to providing advice to our client in relation to proposed legislation (by-law enactment) with the purpose of creation being predominantly reasonably anticipated litigation.

The City states further that the claim for litigation privilege relates to both anticipated prosecutions to alleged breaches of the by-law, as well as to the specific pending court challenge.

In referring to the "dominant purpose" test in *General Accident*, the City submits that the documents which were created, produced or compiled by the solicitor in relation to the enactment of the by-laws were generated for the dominant purpose of responding to reasonably contemplated litigation as well as for the provision of legal advice to the client. The City states further:

> The solicitor for the City knew that the nature of the adult entertainment parlour regulations would be challenged by one or both of the existing adult entertainment parlours in Oshawa, either by way of defence to *Provincial Offences Act* charges or by way of Application. Such contemplation of prospective litigation was reasonable given the organized nature of the adult entertainment parlour industry, challenges launched in other jurisdictions and the industry's reputation for contesting vigorously any and all charges laid be they criminal or quasi-criminal in nature. The solicitor was also aware that many of the provisions contained in the impugned by-law represent stricter regulations than contained in previous by-laws and as such would not be accepted favourably by the industry.

In Order PO-1832, Adjudicator Donald Hale applied the test enunciated by Assistant Commissioner Mitchinson (referred to above) to records relating to the issue of the taxation of hedging with futures or forward contracts. He found that:

> Based on my review and applying the test enunciated by Assistant Commissioner Mitchinson above, I have determined that Records II-8, II-9 and II-10 were created following a meeting of senior Ministry staff. They provide factual background information to assist in the formulation of Ministry policy with respect to the taxation of hedging contracts. The Ministry was aware at the time the records were created that at least one of the affected taxpayers was likely to litigate the assessment question discussed in the records. The Ministry is of the view that the records were, accordingly, prepared for the "dominant purpose" of this anticipated litigation and that they were provided to counsel for inclusion in the brief relating to it.
>
> However, in my view, these records are analogous to the document discussed in *Waugh*, which was a report in relation to an accident that led to litigation, "prepared in part to further railway safety and in part for submission to the railway's solicitor for liability purposes." The result in that case was that, while the court acknowledged that the document had been prepared in part for the purpose of obtaining legal advice in anticipated litigation, that was not its dominant purpose and it was therefore not privileged. Similarly, in the case of Records II-8, II-9 and II-10, although I accept that anticipated litigation was a factor in the drafting of these e-mails, I cannot agree that it was the dominant purpose for their creation. Rather, I find that the dominant purpose for their creation was to assist in the formulation of the Ministry's policy on this complex taxation issue. For this reason, and based on the analysis in *General Accident* and the test set forth in Order MO-1337-I, I find that these records do not meet the dominant purpose test.

In my view, these comments are relevant in the circumstances of the current appeals. I accept that in the by-law creation context, there is always a possibility that the by-law will be challenged and/or that charges may result in connection with violations. Referring back to comments made by Manes and Silver in *Solicitor-Client Privilege in Canadian Law* (as noted above), in my view, in most cases this possibility should be construed at the time of development as "a vague or general apprehension

of litigation". That being said, I accept that the by-law at issue in these appeals was particularly contentious insofar as it affects the interests of adult entertainment parlours. I also accept that the City may have been particularly diligent in producing a by-law and regulations that could withstand a challenge in the courts.

However, I am not persuaded that reasonably contemplated litigation was the "dominant purpose" of the involvement of legal counsel in the by-law development process and the creation of the documents that remain at issue. In my view, the involvement of legal counsel in the drafting of the by-law and regulations and the creation of records in this context should be viewed in a similar manner as the document discussed in *Waugh,* which was a report in relation to an accident that led to litigation, "prepared in part to further railway safety and in part for submission to the railway's solicitor for liability purposes."

Similar to Adjudicator Hale's conclusions in Order PO-1832, I find that the dominant purpose for the creation of the remaining records at issue in this discussion was to assist Council and its committee in the formulation and drafting of a municipal by-law and regulations. Accordingly, I find that these records do not meet the dominant purpose test.

Documents obtained for the lawyer's brief

In Interim 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".

In its submissions on the application of the principles in *General Accident* to the records at issue in this appeal, the City states:

> Before you are a number of documents ... which are actually copies of various case law and legislation which may or may not contain handwritten notes or commentary by the legal researcher ... copies of legislation and case law are readily available from various official and unofficial sources.

The City refers to the test in *Nickmar* (which was cited with approval in *General Accident*) and submits that "its research file which contains copies of various case law, legislation and handwritten notes constitute *selective copying/results from research* and are an exercise of the skill and knowledge on the part of a solicitor". [emphasis in the original]

I found above that these portions of the records are exempt under solicitor-client communication privilege and it is therefore not necessary for me to consider whether litigation privilege applies to them. The City does not discuss the application of this aspect of litigation privilege with respect to the records that remain at issue. As a result, I have no evidence before me that these records found their way into the lawyer's brief for the pending litigation in which the City is currently involved. Therefore, I find that they do not qualify for litigation privilege under the *Nickmar* test.

Summary of records not exempt under section 12

In conclusion, I find that the records and parts of records set out below are not exempt under section 12 of the *Act*. As no other exemptions have been claimed or apply to them, these records and parts of records should be disclosed to the appellant.

MA-990295-1

Records 85 (the remaining portions of Records 90 and 91), 93, 112 and 114, and the remaining portions of Records 110 and 111.

MA-990232-1

Records 49, 64, 65, 74, 75, 77, 79, the remaining portion of Record 33 and part of Record 53. I have highlighted in yellow on the copy of Records 33 and 53 that I am sending to the City's Freedom of Information and Privacy Co-ordinator, the portion of these records that are not exempt under the *Act*.

ORDER:

1. I order the City to disclose the following records and parts of records to the appellant by providing him with a copy of the records on or before **December 27, 2000**:

   - **Appeal MA-990295-1** - Records 85, 93, 112, 114 and the covering memoranda (reports) to Records 90, 91, 110 and 111; and
   - **Appeal MA-990232-1** - Records 49, 64, 65, 74, 75, 77, 79 and the portions of Records 33 and 53 that I have highlighted in yellow on the copies of these records which I am sending to the City's Freedom of Information and Privacy Co-ordinator along with the copy of this order.

2. I uphold the City's decision to withhold the remaining records and parts of records from disclosure.

3. In order to verify compliance with Provision 1, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: December 7, 2000
Laurel Cropley
Adjudicator