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

# ORDER MO-2049-F

## Appeal MA-050079-1

## City of Toronto

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## BACKGROUND:

A useful summary of the lengthy background of this appeal was provided in interim order MO-1978-I. For the reader's convenience, I will repeat most of that summary here, with modifications to reflect the focus of this order.

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). As outlined in more detail below, the requester (now the appellant) appealed the City's decision in respect of that request, and the present appeal (MA-050079-1) was opened.

The appellant was also the requester and appellant in a previous appeal (MA-030105-1), which was dealt with in Orders MO-1742, MO-1900-R and MO-1923-R. All three of these orders have been the subject of applications for judicial review. Only the matter of costs remains from the judicial review of Order MO-1742. The judicial review of Order MO-1900-R is not proceeding as the result of the issuance of Order MO-1923-R. The application with respect to Order MO-1923-R is ongoing.

In the previous appeal (MA-030105-1), which led to the three orders and the judicial review proceedings, the appellant had made a request under the *Act* for a copy of a legal opinion sent to the City. The legal opinion had been prepared for an outside entity (the affected party) by the affected party's legal counsel, and was later forwarded to the City. The City denied access under the exemption at section 12 of the *Act* (solicitor-client privilege).

In the present appeal, the appellant made a request under the *Act* to the City for information relating to the processing of his earlier request for the legal opinion. Specifically, the appellant asked for access to the following:

> The file that would include the contemporaneous notes of the officer who had carriage of the investigation of the request 02-2989, i.e. his discussions with legal and/or all others trying to obtain the record and/or their position on the sol-client issue. All communications with the request[er] or city offices in respect of the request. All representations made by the department with possession of the record with regards to the access request 02-2989. All notes made by the head of Corporate Access [Corporate Access and Privacy, or CAP] regarding the decision to withhold the record.

This request was made while Order MO-1742 was being reconsidered. The City identified 16 pages of records responsive to this request and denied access to them pursuant to sections 10 (third party information) and 12 (solicitor-client privilege) of the *Act*. In addition, the City advised the requester that "[w]ith respect to your request for all communications with the requester, please note that you have already been provided with this information as part of the public record which was part of the Judicial Review of IPC Order MO-1742". As noted, the appellant appealed this decision.

At mediation, the City advised that no responsive records were located for the components of the request relating to "representations made by the department with possession of the record with regards to the access request 02-2989" and "notes made by the head of Corporate Access

regarding the decision to withhold the record". The appellant elected not to pursue these records. In addition, the appellant decided not to pursue access to the records referred to as "all communications with the requester", or the records at page 7 (fax cover sheet) or pages 11-16 (legal opinion). Accordingly, these records are not at issue in this appeal.

I commenced my inquiry into the City's denial of access in this appeal by sending a Notice of Inquiry to the City and to the affected party, seeking representations. Because of the relationship between the present appeal and the ongoing judicial review proceedings, the City asked that the present appeal be placed on hold pending the conclusion of the judicial review proceedings. I sought and received representations on this request from the City, the affected party and the appellant.

In Order MO-1978-I, I addressed the City's request to place this appeal on hold. I determined that I would place the part of the appeal relating to pages 8 to 10 on hold pending the conclusion of the judicial review proceedings since these records had been identified as possibly at issue in those proceedings. I decided to proceed with my inquiry in relation to pages 1 to 6. The City only claimed section 12 for these records, and did not rely on section 10. Accordingly, section 12 of the *Act* is the only exemption at issue in this order.

Following the release of Order MO-1978-I, I continued my inquiry. The City's representations relating to its "on hold" request raised the possibility that the memorandum found at page 1 of the records had been disclosed through the judicial review proceedings. Accordingly, I sought representations from the parties on the continuing inclusion of page 1 as a record at issue, as well as the application of the section 12 (solicitor-client privilege) exemption, and the City's exercise of discretion in relation to it. I received representations from the City. The affected party did not provide representations. I then sent a Notice of Inquiry to the appellant together with the complete representations of the City. The appellant provided representations.

Upon receipt of the appellant's representations, I determined that they raised issues to which the City should be given an opportunity to reply. Based on my review of the appellant's representations and the issues they raised, I concluded that it was not necessary or appropriate to invite reply submissions from the affected party. Accordingly, I shared the appellant's representations, in their entirety, with the City and invited its reply representations. The City responded with reply representations.

## RECORDS:

The following records are being considered in this order:

| Page No. | Records | Exemption |
|---|---|---|
| 1 | Memo to CAP staff from legal | 12 |
| 2 | Email to CAP staff from legal | 12 |
| 3 | Email from legal | 12 |

| | | |
|---|---|---|
| 4 | Handwritten notes re communications between CAP staff and legal | 12 |
| 5 | Handwritten notes re communications between CAP staff and legal | 12 |
| 6 | Handwritten notes of CAP staff | 12 |

I note that there have been minor modifications to the description of the records provided by the City at the time of the abeyance request and I acknowledge the concern about the differing descriptions expressed by the appellant in his representations. I am satisfied, however, that the modifications were offered only to clarify, or expand upon, the existing description of the records at issue.

## DISCUSSION:

### RECORD PREVIOUSLY DISCLOSED

#### Representations

The City's initial representations indicated that page 1 of the records – a "memo to CAP staff from Legal" – had been made part of the public record in the judicial review of Order MO-1742. The City contended that the appellant already had a copy of this record through that proceeding and would also receive a second copy of it as part of the public record in the judicial review application in MO-1923-R. The City suggested that the appeal was moot as regards this record.

When I issued the Notice of Inquiry to the appellant, I asked if the appellant would consent to the removal of page 1 of the records from the list of requested records in view of its inclusion in the public record of the judicial review of Order MO-1742 and/or MO-1923-R. The appellant submitted that, "[i]f in fact the record at page 1 is the document now in the public record of proceedings in [MO-1923-R] clearly disclosure is not required as the issue of it[s] disclosure is now moot".

#### Analysis and Findings

The issue before me is whether the appeal is moot as regards page 1 of the records and if so, whether it ought nonetheless to proceed to a determination. A key fact in this analysis is that in a decision issued on October 25, 2005, [reported at [2005] O.J. No. 4616 (Div. Ct.)], Madam Justice Epstein of the Divisional Court ordered page 1 to be included in the public record of proceedings in relation to the judicial review of Order MO-1923-R., effectively disclosing page 1 to the appellant and to the public generally.

In Order P-1295, former Assistant Commissioner Irwin Glasberg outlined what has been accepted as the appropriate approach to the determination of mootness in appeals adjudicated by the Commissioner's office (see also Order PO-2046):

The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision [in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342]. There, the court commented on the topic of mootness as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...

In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

The live controversy which might have been said to exist between the parties relating to page 1 is now at an end because it is available to the appellant, meeting the first part of Sopinka's mootness test.

Under the second part of the test, I have considered whether the question of access to page 1 of the records is of sufficient public interest or importance to merit reviewing it regardless of its mootness. I have concluded that it does not and that no useful purpose would be served by proceeding with my inquiry in relation to it. I will not, therefore proceed with a determination of the solicitor-client exemption claimed for page 1 of the records.

The appellant does not dispute that disclosure is not required in these circumstances although he suggests that the non-disclosure of page 1 is indicative of a pattern of behaviour on the part of the City. I will address that concern later in this order.

**SOLICITOR-CLIENT PRIVILEGE**

The City has claimed that solicitor-client privilege, the discretionary exemption found at section 12 of the *Act*, applies to exempt the remaining records under consideration in this order, which consist of pages 2 through 6.

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.

Section 12 contains two branches: common law and statutory. The City relies on both the common law and statutory solicitor-client communication privilege and the burden of proof rests on the City to establish that one or the other (or both) branches apply. The City does not rely on litigation privilege under either branch 1 or 2.

**Common law solicitor-client communication privilege**

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice (*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)).

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach (*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)).

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice (*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27). Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication (*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)).

**Statutory solicitor-client communication privilege**

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether

the statutory privilege applies. Statutory solicitor-client communication privilege applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

*Representations of the City*

As noted, the records relate to the processing of the appellant's previous access request, which led to the issuance of Orders MO-1742, MO-1900-R and MO-1923-R, and the ensuing judicial review litigation. With regard to the branch 1 common law solicitor-client communication privilege, the City states that a solicitor-client relationship existed between its Legal Division and both the City's Corporate Access and Privacy [CAP] office as well as the City's Planning Division at the time of the appellant's previous access request, and throughout the processing of that request.

The City contends that there were oral and written communications related to the processing of the access request, aimed at gathering information for, and the provision of, legal advice. The City also comments that:

> [t]he records identified to be at issue in this appeal all fall within that continuum of communications between a solicitor (Legal Division lawyer) and client (staff from the CAP office and/or the Planning Division) identified in *Balabel* [cited above]. They represent either direct communications between Legal and Planning and/or the CAP office [pages 2 and 3] or reflect or confirm the content of such communications in the form of notes [pages 4, 5 and 6].

The City includes the same quote from *Balabel* that I have reproduced above, referring to the privilege attaching to communications designed to keep both solicitor and client informed of developments so legal advice may be given and received as needed. The City states further that these communications were confidential and were created with the expectation of confidentiality to keep the solicitor and client informed.

As regards the branch 2 statutory privilege asserted, the City submits that pages 2 and 3 of the records were prepared by a lawyer employed by the City in its Legal Division for the purpose of giving legal advice to the client in the Planning Division and/or the CAP office.

*Representations of the Appellant*

The appellant describes the City's claim that the records are subject to solicitor-client privilege as "fatuous". He relies on a passage from *Pritchard* v. *Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, which is drawn from *R.* v. *Campbell* [1999] 1 S.C.R. 565. At paragraphs 49 and 50 of *Pritchard*, Binnie J. speaks for the Court, as follows:

> … like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.
>
> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

The appellant questions the nature of the relationship of the parties whose communications are reflected in the records at issue and contends that it is more aptly characterized as the relationship between a CAP investigator and "representatives of the department that was in possession of a record sought in an earlier F.O.I. application", rather than communications between solicitor and client.

The appellant describes the role of the CAP investigator as being:

> … to simply gather the information that is the subject of an access request … then deliver his report to the manager who then in turn provides the material to the "Head" to make a decision applying MFIPPA. He would not be seeking legal advice nor would it be proper for him to do so.

The appellant suggests that "[the] fact that a party may be a lawyer is irrelevant" and asserts that the CAP investigator's communications with the Legal Division cannot be deemed to be legal advice simply because the department from which the document is requested is the Legal department. The appellant's position is that the City lawyer was functioning as an executive rather than as a solicitor and that privilege cannot, therefore, apply.

Under the heading, "Public Confidence in the Operation of the Institution", the appellant suggests there is a need for "at least the appearance of a separation between the CAP and the departments it investigates …" In this argument, the appellant appears to build on the fact that the CAP staff member is called an "investigator", leading to the view that the department whose records were requested is being "investigated". On this basis, the appellant appears to be saying that where the responsive records come from the Legal department of the City, it is somehow inappropriate for the Legal department to provide legal advice concerning the request. This appears to be a collateral criticism of the City's section 12 claim, arguing in effect that if there was a solicitor-client relationship, there should not have been. This argument is essentially irrelevant to the issue of whether section 12 applies, since the relevant question in that context is whether there *was* a solicitor-client relationship. In any event, I do not agree with the appellant's apparent view that the CAP office is not entitled to obtain confidential legal advice from its in-house counsel with respect to how it should respond to a request and discharge its statutory duties under the *Act*. In my view, the CAP office is entitled to do so, regardless of which department is the source of the responsive records.

The appellant's representations also discuss, at some length, the City's decision to claim section 12, and allege bad faith in that regard. I will consider this aspect of the appellant's representations in my discussion of the exercise of discretion, below.

*Reply representations from the City*

In reply, the City reiterates its original position that the counsel in its legal department were in a solicitor-client relationship CAP and Planning staff, and that the records are part of the continuum of communications.

**Analysis and Findings**

As noted, the appellant argued vigorously against the application of section 12 to the responsive records and drew my attention to the Supreme Court of Canada decision in *Pritchard* (cited above) to support his position that these records could not fit within the definition of solicitor-client privilege because, in his view, legal counsel did not act in that capacity in connection with the communications reflected in the records. For the reasons set out below, I do not agree with the appellant's characterization of the role played by legal counsel in connection with these communications.

I note, specifically, that at paragraph 21 of *Pritchard, supra,* the Court said:

> Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client … It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.

I find that in the present appeal, the individuals who authored the records were in a solicitor-client relationship: the solicitor was based in the City's Legal Division and the clients were in the CAP office and Planning Department.

The next determination, then, is whether or not the records can properly be construed as forming part of continuum of communications between solicitor and client for the purpose of seeking and/or providing legal advice. If so, the records are exempt.

Page 2 of the records is an e-mail from legal counsel to City staff, with an added handwritten note. There is no doubt that the e-mail is between solicitor and client and relates to the giving and seeking of legal advice. The note also reflects legal advice concerning a section of the *Act*.

Page 3 is an e-mail communication from a City lawyer to a staff member in the Planning Department, copied to the CAP office, which is directed toward the future provision of legal advice.

Pages 4 and 5 are comprised of handwritten notes by a CAP staff member, documenting conversations with legal counsel for the City directly related to the provision of legal advice, and culminating in the City's access decision as regards this request. Two entries on page 5 briefly record telephone calls to and from the appellant.

Based on my review, I find that the entries on page 5 about conversations with the appellant do not consist of or reveal communications between a solicitor and a client. Otherwise, I find that pages 2, 3, 4 and 5 of the records are either themselves confidential solicitor-client communications or they are a recording of such communications, and qualify for common law solicitor-client communication privilege as part of a continuum of communications in relation to giving or receiving legal advice. With the exception of the notes relating to telephone calls to and from the appellant, I find that these records are therefore exempt under branch 1. The notes about the telephone calls to and from the appellant are not part of the continuum of communications between solicitor and client and are not exempt under branch 1 solicitor-client communication privilege.

Page 6 is a handwritten note by a CAP staff member, documenting a conversation with the appellant about the access request. Chronologically, it follows pages 2 through 5 and post-dates the City's decision to claim the section 12 solicitor-client privilege exemption in relation to the record sought by the appellant in the earlier access request.

In my view, page 6 is most aptly characterized as documentation about the processing of the access request. Its content is a typical reflection of conversations with requesters about the denial of access, whether or not legal advice had been necessary in determining how to process the request. As such, I find that it is not part of the continuum of communications properly subject to solicitor-client privilege and it is therefore not exempt under branch 1 on the basis of solicitor-client communication privilege.

The City only claimed branch 2 statutory privilege for pages 2 and 3, which I need not consider because I have already found them exempt under branch 1. As regards the notes of telephone calls to and from the appellant on pages 5 and 6, I have been provided with no basis for concluding that they were "prepared by or for counsel employed or retained by an institution for use in giving legal advice". This information is therefore also not exempt under branch 2. No other exemptions have been claimed for these parts of the records, and I will order them disclosed to the appellant.

**EXERCISE OF DISCRETION**

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

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

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

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

In this appeal, I have upheld the City's application of the section 12 exemption to pages 2, 3 and 4 of the records, and part of page 5. I must therefore review the City's exercise of discretion with respect to section 12.

*Representations of the City*

The City submits that responding to the appellant's access request, it properly exercised its discretion while simultaneously promoting the purposes of the *Act* in a complicated set of circumstances related to the previous access requests, orders from this office and judicial review proceedings.

The City contends that it considered the nature of the information in the records, including the fact that some of the responsive records "appear to be at issue in the first judicial review application by the appellant and/or the second review application from the [affected] party". The City's position is that given the determination that section 12 exemption applied, the interests section 12 seeks to protect outweighed the appellant's right of access because there was no sympathetic or compelling need for the appellant to receive the information.

*Representations of the Appellant*

The appellant provided extensive representations on the City's decision to apply the section 12 exemption to the responsive records and, generally, in responding to this access request.

The appellant places particular emphasis on the City's decision to withhold page 1 of the records, which is no longer at issue in this appeal because it was disclosed as part of the record of proceedings in the judicial review litigation, as discussed earlier in this order. He says that this decision is indicative of bad faith on the part of the City and, specifically, "most revealing of the manner in which the City handles access requests" since "[t]here is nothing in that document that could be described as Legal advice".

The appellant refers to Order MO-1947, a July 2005 order of Commissioner Ann Cavoukian, and submits that this order addresses this use of exemptions that do not apply. The appellant quotes from Commissioner Cavoukian's comments about moving towards a "culture of openness" and away from a "protective mindset" in responding to access requests. The appellant's excerpt from Order MO-1947 includes the following:

> …Exemptions should not simply be claimed because they are technically available in the *Act*; they should only be claimed if they genuinely apply to the information at issue.

The appellant's submissions on the exercise of discretion appear to stem from a belief that the exemption claimed by the City cannot apply in the circumstances. He bases this on a belief that no solicitor-client relationship existed between the City's legal counsel and the staff members involved in the communications reflected in the records. As noted earlier, he also suggests that it is problematic for such a relationship to exist between the CAP office and the City's legal counsel, which he refers to as a "secret solicitor-client relationship".

The appellant also states that, in Order MO-1923-R, the Commissioner "… has determined that both the third party and the City acted improperly".

Finally, the appellant suggests that the City has invoked section 12 in an attempt to avoid litigation. He states that the purpose of his access request is:

> To determine how an earlier request for a specific document, that is a legal report made as a submission, and given in secret from an applicant for a zoning variation to the Planning Department became an internal memo from a City Planner to the City Solicitor asking for legal advice with attachments.

In the appellant's opinion, the City's reliance on the ongoing judicial review proceedings as justifying the exercise of discretion in this instance demonstrates an attempt to:

> [protect] the City and or individuals who exercise authority and act for the city … from litigation that they may be exposed to at this time [for having assisted] one party to the detriment of another party in a process… that was ostensibly an open process where the City sat as an arbiter…

*Reply representations from the City*

The City provided reply representations, citing the Supreme Court of Canada's discussion of the concept of bad faith in *Enterprises Sibeca Inc.* v. *Frelighsburg (Municipality)* as encompassing not only acts committed deliberately with intent to harm, but also "acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith" ([2004] 3 S.C.R. 304, para. 26).

The City elaborates on its position, by stating that:

> "there is no deliberate attempt to harm, nor any inconsistency with the relevant legislative context of MFIPPA… that there could be no harm to the appellant if solicitor-client privilege in the records at issue is maintained … [and] the City has rendered an access decision that is fully consistent with the legislative context and the common law context of solicitor-client privilege".

Finally, the City disputes the appellant's characterization of the denial of access as an attempt to avoid potential litigation since,

> [a]s far as the City is aware, all of these proceedings are related to a dispute that the appellant had or continues to have with another party. There is no other litigation, potential or otherwise, that the City is aware of, other than what the City has described [in relation to the judicial review proceedings]… [and] there is no basis for finding that solicitor-client privilege is being retained in the records requested in this appeal in order to avoid potential litigation.

**Analysis and Findings**

Page 1 of the records, on which the appellant bases much of his discretion argument, is not before me in this appeal. Even if the appellant is correct that it is not properly exempt under section 12, I am not satisfied on this basis that the City acted in bad faith. The whole point of the appeal process conducted by the Commissioner and her staff is to provide an independent review of institutions' decision-making under the *Act*, as reflected in section 1(a)(iii). It is self-evident that one of the basic legislative reasons for setting out the appeal process (at sections 39 through 44 of the *Act*) is that institutions may at times claim exemptions that are not available. Errors in decision-making are not, in and of themselves, indicative of bad faith or abuse of discretion.

The appellant also attempts to cast doubt on the City's good faith in claiming section 12 by arguing that the Adjudicator "… in Order MO-1923-R has determined that both the third party and the City acted improperly". Order MO-1923-R contains no such finding. It simply finds, after analysis of the relevant facts and law, that section 12 does not apply. The appellant's argument here is also undermined by the fact that the Commissioner's original order, reversed by Orders MO-1900-R and MO-1923-R, had *upheld* the City's section 12 claim. This argument misconstrues not only Order MO-1923-R, but also the nature of the access and appeal process set

out in the *Act*, as discussed in the preceding paragraph. A finding by the Commissioner or one of her delegated adjudicators that a claimed exemption does not apply is *not*, in and of itself, a finding that anything improper has taken place.

At the heart of the appellant's submission on the City's exercise of discretion is his belief that there is no solicitor-client relationship between the City's legal counsel and the other City staff whose communications with counsel are reflected in the records. This belief is inconsistent with several findings in this order. Most significantly, I have agreed with the City that there *is* a solicitor-client relationship between its legal counsel and the staff members whose communications with counsel are reflected in the records. I have also rejected the appellant's argument to the effect that it is somehow improper for staff of the CAP office to have legal advice from the City's legal staff about requests that involve the records of the Legal department.

The City has explained the context of its decision regarding access in the present appeal and has indicated that it considered the complicated inter-relationship between previous access requests, orders from this Commission, and judicial review proceedings. The City's opinion was that the appellant's access request was not adequately sympathetic or compelling to warrant a decision not to claim the section 12 solicitor-client privilege exemption. In my view, these are all relevant factors.

In addition, I can find no reasonable basis upon which I could find that the City evinced bad faith. There is simply no evidence of carelessness, recklessness or intentional fault on the part of the City in its exercise of discretion applying section 12 of the *Act* to exempt the responsive records.

In summary and in view of the circumstances of this appeal, past decisions of this office, and the applicable law, I find that the City's exercise of discretion was not in bad faith and that the City did take into account relevant considerations. Accordingly, I find that the City properly exercised its discretion under section 12 of the *Act*.

## ORDER:

1. I uphold the decision of the City to withhold pages 2, 3 and 4 of the records in their entirety, and part of page 5. The exempt part of page 5 is shown with highlighting on the copy of that page which is being sent to the City with this order. The highlighted information is not to be disclosed.

2. I order the City to disclose the non-highlighted part of page 5 of the records, and page 6 in its entirety, to the appellant by sending him a copy no later than **May 19, 2006**.

3. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the information disclosed to the appellant pursuant to Provision 2, upon request.

Original signed by: April 28, 2006
John Higgins
Senior Adjudicator