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

ORDER MO-2373

Appeal MA06-328

City of Waterloo

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NATURE OF THE APPEAL:

Background – earlier request

In January 2006, the requester submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Waterloo (the City) for records that referred to him. The City denied access to the responsive records and the requester appealed the City's decision to this office. As a result, Appeal MA-060094-1 and, subsequently, Appeal MA-060094-2 were opened. Appeal MA-060094-2 is currently at the adjudication stage of the appeals process.

The Present Appeal

In July 2006, the requester submitted a second request under the *Act* to the City. The request referred to the earlier request which had been submitted to the City, and then read:

> [The requester] now requests:
>
> 1. copies of all records created as a result of his initial inquiry, including but not limited to the notes, all notes of telephone calls, emails and minutes or notes taken by, in control of, or [that] were in the former possession of or under the former control of [named individuals] or any person at any meeting in which this request was discussed; and
>
> 2. a copy of the by-law or resolution passed by the City of Waterloo authorizing the City to intervene in litigation where [the requester] is the plaintiff as well as any documentation and minutes of meetings concerning this by-law or resolution.

In response, the City located responsive records and issued a decision in which it denied the requester access to them on the basis of the exemptions found in sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege). In addition, the City took the position that certain other records relating to the request were not in the custody or control of the City.

The requester (now the appellant) appealed the City's decision, and the current appeal was opened.

During the mediation stage of the appeal, the City issued a revised decision letter to the appellant in which it identified further categories of responsive records, and denied access to them on the basis of the exemption in section 15 (information published or available) and section 41(9) of the *Act*. The City's revised decision letter to the appellant also enclosed one record responsive to the request which it decided to release.

Also during mediation, the City provided the appellant with a detailed Index of Records, identifying the records responsive to the request and the exemptions claimed for each. In addition, issues regarding access to records for which section 15 was claimed were resolved, and the issue of whether certain records were in the custody or control of the City was also removed from the appeal.

Mediation did not resolve the remaining issues, and this file was transferred to the inquiry stage of the process.

A Notice of Inquiry, inviting representations on the remaining issues, was sent to the City, initially. The City provided representations to this office, in which it addressed the issues, and also took the position (for the first time) that the appellant's request was frivolous and vexatious. Also during the inquiry stage of the process, the appellant advised that he was taking the position that the public interest override in section 16 applied to the information contained in the responsive records.

A modified Notice of Inquiry was then sent to the appellant, along with the non-confidential portions of the City's representations. In the modified Notice, the appellant was invited to address all of the issues identified in the Notice that was sent to the City, as well as whether or not this office ought to consider the City's "frivolous and vexatious" claim at this stage of the appeal. In addition, the appellant was invited to address the issue of whether the public interest override applies to any information that may be subject to one of the exemptions claimed by the City.

The appellant provided representations in response to the revised Notice of Inquiry, and subsequently provided this office with further, supplementary representations. Both the initial and supplementary representations were provided to the City, and the City was given the opportunity to provide reply representations, which it did.

The file was subsequently transferred to me to complete the adjudication process.

RECORDS:

There are 15 records remaining at issue in this appeal (numbered 1, 2, 5, 6, 7, 13, 14, 15, 17, 18, 20, 21, 25, 26 and 28) and they consist of handwritten and typed notes, emails, correspondence, the minutes of a meeting, and a memorandum.

DISCUSSION:

Preliminary matter

As identified above, in the City's representations in response to the Notice of Inquiry, it indicated (for the first time) that it was taking the position that the appellant's request was "frivolous and vexatious". The appellant was invited to address the issue of whether or not this office ought to consider the City's "frivolous and vexatious" claim at this stage of the appeal. However, given my findings below upholding the City's decisions respecting access to the subject records, I will not be addressing the frivolous and vexatious arguments in this order.

CLOSED MEETING

The City relies on the exemption in section 6(1)(b) to deny access to Record 28, which consists of the two-page copy of the minutes of a City Council meeting, and one page of hand-written and shorthand notes relating to that meeting.

Section 6(1)(b) reads:

> 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.

Previous orders have held that, for this exemption to apply, the City must establish that

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

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

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.

[Orders M-64, M-102, MO-1248]

I will review each part of this three-part test to determine whether Record 28 qualifies for exemption under this section.

Part 1- a council, board, commission or other body, or a committee of one of them, held a meeting

In support of its position that Record 28 qualifies for exemption under section 6(1)(b) of the *Act*, the City states that it held a closed meeting of the City's Municipal Council on August 30, 2005. The appellant does not dispute that the meeting was held. In the circumstances, I am satisfied that the meeting did take place, and that Part 1 of the three part test under section 6(1)(b) has been met.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

In support of its position that this part of the three-part test is established, the City states that it is entitled to hold a closed meeting under section 239 of the *Municipal Act, 2001*. The City

provides a copy of that section of the *Municipal Act*, and refers specifically to section 239(2)(e) which permits a closed meeting in relation to "litigation or potential litigation, including matters before administrative tribunals, affecting the municipality". The City then states that the matter referred to in the in-camera meeting "deals expressly and explicitly with the City's involvement with litigation which affected the municipality", and the City provides additional information referring to these matters.

Upon my review of the record and evidence provided by the parties, I am satisfied that the City was authorized by section 239(2)(e) of the *Municipal Act* to hold a meeting in the absence of the public, and to consider the matters discussed in that in-camera meeting. In the circumstances, I find that the City was authorized by statute to hold the meeting in the absence of the public, thereby satisfying Part 2 of the test under section 6(1)(b) of the *Act*.

Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting

Under Part 3 of the test set out above, previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

In this appeal, the City states that the disclosure of the information contained in the documents that comprise Record 28 would disclose information that was considered as part of the deliberations of the City. It also states that the disclosure of the contents of Record 28 would reveal to the appellant information regarding the City's dealing with its solicitors.

The appellant's representations on the application of this exemption focus on the reasons why he believes that the information ought to be disclosed, and his concerns about whether the decisions made in the meeting were proper.

Finding

Record 28 consists of the actual minutes of an in camera meeting, as well as handwritten notes taken by an individual who attended that meeting. Based on the information in the representations, as well as on my review of Record 28, I am satisfied the disclosure of Record 28 would reveal the substance of the deliberations of City Council at its in camera meeting of August 30, 2005. Accordingly, the third part of the three-part test has also been met.

In conclusion, I find that all three parts of the test under section 6(1)(b) have been satisfied to exempt Record 28 from disclosure.

Section 6(2)(b): Exception to the Exemption

Section 6(2)(b) sets out an exception to the exemption in section 6(1)(b). It reads:

> 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 addresses this issue by stating that "the material in question does not deal with matters discussed in an open meeting" and that "as Record 28, is a record created by a municipal council, in a closed meeting, properly authorized by the *Municipal Act*, [it] is clearly withheld appropriately."

Based on the information provided to me by the City, I am satisfied that the exception in section 6(2)(b) is not applicable to the circumstances in this appeal. Accordingly, subject to my finding below on the City's exercise of discretion, I find that Record 28 qualifies for exemption under section 6(1)(b) of the *Act*.

Having found that Record 28 is exempt under section 6(1)(b), it is not necessary for me to review the possible application of section 12 to it.

SOLICITOR-CLIENT PRIVILEGE

The City submits that section 12 of the *Act* applies to Records 1, 2, 5, 6, 7, 15, 17, 18, 20, 21 and 26. Section 12 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 as described below. To rely on this exemption, the City must establish that one or the other (or both) branches apply.

Branch 1 derives from the first part of section 12, which permits the City to refuse to disclose "a record that is subject to solicitor-client privilege".

Branch 2 derives from the second part of section 12 and it is a statutory exemption that is available in the context of institution counsel giving legal advice or conducting litigation. The statutory exemption and common law privilege, although not necessarily identical, exist for similar reasons.

Branch 1: common law solicitor-client privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.)].

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].

The 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. The confidentiality attaches to all communications made within the framework of the solicitor-client relationship … [*Descôteaux v. Mierzwinski*, supra)].

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.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident v. Chrusz, supra*].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to branch 1, this branch encompasses two types of privilege, as derived from common law: (i) solicitor-client communication privilege; and (ii) litigation 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 either of the statutory privileges apply.

Representations and Findings

In its representations the City has identified three different types of records which it believes qualify for exemption under section 12.

Records 7, 15, 17, 18, 20 and 21

Representations

The City refers to these six records as the "Lawyer Letters", and states:

> [These records] are collectively and individually, in themselves, solicitor-client communication. [They] were created in the process of the City communicating with its solicitor concerning legal issues. These records are "direct communication" designed at keeping both the City and its solicitors informed about the legal issues. [These records] are the written exchange wherein the client is asking questions of its solicitors, and the solicitor is providing legal information to its client.
>
> … These records were confidential communications between lawyer and client, in which legal information and advice were exchanged, in relation to specific, and known litigation….

The appellant's representations focus mainly on the issue of whether or not any solicitor-client privilege that may have existed in these documents was waived by the City. I will address that issue below. With respect to the issue of whether the solicitor-client privilege attaches to the documents, the appellant refers to identified litigation and states:

> Claims of privilege cannot be based on assumptions. They are fact driven, must be assessed in light of the specific circumstances and nature of the case …

> The party asserting the claim of privilege must identify which communications are privileged and provide a description sufficient for a proper determination of the claim of privilege. The [City] has failed to satisfy this burden.

Findings

I have carefully reviewed Records 7, 15, 17, 18, 20 and 21. Records 7 and 20 are letters from the City's solicitor to the City containing legal advice on identified matters. Record 18 is a letter from the City to the City's solicitor providing information to the solicitor and requesting specific legal advice. Records 15 and 17 are email communications between the City's solicitor and the City, also providing the solicitor with information about the matters for which advice is sought. Finally, Record 21 is a legal memorandum from one of the lawyers in the City solicitor's office to another lawyer, containing legal advice.

On my review of the records and the representations of the City, I am satisfied that these records meet the solicitor-client privilege test as set out above. Records 7, 15, 17, 18 and 20 consist of communications between the City (through its agents or employees) and its legal counsel, made for the purpose of seeking, formulating and/or giving legal advice with respect to an identified matter. Records 7 and 20 clearly contain legal advice that was prepared by City counsel and communicated to the City. The other three items of correspondence (Records 15, 17 and 18) contain specific requests by the City to its counsel seeking legal advice, or fall within the ambit of the solicitor-client communication privilege on the basis that they form part of the "continuum of communications" passing between the City and its legal counsel, as contemplated in *Balabel*. In addition, on my review of Record 21, which is a legal memorandum between lawyers, I am satisfied that it was prepared by or for counsel employed or retained by an institution for use in giving legal advice. Accordingly, subject to my review of the issue of waiver, set out below, I am satisfied that all six of these records qualify for exemption under the solicitor-client communication privilege aspect of branch 1 of section 12 of the *Act*.

Records 2, 5, 6 and 26

Representations

The City refers to these four records as the "Notes", and states:

> Records 2, 5, 6, and 26 … are records prepared in connection with solicitor-client communications. Whereas, the Lawyer Letters were in themselves the communication between solicitor and client, the Notes are documents which record the content of communications between a solicitor and client. The notes contain the content of confidential communications between solicitor and client …
>
> The Notes will reveal the content of solicitor-client privileged communications. The City and its solicitor discussed specific legal issues …. A record of these

> discussions, even in a summary or shorthand form is the equivalent of the confidential solicitor-client communication. An individual would easily be able to determine the content of the City's communication with its solicitor, if in possession of these summaries of the solicitor-client communications….
>
> The Notes are confidential records of confidential communications between solicitor and client concerning legal information and advice. An individual or organization, in recording of advice given to them by their solicitor, cannot be seen as creating a document to which solicitor-client privilege does not apply. In this circumstance these records are personal documents concerning confidential discussions with the City Solicitors where provision of legal advice concerning specific legal issues … [were discussed]. The Notes were either documents prepared for use at confidential meetings with the City's solicitors where legal advice and information was received, or were summaries of the advice and information given by the solicitor(s) to the City.

The appellant did not make specific representations on these records, and his representations on the issue are set out above.

Findings

On my review of Records 2, 5, 6 and 26, I am satisfied that these records also qualify for exemption under the solicitor-client communication privilege aspect of branch 1 of section 12. These records consist of notes taken by City staff either following conversations with the City's solicitor (and reflecting the advice provided by the solicitor) or notes made by staff prior to conversations with the City solicitor, but which identify specifically the questions to be asked or the advice to be sought from the solicitor. In the circumstances, I am satisfied that these records reveal direct communications of a confidential nature between a solicitor and client (the City, through its staff), made for the purpose of obtaining professional legal advice. Accordingly, subject to my review of the issue of waiver, set out below, I am satisfied that these four records fall within the exemption in section 12 of the *Act*.

Record 1

The City refers to this record as a "discussion", and states:

> [Record 1 is a record] relating to private discussions between individuals privy to the solicitor-client communications. Record 1 is an email to members of council advising council members of the discussion held with the City's solicitor with respect to the [the issues]. The purpose of Record 1 was to provide various individuals, who as members of the Municipal Council for the City are responsible for decisions concerning the municipality's legal affairs, the information required to make an informed decision as to the legal effects of decisions …. This record is merely discussion between individuals, all of whom

> as representatives or employees of the City, stand within a "zone of privacy" required by the City to manage its legal affairs.
>
> … [Record 1 is a document] containing the advice of solicitor(s), who were retained by the City to provide confidential advice to [City representatives] required to make decisions on behalf of the City in relation to potential litigation, common-law and statutory solicitor-client and litigation privilege apply to these records.

Findings

I have carefully reviewed Record 1, which is a one-page email sent by a City staff person to members of council, advising them of certain information relating to the subject matter of the request. Although I am not satisfied that it contains information which is legal advice, I am satisfied that it specifically identifies the legal advice that is to be sought, as well as the specific subjects for which legal advice will be provided by the City's solicitors. In that regard, I am satisfied that Record 1 qualifies for exemption under section 12 of the *Act*, as disclosure would reveal direct communications of a confidential nature between a solicitor (City counsel) and client (the City) made for the purpose of obtaining legal advice. Accordingly, subject to my review of the issue of waiver, I am satisfied that this record qualifies for exemption under the solicitor-client communication privilege in branch 1 of section 12.

Waiver

The appellant provides a number of arguments in support of his position that even if the records were to contain solicitor-client privileged information, any privilege that exists has been waived by the City. The appellant's arguments in support of that position refer to some of the background to the records requested in the earlier requests, and to public statements made by the City that it acted in good faith. The appellant also refers to court cases which he states establish that "fairness and consistency will require a waiver of privilege, even in the absence of an intent to waive."

On my review of the appellant's position on waiver, I am not satisfied that the solicitor-client privilege was waived by the City in the circumstances. The appellant's arguments appear to focus on the records at issue in his earlier request, as well as various records which relate to other matters between the parties. The records at issue in this appeal relate to the appellant's request for records created as a result of his initial request. Based on the information provided to me, I am not satisfied that the solicitor-client privilege which exists in these records has been waived.

EXERCISE OF DISCRETION

Sections 6 and 12 are discretionary exemptions. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

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 such a 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)].

With respect to the records which qualify for exemption under sections 6 and 12, the City provided submissions outlining the factors it considered in deciding to exercise its discretion to withhold access. Upon review of all of the circumstances surrounding this appeal, including the City's representations on the manner in which it exercised its discretion, I am satisfied that the City has not erred in the exercise of its discretion not to disclose the records for which sections 6 and 12 were claimed.

Accordingly, I find that Record 28 is exempt under section 6(1)(b) and Records 1, 2, 5, 6, 7, 15, 17, 18, 20, 21 and 26 are exempt under section 12.

DID THE CITY PROPERLY DENY ACCESS IN ACCORDANCE WITH SECTION 41(9) OF THE ACT?

Section 41(9) of the *Act* reads:

> Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.

The City takes the position that this section applies to restrict access to Records 13, 14 and 25, which are handwritten notes of the City's Freedom of Information Coordinator, recording discussions she had with the mediator appointed by this office in the course of processing the earlier appeals.

The City states:

> As noted in Order P-537, section 4l (9) is designed to prevent documentation with respect to representations or other communications with respect to the IPC process in one matter from being "re-considered" in a second request for information. The information is under the control of the Commissioner's office and is to be disclosed in accordance with the procedure of the appeal in which it was created. In the present case, much like in Order P-537, the requestor has attempted to circumvent the IPC's control over the representations made to the Commissioner through means of making a secondary request for the information to the institution.
>
> In the present case, all of the records are either correspondence to the IPC or records which capture the contents of communications between [the City] and the IPC. The disclosure of these documents are to be made only on an order made in the Commission appeal in which the representations were made. Otherwise, a multiplicity of requests and appeals would result. The City submits that these records are properly withheld in the present request as allowed by section 41(9).

The appellant disputes the City's position, and states:

> The word "privileged" in section 41(9) does not mean that the records are to be hidden from public or judicial scrutiny. The interpretation to be given to the word "privilege" is that the records when they are produced are subject to the same privilege that attaches to all records which are produced in any legal proceeding and that the records cannot be used for an improper purpose. It will be up to the judge in any legal proceeding to determine what effect, if any, is to be given to any documents which are produced as a result of the request for access to information. …

In its reply representations the City states that "[i]n terms of section 41(9) of the *Act*, the IPC correspondence deals with a (myriad of) litigation matter(s) and is clearly privileged."

Analysis and Findings

As identified above, the three records which the City claims ought not to be disclosed based on the application of section 41(9) of the *Act* are notes of discussions between the Freedom of Information Co-ordinator for the City and a Mediator appointed by this office, recording discussions between them relating to the earlier appeals (MA-060094-1 and MA-060094-2).

In Order P-537, Adjudicator Anita Fineberg directly addressed the issue of whether an institution properly denied access to records generated during the mediation stage of an earlier appeal on the basis of 52(9) of the *Freedom of Information and Protection of Privacy Act* (similar to section 41(9) at issue in this appeal). She stated:

> … the records at issue were generated during the **mediation** or pre-inquiry stage of the processing of 12 appeals that the appellant had previously filed against prior decisions of the Ministry. Accordingly, because section 52(9) refers to the production of documents or things in the course of an **inquiry**, in my view, it has no direct application to the records in this case.

She then identified that it was important to consider the records at issue in that appeal in the context of the general scheme of the appeals process provided for by the *Act*. Adjudicator Fineberg conducted a brief overview of the appeals process conducted by this office pursuant to the requirements of the *Act*. She also specifically stated that her comments were equally applicable to the corresponding sections of the *Act* at issue in this appeal. She stated:

> The appeals process is initiated when the Commissioner's office receives a letter of appeal from a person who is dissatisfied with the decision which he or she has received from a government institution in response to a request for access to information. The Commissioner's office then opens an appeal file and the institution whose decision is being appealed is notified of the appeal. An Appeals Officer is appointed as a mediator pursuant to section 51 of the *Act* which states:
>
> > The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal.
>
> Should the Appeals Officer not be able to effect a settlement of the appeal, the Commissioner, or his designate, will then conduct an inquiry and make an order disposing of the matters at issue. The statutory authorization for the conduct of the inquiry and the issuance of orders is found in sections 52(1) and 54(1) of the *Act* respectively. Section 52(1) reads as follows:
>
> > Where a settlement is not effected under section 51, the Commissioner shall conduct an inquiry to review the head's decision.
>
> Section 54(1) prescribes that:
>
> > After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

Adjudicator Fineberg then identified that in the appeals she was dealing with, an Appeals Officer (or Mediator) was authorized to try to effect a settlement of the appeals. During mediation, the Appeals Officers necessarily communicated both orally and in writing with the appellant and the institution. Adjudicator Fineberg then stated:

While there are no orders of the Commissioner's office where the records considered were created during the mediation stage of an appeal, there are orders which have dealt with requests for the exchange of representations submitted in the inquiry stage of an appeal. These orders have examined the ability of the Commissioner's office to control its own process and the approach to take in dealing with collateral or derivative access requests. It is my view that these orders provide guidance in addressing the issues raised by this appeal.

The orders which I have referred to involve the interpretation of section 52(13) of the *Act*. This provision states:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

In Order 164, former Commissioner Sidney B. Linden considered an appellant's request for a copy of the representations of the Ministry which had been submitted during the inquiry.

The Commissioner determined that because the *Act* did not specifically address all of the circumstances which arose in the course of an inquiry, he had the power to control the process. He decided that, if the institution's representations were given to the appellant, the contents of the record would effectively be disclosed. Accordingly, he did not order the exchange of representations.

This approach was followed by Commissioner Tom Wright in Order 207, where a similar request had been made for access to representations. In that order, Commissioner Wright expanded on the authority of the Commissioner or his/her delegate to control the inquiry process. He quoted from case law and administrative law texts to support his position. As I believe that the contents of that order have relevance to the present appeal, I will set out the relevant passages from that order.

> In *Re Cedarvale Tree Services Ltd. and Labourers' Intl. Union of North America, Local 183*, [1971] 3 O.R. 832 (Ontario Court of Appeal), Mr. Justice Arnup, at page 841 stated as follows:
>
> > [T]he Board [Ontario Labour Relations Board] is a master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred on it by the Act, but with

> respect to all questions of procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the court (if it be a rule at all) is that the board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be just and convenient in the particular circumstances of the case before it.

In *Practice and Procedure before Administrative Tribunals*, The Carswell Company Limited, Toronto, 1988, Robert MaCaulay, Q.C. states that the above-noted observation of Mr. Justice Arnup with respect to the Ontario Labour Relations Board is of general application to administrative agencies. Further at pages 9-7 and 9-8, he states:

> Generally, subject to any statutory provisions, boards have a common law obligation to run their own affairs as they see fit. This may be construed as a conferral of extensive discretion, but it is subject to the courts' powers to review. To be given wide discretion does not mean that it will be exercised in every case, but rather in the appropriate circumstances.

In *Fishing Vessel Owners' Association of British Columbia et al. v. Canada* (1985), 57 N.R. 376 (Federal Court of Appeal), Mr. Justice Andy states, at page 381, as follows:

> Every tribunal has the fundamental power to control its own procedure in order to ensure that justice is done. This, however, is subject to any limitations or provisions imposed on it by the law generally, by statute or the rules of Court.

In Order 207, Commissioner Wright again concluded that the appellant had no right of access to the representations of the institution.

The issue of the exchange of representations arose again in Order P-345 in which Commissioner Wright reviewed the contents of Orders 164 and 207. He also made reference to comments made by Mr. Justice Isaac of the Ontario Court (General Division) in an unreported decision dated May 6, 1991, in the context of an application for judicial review of Order 162. On pages 11 and 12 of his decision, Mr. Justice Isaac stated:

> I am also of the opinion that there is an additional reason why that part of the "sealed record" which consists of representations made by the corporation to the Commissioner should be sealed and not disclosed to [the named appellant] for purposes of the application for judicial review. This reason is found in two sections of the Act, which, in my view shield such information from disclosure.

Mr. Justice Isaac then went on to quote sections 52(13) and 55(1) of the Act. I have previously referred to section 52(13). Section 55(1) provides that:

> The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

After reviewing the previous orders and considering the more recent caselaw, Commissioner Wright again concluded that the appellant had no right of access to the representations of the institution.

Orders 164, 207, and P-345 all addressed the issue of the exchange of representations. In my view, however, the analysis may be equally applicable to the records … in this appeal (correspondence between the Ministry and the Commissioner's office) in the sense that there exist similar concerns about disclosure of the information contained in these records. It is not necessarily just the representations of the Ministry that may contain references to, or quotes from, the records at issue; such information may also be found in correspondence to and from the Ministry, or other parties to the appeal, and the Commissioner's office.

In addition, to order this correspondence disclosed when the records for which the original access request was made were not released on appeal, would represent a collateral and indirect means of obtaining access to information that was the subject of another proceeding.

I believe that the process envisaged under the *Act* was not intended to be used in such a manner or for this purpose. Nor should the process result in the same information having to be considered in potentially two separate appeals, which is a possibility if the requester submits an original access request and a subsequent request for the institution's Freedom of Information file.

To summarize, it is my view that the records … should not be disclosed to the appellant for the following reasons:

(1) The Commissioner's office has a right to control its own process.

> (2) It is possible that these records may contain the same information that was the subject of the original appeal that was not disclosed.
>
> (3) To grant access to these records would encourage duplicate appeal proceedings and militate against finality in the appeals process.
>
> In my opinion, this view is consistent with the general scheme of the legislation as set out in sections 52(9), 52(13), and 55(1) of the *Act*. It is also consistent with the legal authorities and academic sources cited with respect to questions of procedure which arise before administrative tribunals. Accordingly, I uphold the Ministry's decision to deny access to [certain identified records].

Adjudicator Fineberg went on to find that different considerations applied to records which represented internal documentation generated by the institution during the course of processing the appellant's prior appeals.

In my view, the fact that one of the appeals to which the requested information relates continues to be ongoing is significant. That appeal is in the inquiry stage of the process. Once that appeal has concluded, it is possible that different considerations may apply. Accordingly, in the circumstances of this appeal, I will apply the approach taken by Adjudicator Fineberg in Order P-537.

Nevertheless, the records are in the custody and under the control of the City, and barring the application of any provisions (including section 41(9)), whose effect is to exclude them from the access scheme in the *Act*, they could well be subject to it. Following the conclusion of the inquiry in Appeal MA-060094-2 (and any subsequent related proceedings such as an application for judicial review), the nature of the records, and this office's interest in controlling its own process, may change. At that point, these records may become like other records subject to the *Act*, subject only to the exemptions and/or exclusions set out in the *Act*. I am not required to decide that point in this order, and therefore leave it for another day.

In this appeal, the requested records relate to appeals MA-060094-1 and MA-060094-2, and issues regarding access to the requested records is still being determined. It is my understanding that the adjudicator assigned to Appeal MA-060094-2 is in the process of soliciting representations on the issues regarding access to the records at issue in that appeal.

In my view, to review issues regarding access to Records 13, 14 and 25 in this appeal, when the issues regarding access to the records for which the original access request was made have not yet been determined, would represent a collateral and indirect means of obtaining access to information that is the subject of another proceeding. As was found in P-537, the process envisaged under the *Act* was not intended to be used in such a manner or for this purpose. Nor should the process result in the same information having to be considered in potentially two separate appeals, which is a possibility if the requester submits an original access request and a concurrent request for the institution's Freedom of Information file.

Accordingly, it is my view that the three records at issue in this appeal for which section 41(9) was claimed should not be disclosed to the appellant for the following reasons:

(1) The Commissioner's office has a right to control its own process.

(2) It is possible that these records may contain the same information that is at issue in the original appeal, which has not yet been completed.

In my opinion, this view is consistent with the general scheme of the legislation, and with the sources cited above regarding questions of procedure which arise before administrative tribunals. Accordingly, I uphold the City's decision to deny access to Records 13, 14 and 25 in this appeal.

COMPELLING PUBLIC INTEREST

In the course of this appeal, the appellant took the position that there is a compelling public interest in the disclosure of the records, and that section 16 of the *Act* applies. That section states:

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

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

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

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

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

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

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

Although the appellant did not provide specific representations on the application of section 16 in response to the invitation to do so, in the course of this appeal and throughout his representations, the appellant refers to this matter as a matter of "great public importance". The appellant also states that there is a compelling public interest in the disclosure of the records, and refers to his view that City officials have deceived the public "and now attempt to shield from disclosure records, which show that they acted contrary to their statutory and common law duties."

Findings

In the circumstances of this appeal, I find that section 16 does not apply to override the application of section 12 to the records for which that section is claimed. The records for which section 12 is claimed all concern legal advice sought or received from City solicitors regarding the appellant's earlier request for access to records. I find that the appellant's interest in these records is essentially a private one. In the circumstances of this appeal I do not find that there exists a compelling public interest in the disclosure of these records; nor have I been provided with sufficient evidence to indicate that they raise issues of general application or that the public has a compelling interest in the disclosure of them. Accordingly, I find that section 16 does not apply in the circumstances of this appeal.

ORDER:

I uphold the City's decision to deny access to the records, and dismiss the appeal.

Original Signed By: November 28, 2008
Frank DeVries
Adjudicator