INTERIM ORDER MO-2573-I

Appeals MA08-112 and MA08-113

City of Waterloo

OVERVIEW

This order arises from two requests for records pertaining to two separate lawsuits brought by the City of Waterloo (the City). The appellant, a law firm, represents a corporation who is a third party defendant in the first lawsuit (referred to in Appeal MA08-112) and, in the second lawsuit (referred to in Appeal MA08-113), represents individual employees who are defendants. The appellant submitted a separate request for records in relation to each of these two lawsuits.

As explained in more detail below, the requests indicate that the information sought includes a number of items concerning the litigation identified in each request, including the decisions to commence the actions and decisions about retaining counsel, and also includes press releases and correspondence with the media, and legal fees. The requests were made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The records at issue that are under consideration in this order consist of minutes of three *in camera* meetings held by the City in 2004 and 2005.

The City denied access to these records under the following discretionary exemptions in the *Act*: sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(c) and (d) (economic & other interests) and 12 (solicitor-client privilege). However, the City did disclose a number of records at the time of the request, including by-laws and press releases.

The adjudication regarding access to one responsive record in both appeals, which sets out the total amount of legal expenses incurred by the City in the two lawsuits, has been placed on hold pending the outcome of the City's application for judicial review of Order MO-2294. The decision to defer the adjudication concerning that record was made because the application for judicial review deals with access to information about legal fees in the two lawsuits mentioned in the two requests under consideration in Appeals MA08-112 and MA08-113. The City's application for judicial review was dismissed by the Divisional Court on November 25, 2010.

As well as claiming the exemptions referred to above, the City also argues that the requests are an abuse of process because of the ongoing litigation involving the City and the appellant's clients (and other parties) referred to in the first paragraph, above. This argument is based in part on rulings by the Superior Court of Justice to the effect that some of the questions posed on discovery did not need to be answered by the City because the information was privileged.

Mediation did not resolve these appeals. I received representations from both the City and the appellant, and the non-confidential portions of the representations were shared for comment by the other party in accordance with *Practice Direction 7* issued by this office. This order addresses all of the issues in these two appeals with the exception of any issues relating to the records in respect of which the appeals have been placed on hold.

In the discussion that follows, I conclude that:

- the requests are not an abuse of process;
- the records under consideration in this order are exempt in their entirety under the solicitor-client privilege exemption found in section 12 of the *Act*; and

- the public interest override at section 16 of the *Act* does not apply.

NATURE OF THE APPEALS:

Appeal MA08-112

This appeal arises from the first request submitted by the appellant, which was for access to the following:

> Any and all records relating in any way to *The Corporation of the City of Waterloo v*. [*named individual*] and all related proceedings, including but not limited to the third party claim by the defendant by counterclaim, The Corporation of the City of Waterloo, against [two identified companies] [Court file numbers omitted] and the third party claim by [named individual] against among other [two named companies], including but not limited to:
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> 1. Documentation concerning the decision and authorization to bring the action against [named individual] and to bring the third party claim against [two identified companies];
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> 2. Minutes of Council meetings and any documents prepared for or by City Council relating thereto;
>
> 3. Decision by the City concerning legal representation;
>
> 4. Press releases/correspondence with media about the case;
>
> 5. Legal expenses incurred to date.

As already noted, the appellant acts for a corporation that is a third party defendant in the proceeding referred to in the request.

The City responded to the appellant's request by providing the appellant with an Index of Records and a decision granting access to 4 by-laws and 6 media releases. It denied access in full to the remaining responsive records described in the index on the basis that they were exempt pursuant to sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(c), (d) and (e) (economic and other interests), 12 (solicitor-client privilege), and 15 (information published or available) of the *Act*.

This decision was appealed and is the subject of Appeal MA08-112.

During mediation, the appellant objected to the fact that the Index of Records provided by the City did not include a description of the responsive records. As a result, the City provided the appellant with a revised Index of Records that included a description of the responsive records.

In the revised index, the City clarified that it was claiming sections 6(1)(b), 7(1), 11(c), (d) and (e) and 12 for the records responsive to parts 1, 3 and 5 of the request. It claimed section 15 for records responsive to part 2 of the request. The City subsequently explained that the records responsive to part 2 are the 4 by-laws disclosed to the appellant at the request stage and Agendas and Minutes of the City Council which are available on the City's website.

Also during mediation, the appellant clarified that part 5 of the request, in which he asked for "legal expenses incurred to date" was a request for the total dollar amount spent on legal fees to date, and that he does not seek access to the actual legal bills. The record responsive to part 5 of the request is the same as the responsive record relating to part 5 of the request in Appeal MA08-113. During mediation, the City reiterated its claim that this record is exempt under section 12, and stated that access would continue to be denied pending a decision of the Divisional Court in the judicial review application relating to Order MO-2294. Given that the total dollar figure named in this record subsumes legal fees that are at issue in the application for judicial review, I decided to place the adjudication relating to the record that is responsive to part 5 of the request on hold pending the outcome of that application. This order will therefore not deal with the record responsive to part 5. However, as previously noted, the City's application for judicial review was dismissed by the Divisional Court on November 25, 2010.

In response to the City's position taken during mediation, as outlined above, the appellant stated that he is satisfied with the City's explanation with respect to parts 2, 3 and 4 of his request, and that the records responsive to those parts are no longer at issue in this appeal. Therefore, the records responsive to parts 1 and 5 are the only records at issue in this appeal and since section 15 was claimed for part 2 of the request only, it is no longer at issue in this appeal. As outlined above, the adjudication relating to the record responsive to part 5 has been placed on hold, and this order therefore deals only with the records responsive to part 1.

Also during mediation, the appellant claimed that section 16 (compelling public interest) applied to the records remaining at issue. As a result, I have made section 16 an issue in this appeal.

No further mediation was possible and this file was moved to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*. I have been assigned as the adjudicator in this appeal and in related Appeal MA08-113.

The inquiry into part 1 of this appeal was held in conjunction with the inquiry in Appeal MA08-113, which involves the same parties, similar issues and similar records. As noted above, both parties provided representations in the inquiry, which were shared for comment by the other party in accordance with *Practice Direction 7*.

Appeal MA08-113

This appeal arises from the second request submitted by the appellant, which was for access to the following:

> Any and all records relating in any way to the *Corporation of the City of Waterloo v*. [*14 identified individuals*] [Court file numbers omitted] including but not limited to:
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> 1. Documentation concerning the decision and authorization to bring the action;
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> 2. Minutes of Council meetings and any documents prepared for or by City Council relating thereto;
>
> 3. Decision by the City concerning legal representation;
>
> 4. Press releases/correspondence with media about the case;
>
> 5. Legal expenses incurred to date.

As already noted, the appellant acts for individual defendants in the proceeding identified in this request.

The City provided the appellant with an Index of Records and issued a decision granting access to 4 specified by-laws and 6 media releases. It denied access in full to the remaining responsive records described in the index on the basis that they are exempt pursuant to sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(c), (d) and (e) (economic and other interests), 12 (solicitor-client privilege), and 15 (information published or available) of the *Act*.

This decision was appealed and is the subject of Appeal MA08-113.

During mediation, the City provided the appellant with a revised Index of Records. As in Appeal MA08-112, the appellant clarified that part 5 of the request, in which he asked for "legal expenses incurred to date," was a request for the total dollar amount spent on legal fees to date, and that he does not seek access to the actual legal bills. The record responsive to part 5 of the request is the same as the responsive record relating to part 5 of the request in Appeal MA08-112. During mediation, the City reiterated its claim that this record is exempt under section 12, and stated that access would continue to be denied pending a decision of the Divisional Court in the judicial review application relating to Order MO-2294. For the reasons outlined above, I decided to place the adjudication relating to the record that is responsive to part 5 of the request on hold pending the outcome of that application. This order will therefore not deal with the record responsive to part 5. However, as already noted, the City's application for judicial review was dismissed by the Divisional Court on November 25, 2010.

Also during mediation, the appellant stated that the only records at issue in the appeal are those responsive to parts 1 and 5 of the request and he claimed that section 16 (compelling public interest) applied to the records remaining at issue. As a result, I have made section 16 an issue in this appeal. Since section 15 was claimed for part 2 of the request only, it is no longer at issue in

this appeal. As outlined above, the adjudication relating to the record responsive to part 5 has been placed on hold, and this order therefore deals only with the records responsive to part 1.

No further mediation was possible and this file was moved to the adjudication stage of the appeal process. As noted above, both parties provided representations in the inquiry, which were shared for comment by the other party in accordance with *Practice Direction 7*.

RECORDS:

The records at issue consist of the minutes of three closed meetings of City Council held during 2004 and 2005.

DISCUSSION:

PRELIMINARY ISSUES

Abuse of Process/Frivolous or Vexatious

The City advises that at the time of its representations, it was a party to two civil actions with multiple parties, both of which are at the examination for discovery stage. The appellant represents parties in both of the actions.

The City alleges that the appeals should be denied or stayed on the basis that they are an "abuse of process," as the appellant is inappropriately attempting to obtain privileged material through the *Act* that he would not be entitled to in the regular litigation process. In addition, the City submits that the appeals have "nothing to do with any public interest in disclosure."

In addressing this submission it is necessary to consider the purposes and function of the *Act*, and previous decisions of this office and the courts.

Although transparency and accountability are important purposes of access-to-information legislation, the right of access is not predicated upon the "public interest in disclosure." That topic is expressly addressed under section 16 of the *Act*, which provides an override where a compelling public interest in disclosure outweighs the purpose of an exemption that would otherwise apply.

Instead, the right of access is a fundamental purpose of the *Act*, as indicated in section 1(a)(i) and (ii). These sections state:

The purposes of this Act are,

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,

> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, …

The right of access is broadly expressed in section 4(1), which states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
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> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Thus, the right of access exists independent of a requirement for justification by a demonstrated need for the information, and if a request is made for "privileged material," that does not, *per se*, render it an abuse of process. Rather, the proper response to a request for material that an institution believes to be "privileged" is to claim the exemption in section 12 of the *Act*, which protects information that is subject to solicitor-client privilege, as the City has done here. Moreover by section 39, requesters are entitled to appeal from such an exemption claim, as the appellant has done in this case. None of this renders a request an abuse of process.

In that regard, although it was open to the City to claim that the appellant's requests are frivolous or vexatious under section 4(1)(b), the City has not done so. Instead, it alleges that the requests are an "abuse of process."

The particular grounds advanced by the City in relation to the allegation that the requests are an "abuse of process" are that:

- the same requests for information are already being pursued by the appellant and another party in the litigation in another forum, that is, through examination for discovery and upcoming motions in court related to the litigation;
- the proper forum for determining whether the records should be disclosed to the appellant is not through this process, but through the civil litigation process. The court should decide the questions of privilege that are squarely an issue in, and solely relevant to, the litigation;
- the appellant has not provided certain information relating to its client in the litigation on the basis of privilege;

- if the appeals are not stayed or dismissed, there is a real risk of inconsistent decisions (one decision by the court and a different decision in the context of these FOI requests) in respect of whether the City can be compelled to produce the documentation and information, which includes decisions on the City's privilege over the documents and information. The City submits that there should only be one determination for these issues, and not separate attempts by the appellant to obtain privileged information. Inconsistent determinations and multiple requests for the same information in different and discrete forums could prejudice the City and the court/FOI processes; and

- FOI requests have been made by parties other than the appellants. The City submits that it is unfair to allow the City to be subject to so many requests for the same privileged information in so many different forums.

Dealing briefly with the last point, I must observe that requests made by other requesters under the *Act* are utterly irrelevant to the issues under consideration here, namely whether the appellant's requests are an abuse of process, or frivolous or vexatious.

The appellant's representations in response to those provided by the City argue that the City has failed to meet its onus of establishing that the requests are frivolous or vexatious, or that they amount to an abuse of process, in that the City has not demonstrated that the requests are an abuse of the right of access under the *Act*. In addition, the appellant submits that whether the records are privileged or subject to other exemptions is not a basis for finding the requests frivolous or vexatious.

The appellant also submits the following:

- the requests are narrow in scope and are the only requests made by the appellant under the *Act*. There is no pattern of conduct that amounts to an abuse of the right of access;

- the sole objective behind the request is to gain access to the records and that purpose is not contradicted by the possibility that the appellant may use the records in connection with ongoing litigation;

- the fact that the requests were made at the same time as the litigation, is, in isolation, insignificant;

- responding to the request would not interfere with the operations of the City;

- there is no "bad faith" on the part of the appellant – the requests were not made for the purpose of harassing the City, but to shed light on the decision and authorization to commence litigation;

- the requests for access are unrelated to any attempts to seek production from the City of documents relevant to the litigation, since they could have been made by any member of the public, not just the appellant;

- there is no basis for differentiating the appellant from other members of the public because it acts for parties in the litigation; and

- the motions referred to by the City, to date, have not taken place, and the requests are not a collateral attack on a court order; and

- a request under the *Act* cannot be considered a collateral attack on a motion for production in a civil action due to the different and separate processes involved.

In reply, the City submits that the requests continue to constitute an abuse of process and were made in bad faith. The City states that two motions were brought, and concluded, in Superior Court, and that the information at issue in this appeal was sought by two of the parties in the litigation previously referred to. The purpose of the motions was to compel answers to questions the City had refused to answer in the discovery process.

One motion was brought by the defendant in the action referred to in Appeal MA08-112 and is the subject of an endorsement dated October 6, 2009 and a subsequent costs endorsement of October 28, 2009. The second motion was brought by the appellant's law firm in the action referred to in Appeal MA08-113 and was the subject of an endorsement dated December 1 and 2, 2009. The City argues that both motions were denied by a Master of the Superior Court of Justice on the basis that the information was protected under solicitor-client privilege.

The City further states that the records are obviously privileged, and the appellant should not be seeking to re-litigate the privilege issue in the appeals where that issue has already been determined by the Superior Court of Justice, and that the attempt to do so in a different forum (that is, these appeals) constitutes an abuse of process.

The City also repeats its submission that the requests are an abuse of process, as the purpose of the requests is to harass the City and accomplish a private gain in the litigation, unrelated to a legitimate request for the records.

With respect to the City's allegation of bad faith, the City submits that the request represents a state of mind "operating with secret design or ill will" since its purpose is to obtain an advantage in the litigation. The City also disputes that the processes involved are "extremely different and separate," and explains further that the appellant "seeks the same result in both the appeals and the litigation, that is, the release of "confidential and protected information" whose disclosure has, according to the City, already been refused by the Court.

The City concludes that an order made by the IPC in favour of the appellant would run contrary to "clear common law and statutory legal principles" and would render the Court's decision

inoperative. As a result, the City alleges that bad faith "lies at the foundation" of the requests and the appeals.

In sur-reply, the appellant states that the rulings in the two motions described by the City did not decide the issue of whether the entirety of the records at issue in these appeals was solicitor-client privileged or not. The appellant submits that the first motion dealt with minutes of an *in camera* meeting that took place at least two years prior to the minutes at issue in these appeals. In addition, the appellant submits that the second motion related to answers to questions on examination for discovery and not to the entirety of the records at issue in these appeals.

The relationship between access under the *Act* and civil litigation is dealt with in section 51(1) of the *Act*, which states, in part:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

In Order PO-1688, Senior Adjudicator David Goodis analyzed the relationship between access under the *Act* and the discovery process. In that appeal, a third party appellant had argued that, where the parties are involved in litigation, it was improper for the requester to use the access to information process under the *Act* as opposed to the discovery process. Senior Adjudicator Goodis rejected this argument, and provided a helpful summary of the jurisprudence on this issue:

> The application of section 64(1) … was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
>
> > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …
>
> …
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> In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the Act's municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:

> The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the Municipal Freedom of Information and Protection of Privacy Act legislation, nor ban the publication of the contents of police files required to be produced under that Act. … In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. *The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.* [Emphasis added.]

I considered the provincial equivalent of section 51(1) in Order PO-2490, and found that the presence of this section in the statute provides a clear indication that the legislature turned its mind to the relationship between the *Act* and civil litigation. In doing so, it could have added a section precluding access under the *Act* to information that might be sought through discovery in litigation, but it did not do so.

The *Act* does not contain any provision aimed at preventing a requester from making an access request, even where the requester is involved in litigation with the institution, and the requested records may be related to the litigation. At its heart, the City's abuse of process argument is premised on the view that the requests are an abuse of process because of the litigation between the parties, and any decisions regarding the records should be dealt with in the context of the litigation. Based on all of the foregoing analysis, including the decision of Justice Lane in the *Doe* case, quoted above in the extract from Order PO-1688, I disagree. A request for information that could also be sought on discovery in contemporaneous litigation is not, *per se*, an abuse of process.

For the same reasons, as outlined in considerable detail in Order PO-2490, such a request cannot be considered a "collateral attack" on a Court's finding in a motion for production.

As I have already noted, the City has not expressly relied on the "frivolous or vexatious" provision found in section 4(1)(b) of the *Act*. Given that some of the City's arguments, outlined above, echo portions of the frivolous or vexatious provisions of the *Act* and of Regulation 823, I have also considered these provisions in assessing those arguments.

Section 4(1)(b) states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

> the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

As noted above, the City has argued that it is unfair to allow it to be subjected to so many requests in so many different forums, an argument which suggests that, in the City's view, the requests are "part of a pattern of conduct that amounts to an abuse of the right of access" under section 5.1(a) of the Regulation. I am aware of two access requests made by the appellant. These consist of the two requests that led to the current appeal.

In my view, these requests do not demonstrate a "pattern of conduct" that amounts to an abuse of the right of access. Rather, they represent a modest number of requests. The fact that they are requests for information that the City considers to be exempt is irrelevant in this context; that issue is properly addressed by testing the applicability of the claimed exemptions, as I will do later in this order.

Nor does the City provide any persuasive basis for concluding that these two access requests for very limited information would, to use the language of section 5.1(a) of the Regulation, "interfere with" its operations. The nature of the requested information, and the responsive records produced by the City, point to the opposite conclusion. I am not persuaded that the appellant's requests amount to a pattern of conduct that would interfere with the City's operations.

I am also not persuaded that the requests were made in bad faith. I have already addressed the City's arguments that the appellant's requests, taken together, represent an "inappropriate attempt" to gain access to material that the City claims is privileged, and that there is no public interest in the requested information. As I have already stated, the right of access exists independent of a demonstrated need for the information, and if a request is made for "privileged material," that does not render it an abuse of process. In that regard, the presence of section 12 in the *Act* is highly significant, as it protects the very interest identified by the City. Nor does the

City's privilege claim provide any basis for concluding that the request was made in bad faith. The remedy for an institution believing that information is responsive to a request is privileged is to claim exemptions, as the City has done here.

In addition, there is, in my view, no evidence to suggest that the requests are for a purpose other than to obtain access. As I noted in Order PO-2490, it is legitimate for requesters to have some concrete purpose in mind in making an access request, and this can include using the information in a dispute, or to criticize the institution. Requests are not required to be made for abstract purposes only. (See also Orders M-860 and M-906.)

For all these reasons, I conclude that the requests are neither an abuse of process nor "frivolous or vexatious" within the meaning of section 4(1)(b) of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

Section 12 states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Analysis

In my view, for the reasons that follow, all of the records under consideration in this order are exempt because they are subject to common law solicitor-client privilege, and are therefore covered by branch 1 of the section 12 exemption.

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], 1 S.C.R. 860 (S.C.C.)]. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

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

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

The City submits that the purpose of the *in camera* meetings was to allow communication between the City and its legal counsel with respect to the litigation that has been previously described in this order. In turn, this communication allowed the City to receive legal advice and to provide instructions. As the communications relate to litigation, the City states that the records fall under both heads of privilege, namely common law (solicitor-client and litigation) privilege, and statutory privilege. In addition, the City submits that there has been no waiver of this privilege, particularly as the litigation is ongoing, and there has been no open Council meeting regarding the matters discussed in the *in camera* meetings.

The appellant submits that the City has the burden of showing that the records are protected by solicitor-client privilege. In addition, the appellant states:

> Even if the City is able to satisfy its burden of showing that parts of the [records] are privileged, it must still disclose as much of the [records] as can reasonably be severed without disclosing the privileged information. The Divisional Court explained in *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)* that portions of records containing communications for other purposes which are clearly unrelated to legal advice can be severed from privileged communications. In addition, it is submitted that to the extent the [records] set out facts, as opposed to recommendations of legal counsel, those facts are not privileged and should be disclosed.

In reply, the City states that the issue of solicitor-client privilege has already been decided by the rulings of the Master, as he recently denied two motions brought by parties in the ongoing litigation. One motion was brought by the appellant's clients; the other motion was brought by

another party in the litigation. The City argues that the motions were brought, in part, to obtain from the City the same information that is at issue in these appeals, and that the motions were denied on the basis that the information was protected by solicitor-client privilege.

As previously noted, the appellant states in sur-reply that the rulings in the two motions described by the City did not decide whether the minutes at issue in these appeals, in their entirety, should be protected by solicitor-client privilege. The appellant submits that the first motion dealt with minutes of an *in camera* meeting that took place at least two years prior to the minutes at issue in these appeals. In addition, the appellant submits that the second motion related to answers to questions on examination for discovery and not to the entirety of the records at issue.

Having reviewed the records, I conclude that they relate to retaining and instructing counsel. Information of this nature has been the subject of a number of previous decisions.

In *Descôteaux v. Mierzwinski* (cited above) the Supreme Court of Canada addressed the question of whether an application for legal aid, which had been submitted by the applicant to the legal aid office, is subject to solicitor-client privilege. In the circumstances of that case, the Court applied the exception to privilege, relating to communications made to facilitate the commission of a crime, to the financial information in the application, but found the rest of the application to be subject to solicitor-client privilege. In doing so, the Court formalized the implicit view, arising from *Solosky v. The Queen*, [1980] 1. S.C.R. 821, that solicitor-client privilege is not only a rule of evidence, but also a substantive rule. It also found that the substantive rule was applicable to communications made to the legal aid plan in order to be able to retain counsel, and that the inception of privilege did not depend on the retainer having been finalized.

Writing for the Court in *Descôteaux*, Justice Lamer (as he then was) explained how the law of privilege applies in relation to retaining counsel and obtaining legal advice:

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, 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 attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

In Order MO-1180, Senior Adjudicator David Goodis found that correspondence pertaining to a possible retainer for the conduct of judicial review litigation was subject to solicitor-client privilege. He stated as follows:

> Record 9 is a letter to the Region from a law firm recommending various other firms to the Region for the purpose of the judicial review proceedings. Record 10 is a letter to the Region from one of the recommended law firms later retained by the Region for those proceedings. Record 10 attached various resumés which are no longer at issue in this appeal. Although the Region had not formally retained either law firm at the time of these communications, this does not preclude the application of solicitor-client privilege. As stated by R.D. Manes and M. Silver in Solicitor-Client Privilege in Canadian Law (Markham, Ont.: Butterworths, 1993), at p. 34:
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> > The solicitor-client relationship arises as soon as the potential client takes the first steps and has the first dealings with the lawyer's office. This relationship arises even before the formal retainer agreement is established, and even if no retainer is taken out.
>
> I am satisfied that Records 9 and 10 are confidential communications made for the purpose of retaining counsel and for the purpose of obtaining or providing legal advice in the context of the judicial review proceedings and, therefore, these records qualify for solicitor-client communication privilege under section 12.
>
> Further, communications between a solicitor and client for the purpose of retaining the solicitor are privileged even if there is no formal retainer agreement [Order P-1631; R.D. Manes and M. Silver, p. 47; Stevens v. Canada (Prime Minister) (1998), 161 D.L.R. (4th) 85 at 100 (Fed. C.A.)].

As well, in Order PO-1714, Adjudicator Holly Big Canoe found that a retainer agreement was privileged. She stated:

> Record 1 is the retainer agreement between the LCBO and its counsel. This is a confidential communication made between a solicitor and its client for the purpose of retaining the solicitor and as such is subject to solicitor-client privilege (R.D. Manes and M. Silver, Solicitor-Client Privilege in Canadian Law (Markham, Ont.: Butterworths, 1993), p. 47; Stevens v. Canada (Prime Minister) (1998), 161 D.L.R. (4th) 85 at 100 (Fed. C.A.)).

I also note that in the second endorsement provided by the City, the Master found that Item 158, in which the City was asked "[t]o advise when the City of Waterloo first retained [named counsel] in connection with the 2004 lawsuits," is "… protected by solicitor-client privilege" and need not be answered.

In the present appeal, all three records reflect discussions and conclusions reached by the City Council about retaining and instructing a lawyer. Counsel representing the City was present on each of these occasions. While the mere presence of a lawyer at a meeting does not necessarily

render the minutes of that meeting privileged, I am satisfied that in the circumstances of this appeal, and based on the contents of the records, the proper conclusion is that all three sets of minutes, in their entirety, reflect communications made for the purpose of obtaining legal advice, and are therefore subject to solicitor-client privilege. This conclusion is consistent with the Master's finding on Item 158 (see above), which although not determinative, is relevant and persuasive.

In addition, based on the contents of the records and the authorities I have just cited, I am not persuaded by the appellant's arguments that any of this information could be severed and disclosed because, in my view, all of it falls within the framework of the solicitor-client relationship.

Before leaving this subject, it is important to note that the information about retaining and instructing counsel is distinct from information about the amounts of legal fees actually paid. The latter type of information is the subject of the record that is responsive to part 5 of both requests, the adjudication of which I have placed on hold for the reasons stated above. Legal billing information requires consideration of a completely different line of cases from the ones I am relying on here, commencing with the Supreme Court of Canada's decision in *Maranda v. Richer,* [2003] 3 S.C.R. 193, which established a rebuttable presumption for information about the amount of fees charged for legal services. *Maranda* was applied by the Ontario Court of Appeal in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941, and subsequently by the Divisional Court in (*Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769. There is no rebuttable presumption with respect to information about retaining and instructing counsel; that type of information is privileged, as established in *Descôteaux*.

The only remaining question is whether privilege has been waived in the minutes of the closed meetings that are under consideration in this order. In my view, it has not. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege, and voluntarily evinces an intention to waive the privilege. [*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes 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.)].
The City submits that there has been no waiver of privilege, as there has been no open Council meeting regarding the matters discussed *in camera* during the meetings at issue. The appellant's representations did not specifically address the issue of waiver.

Although the by-law and one of the press releases that the City disclosed to the appellant discuss the commencement of legal proceedings, I am not satisfied that this, in itself, is sufficient to waive privilege in the minutes, which outline particulars of City Council's discussions and conclusions about retaining and instructing counsel. In addition, there is no evidence that the

contents of the minutes have been disclosed to another outside party, the opposing parties in the litigation, or in open court. Having reviewed the records and the representations of the parties, I find that the City's actions or conduct do not amount to waiver of the privilege that attaches to the minutes.

Accordingly, I find that the three records at issue are exempt, in their entirety, under section 12 of the *Act*. As a consequence, it is not necessary for me to consider the other exemptions claimed by the City for this information.

PUBLIC INTEREST OVERRIDE

The appellant has raised the public interest override in section 16 of the *Act*, which 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.

The appellant cites the public interest override in relation to the exemptions found in sections 7 and 11, which I have not addressed in this case because I found the records exempt under section 12.

It is significant that the exemption I have found to apply, found in section 12 of the *Act*, is not identified in section 16 as an exemption that may be overridden by a compelling public interest in disclosure.

In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (cited above), the Supreme Court of Canada found that the omission of the solicitor-client privilege exemption from the exemptions that can be overridden in the "public interest override" provision in the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) (the equivalents of sections 12 and 16 of the *Act*) was not a violation of the *Canadian Charter of Rights and Freedoms*.

While the Court did not rule out the possibility that a section 2(b) freedom of expression interest could require the disclosure of records requested under *FIPPA*, the Court reversed the earlier ruling of the Ontario Court of Appeal in the same case (2007 ONCA 392), which had read in the solicitor-client privilege exemption in section 19 of the provincial *Act* (the equivalent of section 12 of the *Act*) as an exemption included in the public interest override in section 23 of that statute (the equivalent of section 16 of the *Act*).

The appellant's arguments concerning the override do not refer to any interest under section 2(b) of the *Charter* and, moreover, pertain to an essentially private interest, given the fact that the appellant's clients are defending their own interests in the litigation with the City.

I find that section 16 does not apply.

EXERCISE OF DISCRETION

General principles

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, this office may determine whether the institution failed to do so.

In addition, this office 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].

The City submits that its exercise of discretion to deny the Appellant access to the records was proper, both under the *Act* and under common law. The City argues that disclosure of the records would damage the City's interests, as the information in the records reflects unfettered discussions between Council and the City's legal counsel regarding ongoing litigation. In addition, the City submits that the information sought relates to solicitor-client privilege and that disclosure of the records would pierce privilege and damage the City's interests.

With respect to the City's exercise of discretion, the appellant states:

> … [T]he City failed to consider the broad purposes of the *Act*, that information should be made available to the public and that the exemptions from the right of access should be *limited* and *specific*. Moreover, section 4(2) of the *Act* requires the City to disclose as much of the record as can reasonably be severed without disclosing the information that falls under an exemption.

I have already discussed the question of severability in my consideration of section 12, and found that there is no information that could be severed from the records.

On reply, the City submits that it took the following factors into consideration in denying the records:

- the City historically protects records that are privileged;
- the records are sensitive to the City as they concern confidential City matters; and

- the records are requested solely for private gain at the taxpayer's expense and the release of the records would be contrary to the public interest.

In sur-reply, the appellant states that the requests were not made for private gain, but to shed light on the City's decision to bring the legal actions "in light of the exorbitant costs." In addition, the appellant submits that the cost to the taxpayer of producing the minutes from three *in camera* meetings "pales" against the cost of carrying on the litigation. As noted above, however, the appellant's clients are defending their own private interests in the litigation.

With respect to the decision to withhold information under section 12 of the *Act*, taking all of the circumstances into account, I am satisfied that, in exercising its discretion, it was reasonable for the City to base its decision on its desire to protect confidential information that is subject to solicitor-client privilege.

In reaching this conclusion, I also took into consideration that the purposes of the *Act* include the principle that information should be available to the public and that requesters should have a right of access to information held by institutions. However, in the circumstances of this appeal, the importance of allowing parties to protect information that is subject to solicitor-client privilege provides an acceptable rationale for the City's exercise of discretion. This view is consistent with the approach taken to the exercise of discretion relating to the solicitor-client privilege exemption by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (cited above), where it refers to the "categorical nature of the privilege" (at para. 75 of the judgment).

Accordingly, I uphold the City's exercise of discretion to withhold the records under section 12 of the *Act*.

This is an interim order pending the adjudication of the issue of access to the record responsive to Part 5 of the request in each appeal.

ORDER:

I uphold the City's decision to deny access to the three sets of minutes of *in camera* meetings of City Council.

Original signed by: November 30, 2010
John Higgins
Senior Adjudicator