OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 03-32

CITY OF VANCOUVER

David Loukidelis, Information and Privacy Commissioner
July 24, 2003

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Summary: Canadian Pacific Railway requested records relating to its Arbutus railway corridor lands. The City of Vancouver failed to comply with s. 6(1) by responding to the access request outside the legislated time frame, without seeking an extension of time under s. 10(1). Although the City also initially failed to comply with s. 6(1) by inadequately searching for the requested records and incompletely responding to the access request, this was rectified by subsequent searches and disclosure to the applicant. Section 14 authorizes the City to refuse to disclose the remaining disputed records.

Key Words: duty to assist – search for records – reasonable effort – solicitor-client privilege – litigation privilege – legal professional privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1) and 14.

Authorities Considered: B.C.: Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-26, [2002] B.C.I.P.C.D. No. 29; Order 02-54, [2002] B.C.I.P.C.D. No. 55; Order 03-22, [2003] B.C.I.P.C.D. No. 22; Order 03-23, [2003] B.C.I.P.C.D. No. 23.

Cases Considered: *Canada (Information and Privacy Commissioner)* v. *Canada (Commissioner of the RCMP) et al.*, [2003] S.C.J. No. 7, 2003 SCC 8; *B.* v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.); *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, [2002] B.C.J. No. 2779 (C.A.), leave to appeal s. 13 decision denied, [2003] S.C.C.A. No. 83); *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.); *General Accident Assurance Co.* v. *Chrusz* (1999), 180 D.L.R. (4th) 241 (Ont. C.A.); *Wheeler* v. *Le Marchant* (1881), 17 Ch. D. 675 (C.A.); *Cooper* v. *British Columbia*, unreported, February 3, 1999 (BCSC Action No. C984069, Vancouver Registry); *Health Services and Support-Facilities Subsector Bargaining Assn.* v. *British Columbia*, [2002] B.C.J. No. 2464 (S.C.).

1.0 INTRODUCTION

[1] On August 24, 2000, the Canadian Pacific Railway Company ("CPR") made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the City of Vancouver ("City") for access to records that "relate to the Arbutus Corridor Lands owned by CPR that run from False Creek to the Fraser River" in the City. CPR's request went on to specify a non-exhaustive list of 15 categories of records included within its scope. With one exception, the request was limited to records dated or created after January 1, 1997. The request also identified seven City bylaws, plans or reports that CPR already possessed, which the City need not disclose. The access request was made one month after the City enacted the Arbutus Corridor Official Development Plan Bylaw, which affected the uses that CPR could make of its lands.

[2] Also on August 24, 2000, CPR filed a petition in the Supreme Court of British Columbia for judicial review of the Arbutus Corridor Official Development Plan Bylaw. This petition was eventually heard and decided in June and October 2002, respectively, along with a petition for judicial review that CPR had started in 1999 respecting another City bylaw. Success was divided and CPR has appealed the decision.

[3] Section 7(1) of the Act requires a public body to respond no later than 30 days after receiving an access request. On August 28, 2000, the City informed CPR that it had already decided to extend that time limit for another 30 days under s. 10(1)(b). The City's letter said the following:

> It is necessary to extend the time for response because the scope of your request is exceedingly broad. It covers a number of civic departments and divisions, most of which have their own filing systems. Although it is impossible, at this stage, to provide you with a firm estimate as to how long it will take to identify, locate and review all responsive records, it is my experience that requests of this scale and complexity cannot be processed within 30 days with the staff resources available to us.
>
> The City received your request on August 24, 2000 so we will provide you with a final response by October 23, 2000, or earlier if possible. As with any request, we will, of course, endeavour to respond as quickly as possible. Within the next several weeks, I will complete a preliminary identification of the responsive records and will send you an estimate of the fees payable under section 75 of the Act. You must then decide whether you wish to obtain copies or examine the records in person.

[4] The City did not, however, provide a fee estimate within the next several weeks and it did not provide a response to the access request by October 23, 2000. Instead, on October 19, 2000, the City estimated a fee of $3,832.50 to provide the roughly 8,370 pages of records that it believed would be responsive to the access request. As the City requested, CPR promptly paid a deposit of half the estimated fee.

[5] The City's response to the request was then further delayed by, among other things, a civic strike from September 27 to November 15, 2000. On December 14, 2000, the City acknowledged receipt of CPR's fee deposit. It told CPR that all potentially relevant records had been located and retrieved and their line-by-line review had begun. At no time did the City request, under s. 10(1) of the Act, a further extension of time to respond to the access request. Instead, it said the following in its December 14, 2000 letter to CPR:

> Dealing with the backlog of requests that accumulated during the strike will make this review slower than usual. In addition, due to the complexity of this request, a number of staff will have to be consulted about the release of these records. Many of these staff will be unavailable over the Christmas holidays. Even after a decision has been made, we must still prepare a severed copy of the records subject to exceptions. We therefore estimate that we will not be able to provide you with access to these records until the end of January 2001.
>
> We trust you will understand our position, and we appreciate your patience.

[6] By February 16, 2001, CPR was apparently of a mind not to be understanding about the City's position, nor to be patient about the pace of progress on the access request. On that date, it sought a review of the City's failure to respond in time. On May 10, 2001, this office issued a Notice of Written Inquiry on that issue. Submissions in the inquiry were scheduled to complete by June 2001.

[7] On May 15, 2001, the City finally responded to the access request. It disclosed 1,362 pages of records and withheld 3,415 pages of records under one or more of ss. 13, 14, 16 and 20 of the Act. CPR requested a review of the City's response as well, and during that review process the City added a claim of s. 12(3)(b) protection for some of the requested records. The City's refusal to disclose some records was added to the Notice of Written Inquiry and it was adjourned by consent for mediation between the parties with this office's assistance.

[8] On June 10, 2001, the City disclosed 100 more pages of records and, on July 10, 2001, it disclosed 639 more pages. On July 12, 2001, it disclosed 832 more pages and, on July 27, 2001, it disclosed 67 more pages.

[9] Consent adjournments followed to permit the parties to pursue disclosure applications in the Supreme Court of British Columbia in connection with the above-noted petitions for judicial review. The disclosure applications led to the issue of CPR's access being resolved between the parties for some records and by the court for others. As a result, a good number of the records that the City refused to disclose under the Act are no longer part of this inquiry. As already noted, although the petitions for judicial review have now been heard and decided, CPR has filed an appeal of the decision.

2.0. ISSUES

[10] The issues in this inquiry are as follows:

1. Did the City perform its duty under s. 6(1) of the Act to respond openly, accurately and without delay, including by conducting an adequate search for records?

2. Does s. 14 of the Act authorize the City to refuse to disclose information in the disputed records?

[11] Previous decisions have established that the City bears the burden of proof on the first issue, while s. 57(1) of the Act requires the City to establish that s. 14 authorizes it to refuse to disclose information.

3.0 DISCUSSION

[12] **3.1 The Disputed Records** – Of the many records that responded to CPR's request, only the following 45 records (using the City's numbering) remain in dispute: 117, 200.2, 206, 207, 210-224, 224.1, 225-234, 234.1-234.6, 235-240, 240.1, 241 and 242. The City prepared a list of the records it withheld from the applicant, which was included as an appendix to the Portfolio Officer's Fact Report. The City's descriptive categories for the disputed records, which I will examine in my discussion of whether s. 14 excepted them from disclosure, are as follows:

- Communications between the City and its outside legal counsel for the purpose of seeking and obtaining legal advice. (Record 117)

- Documents reflecting decisions made at a City staff meeting with participation of solicitors providing legal advice and receiving instructions and/or background information to assist in preparation of legal advice. (Record 200.2)

- Communications between [*sic*] discussing, summarizing, or commenting on, legal advice received, or sought from Legal Services or outside legal counsel. (Records 206, 207)

- Draft reports to City Council prepared, or reviewed and modified, by a solicitor in the course of providing legal advice. Includes records with solicitor's handwritten notes and comments. (Records 210-219)

- Draft correspondence prepared, or reviewed and modified, by a solicitor in the course of providing legal advice. Includes records with solicitor's handwritten notes and comments. (Records 220-224, 224.1)

- Draft memoranda and submissions prepared, or reviewed and modified, by a solicitor providing legal advice. Includes records with solicitor's handwritten notes and comments. (Records 225-228)

- Draft public documents prepared, or reviewed and modified, by a solicitor providing legal advice. Includes records with solicitor's handwritten notes and comments. (Records 229-234, 234.1-234.6, 235, 236)

- Documents referred to Legal Services by City staff for advice and containing solicitor's handwritten notes and comments. (Records 237-240, 240.1, 241, 242)

[13] **3.2 Procedural Objection** – CPR objected to the second affidavit of Paul Hancock, the City's Manager of Corporate Information and Privacy, because it was tendered with the City's reply submission. I decided, in all of the circumstances, to consider that affidavit and gave CPR an opportunity to make submissions in response, which it did and I have also considered those submissions.

[14] **3.3 Duty to Assist** – CPR contends that the City responded to CPR's request outside the time allowed under the Act and that its search for records was inadequate.

Delay in responding

[15] The City concedes that it failed to respond within the time limits required in the Act. It says, however, that the delay was due to the complexity of CPR's request, the large volume of records involved, the many City departments that had to search for records and had to be consulted by the City's access to information staff, as well as the seven-week City strike, and resulting backlog of work, that it says "severely interfered" with its activities (para. 14, initial submission).

[16] The intent of s. 6(1) is to require public bodies to make every reasonable effort to respond sooner than required under s. 7. A public body that has failed to respond to an access request within the legislated time cannot be said to have made every reasonable effort to respond "without delay" as required by s. 6(1). See, for example, Order 03-22, [2003] B.C.I.P.C.D. No. 22, another case in which the City failed to respond in time but nonetheless argued that it had fulfilled its s. 6(1) duty to the applicant.

[17] The seven-week City strike in the fall of 2000 was obviously one reason why the City could need more time to process CPR's access request. So was the breadth and complexity of the access request. The City overlooks the fact that these kinds circumstances are precisely why s. 10(1) of the Act permits a public body to request approval from the Commissioner of a further extension of time to respond to an access request. Requesting such an extension would have entailed explaining and justifying the need for it. The City instead chose to set its own pace, outside the requirements of the Act and to assume that CPR was understanding and patient about the delay, when that fairly clearly was not the case.

[18] As I said above, if a public body has not responded when required, it cannot be said to have nonetheless fulfilled its duty to assist under s. 6(1). There is also nothing here that suggests the City could not, despite the civic strike, have sought a further

extension of time to respond under s. 10(1). In any event, the length of time the City took to respond far exceeded the duration of the strike or its immediate aftermath.

[19] Public bodies must not ignore the requirements of the Act. This is even more important when the public body's duty to assist the Act is engaged by a broad access request by a sophisticated applicant that has initiated litigation against the public body in the very area covered by the request. The City has not been alone in failing in such circumstances to apply for an extension of timeunder s. 10(1). See, for example, Order 02-54, [2002] B.C.I.P.C.D. No. 55.

[20] The City is a large and sophisticated public body. The City's delay in responding to the request, without an extension under s. 10(1) or CPR's consent, is not acceptable. It would not be acceptable if the delay was due to simple oversight or neglect. It would be even less acceptable if the litigation context of this access request – of which the City and CPR pretty clearly were all too aware throughout the process – caused or contributed to the City's delay or its failure to seek time extensions under s. 10(1).

Completeness of initial and subsequent responses

[21] A number of cases have established that, in searching for records, a public body must undertake such efforts as a fair and rational person would find to be acceptable in the circumstances. This does not impose a standard of perfection, but a public body's search efforts must be thorough and comprehensive. See, for example, Order 03-23, [2003] B.C.I.P.C.D. No. 23, and Order 00-26, [2002] B.C.I.P.C.D. No. 29.

[22] The City submits that its efforts in searching for records met the standard required under s. 6(1), but concedes that its initial response was incomplete.

[23] In his first affidavit, Paul Hancock deposed that, having determined which City departments could be expected to have records responsive to the request, he first asked those departments how many such records could be in their possession. He identified the departments that might have records by consulting the City's directory of records and by discussing the access request with City employees who he believed might be familiar with the subject of the request.

[24] Hancock also communicated with CPR's counsel to discuss a possible clarification or narrowing of the scope of CPR's access request, but no agreement was reached. At para. 14 of its reply submission, the City says that CPR "refused to clarify the Request when clarification was sought by the City". At p. 9 of its further submission, CPR takes issue with this "mis-statement of the evidence" and contends that it never refused to clarify the access request.

[25] In asking various City departments to locate and deliver files and records to him, Paul Hancock deposed that he told the departments to "always err on the side of including rather than excluding records". He then reviewed all records and selected only those that he considered responsive to CPR's request. He deposed that he told "many staff persons" who were uncertain about whether some records were covered by the

request to, whenever in doubt, consider the records to be responsive. In selecting records, Hancock deposed, he included all records that specifically referred to the Arbutus corridor or that in any way dealt with the corridor.

[26] The City has acknowledged that the fee estimate it gave to CPR was based on a much larger volume of records than the City ultimately identified as responsive. According to Hancock's evidence, however, this came about because he had, as already noted, asked City staff to err on the side of caution on estimating the number of records involved. The actual number of responsive records was, he deposed, smaller than the number he had estimated for the purposes of the City's fee estimate. The City says this discrepancy does not support a finding that its search efforts were inadequate.

[27] The City says that, because of the volume of records and the number of City departments involved, some records were missed in the initial response then, as soon as missing records were identified, further disclosure was made to the applicant. For example, on July 11, 2001, the City disclosed "several files" to CPR that had been "overlooked during the initial search". These files were apparently identified in "additional searches" that the City conducted. Similarly, on July 27, 2001, the City disclosed additional records that had been "inadvertently missed" during the original search for records. The City's letter indicated that a binder of responsive records had not been initially disclosed because "a staff person had assumed that it had already been copied." Hancock deposed, at para. 25 of his first affidavit, that the "vast majority of the records" discovered by the City's further searches came from records in a City Clerk's file "containing correspondence from the public during the public hearing process related to the Arbutus Corridor Official Development Plan."

[28] The City does not specifically contend its initial oversights were accidents that occurred despite adequate search efforts by the City. As just indicated, it is clear that at least some records were overlooked because a City employee incorrectly assumed that the records had already been copied and therefore disclosed.

[29] CPR submits, in considerable detail, that the City's initial search for records was inadequate and so were its later search efforts. CPR notes that, in addition to the general scope of the language used in its request, it itemized a number of specific kinds of records in which it was interested. It says there is evidence that, in searching for records, initially and later, the City gave an overly narrow interpretation to the words "relating to" in the access request.

[30] The City has responded in considerable detail in its reply submission. It emphasizes that the access request, including the 15 specific kinds of records listed in it, was for records that relate "to the Arbutus Corridor" and says it would have been "absurd" to expand the scope of the request – and hence the City's search efforts – to "cover records related to any work or research through which City staff acquired knowledge or information that may eventually have influenced their work on the Arbutus Corridor". It also points out that some classes of records that CPR argued were missed by the City's search efforts were in fact outside the time-frame of the request.

[31] I consider that the City's initial response to CPR's access request did fall short of the mark and that the City did not discharge its duty under s. 6(1) to respond completely. This leads to the further question of whether the City's subsequent searches and disclosure to the applicant addressed the problem. It also leads to CPR's submission that the City, at all stages, interpreted the access request too narrowly and thus searched and disclosed too narrowly. According to CPR, the City's subsequent searches and disclosure repeated rather than corrected that pattern. CPR says the later searches continued to be based on an overly narrow interpretation of the scope of the request and that the City focussed on finding specific records CPR said were "missing", rather than on taking fresh and thorough steps to providing an accurate and complete response to the access request as a whole. The relief sought by CPR in this inquiry therefore includes a request for an order under s. 58(3) requiring the City to conduct a complete new search for records responsive to the request.

[32] As already noted, the request is for records "that relate to" the Arbutus Corridor lands owned by CPR. There follows in the request an approximately two-page list of records that, "[w]ithout limiting the foregoing", would be included in the records requested. The following are typical examples of the items on the list:

> Alternative corridors
>
> (6) all records pertaining to alternative corridors to service south Vancouver, Richmond and the airport for transit purposes, and the relative merits and otherwise of each option;
>
> (7) all records pertaining to the City's assessment of alternative uses for those corridors, including viability and demand for transit use as compared to greenway use;
>
> Options for rail use
>
> (8) all records pertaining to the options for, and viability of rail use in the Arbutus Corridor;
>
> …
>
> Discontinuance
>
> (11) all records pertaining to the City's consideration of the CPR's options, and actions, under the discontinuance process established by the *Canada Transportation Act*;
>
> (12) all records pertaining to the City's intentions, and options, as regards the discontinuance process, including as regards acquisition by it or any other body;

[33] CPR refers to the definition of "relate to" in *Black's Law Dictionary* (5th ed.), which includes "to have bearing or concern", "to pertain" and "to bring into association with or connection". The last meaning was referred to by Gonthier J., in interpreting the

federal *Privacy Act*, in *Canada (Information and Privacy Commissioner)* v. *Canada (Commissioner of the RCMP) et al.*, [2003] S.C.J. No. 7, 2003 SCC 8, at para. 25. I also discussed the meaning of "relating to" in s. 3(1)(h) of the Act in some detail in a March 28, 2003 ruling respecting an access request to the Ministry of Attorney General. I summarized the effect of many of the cases, as follows:

> These cases illustrate how the same or similar words can yield narrow or broad interpretations. *Haskett* found that the words "relating to" necessitated a "logical, reasonable connection" and it also imposed a requirement for a causal connection. The majority judgment in *Slattery*, by contrast, took a broader view of the meaning of "relating to" in s. 241(3) of the *Income Tax Act*. In *Re Woodward Stores*, the words "relates to" were interpreted to require an examination of the surrounding circumstances in each case. In *British Columbia (Human Rights Commission)*, the words "unrelated to" took on broader or narrower meaning (but with the same impact on the outcome of the case) depending on whether the emphasis was on "convicted" or "offence" in the phrase "convicted for a[n] … offence". In *Commissioner of the RCMP*, the disputed information was found to be both information "relating to" individual employment history and information about an employee that "relates to" their position or functions. Differences between these judicial interpretations of "related", "relating to" and "unrelated" are, of course, the result of different statutory contexts. That is clear from the decisions. The relevance of statutory context was also underlined by Iacobucci J. in *Sarvanis* v. *Canada*, [2002] S.C.J. No. 27, which addressed the meaning of the phrase "in respect of" in the federal *Crown Liability and Proceedings Act*:
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> > ¶ 22 It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.
> >
> > …
> > ¶ 24 In both cases [the English and French versions of the statutory provision], we must not interpret words that are of a broad import taken by themselves without looking to the context in which the words are found. Indeed, the proper approach to statutory interpretation requires that we more carefully examine the wider context of s. 9 before settling on the correct view of its reach. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, in discussing the preferred approach to statutory interpretation, the Court stated, at para. 21:
> >
> > > … Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> In my view, the nature and content of this approach, and the accuracy of Professor Driedger's succinct formulation, has not changed. Accordingly, we cannot rely blindly on the fact that the words "in respect of" are words of broad meaning.

[34] CPR is understandably frustrated with the City, which was slow and, initially at least, incomplete in responding to the access request. I do not, however, believe the answer is to hold the City, in its understanding of the access request, to the standards for interpreting statutes. Deciphering an access request and identifying the records that are responsive to it is not an exercise equivalent to interpreting and applying a statute. Nor is the access to information process in the Act equivalent to the document production process overseen by the courts in respect of legal proceedings.

[35] Although the duty in s. 6(1) of the Act to make "every reasonable effort" sets a high standard for public bodies, there may still be more than one reasonable way to interpret an access request as broad as the one CPR made and there may also be more than one reasonable conclusion about whether or not specific records or classes of records fall within its scope. The applicant and the public body needed to engage in constructive dialogue about this access request, as it was being processed. This is not necessarily true of all access requests, but it was true of this complex request by a sophisticated requester. For whatever reason – the City and CPR cannot agree why – that dialogue did not happen. This hampered the City in fulfilling its duty to assist under the Act in a way that satisfied CPR.

[36] I have found that the City failed initially to discharge its duty under s. 6(1) to respond completely to the access request. After careful assessment of the evidence, I have concluded that the City's subsequent searches and disclosure were sufficient, in all the circumstances, to remedy the situation.

[37] I am concerned, however, that CPR still considers that it requested more records than the City considered it requested. For this reason, I should make it clear that CPR is in no way foreclosed by this access request or this order from making further access requests to the City for records relating to the same subject. I would expect the City to diligently process and respond to such requests (though it need not, of course, disclose again records that have already been disclosed) and I would expect both the City and CPR to communicate clearly and productively about the scope and meaning of CPR's requests.

[38] **3.4 Solicitor-Client Privilege** – The City says s. 14 authorizes it to withhold information from the disputed records. Section 14 authorizes a public body to refuse to disclose "information that is subject to solicitor-client privilege." Of the two kinds of privilege recognized at common law and incorporated by s. 14, the City relies on legal professional privilege for all of the disputed records, except record 117 over which litigation privilege is claimed.

[39] Litigation privilege attaches to communications and materials produced or brought into existence for the dominant purpose of being used to prepare for or conduct litigation under way at the time or then in reasonable prospect. One feature of litigation privilege is that it applies to communications between the lawyer and the client and also between the lawyer and third parties. This is in contrast to legal professional privilege, which applies to communications with third parties only in much more limited circumstances. Another feature of litigation privilege is that it ends with the litigation.

[40] Legal professional privilege protects confidential communications between a lawyer and client (or an agent of the client) that are related to the seeking or giving of legal advice. The criteria for establishing legal professional privilege were stated as follows by Thackray J. (as he then was) in *B*. v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.):

> As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[41] I have applied this text on many occasions. See, for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8, at p. 11. (The Court of Appeal quashed Order 00-08, but not on this point, in *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, [2002] B.C.J. No. 2779 (C.A.), leave to appeal s. 13 decision denied, [2003] S.C.C.A. No. 83).

[42] The City argues, with respect to legal professional privilege, that s. 14 protects records "which would not ordinarily be privileged if their disclosure could result in

revealing any information that is subject of [*sic*] the solicitor-client privilege" (para. 23, initial submission). It cites *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.), where Lowry J. said that the question to be asked "must be whether granting access to a record requested will disclose any information, directly or indirectly, that is the subject of solicitor-client privilege." The City goes on to argue as follows in its initial submission:

> 25. Traditionally, solicitor-client privilege protected communications between the client and his or her solicitor as long as those communications related to the seeking or obtaining legal advise [*sic*]. By protecting *information* that is subject to solicitor-client privilege, the Legislature ensured that all records which could reveal [*sic*] subject to a privileged communication are protected from disclosure, whether or not the records themselves are a communication between the solicitor or a client.
>
> 26. It is submitted that in the context of the present inquiry section 14 must be interpreted as applying not merely to records of communications between City staff and City's in-house or outside solicitors but also to all records made by City staff which would reveal what advice was sought or received.

[43] The City makes the point that it is not unusual for its solicitors to provide advice in the form of preparation or review of draft documents. By preparing, revising or commenting on a draft document, a lawyer communicates advice to the client and, the City submits, disclosure of the draft documents would inevitably reveal information that is subject to solicitor-client privilege, including the fact that the City sought advice about the drafts. The City goes so far as to submit that disclosure of several of the disputed records would permit CPR to compare draft records to publicly-available final versions and thus determine the "nature and content" of the legal advice given.

[44] CPR says the fact "that a lawyer has had input with respect to a record does not necessarily make it privileged" (para. 154, initial submission) and, further, that many factors other than legal advice might influence changes between draft documents and their final versions. CPR adds, citing court decisions and previous orders under the Act, that privileged information can and should be severed from the records, with the non-privileged portions being disclosed.

[45] I asked the City to confirm whether the disputed records come from files of lawyers in its Law Department. Counsel for the City confirmed that the disputed records are copies of records from the files of the City's Department of Legal Services, except for records 206 and 207, which, counsel told me, "appear to be copies of records from the files of Engineering Services". Some of the records have annotations on them, usually by a City solicitor. Some of the annotations are questions or comments, while others are suggested additions or changes to the records. Other records bear no comments or suggested changes. They are simply copies of, according to Yvonne Liljefors's evidence, draft documents produced by other City staff and sent to the City's lawyers for advice.

[46] I accept, based on all the material before me, that the disputed records come from files in the City's in-house lawyers, although it is apparent that the originals or other copies of some (if not all) of them are likely to exist in the files of other City departments. I am also satisfied that the necessary element of confidentiality is present respecting the disputed records and the communications relating to them to and from the City's lawyers.

[47] I have analyzed the s. 14 issue on the basis that this inquiry is into the question of whether the disputed records in the files of the City's lawyers are privileged and whether the lawyers' annotations on many of the records are also privileged. I have also, where possible, expressed my view of whether the disputed records, without the lawyers' annotations, have been established on the evidence before me to be privileged in the files of other City departments, but I have made no order in that respect.

[48] I will now analyze the disputed records in more detail.

Record 117

[49] In its list of withheld records, the City described record 117 as a communication between the City and its outside legal counsel for the purpose of seeking and obtaining legal advice. In the inquiry, however, the City claimed litigation privilege over record 117 and relied on the affidavit of Yvonne Liljefors, a lawyer employed in its Department of Legal Services, who (at para. 10) described record 117 as:

> … a copy of a communication with a third party for the sole purpose of obtaining information for use in contemplated litigation, in particular the defence of the proceedings brought by CPR against the City.

[50] At para. 8 of her affidavit, Yvonne Liljefors referred to "litigation commenced by CPR against the City." There are other references to litigation between CPR and the City, notably applications for judicial review that CPR brought respecting certain City decisions and actions relating to land use matters. Liljefors does not specify if the judicial review applications are the "proceedings" or "litigation" to which she refers. It is, however, apparent from other material before me, including the affidavit of Vaneisa Lam, that the litigation to which Liljefors referred are the two judicial review applications that CPR brought against the City.

[51] I have examined record 117. It is a communication by the City of Vancouver Law Department to a third party-registry search service that occurred between the filing dates of CPR's two petitions for judicial review. A communication between a solicitor and a third party of this nature is not protected by legal professional privilege. See *College of Physicians and Surgeons*, above, as well as *General Accident Assurance Co.* v. *Chrusz* (1999), 180 D.L.R. (4th) 241 (Ont. C.A.) and *Wheeler* v. *Le Marchant* (1881), 17 Ch. D. 675 (C.A.). The only issue is whether litigation privilege applies to this record. I accept that its purpose was the City's defence of CPR's petitions for judicial review. I find that litigation privilege applied to record 117 and that it continues to apply in light of CPR's appeal of the Supreme Court of British Columbia judgement on the petitions.

Record 200.2

[52] In its list of withheld records, the City described record 200.2 as a document reflecting decisions made at a City staff meeting, with the participation of lawyers who provided legal advice and received instructions or background information, or both, to assist in the preparation of legal advice.

[53] Based on information and belief from another City solicitor, Yvonne Liljefors deposed that record 200.2 (as well as record 201, which is not in issue) "reflect decisions made at a meeting" of City staff and City lawyers "at which legal advice was sought and provided for the very purpose of making those decisions." She also deposed as to her belief that disclosure of record 200.2 "could" reveal the "nature of legal advice sought and provided at that meeting." She also deposed that the record contains "handwritten notes made by solicitors in the course, and for the purpose, of providing legal advice." Liljefors did not elaborate on her belief that record 200.2 "could" reveal the "nature" of legal advice or such advice itself.

[54] I have reviewed record 200.2. It consists of pages one and three of what appears to be a three-page "work to do" document. Page two is missing. Both of the existing pages have a small amount of handwriting on them. I accept that record 200.2 is a solicitor's working copy of part of a client document and the handwriting on it is that of a City solicitor. On that basis, I find that it is privileged and s. 14 authorized the City to refuse to disclose this record under the Act.

[55] I do not know if record 200.2, without the solicitor's notes, is in the files of other City departments and has been disclosed to CPR. I am not persuaded from my inspection of the copy of two pages of this document from the solicitors' files, or based on the Liljefors affidavit, that this record, without the lawyer's notes, would be privileged in other City files. Liljefors's belief that record 200.2 – presumably all of it – could reveal the nature of legal advice sought and provided is vague and overstated. A document is not automatically privileged because it reflects what a client has, with legal (and other) advice, decided to do, or because the document was produced with input from legal advisors. There is also merit in CPR's submission respecting record 200.2 that privilege does not cover "all notes of a meeting simply because a lawyer was in attendance" (para. 151, initial submission).

[56] Exhibit "E" to the affidavit of Vaneisa Lam, provided by the City with its initial submission, consists of the November 28, 2001 oral reasons for judgement of Sigurdson J. on disclosure applications in the judicial review proceedings between the City and CPR. Sigurdson J. appears to have also concluded that a similar privilege claim made by the City was overbroad (at para. 49):

> Schedule 1, document 12, is described as an e-mail from Pat Wotherspoon to Ms. McAfee and Mr. Riera, dated June 13, 2000. The City says the document, if disclosed, would allow the reader to deduce the nature of the legal advice that was provided by Legal Services. That may be true, but the document as produced is

> over-edited. Once those portions where legal services could be deduced are deleted, and those portions only, the document should be produced to the petitioner [CPR].

Records 206, 207

[57] In its list of withheld records the City described records 206 and 207 as communications discussing, summarizing or commenting on legal advice received, or sought, from its Department of Legal Services or outside legal counsel.

[58] According to Yvonne Liljefors's affidavit, records 206, 207 and 208.1 are "confidential internal City communications discussing, summarizing or commenting on, legal advice provided or requested" from in-house or outside City lawyers. Having reviewed these records, I find that they are confidential communications related to the seeking or giving of legal advice or would, if disclosed, reveal such communications. It is also true that, as Liljefors has said, records 206 and 207 "appear to be copies of records from the files of Engineering Services". This is because the request for legal advice emanated from that department. Two pieces of external correspondence that are attached to record 206 would be known to CPR. In the context of a request for records that the City referred to its solicitors for legal advice, these copies of external correspondence were part of the privileged communication between client and solicitor. Records 206 and 207, but not the two pieces of external correspondence attached to record 206, would also be privileged in the files of other City departments.

Records 210-219

[59] In its list of withheld records, the City described records 210-219 as draft reports to City Council prepared, or reviewed and modified, by a solicitor in the course of providing legal advice, including records with solicitors' handwritten notes and comments.

[60] According to Yvonne Liljefors's affidavit:

> 17. Documents numbered 210 through 219 on the List are copies of various draft reports to City Council which had been reviewed and commented on by me or other solicitors with the City's Legal Services. I believe that disclosure of these records would allow an informed reader to compare the various drafts to final reports and ascertain the nature and content of legal advice provided by me and other solicitors with [the City's Department of] Legal Services. In my experience with the City, it is usual for solicitors to provide legal advice in the form of review and comments on draft documents, especially draft reports to City Council. Some of the documents referred to in this paragraph contain handwritten notes and comments made by me or other solicitors.

[61] Having reviewed records 210-219, I accept that they are, like record 200.2, solicitors' working copies of client documents, in this case draft documents. All of them except record 212 have handwriting on one or more pages, which I accept to be the

handwriting of City lawyers. On that basis, I conclude these records are privileged and that s. 14 authorizes the City to refuse to disclose them under the Act.

[62] As with record 200.2, I do not know if records 210-219, without the solicitors' notes, are in the files of other City departments and have been disclosed to CPR. If they exist in the files of other City departments, without the lawyers' notes, I am not persuaded from my inspection of the copies in the solicitors' files or the Liljefors affidavit that they would be privileged in that form.

Records 220-224, 224.1

[63] In its list of withheld records, the City described records 220-224 and 224.1 as draft correspondence prepared, or reviewed and modified, by a lawyer in the course of providing legal advice, including solicitors' handwritten notes and comments.

[64] According to Yvonne Liljefors's affidavit:

> 18. Documents numbered 220 through 224.1 on the List are copies of correspondence prepared, or reviewed and modified, by me or other solicitors in the course of providing legal advice. I believe that disclosure of these documents would allow an informed reader to deduce the nature and content of legal advice provided by me and other members of Legal Services.

[65] I have reviewed records 220-224 abd 224,1. The City's descriptions of them are accurate, except that record 224.1 also includes an e-mail from a City lawyer to a City official that attaches draft correspondence in the official's name. I conclude that these records disclose confidential solicitor client communications and that s. 14 authorizes the City to refuse to disclose them under the Act.

[66] The solicitor's e-mail that is part of record 224.1 and the draft correspondence that is marked up by the City's solicitors would also be privileged in the files of other City departments. If the draft correspondence exists in the files of other City departments, without the solicitors' notes, I am not persuaded from my inspection of the copies in the solicitors' files or the Liljefors affidavit that they would be privileged in that form. I again refer to Sigurdson J.'s oral reasons for judgement of November 28, 2001, in this case at para. 47:

> … Schedule 1, document 9 is an e-mail from Ms. McAfee dated March 8, 2000. The document in question appears to be a draft letter from the Mayor with comments of the Legal Department handwritten on it. The document in that form is privileged. If the letter was sent out by the mayor or was retained without markings from the Legal Department, that letter should be produced to the petitioner.

Records 225-228

[67] In its list of withheld records, the City described records 225-228 as draft memoranda and submissions prepared, or reviewed and modified, by a solicitor providing legal advice, and including solicitors' handwritten notes and comments.

[68] According to Yvonne Liljefors's affidavit:

> 19. Documents numbered 225 through 228 on the List are copies of draft memoranda and draft oral submissions prepared, or reviewed and modified, by me or other solicitors in the course of providing legal advice. I believe that disclosure of these documents would allow an informed reader to deduce, through comparison with final versions (which are publicly available), the nature and content of legal advice provided by me and other members of Legal Services.

[69] I have reviewed records 225-228. They conform to the City's descriptions, but I add that record 225 has no handwritten notes and instead has at least one comment, in bold face type, that appears to be directed to one of the City's solicitors by name. I conclude that these records disclose confidential solicitor client communications and s. 14 authorizes the City to refuse to disclose them under the Act.

[70] As with records 200.2 and records 210-219, I do not know if records 225-228, without the notes to or by the solicitors, are in the files of other City departments and have been disclosed to CPR. If these records exist in the files of other City departments, without the notes to and by the solicitors, I am not persuaded from my inspection of the copies in the solicitors' files or the Liljefors affidavit that they would be privileged in that form.

Records 229-234, 234.1-234.6, 235, 236, 237-240, 240.1, 241, 242

[71] In its list of withheld records, the City described records 229-234, 234.1-234.6, 235 and 236 as draft public documents prepared, or reviewed and modified, by a solicitor providing legal advice, including records with solicitor's handwritten notes and comments. It described records 237-240, 240.1, 241 and 242 as documents referred to its Legal Services department by City staff for advice and containing solicitor's handwritten notes and comments.

[72] According to Yvonne Liljefors's affidavit:

> 20. Documents numbered 229 through 236 and 241 on the List are copies of draft public documents (including public hearing notices, etc) which have been prepared or reviewed and modified by me or other solicitors in the course of providing legal advice. I believe that disclosure of these documents would allow an informed reader to deduce, through comparison with final versions (which are publicly available), the nature and content of legal advice provided by me and other members of Legal Services.
>
> 21. Documents numbered 237 and 239 on the List is a draft document [*sic*] referred to Legal Services for comments and contain my hand written notes

> and comments. As noted above, it is usual for solicitors with Legal Services to provide legal advice to City staff in the form of review and comments on draft documents. Copy of document 239 without the comments has been provided to Mr. Kenward [counsel for CPR] in a severed form.
>
> 22. Documents numbered 238, 240, 240.1, and 242 on the List are copies of documents referred to Legal Services for advice and contain handwritten notes made by solicitors in the process of providing or preparing legal advice. I am advised by Mr Zworski [a lawyer employed by the City] that the original documents have either been released to Mr. Kenward [counsel to CPR] or are publicly available, however, [*sic*]
>
> 23. I believe that disclosure of these copies would reveal that legal advice was sought with regard to these documents.

[73] I have reviewed records 229-234, 234.1-234.6, 235, 236, 237-240, 240.1, 241 and 242. They conform to the City's descriptions. I add only that some of them are marked with handwritten notes while others are not and that some include a covering memo from a City official to a City solicitor that requests advice respecting the attached draft document. I conclude that these records disclose confidential solicitor client communications and that s. 14 authorizes the City to refuse to disclose them under the Act.

[74] The cover memos would also be privileged in the files of other City departments. If the other records exist in the files of other City departments, without the solicitors' notes, I am not persuaded from my inspection of the copies in the solicitors' files or the Liljefors affidavit that they would be privileged in that form. This is not to say that there will not be other cases where a draft document in a client file that was prepared by a client and provided to his or her lawyer, or the other way around, could inferentially reveal confidential legal advice. This is simply not a conclusion I reach about the draft documents, absent the solicitors' notes, that are before me in this inquiry.

[75] I would also disagree with the contention, which the City appears to advance, that, because its lawyers are frequently asked to draw up, review and advise on draft documents, then all draft documents must be privileged as part of the continuum of confidential solicitor client communications, whether or not they are in the solicitor's files or reveal the seeking or giving of legal advice. I note that two recent decisions held that draft documents in the form of draft legislation that was not annotated with the commentary and advice of legislative counsel were not privileged because they did not disclose the seeking or giving of legal advice. See *Cooper* v. *British Columbia*, unreported, February 3, 1999 (BCSC Action No. C984069, Vancouver Registry); *Health Services and Support-Facilities Subsector Bargaining Assn.* v. *British Columbia*, [2002] B.C.J. No. 2464 (S.C.).

4.0 CONCLUSION

[76] I have found that the City failed to perform its duty under s. 6(1) to make every reasonable effort to respond without delay to CPR. I have also found that the City failed to perform its duty under s. 6(1) because it inadequately searched for the requested records and incompletely responded to the access request. In the circumstances, I make no order under s. 58(2)(a) requiring these duties to be performed, however, because I have further found that the City subsequently searched and responded adequately, in the circumstances, to the access request.

[77] For the reasons given, under s. 58(2)(b) of the Act, I find that the City is authorized by s. 14 to refuse to give CPR access under the Act to the disputed records in the files of its solicitors. I find no ground to interfere with the City's exercise of discretion to refuse access under s. 14 and I confirm the City's decision in that regard.

July 24, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia