Decision of the Information and Privacy Adjudicator
Jeffrey Schnoor, Q.C.

Manitoba Ombudsman Case 2018-0424

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Introduction

1. In August of 2017, raw sewage began to back up into the Complainant's home in north Winnipeg. The Complainant believed that the sewer backup could have been prevented if the City of Winnipeg (the "City") had properly inspected and maintained the sewer line to her home. As such, the Complainant submitted a claim to the City in the amount of $5,846.20 for the damage sustained to her home.

2. The Complainant's claim was denied, and on August 10, 2018, she submitted three requests to the City pursuant to *The Freedom of Information and Protection of Privacy Act,* C.C.S.M. c. F175 ("*FIPPA*"). Only one of these requests is the subject of this review and it concerns documents related to the Complainant's claim and the sewer in question.

3. Subsequently, the City responded to the Complainant and provided her with responsive records that were largely redacted. Following the City's response, on November 9, 2018, the Complainant made a complaint to the Manitoba Ombudsman, Access and Privacy Division (the "Ombudsman").

4. On March 16, 2021, the Ombudsman recommended that the City release the records to the Complainant without redaction, with the exception of the personal information of a third party. The City responded on March 30, 2021, and advised that it did not agree with the Ombudsman's recommendation and could not accept it.

5. On April 13, 2021, the Ombudsman requested that the matter be reviewed by the Information and Privacy Adjudicator (the "Adjudicator") in accordance with sections 66.1(1)(a) and 66.1(2)(a) of *FIPPA*. This is the Adjudicator's decision on the review.

6. The issues raised in this adjudication are complex, and it is necessary to discuss the relevant statutory provisions of *FIPPA,* the history of this legislation, and the role of the Adjudicator to give context to this decision. Accordingly, these reasons will begin with that discussion. They will then describe the chronology of events that led to this review, followed by the process established by the Adjudicator to conduct this review. Then, the position of the parties and the issues to be decided will be set out. Finally, the issues will be analyzed, and the Order of the Adjudicator will be made.

Relevant *FIPPA* Provisions, the History of *FIPPA*, and the Role of the Adjudicator

Relevant FIPPA Provisions

7. Section 2 of *FIPPA* sets out the purposes of the legislation. For this adjudication, the most relevant purposes are:

> (a) to allow any person a right of access to records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act;
>
> …
>
> (e) to provide for an independent review of the decisions of public bodies under this Act and for the resolution of complaints under this Act.

8. "Public body" is defined in s.1(1) of *FIPPA* to include "a local public body". In turn, "local public body" is defined as including "The City of Winnipeg".

9. At first blush, the right of access to records under *FIPPA* is quite expansive. Section 7(1) states that "subject to this Act, an applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant."

10. However, *FIPPA* provides a number of exceptions to the right of a person to obtain records. Some of these exceptions are mandatory, while others may be exercised within the discretion of the public body.

11. For the purposes of this adjudication, four of the exceptions are relevant. First, s.17(1) of *FIPPA* provides that "the head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy." This is a mandatory exception to access.

12. Next, s.23 contains a broad but discretionary exception with respect to advice to a public body. The relevant portion of this provision is as follows:

> **Advice to a public body**
>
> 23(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal
>
> (a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;
>
> (b) consultations or deliberations involving officers or employees of the public body or a minister; …

13. Section 25 provides a discretionary exception that, according to its heading, relates to "disclosure harmful to law enforcement or legal proceedings". The relevant part of this section reads as follows:

> **Disclosure harmful to law enforcement or legal proceedings**
>
> 25(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to
>
> …
>
> (n) be injurious to the conduct of existing or anticipated legal proceedings.

14. Finally, s.27 sets out a discretionary exception for solicitor-client privilege, which states:

> **Solicitor-client privilege**
>
> 27(1) The head of a public body may refuse to disclose to an applicant
>
> (a) information that is subject to solicitor-client privilege;
>
> (b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence; or
>
> (c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney-General or the public body and any other person in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence.

15. *FIPPA* recognizes that, from time to time, persons seeking the disclosure of information will not agree with the application of these exceptions or with other decisions made by the public body in response to their request. Accordingly, *FIPPA* provides a mechanism for resolving such disputes, which will be discussed in greater detail below.

History of FIPPA

16. Prior to January 1, 2011, the dispute resolution mechanism provided for by *FIPPA* involved a complaint to the Ombudsman, with the possibility of an appeal to court. On January 1, 2011, the process by which disputes pursuant to *FIPPA* are resolved changed significantly. That is the date on which amendments to *FIPPA*, passed in 2008, came into force: *The Freedom of Information and Protection of Privacy Amendment Act,* S.M. 2008, c.40.

17. At that point, the option of an appeal to the court was replaced with the option to appeal to the newly created Information and Privacy Adjudicator. In order to understand the role of the Adjudicator, it is important to review dispute resolution under *FIPPA* before and after its creation.

i. The Ombudsman

18. The role of the Ombudsman has remained largely unchanged. Pursuant to s.59(1) of *FIPPA,* a person who requests access to a record and is dissatisfied with the response of the public body can make a complaint to the Ombudsman, an independent officer of the Manitoba Legislative Assembly, who is then required to investigate the complaint.

19. *FIPPA* provides the Ombudsman with extensive investigative powers. First, s.50(1) says that "the Ombudsman has all the powers and protections of a commissioner under Part V of *The Manitoba Evidence Act* when conducting an investigation under this Act."

20. These are significant, court-like powers. For example, s.88(1) of the *Manitoba Evidence Act* (the "*MEA*") gives the Ombudsman the power to summon witnesses and documents:

> **Powers to summon witnesses**
>
> 88(1) The commissioners have the power of summoning any witnesses before them by a subpoena or summons under the hand of any of them, and of requiring those witnesses to give evidence on oath or affirmation, and either orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matter into which they are appointed to inquire. [emphasis added]

21. Further, s.90 of the *MEA* provides that a commissioner may issue warrants for non-appearance by a witness. Commissioners may even cause a witness who refuses to answer questions to be jailed for up to one month pursuant to s.91 of the *MEA*.

22. *FIPPA* goes on to articulate further powers for the Ombudsman in conducting an investigation:

> **Production of records**
>
> 50(2) The Ombudsman may require any record in the custody or under the control of a public body that the Ombudsman considers relevant to an investigation to be produced to the Ombudsman and may examine any information in a record, including personal information.

Records to be produced within 14 days

50(3) A public body shall produce to the Ombudsman within 14 days any record or a copy of a record required under this section, despite any other enactment or any privilege of the law of evidence. [emphasis added]

…

Investigation in private

52 The Ombudsman shall conduct every investigation in private.

…

Privilege

54 Anything said, any information supplied, and any record produced by a person during an investigation by the Ombudsman under this Act is privileged in the same manner as if it were said, supplied or produced in a proceeding in a court.

23. In accordance with s.66(4) of *FIPPA,* if the Ombudsman's report of its investigation contains recommendations, the head of the public body is required to provide a written response in which it either accepts the recommendations or gives reasons as to why the public body refuses to accept the recommendations. It is at this point that the current version of *FIPPA* and the earlier version diverge.

ii. Appeals prior to January 1, 2011

24. Prior to January 1, 2011, if the public body advised that it refused to accept the Ombudsman's recommendations, then the person who requested access to the record could appeal the decision to the Court of Queen's Bench. The Ombudsman also had the right to appeal to the Court if the Ombudsman was of the opinion that "the decision raises a significant issue of statutory interpretation or that an appeal is otherwise clearly in the public interest."

25. In an appeal to the court, the burden was on the head of the public body "to prove that the applicant has no right of access to the record or part of the record." The Court was given powers similar to those given to the Ombudsman to examine records. Section 71 of *FIPPA* provided that:

Court may order production of records

71 Despite any other enactment or any privilege of the law of evidence, for the purpose of an appeal under section 67 or 68 the court may order

production of any record in the custody or under the control of a public body for examination by the court.

26. The court was empowered to dismiss the appeal or to order the disclosure of some or all of the records in dispute. The court's decision was final and binding, and there was no further appeal.

iii. Appeals since January 1, 2011

27. Part 4.1 of *FIPPA* creates the position of the Information and Privacy Adjudicator, an independent officer of the Legislative Assembly. The Adjudicator's role is articulated in s.58.1(2): "…to review – at the request of the Ombudsman under section 66.1 – a decision, act or failure to act of the head of a public body."

28. Although not required by statute, the custom has been that the position of the Information and Privacy Adjudicator is held by the Conflict of Interest Commissioner, the independent officer of the Legislative Assembly who advises members of the Assembly on their obligations under *The Legislative Assembly and Executive Council Conflict of Interest Act,* C.C.S.M. c. L112.

29. Section 66.1(1) of *FIPPA* provides that, when the head of a public body advises the Ombudsman that the public body refuses to accept their recommendations, the Ombudsman may ask the Adjudicator to review the matter.

30. According to s.66.4(4) of *FIPPA,* the Adjudicator "has the same powers as the Ombudsman has under section 50". In other words, the Adjudicator has the powers of a commissioner under the *MEA*, as described above, and has the power to require the production of documents "despite any other enactment or privilege of the law of evidence", as set out in s.50(3) of *FIPPA*.

31. In a review by the Adjudicator, the burden of proof rests with the public body:

> **Burden of proof if access denied**
> 66.7(1) In a review of a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.

32. The Adjudicator is expected to resolve the dispute:

> **Review by adjudicator**
>
> 66.3 On receiving a request from the Ombudsman, the adjudicator must conduct a review of the matter and decide all questions of fact and law arising in the course of the review. [emphasis added]
>
> …

Adjudicator's order

66.8(1) Upon completing a review under section 66.3, the adjudicator must dispose of the issues by making an order under this section.

33. The order of the Adjudicator can, among other things, confirm the decision of the head of the public body not to give access to the record or can require the head of the public body to give access.

34. Pursuant to s.66.9(1) of *FIPPA,* the head of the public body concerned must comply with the Adjudicator's order, subject to an application for judicial review of the order.

Chronology of Events

35. Having described the legal framework for this review, it is necessary to set out the chronology of events that led to this adjudication.

36. On or about September 1, 2017, the Complainant submitted a claim to the City for the damage to her home as a result of the sewer back-up.

37. On November 23, 2017, the City denied the Complainant's claim. On or about April 3, 2018, the Complainant appealed that decision to Cynthia Bauer, the Corporate Risk Manager employed by the City in the Corporate Finance Department.

38. On or about May 7, 2018, Ms. Bauer denied the Complainant's appeal. Then, on or about August 31, 2018, the Complainant appealed Ms. Bauer's decision to Mike Ruta, who was the Chief Financial Officer of the City at the time. Mr. Ruta denied the Complainant's appeal on or about October 9, 2018.

39. As previously mentioned, on August 10, 2018, the Complainant made three requests to the City for access to information. In the request that is the subject matter of this review, the Complainant requested the following:

> I would like to receive all internal City of Winnipeg correspondence regarding my Claim number [claim number removed] and any discussions referencing sewer and [street named removed] Avenue or [street name removed] Street.

40. On September 10, 2018, the City provided a response to the Complainant which indicated that it had located responsive records within both the Water and Waste Department and Corporate Finance's Risk Management branch (the "First Decision"). The City granted the Complainant's request in part, and provided her with 11 pages of documents with some redactions.

41. The City explained that it was withholding the severed information based on ss.23(1)(a) and (b) of *FIPPA,* which are replicated earlier in this decision. The City stated that it was of the view that the severed information "may reveal the substance of advice, opinion, discussion and consultation".

42. On November 9, 2018, the Complainant submitted a complaint to the Ombudsman. The Ombudsman contacted the City on November 22, 2018 to advise them of the complaint and requested information from the City as to how the withheld information would reveal the type of information described under ss. 23(1)(a) and (b) of *FIPPA.*

43. The City responded to the Ombudsman on January 7, 2019. The City stated that the severed information comprised confidential advice and consultations between Risk Management and Wastewater Services employees pertaining to the City's position on the Complainant's claim. The City maintained that ss.23(1)(a) and (b) of *FIPPA* applied because, if disclosed, the severed information would reveal the opinions and analyses obtained by Risk Management from Wastewater Services.

44. The City also broadened its basis for withholding the severed information, indicating that ss.27(1)(a) and (b) of *FIPPA* (i.e. solicitor-client privilege) applied. The City advised that the severed records were created and gathered for investigation and preparation for anticipated litigation and therefore s.27(1)(a) of *FIPPA* applied. Further, the City stated that it was also relying upon s.27(1)(b) of *FIPPA,* as the records were prepared by agents of the public body (Risk Management employees) in relation to a matter involving legal services (i.e. the legal claim investigation and preparation of records in anticipation of litigation).

45. The City further advised that, upon further reflection, it had identified additional responsive records, such that there were now 24 pages of responsive records as opposed to the original 11 pages. The City explained that the additional pages were records of a separate legal claim by another claimant at a different address, but were responsive since the Complainant asked for not only her own records, but also for "any discussions regarding sewer and [street name removed] Avenue or [street name removed] Street". The City noted that the records pertained to a third party's sewer damage-related legal claim and that the third party's personal information could not be reasonably severed from the records, so the City intended to release only the non-personally identifiable header information and refuse access to the remaining information in accordance with s.17 of *FIPPA* (i.e. disclosure harmful to a third party's privacy).

46. The City provided the Ombudsman with copies of the severed records. The Ombudsman observed that, though not stated in its correspondence to the Ombudsman, the City was also relying on s.25(1)(n) of *FIPPA* (i.e. disclosure harmful to law enforcement or legal proceedings).

47. Subsequently, the Ombudsman responded to the City and advised that, if the City now wished to rely on ss. 25(1)(n) and 27(1)(a) and (b) of *FIPPA* in order to refuse access to the records, it must issue a revised access decision to the Complainant to explain its reliance on the additional exceptions.

48. As such, on April 23, 2019, the City provided the Complainant with a revised access decision (the "Second Decision"). The City explained that its access decision remained "access granted in part, with severing", and that the basis for the majority of the severing was ss. 25(1)(n) and 27(1)(a) and (b) of *FIPPA*. The City further stated that it had determined that further responsive records ought to be disclosed to the Complainant and that the responsive records now totalled 24 pages, which were enclosed.

49. The records provided to the Complainant included two letters written by the Complainant to the City. With the exception of these letters, all other records were severed either in whole or in part and no substantive information was released to the Complainant.

50. The City explained that the further responsive records related to a third party and contained personal information of that third party that could not be reasonably severed from the records. Therefore, the City was disclosing only the non-identifiable header information in accordance with s.17 of *FIPPA* (i.e. disclosure harmful to a third party's privacy), as well as s.25(1)(n) (i.e. disclosure harmful to law enforcement or legal proceedings) and ss.27(1)(a) and (b) (i.e. solicitor-client privilege), since the records related to a separate claim.

51. After the City issued the Second Decision, the Complainant advised the Ombudsman that she did not wish to pursue access to the third-party information which the City had severed pursuant to s.17 of *FIPPA*. Accordingly, the Ombudsman's investigation was limited to the City's reliance on ss. 25(1)(n), and 27(1)(a) and (b) of *FIPPA* in order to withhold information from the Complainant.

52. The Ombudsman asked to be provided with unsevered copies of the responsive records so that it could review any severing to assess the City's reliance on the above-noted exceptions. The City declined to provide the Ombudsman with unsevered copies of the records on the basis that doing so would result in a waiver of privilege over the records.

53. On March 16, 2021, the Ombudsman provided a letter and report to the City, in which the Ombudsman found that the exceptions relied upon by the City did not apply. The Ombudsman recommended that the City release the records to the Complainant without severing, except for the personal information of a third party to which the City refused access under s.17 of *FIPPA*.

54. On March 30, 2021, the City wrote to the Ombudsman and advised that it could not accept the recommendation to release the unsevered records to the Complainant.

55. On April 13, 2021, the Ombudsman requested that the Adjudicator review the matter pursuant to ss.66.1(1)(a) and s.66.1(2)(a) of *FIPPA*. The Ombudsman advised that it wished to be a party to the review, as permitted by s.66.5(3) of *FIPPA,* as it considered the matter raised by the review to be an issue of public interest.

Process

56. Pursuant to s.66.4(1) of *FIPPA,* the Adjudicator may make rules of procedure for conducting a review. *FIPPA* goes on to say in s.66.4(2) that "the adjudicator may receive and accept any evidence and other information that he or she considers appropriate, whether on oath or by affidavit or otherwise, and whether or not it is admissible in a court of law."

57. *FIPPA* further states at s.66.5(2) that:

> **Procedure**
>
> 66.5(2) The adjudicator may decide
>
> (a) whether representations are to be made orally or in writing; and
>
> (b) whether a person is entitled to be present during representations made to the adjudicator by another person, or is entitled to have access to those representations or to comment on them.

58. The Adjudicator is to take every reasonable precaution against disclosure of certain information pursuant to s.58.4 of *FIPPA*:

> **Adjudicator to take precautions against disclosing**
>
> 58.4 The adjudicator shall take every reasonable precaution, including receiving representations ex parte, conducting hearings in private and examining records in private, to avoid disclosure
>
> (a) of any information the head of a public body is authorized or required to refuse to disclose under Part 2; or
>
> (b) as to whether information exists, if the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 12(2).

59. Section 66.6(1) of *FIPPA* requires the Adjudicator to complete a review within 90 days after the Adjudicator receives the request from the Ombudsman, unless the Adjudicator extends the period.

60. On April 19, 2021, I asked the City to provide me with a copy of the original request for information it received from the Complainant, together with the 24 pages of records which it provided to her in response, along with the basis for each part that had been severed from those records.

61. Further, I asked the City to provide me with a copy of the same documents in unsevered form, and undertook to review those documents in private in accordance with s.58.4 of *FIPPA*. I noted that *FIPPA* provided me with all of the powers and protections of a commissioner under Part V of the *MEA* and that, if the City wished for me to issue a subpoena for the records in their unsevered form, it should advise me of same.

62. On May 14, 2021, the City advised as follows:

> …it is the City's position that the severed portions of the responsive records are privileged and accordingly, in order to prevent a waiver of such privilege, the City requires a court order before it will disclose such records to…the Adjudicator…
>
> With respect, it is the City's position that a subpoena issued by the Adjudicator pursuant to the *Manitoba Evidence Act* is insufficient to guarantee against a waiver of Privilege.

63. In light of the City's position, I established the following process for this review on May 18, 2021:

(a) The City would provide a sworn affidavit by June 8, 2021, which would not be shared with the other parties and which:

(i) Referred to each redacted section in the responsive documents provided to the Complainant on September 10, 2018 and the revised responsive documents provided to the Complainant on April 23, 2019 by number;

(ii) Provided a statement as to what type of privilege was being claimed with respect to each redacted section in the documents, and why each particular section met the standard for the type of privilege claimed;

(iii) Provided information about each party to the communication, and in particular his or her place of employment and position at such place of employment, and an explanation of the relationship amongst these individuals; and

(iv) Provided a statement as to why any privilege in the documents had not been waived or lost by disclosure to others, in particular with respect to emails that had been sent or copied to third parties outside of the City.

(b) The City would provide its submissions on the following issues to the Adjudicator and the other parties by June 8, 2021:

(i) Does the Adjudicator have the power to compel the City to produce unsevered copies of the documents?

(ii) To the extent that the City claims solicitor-client privilege over the documents, is solicitor-client privilege waived or vitiated if the Adjudicator compels the City to produce unsevered copies of the documents?

(iii) Having regard to s.66.3 of *The Freedom of Information and Protection of Privacy Act,* which provides that the Adjudicator must "decide all questions of fact and law" arising in the course of his review, is it necessary for the Adjudicator to review the unsevered documents in order to perform this function?

(c) The Ombudsman, and the Complainant, if she wished, would provide their submissions on the above-noted issues to the Adjudicator and the other parties by June 22, 2021.

64. Accordingly, on June 8, 2021, the City provided an Affidavit of Cynthia Bauer (the "First Bauer Affidavit"), the Corporate Risk Manager for the City. The City also provided an Affidavit of Denise Jones (the "Jones Affidavit"), the Corporate Access and Privacy Officer employed by the City. As well, the City provided written submissions on the issues set out above.

65. On June 22, 2021, the Ombudsman provided written submissions on the above issues.

66. Following my review of the materials provided by the City, on June 30, 2021, I asked the City to answer some further questions regarding the City's claims process by way of affidavit evidence.

67. As the Ombudsman requested that I review this matter on April 13, 2021, the 90-day period for this review was set to expire on July 12, 2021. Given the complexity of the issues involved in this review and the fact that I had requested further information from the City on June 30, 2021, I advised the parties at that time that my review would not be completed by July 12, 2021 and that I expected the review to be completed by September 30, 2021, but that a further extension might be required.

68. On July 26, 2021, the City provided a further Affidavit of Cynthia Bauer (the "Second Bauer Affidavit") in response to my request for further information. This affidavit was shared with all parties.

69. That same day, I provided all parties with the opportunity to make final submissions on any matter related to this adjudication that they had not previously addressed.

70. On August 16, 2021, the City provided final submissions and the Ombudsman did the same on August 30, 2021. The Complainant did not provide any submissions in this matter.

71. On September 28, 2021, I wrote to the parties and advised them that I was in the process of writing my reasons and that, due to the lengthy submissions provided by the parties and the complexity of the issues raised in this review, I required a further extension to October 31, 2021 to complete my review.

72. Before setting out the positions of the parties on this review, I wish to address the issue of the First Bauer Affidavit and the Jones Affidavit. As stated above, I had advised the City on May 18, 2021 that the affidavits they provided would not be shared with the other parties. This was done to encourage candor on the part of the City, and to ensure that any privileged information was not inadvertently shared with the other parties, in keeping with s.58.4 of *FIPPA*.

73. However, following my review of these affidavits, it appeared to me that the affidavits did not contain any information that might breach privilege or that was otherwise necessary to preclude the other parties from viewing.

74. As such, on June 24, 2021, I asked the City whether they were agreeable to sharing the affidavits with the Ombudsman and the Complainant. The City responded and requested that the affidavits not be shared with the other parties. On June 25, 2021, I confirmed that the City's affidavits would not be shared with the other parties. However, it is necessary to review the contents of these affidavits in this decision in order to meaningfully address the central issues and concerns raised by the parties in this adjudication: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 127. As such, this decision will refer to these affidavits in some detail.

Position of the Parties

The City

75. As mentioned above, the City provided three affidavits in the course of this adjudication. The First Bauer Affidavit explained that the City's Claims Branch is a part of the Risk Management Division, Corporate Finance Department. It went on to say:

> …The Claims Branch administers an alternative dispute resolution process for individuals who believe they have a claim against the City for property damage or bodily injury that would otherwise proceed directly to litigation. Because claims are precursors to litigation proceedings, all claims are processed in contemplation of litigation.

76. The First Bauer Affidavit further stated that:

> In administering the claims process, the Claims Branch gathers information to assess the potential liability of the City in relation to a claim and regularly consults with Legal Services regarding same. The Claims Branch considers legal issues, including causes of action, contributory negligence, duty of care, causation, damage assessment, statutory defences, and the like.

77. The affidavit said that "if there are unique circumstances that warrant Legal Services' involvement, or if a claimant initiates litigation, Legal Services is provided with the entire claim file and takes over the matter on behalf of the City."

78. Further, Ms. Bauer explained that, if the City denies a claim, a claimant has the option to appeal the decision to her as Corporate Risk Manager, and then to the City's Chief Financial Officer. As previously indicated, that is what occurred in this case.

79. Ms. Bauer indicated that she had "reviewed the history of claims submitted to the Claims Branch over the last five years and determined that from 2016 to date, there have been approximately 7,371 claims filed. Of the claims filed, 40 of those resulted in appeals to me and just three were appealed to the CFO."

80. I requested further information from the City with respect to the outcomes of the 7,371 claims. In response, the City provided the Second Bauer Affidavit. In this affidavit, Ms. Bauer stated that she had reviewed Claims Branch records, and believed that:

(a) 1,395 claims were settled;

(b) 5,976 claims were denied;

(c) 54 claims resulted in a Statement of Claim being filed;

(d) Seven appeals to either herself or the Chief Financial Officer were allowed; and

(e) None of the appeals resulted in a Statement of Claim being filed.

81. In written submissions, the City explained that the City's claims process is "intended to divert matters away from the traditional court process." The City further stated that the claims process also provides claimants with an opportunity to satisfy their legislative notice requirements contained in ss. 489-491 of *The City of Winnipeg Charter*, S.M. 2002, c. 39 (the "*City Charter*").

82. The City says that in many cases, pursuant to the *City Charter,* a notice of a claim is a prerequisite for an action against the City*,* and therefore the City considers such notice as a first step in an action and contemplates that litigation could follow. I asked the City for

submissions on which provisions of the *City Charter* applied in this case, but the City did not elaborate further.

83. The City submits that the reference to "solicitor-client privilege" in s.27 of FIPPA includes "litigation privilege". The City cites the Supreme Court of Canada's decision in *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 ("*Lizotte"*) in support of this submission, which will be discussed in greater detail below.

84. The City takes the position that the Adjudicator is not in a position to compel production of the unsevered documents in this matter, as *FIPPA* does not contain clear, unambiguous statutory language. The City relies on *Alberta (Information and Privacy Commissioner) v University of Calgary,* 2016 SCC 53 ("*Alberta (Information and Privacy Commissioner")*, in support of this position. This decision will also be discussed later in these reasons.

85. The City asserts that, because *FIPPA* does not contain clear, unambiguous language, disclosure of its unsevered records to the Adjudicator could result in a waiver of privilege, and relies on the *Alberta (Information and Privacy Commissioner)* decision in support of this position. The City stated that it was prepared to provide its unsevered records to the Adjudicator if a court order with conditions was obtained, as doing so would, in its view, ensure that privilege was not waived.

86. Further, the City submits that the Adjudicator is not required to review the unsevered records in order to determine whether they ought to be disclosed to the Complainant, as the City has provided sufficient evidence to support its assertions of litigation privilege.

87. The evidence provided by the City in support of this position is the Jones Affidavit, which contains a summary of each of the ten responsive records that contain redactions. There are a total of ten redactions which I will summarize below with reference to their location in the City's First Decision and Second Decision. As I will explain in more detail later, I am only tasked with determining with whether the Complainant is entitled to the information contained in six of these redactions.

88. The first redaction is found at page 3 of the First Decision and page 16 of the Second decision. It contains a Microsoft Outlook Task requested on September 19, 2017 by Luis Almeida to Travis Stephenson. The Outlook Task contains two attachments: an e-mail from Samantha Jones to WWDClaims@winnipeg.ca, and a memorandum dated September 18, 2017 from Samantha Jones requesting information to assist the Claims Branch to conduct a legal analysis of the Complainant's claim.

89. Mr. Almeida is a former employee of the City, who was a Senior Project Engineer in the Water and Waste Department at the relevant time. Mr. Stephenson is a current employee in the Water and Waste Department, whose title at the material time was Technologist 2. Mr. Stephenson reported to Mr. Almeida at the time.

90. The City asserts litigation privilege with respect to the first redaction on the basis that litigation was contemplated when the record was created and sent to WWDClaims@winnipeg.ca as a result of the Complainant's claim. Ms. Jones' evidence was that Samantha Jones' memorandum was created "to investigate and obtain information relevant to [the Complainant's] claim in order to conduct legal analysis about the merits of the claim, and would not have existed without [the Complainant] first submitting a claim alleging property damage." The City also relies on s.25(1)(n) of *FIPPA* as the basis for this redaction.

91. The second redaction is located at pages 4-5 of the First Decision and pages 20-21 of the Second Decision, and contains notations from Water and Waste to the memorandum of Samantha Jones. At the time, Samantha Jones was a Claims Adjuster in the Risk Management Division of the Corporate Finance Department. The Jones Affidavit states that "the notations include an analysis of the facts in contemplation of [the Complainant's] claim".

92. The City claims litigation privilege over redaction 2 on the basis that "the redacted content reflects the City's analysis of the facts and discussion of the merits of [the Complainant's] claim." The City also relies on s.25(1)(n) of *FIPPA* as the basis for this redaction.

93. Redaction 3 is the first redaction on page 6 of the First Decision, and page 25 of the Second Decision. It contains an e-mail from Mr. Stephenson to Mr. Almeida dated April 17, 2018. The City says that the e-mail contains comments and analysis regarding the Complainant's appeal to the Corporate Risk Manager. The Jones Affidavit asserts litigation privilege over this redaction "because the email was prepared for the purpose of deliberating and assessing [the Complainant's] claim and a discussion of her subsequent appeal". The City also relies on s.25(1)(n) of *FIPPA* as the basis for this redaction.

94. Redaction 4 is found at pages 6-7 of the First Decision, and pages 5-6, 22-23, and 25-26 of the Second Decision. It relates to an e-mail dated October 30, 2017 from Mr. Stephenson to Samantha Jones and FINClaim@winnipeg.ca, which is a general e-mail address within the Risk Management Division that is used for the purpose of receiving claims information. The e-mail is copied to Chris Carroll, Susan Lambert, Luis Almeida, Tamara Towse, Tyler Phillips, and WWDClaims@winnipeg.ca.

95. At the time, Mr. Carroll was the Manager of Wastewater Services. Ms. Lambert was an Engineer in Field Service Operations of the Water and Waste Department. Ms. Towse was the Executive Assistant to the Director of the Water and Waste Department, and Mr. Phillips was an Engineer in Training.

96. The City asserts that the redacted portion of the e-mail is subject to litigation privilege as it "contains a report of information prepared for the Claims Branch in response to [the Complainant's] claim". The City also relies on s.25(1)(n) of *FIPPA* as the basis for this redaction.

97. Redaction 5 is found at pages 8-9 of both the First Decision and the Second Decision. It contains notes entered into the Risk Management Division's CSC Risk Master Accelerator database on April 23, 2018 by Samantha Jones with respect to a call she had with Mr. Stephenson in April of 2018.

98. The City claims litigation privilege over Samantha Jones' notes because "they capture a conversation between City employees which took place for the sole purpose of assessing the merits of [the Complainant's] claim, and in contemplation of litigation."

99. The sixth redaction is found at pages 4, 7, 15, 18, 19, and 24 of the Second Decision, and is in relation to a memorandum dated September 18, 2017 from Samantha Jones to the Wastewater Division of the Water and Waste Department. This is the same memorandum as contained in the Outlook Task in redaction one.

100. The Jones Affidavit states that litigation privilege applies to this redaction because:

> …litigation was contemplated when the memorandum was created, and for the purpose of gathering information to conduct a legal analysis about the merits of [the Complainant's] claim. The memorandum would not have existed without [the Complainant] submitting her claim alleging property damage. The severed portions of the memorandum reveal information about the City's assessment of [the Complainant's] claim.

101. The City also relies on s.25(1)(n) of *FIPPA* as the basis for this redaction.

102. The City asserts that, in addition to litigation privilege and s.25(1)(n) of *FIPPA,* the basis for redactions 7, 8, 9, and 10 is s.17(1) of *FIPPA,* as these redactions contain information that, if disclosed, would amount to an unreasonable invasion of a third party's privacy.

103. The Complainant advised the Ombudsman that she did not wish to pursue access to third party personal information and I am not asked to make a decision with respect to the propriety of the City's reliance on s.17(1) of *FIPPA.* As such, redactions 7, 8, 9, and 10 will not be considered in these reasons.

104. The City says that its reliance on litigation privilege as the basis for redactions 1-6 is justified because the employees who generated the records at issue did so in contemplation of litigation which was triggered by the Complainant's claim and by her subsequent appeal to Ms. Bauer. The City further submits that the redactions contain records which were prepared to evaluate the City's legal position in relation to the Complainant's claim.

105. The City submits that its reliance on litigation privilege must be considered in the alternative dispute resolution context of the City's claims process and cites *Kaymar Rehabilitation Inc. v Champlain Community Care Access Centre,* 2013 ONSC 1754 ("*Kaymar"*), for the principle that litigation privilege in the context of other forms of

dispute resolution should also be protected. In sum, the City says that the privilege asserted in this case must be protected and is essential to the protection of the City's claims process.

106. With respect to its reliance on s.25(1)(n) of *FIPPA* for redactions 1-6, the City submits that the potential for legal proceedings continues to exist, and therefore disclosure of the severed records cannot occur until such time that the potential for litigation no longer exists. To do otherwise, in the City's submission, would be injurious to anticipated legal proceedings and undermine the City's ability to rely on litigation privilege in such proceedings.

The Ombudsman

107. The Ombudsman says that, pursuant to *FIPPA,* the Adjudicator does have the power to compel public bodies to produce unsevered copies of the records to the Adjudicator in order to determine whether a public body's reliance on an exception to disclosure under *FIPPA* is justified. The Ombudsman cites a number of provisions of *FIPPA* in support of this submission, including ss. 66.4(4), 50(1), 50(2), and 50(3), which were discussed earlier in these reasons. The Ombudsman also notes the powers of a commissioner pursuant to the *MEA,* which were previously referenced in this decision.

108. The Ombudsman further submits that there are a number of protections within *FIPPA* such that solicitor-client privilege is not waived where a public body produces unsevered documentation to the Ombudsman or the Adjudicator. For example, s.58.6 of *FIPPA* states that:

> **Information provided under qualified privilege**
> 58.6 Anything said, any information supplied, and any record produced by a person during a review by the adjudicator under this Act is privileged in the same manner as if it were said, supplied or produced in a proceeding in a court.

109. The Ombudsman also references the decision of McLachlin J., as she then was, in *S. & K. Processors Limited v Campbell Avenue Herring Producers Limited*, 1983 CarswellBC 147 ("*S. & K. Processors"*), for the principle that, where production of a document is required under statutory authority, solicitor-client privilege over the document is not lost.

110. In response to the City's reliance on the *Alberta (Information and Privacy Commissioner)* decision, the Ombudsman cites the decision of *British Columbia (Ministry of Attorney General), Re* 2019 BCIPC 23 for the proposition that it may be appropriate for the Adjudicator to inspect documents if there are doubts about a public body's claim of solicitor-client privilege and it is necessary to do so in order to fairly decide whether records are privileged.

111. The Ombudsman says there is doubt as to whether the City has properly asserted privilege over the documents at issue in this matter. The Ombudsman points out that the Complainant

has given no indication to the City that she has either retained a lawyer or intends to proceed with litigation. The Ombudsman submits that the City assesses the issue of litigation privilege on a "blanket basis" following its receipt of a Notice of Claim.

112. Further, the Ombudsman submits that the City's claims process is not statutorily mandated under the *City Charter* and is an internal dispute resolution process. As such, the claims process is distinguishable from statutory processes such as Small Claims Court or an administrative tribunal that is statutorily constituted. Therefore, the principles from *Kaymar* do not apply and litigation privilege is not applicable to the City's claims process.

113. The Ombudsman notes that the percentage of claims to the City that result in a Statement of Claim being filed is less than 1% and says that therefore litigation cannot be reasonably apprehended as soon as a claim is filed with the City's Claims Branch.

114. The Ombudsman suggests that the Complainant's claim to the City does not fall within the purview of s.491 of the *City Charter,* which deals with public facilities. The Ombudsman believes that the applicable section for a claim related to damage to property from sewer works is s.493(1) of the *City Charter,* which does not require a notice of claim to be filed as a prerequisite to bringing an action against the City.

115. The Ombudsman submits that it is necessary for the Adjudicator to review the unsevered records in order to satisfy the onus upon the City as set out in s.66.7(1) of *FIPPA,* which was reproduced earlier in these reasons.

116. With respect to the City's reliance on s.25(1)(n) of *FIPPA,* the Ombudsman says that there are no existing legal proceedings and there is no evidence of anticipated legal proceedings simply because the Complainant has filed a Notice of Claim with the City.

117. The Ombudsman also points out that s.25(1)(n) requires the head of a public body to establish that disclosure of information "could reasonably be expected to be injurious" to the conduct of existing or anticipated legal proceedings, and that the City has not provided such evidence in this case.

Issues

118. The issues on this review are as follows:

(a) What is the distinction between solicitor-client privilege and litigation privilege?

(b) What is the distinction between solicitor-client privilege and litigation privilege in the context of *FIPPA*?

(c) Does the Adjudicator have the power to compel the City to produce unsevered copies of the documents?

(d) Is it necessary for the Adjudicator to review the unsevered documents in order to decide this review?

(e) Should the Adjudicator order the City to produce the unsevered documents to the Complainant?

Analysis

(a) What is the distinction between solicitor-client privilege and litigation privilege?

119. This case is about litigation privilege. However, *FIPPA* does not contain the words "litigation privilege", but sets out a discretionary exception to disclosure in s.27(1) for solicitor-client privilege. As such, it is important to discuss these two forms of privilege.

120. As the Supreme Court of Canada recognized in *Blank v Canada (Minister of Justice),* 2006 SCC 39 ("*Blank*"), solicitor-client privilege and litigation privilege are related, yet distinct concepts. There, Justice Fish described these two forms of privilege as follows:

> 26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.
>
> 27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

121. Fish J. went on to say that the purpose of litigation privilege is to "create a 'zone of privacy' in relation to pending or apprehended litigation." He confirmed that, once the litigation has

ended, so does the litigation privilege, unless the parties remain involved in closely related litigation. In contrast, solicitor-client privilege is permanent in duration.

122. After *Blank, supra,* the Supreme Court explored the concepts of solicitor-client privilege and litigation privilege again in *Lizotte, supra.* There, the Court stated that:

> [64] There is of course no question that litigation privilege does not have the same status as solicitor-client privilege and that the former is less absolute than the latter. It is also clear that these two privileges, even though they may sometimes apply to the same documents, are conceptually distinct…

123. However, the Court went on to say that, like solicitor-client privilege, litigation privilege is "fundamental to the proper functioning of our legal system." The court said:

> … As a number of courts have already pointed out, the Canadian justice system promotes the search for truth by allowing the parties to put their best cases before the court, thereby enabling the court to reach a decision with the best information possible: *Penetanguishene Mental Health Centre v. Ontario*, 2010 ONCA 197, 260 O.A.C. 125, at para. 39; *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494, 100 C.P.C. (6th) 70, at para. 15. The parties' ability to confidently develop strategies knowing that they cannot be compelled to disclose them is essential to the effectiveness of this process. In Quebec, as in the rest of the country, litigation privilege is therefore inextricably linked to certain founding values and is of fundamental importance. That is a sufficient basis for concluding that litigation privilege, like solicitor-client privilege, cannot be abrogated by inference and that clear, explicit and unequivocal language is required in order to lift it.

124. In sum, it is well-established that solicitor-client privilege and litigation privilege are different concepts. Although litigation privilege does not have the same status as solicitor-client privilege, it has been recognized that litigation privilege is of fundamental importance to the proper operation of the legal system in Canada.

(b) What is the distinction between solicitor-client privilege and litigation privilege in the context of *FIPPA?*

125. As previously mentioned, *FIPPA* does not expressly recognize "litigation privilege" as an exception to disclosure. Rather, s.27(1) of *FIPPA* sets out a discretionary exception to disclosure for "solicitor-client privilege". What role, then, does litigation privilege play within the framework of *FIPPA*?

126. To assist government officials and government agencies comply with their responsibilities under *FIPPA,* the Manitoba Government has published a "*FIPPA* Resource Manual" (the

"Manual"). Chapter 5 of the Manual provides information on exceptions to disclosure, and states that "solicitor-client privilege" within the meaning of s.27(1) of *FIPPA* includes both "legal advice privilege" and "litigation privilege".

127. The Manual goes on to say that, for the purposes of s.27(1) of *FIPPA,* "solicitor-client privilege" includes:

- all communications, verbal or written, of a confidential character between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance, including the legal advisor's working papers which are directly related to the legal advice or assistance; this branch of the privilege applies whether or not litigation is contemplated; ('legal advice or solicitor-client communication privilege'); and

- papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated ('litigation privilege').

128. The Manual relies on *Blank, supra,* in support of this statement. There, the Supreme Court considered litigation privilege in the context of the *Access to Information Act,* R.S.C. 1985, c.A-1. At the time, section 23 of that legislation referenced solicitor-client privilege, but litigation privilege was not mentioned anywhere in the statute.

129. In finding that the reference to solicitor-client privilege was intended to include litigation privilege, the Court said:

> 4 As a matter of statutory interpretation, I would proceed on the same basis. The Act was adopted nearly a quarter-century ago. It was not uncommon at the time to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the Act. And it explains as well why, despite the Act's silence in this regard, I agree with the parties and the courts below that the *Access Act* has not deprived the government of the protection previously afforded to it by the legal advice privilege *and* the litigation privilege: In interpreting and applying the Act, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

130. Similarly, *FIPPA* does not make separate reference to litigation privilege. Accordingly, on the basis of the Supreme Court's decision in *Blank,* I accept that "solicitor-client privilege" within the meaning of s.27(1) of *FIPPA* includes litigation privilege. In other words, if the head of a public body can establish that litigation privilege attaches to a piece of information, the head may refuse to disclose the information to an applicant on that basis.

(c) Does the Adjudicator have the power to compel the City to produce unsevered copies of the documents?

131. As stated above, the City takes the position that the severed portions of the responsive records are privileged and would not disclose them to me without a court order.

132. I decline to accept the City's invitation to obtain a court order to compel them to disclose the unsevered documents to me. As set out above, the role of the Adjudicator was created in January of 2011 to replace the option of an appeal to the court from a decision of the Ombudsman. As such, the creation of the role of the Adjudicator demonstrates that the Legislature intended to establish an expedited process for the review of these matters and to divert these matters away from the court system.

133. Further, the Adjudicator is required by virtue of s.66.3 of *FIPPA* to "decide all questions of fact and law" arising in the course of a review. The Adjudicator is also required to "dispose of the issues" upon completing a review in accordance with s.66.8(1) of *FIPPA*. For the Adjudicator to seek a court order to compel the City to provide unsevered records would be for the Adjudicator to pass off these responsibilities to the court. Not only would doing so be inconsistent with the mandatory language in ss.66.3 and 66.8(1) of *FIPPA*, it would be inconsistent with the spirit and intent of this legislation as well.

134. Therefore, I must determine whether I have the authority under *FIPPA* to compel the City to provide me with unsevered copies of the documents.

135. As previously discussed, s.50 of *FIPPA* provides the Ombudsman with a number of powers when conducting an investigation. Section 50(2) says that the Ombudsman "may require any record in the custody or under the control of a public body that the Ombudsman considers relevant to be produced to the Ombudsman." Section 50(3) requires a public body to produce such a record to the Ombudsman within 14 days, "despite any other enactment or any privilege of the law of evidence." The Adjudicator has these same powers by virtue of s.66.4(4) of *FIPPA,* which is quoted earlier in these reasons.

136. The Supreme Court has discussed the power of a Privacy Commissioner to compel the production of documents in two cases. In *Canada (Privacy Commissioner) v Blood Tribe,* 2008 SCC 44 ("*Blood Tribe*"), the Supreme Court dealt with the Privacy Commissioner's powers under s.12 of the *Personal Information Protection and Electronic Documents Act ("PIPEDA"),* which empowered the Commissioner to compel the production of any records that the Commissioner considered necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and "to receive and accept any evidence and other information…whether or not it is or would be admissible in a court of law."

137. There, an employee was dismissed from her job and requested access to her personal employment file. The employer denied the request and the employee filed a complaint

with the Privacy Commissioner. The Commissioner requested the records from the employer, who provided all records except for those over which the employer asserted solicitor-client privilege by way of affidavit. The Commissioner then ordered production of the privileged documents in accordance with s.12 of *PIPEDA*.

138. The Commissioner argued that s.12 of *PIPEDA* granted her court-like powers, and said that the Commissioner must verify claims of solicitor-client privilege just as courts are required to do. In rejecting the analogy between the Commissioner and a court and in finding that s.12 of *PIPEDA* did not permit the Commissioner to order production of records over which solicitor-client privilege was claimed, the Court stated that the Commissioner was "an administrative investigator" and not an adjudicator. The Court went on to say that:

> [22] In any event, a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power. [emphasis added]

139. The Court also noted that a major distinction between the Privacy Commissioner and a court was that the Privacy Commissioner may become adverse in interest to the party whose documents the Commissioner wished to access, which was not true for a court. The Commissioner could take the employer to court, but could also decide to share compelled information with prosecutorial authorities pursuant to s.20(5) of *PIPEDA*.

140. The Court also stated that "even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue."

141. *Blood Tribe, supra,* is distinguishable from the matter before me. First, that case dealt with solicitor-client privilege, whereas the present case is about litigation privilege.

142. Further, the Court in *Blood Tribe* was determining the powers of a Privacy Commissioner, not an Adjudicator. The Adjudicator is an independent decision maker who cannot become adverse in interest to a public body. The Adjudicator is empowered by *FIPPA* to decide questions of law and fact and must dispose of the issues on a review. Therefore, unlike the Privacy Commissioner, the Adjudicator has the "power to adjudicate disputed claims over legal rights".

143. Finally, it is notable that s.55(4) of *FIPPA* provides the Ombudsman with the authority to disclose information to prosecutorial authorities, similar to how s.20(5) of *PIPEDA* provides the Privacy Commissioner with the same authority. However, the Adjudicator is not given this power under *FIPPA*.

144. In the subsequent decision of *Alberta (Information and Privacy Commissioner), supra,* the Supreme Court considered whether s.56 of Alberta's *Freedom of Information and Protection and Privacy Act* ("*FOIPP*") permitted the Commissioner to review documents over which a public body asserted solicitor-client privilege.

145. Sections 56(2) and (3) of *FOIPP* read:

> (2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.
> (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2). [emphasis added]

146. In that case, the University of Calgary was sued by a former employee. The former employee made a request for access to information pursuant to *FOIPP* for records about her that were in the University's possession. The University provided some records in response to the request, but asserted solicitor-client privilege over others. The former employee then brought an application under *FOIPP* for production of the withheld records.

147. The Commissioner then conducted an inquiry on the matter. The University declined to provide a copy of the withheld records to the Commissioner and provided a sworn affidavit from its Access and Privacy Coordinator which stated that the University was claiming solicitor-client privilege over the records. Subsequently, the Commissioner asked the University to substantiate its claim of solicitor-client privilege either by providing an unsevered copy of the records or providing additional information regarding the records at issue.

148. The University did not comply with this request, and the Commissioner issued a Notice to Produce Records in accordance with s.56(3) of *FOIPP*. The University did not comply, and sought judicial review of the Commission's decision.

149. In considering whether s.56(3) allowed the Commissioner to review the unsevered documents, the Court stated that:

> [28] To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so. The privilege cannot be set aside by inference (*Blood Tribe*, at para. 11; *Pritchard v. Ontario (Human Rights*

> *Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, at para. 33; *Lavallee*, at para. 18)…

150. The Court went on to say that:

> [34] It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice (*Blood Tribe*, at para. 9). Lawyers have the unique role of providing advice to clients within a complex legal system (*McClure*, at para. 2). Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive (see *Smith v. Jones*, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455, at para. 46). It is therefore in the public interest to protect solicitor-client privilege. For this reason, "privilege is jealously guarded and should only be set aside in the most unusual circumstances" (*Pritchard*, at para. 17).

151. Justice Côté noted the Court's repeated affirmation that "solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary."

152. The Court found that the phrase "privilege of the law of evidence" in s.56(3) of *FOIPP* was not "sufficiently clear, explicit, and unequivocal to evince legislative intent to set aside solicitor-client privilege."

153. Moreover, the Court looked at s.27(1) of *FOIPP,* which states that the head of a public body may refuse to disclose "information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege". The Court found that the use of the term "solicitor-client privilege" meant that the legislature had turned its mind to the specific issue of solicitor-client privilege and was alive to its significance. The Court said that, had the legislature intended s.56(3) to apply to documents over which solicitor-client privilege was asserted, the legislature could have used clear and unequivocal language as it did in s.27(1).

154. The Court concluded by saying that, even if the language of s.56(3) of *FOIPP* did clearly demonstrate legislative intent to set aside solicitor-client privilege, it was not appropriate for the Commissioner to order production. The Court noted that courts will decline to review solicitor-client documents to assess whether privilege is properly claimed unless there is evidence or argument which establishes the necessity of doing so in order to fairly decide the issue, as the Court had previously held in *Blood Tribe, supra*. There was no evidence or argument to suggest that solicitor-client privilege had been falsely claimed by the University.

155. While the language of ss.27(1) and 56(3) of *FOIPP* is similar to that contained in ss. 27(1) and 50(3) of *FIPPA,* there are some clear differences between the facts in *Alberta (Information and Privacy Commissioner), supra,* and the matter before me.

156. For one, as with *Blood Tribe*, *supra, Alberta (Information and Privacy Commissioner),* dealt with solicitor-client privilege as opposed to litigation privilege. Further, the case involved a consideration of the powers of an Information and Privacy Commissioner rather than an Information and Privacy Adjudicator. In fact, the Court stated:

> [36] In this regard, it is noteworthy that the Commissioner is not an impartial adjudicator of the same nature as a court. *FOIPP* empowers the Commissioner to exercise both adjudicative and investigatory functions. Unlike a court, the Commissioner can become adverse in interest to a public body. The Commissioner may take a public body to court and become a party in litigation against a public body that refuses to disclose information. These features of the Commissioner's powers further indicate that disclosure to the Commissioner is itself an infringement of solicitor-client privilege. [emphasis added]

157. In contrast, under *FIPPA,* the Adjudicator is just that – an adjudicator. The Adjudicator does not have investigatory powers, as those powers lie with the Ombudsman.

158. Given the clear differences between the matter before me and the Supreme Court's decisions in *Blood Tribe* and *Alberta (Information and Privacy Commissioner), supra,* neither case is dispositive of the issue of whether I have the power under *FIPPA* to compel the City to produce the unsevered records for my review. I find that the language of s.50 of *FIPPA* and s.88(1) of the *MEA,* as well as my role as an impartial Adjudicator and my attendant responsibilities under *FIPPA,* provide me with the authority to order the City to provide me with the unsevered records for my review. To do so would not result in a waiver of privilege based on McLachlin J.'s reasons in *S. & K. Processors, supra.*

159. The next question to be determined then is whether it is necessary for me to exercise this power in this case.

(d) Is it necessary for the Adjudicator to review the unsevered documents in order to decide the issues on this review?

160. Notwithstanding the fact that I have the authority under *FIPPA* to compel the City to produce the unsevered records for my review, I am satisfied that I do not need to exercise that power in this case.

161. In *Blood Tribe* and *Alberta (Information and Privacy Commissioner), supra,* the Court emphasized that the power to review documents over which solicitor-client privilege is

asserted in order to determine the validity of such an assertion must be exercised sparingly and only where evidence or argument establishes that it is necessary to do so.

162. While *Blood Tribe* and *Alberta (Information and Privacy Commissioner), supra,* discussed the sanctity of solicitor-client privilege as opposed to litigation privilege, I recognize that litigation privilege, though it does not enjoy the same status as solicitor-client privilege, has been said to be of fundamental importance to the Canadian legal system. Therefore, I am satisfied that I should only order the City to produce the records over which they claim litigation privilege for my review if necessary for the purposes of deciding the issues on this review.

163. In this case, the City has provided evidence by way of the Jones Affidavit to support its claims of litigation privilege, as was done in the *Blood Tribe* and *Alberta (Information and Privacy Commissioner)* decisions. The Jones Affidavit provides a description of the each of the redacted documents, information about each party to the communications at issue, as well as a statement as to why each particular redaction meets the standard for the type of privilege being asserted.

164. I am satisfied that I can decide whether the City has established that the Complainant has no right of access to the unsevered records on the basis of the information provided in the Jones Affidavit. While the Ombudsman is correct in noting that the City bears the onus of establishing that the Complainant has no right of access to the unsevered records pursuant to s.66.7(1) of *FIPPA*, the City was provided with an opportunity to provide me with the unsevered records for my review and declined to do so. The City takes the position that I can decide whether it has met its onus on the basis of the affidavit evidence it has provided, and, accordingly, I will now go on to make that determination.

(e) Should the Adjudicator order the City to produce the unsevered documents to the Complainant?

165. The final question to be determined on this review is whether the City should be ordered to produce the unsevered documents to the Complainant. In other words, has the City met its onus under s.66.7(1) of *FIPPA* to prove that the Complainant has no right of access to the unsevered records?

Litigation Privilege – s.27(1) of FIPPA

166. The first basis upon which the City says that the Complainant has no right of access to the unsevered records is litigation privilege pursuant to s.27(1) of *FIPPA.* The City relies upon both ss.27(1)(a) and (b).

Section 27(1)(a)

167. This provision provides an exception to disclosure for "information that is subject to solicitor-client privilege". As indicated above, the reference to solicitor-client privilege in *FIPPA* includes litigation privilege.

168. In *Blank, supra,* the Supreme Court addressed the question of when litigation privilege should apply to a document. The Court noted a spectrum of possible standards: (1) when a document is created for the substantial purpose of litigation, (2) when a document is created for the dominant purpose of litigation, or (3) when a document is created for the sole purpose of litigation. Ultimately, the Court determined that the "dominant purpose test" should be used to determine whether litigation privilege applies to a given document.

169. In doing so, the Court stated:

> 60 I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure…[emphasis added]

170. Later, in *Lizotte*, *supra,* the Court confirmed that, for litigation privilege to apply, there must be a document that is created "for the dominant purpose of litigation", and the litigation in question or related litigation must be pending or "may reasonably be apprehended". Both requirements must be satisfied in order for privilege to attach to a document.

171. The "dominant purpose" test has been the subject of much judicial consideration. In *Man-Shield Construction Inc. et al. v Renaissance Station Inc. et al.,* 2014 MBQB 101, Associate Chief Justice Perlmutter stated that, for litigation privilege to apply to a document, "assisting in litigation must be the dominant purpose and not only one possible purpose. It is not sufficient if the litigation is but one of several purposes."

172. The parties have provided authorities on the issue of when litigation is reasonably contemplated. The Ombudsman provided *Celli v White,* 2010 BCSC 313, where the court cited *Hamalainen v Sippola,* 1991 CanLII (BCCA), which was submitted by the City. In that case, the court held that "litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it."

173. I do not accept the City's assertion that "because claims are precursors to litigation proceedings, all claims are processed in contemplation of litigation." As set out in the First Bauer Affidavit, after a claimant submits a claim to the City, the City investigates and gathers information in order to consider the claim. If the City denies a claim, then the claimant has the option to appeal that decision to the Corporate Risk Manager (Ms. Bauer). If Ms. Bauer denies the appeal, then the claimant may appeal to the City's Chief Financial Officer.

174. Therefore, there are three steps within the City's claims process that are available to a claimant prior to initiating litigation against the City: (1) filing a claim initially, (2) an appeal to the Corporate Risk Manager, and (3) an appeal to the Chief Financial Officer.

175. In light of the fact that there are three steps available to a claimant within the City's claims process, a reasonable person possessed of all pertinent information would not conclude that a claim submitted to the City would be unlikely to be resolved without litigation. This is supported by Ms. Bauer's evidence that, of the 7,371 claims filed with the City since 2016, only 54 resulted in litigation being initiated against the City. It cannot be said that, simply because an individual files a claim with the City, litigation is a reasonable prospect.

176. The City relies on *Kaymar, supra,* in support of its submission that litigation privilege in the context of other forms of dispute resolution ought to be protected. However, I do not accept the City's characterization of its claims process as an "alternative dispute resolution process". First, there is no statutory basis for the claims process. Second, unlike the alternative dispute resolution processes of mediation and arbitration, the City's claims process does not involve an impartial third party to assist in resolving a claim. Rather, it involves City employees reviewing a claim and making a determination on the claim.

177. Further, I find that *Kaymar, supra,* is distinguishable from the present case, as, it deals with the application of litigation privilege in the context of courts or administrative tribunals. The City's claims process involves neither and, as previously stated, does not involve an adjudicative function.

178. In assessing the City's assertion of privilege over the documents in the present case, I must ask when would a reasonable person conclude that it is unlikely that the Complainant's claim to the City would be resolved without litigation? The chronology of events in this case and the dates of the records at issue are critical to a determination as to whether litigation privilege applies to the documents at issue.

179. The Complainant submitted her claim to the City on September 1, 2017. Her claim was denied on November 23, 2017. On or about April 3, 2018, the Complainant appealed that decision to Ms. Bauer, who denied the appeal on or about May 7, 2018. Then, on or about August 31, 2018, the Complainant appealed Ms. Bauer's decision to Mr. Ruta. Mr. Ruta denied the Complainant's appeal on or about October 9, 2018.

180. In this case, redactions 1-6 all relate to documents created on or before April 23, 2018. In other words, the documents were created starting when the Complainant first submitted her claim to the City on September 1, 2017, through to shortly before Ms. Bauer denied the Complainant's appeal on May 7, 2018.

181. During this period, would a reasonable person conclude that it is unlikely that the Complainant's claim to the City would be resolved without litigation? I find that the answer is no.

182. As set out above, after a claim is first denied by the City, a claimant has two further avenues open to them aside from litigation: first, an appeal to Ms. Bauer, and then to the Chief Financial Officer. Although the Complainant's claim had been denied at the time that all of the documents were created, her appeal was in the process of being assessed by Ms. Bauer and has not yet been dismissed. Even after that, the Complainant had the option to appeal to Mr. Ruta, which she did. It cannot be said that, on or before April 23, 2018, a reasonable person would conclude that it is unlikely that the Complainant's claim to the City would be resolved without litigation, because the Complainant still had other avenues of resolution available to her within the City's process itself.

183. This finding is supported by the fact that, according to the evidence of Ms. Bauer, of the 7,371 claims filed with the City since 2016, 40 were appealed to Ms. Bauer and three were appealed to the CFO. None of these appeals resulted in a Statement of Claim being filed.

184. Further, the City asserted that its claims process provides an opportunity for claimants to comply with their legislative notice requirements as set out in ss.489-491 of the *City Charter*. As mentioned above, the City did not explain which of these provisions is applicable in this case. These sections set out limitation periods for actions against the City for loss or damage arising "out of the construction or condition of a street", "from a person falling owing to snow or ice on a street", and "for loss or damage arising from failure to maintain or keep in repair a public facility". "Public facility" is defined in s.468 of the *City Charter* as meaning "a place that is subject to the direction, control and management of the city, and includes all playgrounds, arenas, swimming pools, recreation centres, offices and libraries operated by the city."

185. I do not find that any of ss.489-491 of the *City Charter* are applicable to this case, where the Complainant's claim relates to damage to her home as a result of sewer backup. It seems that the relevant section of the *City Charter* is s.493(1), which sets out a limitation period for "loss, damage or injury, caused by or arising out of the construction, operation, repair or maintenance of any works or undertakings by the city". "Works" is defined broadly, and includes "waterworks" as well as "water control works".

186. Notably, unlike ss.490-491 of the *City Charter*, s.493(1) does not require a notice of claim to be filed with the City as a prerequisite to commencing litigation against the City. As

such, I cannot accept the City's submission that a notice of claim is the first step in an action in all cases.

187. Moreover, it sets out a limitation period of "within two years after the alleged damages were sustained", or "where there is a continuation of damage or injury, within two years after that damage or injury ceases."

188. The Complainant's damages were sustained in early August of 2017. Accordingly, the two-year limitation period is long expired. As the Supreme Court stated in *Blank, supra,* litigation privilege expires when the litigation ends, absent closely related proceedings. Therefore, even if I am wrong in my finding that litigation privilege does not apply to the documents, any privilege that did exist in the documents has ended by virtue of the expiry of the limitation period. There is no evidence of any related litigation that is pending or reasonably apprehended.

189. For all of the foregoing reasons, I find that the City has not met its onus of establishing that the Complainant has no right of access to the records on the basis of s.27(1)(a) of *FIPPA*.

Section 27(1)(b)

190. This provision allows for a public body to refuse disclosure of "information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence."

191. The City has not provided a factual basis for their reliance on this exception and I find that it has no application to this matter. None of the individuals involved in the correspondence at issue are lawyers for the City. They were not providing legal advice or legal services and there was no offence to be investigated or prosecuted.

192. In sum, I find the City has not met its onus to establish that litigation privilege under s.27(1) of *FIPPA* applies to redactions 1-6.

Disclosure injurious to the conduct of existing or anticipated legal proceedings – s.25(1)(n) of FIPPA

193. The City has also relied on s.25(1)(n) *FIPPA* as a basis to withhold the severed portions of the records from the Complainant.

194. There are no "existing" legal proceedings in this matter nor are there "anticipated" legal proceedings, for the reasons discussed previously. Even if there were, s.25(1)(n) requires that the head of a public body demonstrate that the disclosure of the information at issue could reasonably be expected to "be injurious" to such proceedings. The City has not provided any evidence in this regard.

195. For these reasons, the City has not met its onus to establish that s.25(1)(n) of *FIPPA* applies to redactions 1-6.

Conclusion

196. In conclusion, I find that the City has not met its burden under s.66.7(1) of *FIPPA* to establish that the Complainant has no right of access to the information contained in redactions 1-6 of the records on the basis of either ss. 25(1)(n) or 27 of *FIPPA*.

Order

197. Based on the foregoing, I order the City to provide the Complainant with unsevered copies of all of the material at issue, with the exception of the material contained in redactions 7, 8, 9, and 10.

Jeffrey Schnoor, Q.C.
Information and Privacy Adjudicator

Manitoba Ombudsman

Title	Report with recommendation under FIPPA and report on compliance with recommendation
Case number	2018-0424
Act	Freedom of Information and Protection of Privacy Act
Public body	City of Winnipeg
Type of access complaint	Refused access
Provisions considered	27(1)(a) and 27(1)(b)
Date of public release	May 18, 2021

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Summary

A request was made under the Freedom of Information and Protection of Privacy Act (FIPPA) to the City of Winnipeg (the city) for records relating to the applicant's claim for sewer back-up damage. The city refused access, in part. The exceptions cited were advice to a public body (23(1)(a) and (b)), unreasonable invasion of an individual's privacy (17(1) and 17(3)(i)), disclosure harmful to law enforcement or legal proceedings (25(1)(n)) and solicitor-client privilege (27(1)(a) and (b)).

The city refused to provide records for review by our office on the basis of its claim of solicitor-client privilege. The city took the position that the records were made in anticipation of litigation on the basis that it considers all claims made through its administrative process to be in anticipation of litigation regardless of whether the claimant has indicated a wish to file a lawsuit.

Our office considered the city's representations regarding the application of clauses 27(1)(a) and (b) and we found that the city had not established that these exceptions applied. In the absence of records for review, our office was unable to conclude that the other exceptions relied on by the city applied to the withheld information. The ombudsman recommended that the city provide the complainant with a copy of the withheld information, with the exception of any information withheld under section 17 of FIPPA.

FIPPA required that the city provide our office with its response to our report by March 31, 2021, to indicate whether it accepted the recommendation. We received the response from the city on March 31, 2021, indicating that it was not accepting the recommendation. As the city refused to take action to implement the recommendation, on April 12, 2021, the ombudsman requested a review by the information and privacy adjudicator of the city's decision to refuse access.

Manitoba Ombudsman

REPORT WITH RECOMMENDATION UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0424

CITY OF WINNIPEG

ACCESS COMPLAINT: REFUSED ACCESS

PROVISIONS CONSIDERED: 27(1)(a) and (b)

REPORT ISSUED ON MARCH 16, 2021

SUMMARY: An applicant made a request for access to the City of Winnipeg (the city or the public body) under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for records relating to the applicant's claim against the city for damage to property. Responsive records were identified and access was provided in part with some information severed under clauses 23(1)(a) and (b) (advice to a public body) of FIPPA. A complaint was made to our office about this decision to refuse access. On receiving notification of the complaint from our office, the city located additional responsive records and revised its access decision. The city applied subsection 17(1) in conjunction with clause 17(3)(i) (unreasonable invasion of an individual's privacy) and clauses 25(1)(n) (disclosure harmful to law enforcement or legal proceedings) and 27(1)(a) and (b) (solicitor-client privilege) of FIPPA to withhold information. Further to the city's application of clauses 27(1)(a) and (b), the city refused to provide records for review by our office. Our office considered the city's representations regarding the application of clauses 27(1)(a) and (b) and we found that the city had not established that these exceptions applied. In the absence of records for review, our office is unable to conclude that the other exceptions relied on by the city applied to the withheld information. This report contains a recommendation to the public body to provide the complainant with a copy of the withheld information with the exception of the personal information of a third party to which the city refused access under section 17.

ACCESS REQUEST AND INITIAL ACCESS DECISION

The City of Winnipeg (the city or the public body) received a request on August 10, 2018, under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for access to the following:

> *I would like to receive all internal City of Winnipeg correspondence regarding my Claim [claim number removed] and any discussions referencing sewer and [street name removed] Avenue or [street name removed] Street.*

The city responded with its access decision on September 10, 2018, stating that it had located responsive records in both the Water and Waste Department and Corporate Finance Risk Management Branch. Access to 11 pages of responsive records was provided in part with the majority of information severed from the records on the basis that it would reveal advice to the public body. The city relied on clauses 23(1)(a) and (b) of FIPPA to refuse access to this information. The provision reads:

> ***Advice to a public body***
> ***23(1)*** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*
>
> *(a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;*
>
> *(b) consultations or deliberations involving officers or employees of the public body or a minister;*

COMPLAINT AND REVISED ACCESS DECISION

A complaint concerning this decision to refuse access to part of the information was received by our office on November 9, 2018. On receiving this complaint, our office contacted the city and requested information explaining how the withheld information would reveal the type of information described under clauses 23(1)(a) and (b) of FIPPA. We also asked for an unsevered copy of the records for our review of the application of the exceptions to the information to which the city had refused access.

The city responded to our office on January 7, 2019. The city stated that the severed information comprised confidential advice and consultations between Risk Management and Wastewater Services employees pertaining to the city's position on the complainant's claim for damage to property and, if disclosed, the severed information would reveal the opinions and analyses obtained by Risk Management from Wastewater Services. The city, therefore, continued to maintain that clauses 23(1)(a) and (b) of FIPPA applied to the severed information.

In addition to the two exceptions claimed in its access decision, the city advised our office that it had subsequently determined that additional exceptions applied. The city stated that, upon further review, it had determined that clauses 27(1)(a) and (b) of FIPPA also applied to the severed information. These additional provisions read:

> ***Solicitor-client privilege***
> ***27(1)*** *The head of a public body may refuse to disclose to an applicant*
> *(a) information that is subject to solicitor-client privilege;*
> *(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence;*

The city explained to our office that it considers the process of making a claim against the city as the opening phase in litigation against the city. As such, any records created as part of the claim adjudication process are done so in anticipation of litigation and are, therefore, subject to solicitor-client privilege. Additionally, as the records at issue were subject to solicitor-client privilege, the city stated it would not be providing copies of information withheld under section 27 for our review.

The city further explained that, on reviewing its initial access decision, it had identified more responsive records. Responsive items now totalled 24 pages. The city provided our office with copies of the severed records and a document index which included brief descriptions of each withheld record.

Our office observed that (although not stated in its January 7 letter to our office) the city had also applied clause 25(1)(n) of FIPPA to withhold information according to a notation made to one of the severed pages. This provision reads:

> ***Disclosure harmful to law enforcement or legal proceedings***
> ***25(1)*** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*
> *(n) be injurious to the conduct of existing or anticipated legal proceedings.*

Our office responded to the city regarding its reliance on clauses 27(1)(a) and (b) of FIPPA and requested a copy of the responsive records for our review. We also explained that if the city now wished to rely on clauses 27(1)(a) and (b) and clause 25(1)(n) of FIPPA to refuse access, it must make a revised access decision to the complainant explaining its reliance on additional exceptions.

On April 23, 2019, the city provided the complainant with a revised access decision. The decision stated that additional responsive records had been located and the city was giving access in part to 24 pages of records. The records included email communication between the City of Winnipeg Corporate Finance Department (Claims Branch) and the Water and Waste Department (Wastewater Services Division). The records naturally divide into two groups by date. The first group includes records dating from between August 14, 2017, and October 30, 2017. The second group includes records dating between April 3, 2018, and August 31, 2018. These include a copy of a letter dated April 3, 2018, written by the complainant to the City of Winnipeg corporate risk manager (claims appeal). The letter was written by the complainant on being made aware that their claim for damages had been disallowed (an itemized list of damages and expenses was attached). Also included was a copy of another letter dated August 31, 2018, written by the complainant to the City of Winnipeg chief financial officer appealing the decision on their claim (an itemized list of damages and expenses was attached) and adjuster notes dating from April 23, 2018. With the exception of the complainant's own letters to the city, all other records were severed either in whole or in part and no substantive information was released to the complainant. The email communication also referenced several attachments, including service requests and work orders found in an online records management system. These attachments were not part of the 24 pages of records and were not at issue in this complaint because they were previously provided to the complainant in response to another request for access to information.

The city explained in its revised access decision that it was relying on clauses 25(1)(n) and 27(1)(a) and (b) of FIPPA to withhold information. Also, the city explained, some information contained in the additional responsive records related to a third party who had made a separate claim to the city for damage to property. In refusing access to this third-party information, the city relied on the mandatory exception for access to personal information under subsection 17(1) in conjunction with subclause 17(3)(i) of FIPPA. The cited provisions read:

> ***Disclosure harmful to a third party's privacy***
> ***17(1)*** *The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.*
>
> ***Determining unreasonable invasion of privacy***
> ***17(3)*** *In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether*
>
> > *(i) the disclosure would be inconsistent with the purpose for which the personal information was obtained.*

DISCUSSION OF ISSUES

Following the revised access decision, our office conferred with the complainant who advised our office that they did not wish to pursue access to third-party personal information which the city had severed under subsection 17(1) in conjunction with subclause 17(3)(i) of FIPPA. Our investigation was, therefore, confined to an investigation of the city's reliance on clauses 25(1)(n) and 27(1)(a) and (b) of FIPPA to withhold information, as cited in the city's revised access decision.

In this case, as is usual in access complaint investigations, our office asked for unsevered copies of the responsive records so that we could review any severing for the correct application of exceptions to access. The city had the option to provide for our review the information to which it had applied clauses 27(1)(a) and (b) of FIPPA to refuse access. It is the position of our office that doing so would not constitute a wider waiver of solicitor-client privilege over this material.

Consistent with its view that all information at issue in this complaint was subject to litigation privilege, the city did not provide our office copies of the information at issue as it had concluded that to do so would constitute a waiver of privilege over that information. In doing so, the city referenced *Lizotte* which found that privilege can be asserted against third party investigators, such as our office. *Lizotte* also held that the principle set out in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*[1] that solicitor-client privilege cannot be abrogated absent an express provision is applicable to litigation privilege as well. The city has submitted that FIPPA does not contain the required express provision.

Has the public body established the application of the exception under clauses 27(1)(a) and (b) of FIPPA to withhold information from access?

In Canada, communications between a lawyer and a client related to the seeking, formulating or giving of legal advice are said to be confidential and subject to solicitor-client privilege even to the extent that parties to these communications cannot be compelled to reveal these privileged discussions by the courts. The expectation of protection for communications between a lawyer and a client applies even where the client is a public body, such as the city, and the legal counsel are on the staff of the public body.

Clause 27(1)(a) of FIPPA applies to information that is subject to solicitor-client privilege. For the purposes of the exception, solicitor-client privilege is interpreted as including both legal advice privilege and litigation privilege in that it also applies to background information created or obtained by the client or the lawyer in anticipation of litigation, whether existing or contemplated. As explained by the Information and Privacy Commissioner/Ontario (IPC

[1] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 SCR 574, https://canlii.ca/t/1zhmr, last retrieved on 2021-01-27.

Ontario) in Order 49,[2] litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial litigation and this branch of privilege may only be asserted over information created or obtained especially for the lawyer's brief for litigation. A record can fall under litigation privilege regardless of whether the common law criteria relating to the legal advice branch of privilege are satisfied.

Clause 27(1)(b) applies to information prepared by or for a public body (such as a memorandum) in relation to a matter involving the provision of legal advice or the investigation or prosecution of an offence.

The city provided representations to our office explaining its reasons for relying on clause 27(1)(a) of FIPPA to withhold information. The city referenced the Supreme Court case *Blank v. Canada (Minister of Justice)*[3] as having established that there was no distinction between solicitor-client privilege and litigation privilege in the application of clause 27(1)(a) and similar exceptions found in other Canadian access to information legislation. The city maintains that *Blank* further established that information subject to litigation privilege is not restricted to communications between a lawyer and a client but includes all communications associated with pending or apprehended litigation. While the city acknowledged that the Supreme Court also specified that litigation privilege should attach only to records made for the dominant purpose of litigation, the city asserted that the records at issue in this complaint investigation were prepared for the sole purpose of litigation and no other reason.

In support of this assertion, the city provided that there was no distinction between investigating the facts of a claim and defending a claim in litigation, or between the work of the city's claims adjusters and its Legal Services Department. Further, the city made no distinction between filing a claim using the 'Notice of Claim' form posted on the city's website and filing a Statement of Claim or Notice of Application with the courts (or initiating a Small Claims Court proceeding). As the city explained, all are assertions made by claimants concerning claims they believe they have against the city. The city further stated that the yardstick for assessing all claims, no matter how made, is the legal validity of the claim and the chances it will be proven in court. In the city's words, "all claims investigation and settlement takes place 'in the shadow of the law'[4]." The city asserts that the intake, investigation and settlement of claims, whether done by Claims Branch or Legal Services, are all part of the litigation process and that the initial investigation of a claim is essential to planning litigation strategy and determining the probable outcome of litigation, in light of which the city determines whether a claim should be settled. The city stated that if it were forced to disclose documents it has protected by litigation privilege, it would harm a public body's ability to conduct litigation and the litigation process as a whole.

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[2] IPC Order 49 (April 10, 1989) found at https://decisions.ipc.on.ca/ipc-cipvp/orders/en/127987/1/document.do accessed on January 27, 2021.
[3] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 SCR 319, <https://canlii.ca/t/1p7qn>, last retrieved on 2021-01-27.
[4] It is our understanding that the concept of 'the shadow of the law' refers to the way laws can affect people's actions even when there is no direct legal involvement.

In support of this argument, the city advised our office that all correspondence with claimants includes the phrase "Without Prejudice."

On receiving these representations from the city, our office also reviewed cases considering the application of litigation privilege, including *Blank* and *Lizotte v. Aviva Insurance Company of Canada*[5]. *Lizotte* clearly sets out the conditions for the application of litigation privilege:

1) The information so excepted must be collected or created for the dominant purpose of litigation; and
2) The litigation is ongoing, pending or may reasonably be apprehended.

Lizotte further states that,

> ... only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose") are covered by the privilege (para 23).

We note that the onus is on the public body to establish that each document was created for the dominant purpose of litigation. As stated in *Canadian Natural Resources Limited v. ShawCor Ltd.*[6] at para 83,

> ...a record will not be protected by litigation privilege simply because litigation was one of several purposes for which the record was created...

Our office considered the city's assertion that use of the phrase 'without prejudice' confers a blanket of litigation privilege on correspondence so designated. We note that this phrase is typically used so that settlement discussions between the parties cannot later be entered into evidence in litigation. In our view, the use of the phrase by the city in all claim correspondence does not automatically create settlement privilege in the context of exchanges that do not involve concessions of some sort meant to move the parties to settlement.

Our office invited further representations from the city. In support if its position, the city notes that case law varies widely in terms of when litigation can be considered as contemplated, however, the courts stress that each case must be considered on its merits within specific circumstances and context. The city asserts it is not possible to make a blanket finding about the applicability of FIPPA in the context of claims filed with the city. By way of illustration the city referenced *Waissman v. Calgary (City)*[7]. In this matter, the court found that an occurrence report

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[5] *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 (CanLII), [2016] 2 SCR 521, <https://canlii.ca/t/gvskp>, last retrieved on 2021-01-27.
[6] *Canadian Natural Resources Limited v ShawCor Ltd.*, 2014 ABCA 289 (CanLII), https://canlii.ca/t/g90h9, last retrieved on 2021-01-28.
[7] *Waissmann v Calgary (City)*, 2018 ABQB 131 (CanLII), https://canlii.ca/t/hqlpr, last retrieved on 2021-02-04.

made shortly after an accident involving a Calgary city bus could be considered to have been created in a circumstance where litigation was reasonably contemplated. The court noted that litigation was common against the City of Calgary for transit related injuries. The city also referenced *Pedersen v. Westfair Foods Ltd*[8], which is similar in that litigation privilege was found to apply to an accident report made shortly after a slip and fall incident in a grocery store. Our office notes that both cases involved personal injury claims where litigation may reasonably be contemplated given the experience of the City of Calgary and Westfair Foods in relation to personal injury claims in the past.

Our office reviewed the application of litigation privilege in cases involving municipalities, including three decisions made by IPC/Ontario.[9] In these cases, reports examining the causes of damage to property in order to assess liability for possible future litigation were withheld from access under the exception for litigation privilege found in Ontario's access to information legislation.[10] We note that *Halton (Regional Municipality)* related to a severe flooding event where numerous claims had been filed and litigation had already commenced in two cases before the consultant's report at issue was commissioned. Similarly, *Greater Sudbury (City)* related to a catastrophic event where 544 claims had been received before the engineering report at issue was commissioned. In both *Halton* and *Greater Sudbury (City)*, IPC/Ontario found that the reports at issue had appropriately been withheld from access under the exception for solicitor-client privilege. We observed that, in both cases, the records subject to solicitor-client privilege were created at some time after the damage event and, in *Halton*, after litigation had already commenced. In *Toronto (City)*, litigation privilege was found to apply to an engineering report. We observed the report was prepared seven months after the access requester's solicitor sent a letter to the city threatening legal action if the requester's demands were not met. In this circumstance, litigation could reasonably be apprehended at the time the engineering report was prepared. (We note that in the complaint investigated by our office, no threat of litigation was made by the complainant.) Also, in *Toronto (City)*, internal documents not involving counsel and which were in the nature of administrative matters were found not to be used for giving legal advice or in contemplation of litigation. Memoranda prepared by the City of Toronto corporate adjuster were also found not to be subject to the litigation exception as there was no evidence they had been prepared for use in giving legal advice or in the contemplation of litigation.

Our office also reviewed recent Manitoba case law considering litigation privilege, including *Man-Shield Construction Inc. et al. v. Renaissance Station Inc. et al.*, 2014.[11] The court noted

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[8] *Pedersen v. Westfair Foods Ltd*., 1993 CanLII 2381 (BC SC), https://canlii.ca/t/1djrn, last retrieved on 2021-02-04.
[9] *Halton (Regional Municipality) (Re),* 2002 CanLII 46351 (ON IPC), https://canlii.ca/t/1r3gc , last retrieved on 2021-02-04; *Greater Sudbury (City) (Re),* 2011 CanLII 53346 (ON IPC), https://canlii.ca/t/fmvnq, last retrieved on 2021-02-04; *Toronto (City) (Re)*, 2006 CanLII 50776 (ON IPC), <https://canlii.ca/t/1qvvh>, last retrieved on 2021-02-09; *Toronto (City) (Re)*, 2007 CanLII 8392 (ON IPC), https://canlii.ca/t/1qwzh, last retrieved on 2021-02-04.
[10] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, CHAPTER F.31. While Ontario's legislation is not identical to Manitoba's, the provision under clause 19(a) of Ontario FIPPA for information that is subject to solicitor-client privilege is identical to Manitoba FIPPA clause 27(1)(a).
[11] *Man-Shield Construction Inc. et al. v. Renaissance Station Inc. et al.*, 2014 MBQB 101 (CanLII), https://canlii.ca/t/g711d, last retrieved on 2021-02-04.

that a document will attract litigation privilege if the dominant purpose for which the document was prepared was for use in litigation. However, it is not sufficient that litigation be but one of several purposes for preparation. As such, the Supreme Court of Canada approach set out in Blank and Lizotte is followed in Manitoba.

As stated in *Man-Shield Construction Inc.*, the test for the application of litigation privilege requires an analysis of:

1. whether a document was prepared for use in litigation; and
2. whether there was actual litigation or a reasonable prospect of litigation at the time the record was prepared.

The decision also states that privilege arises from the nature of, and the circumstances surrounding, the communications in question.

In keeping with *Man-Shield Construction*, the city argued that, in this situation, context is paramount. It maintains that the specific contextual backdrop of sewer back-up incidents is a situation where litigation can be reasonably contemplated when a claim is filed with the city. The city stated that damage to property litigation resulting from sewer back-ups are very commonly filed and submitted that, with this background context in mind, litigation could reasonably be contemplated by the Claims Branch in its assessment of the claim in this case (and all other claims made in similar circumstances). The city explained its view that the contextual backdrop of sewer back-up claims creates a circumstance where the creation of all claim-related documentation is with a view to potential litigation. In support of its view that a context of anticipated litigation surrounded the actions of Claims Branch from the point of initial intake the city also referenced *Manitoba Crop Insurance Corp. v. Wiebe, et al*[12] which states, "if a document's dominant purpose is with a view to potential litigation, it can, in the proper circumstances, still be protected under the umbrella of litigation privilege whether or not litigation has been initiated or, as in this case, authorized."

Our office considered the city's arguments. In our view, the anticipation of litigation in all sewer back-up claims would reasonably be based on a high proportion of sewer back-up claims resulting in litigation. Our office asked the city about the number of sewer back-up claims that proceeded to litigation. The city explained that between January 1, 2016, and December 2, 2019, there were 253 discrete claims for damage resulting from sewer back-ups filed with the city and, of those, six or 2.37 per cent were in litigation at the time our request for litigation numbers was made. Even allowing that there may have been more claims that went into litigation than the six currently in litigation, this does not suggest a contextual circumstance where litigation can reasonably be anticipated whenever a sewer back-up claim is made to the city. Given that the experience of the city is that sewer back-up claims resulted in litigation only 2.37 per cent of the time during the period surveyed, it is not logical or reasonable to anticipate litigation in all such claims.

[12] *Manitoba Crop Insurance Corp. v. Wiebe, et al*., 2006 MBCA 143 (CanLII), https://canlii.ca/t/1q35r, last retrieved on 2021-02-04

It is the position of our office that assessing the merits the complainant's claim for damages is not a legal process but primarily an administrative one, at least in the initial stages. A claims adjuster is not engaged in the practice of law and while they may apply a legal validity yardstick when considering whether to pay a claim, this is not the same as legal counsel preparing for litigation. Further, our office considers it unfair to claimants, most of whom are unfamiliar with the legal process, to characterize completing a 'Notice of Claim' for damage to property on the city's web page as the commencement of legal proceedings against the city. It is our view that, while the possibility of litigation may have been one of the purposes for the creation of the responsive records at the initial, information gathering stage and during an initial assessment of the complainant's problem (for example, those records dating from 2017), the dominant purpose for the creation of these documents was not in contemplation of litigation.

As the cases of IPC/Ontario noted above illustrate, generally within Canada, a triggering event such as a formal demand for damages, the retaining of counsel, a decision to deny liability or provision of statutory notice will trigger the application of litigation privilege from that point on. In our view, even allowing that the mere possibility of litigation is sufficient to establish its likelihood, the city must also provide evidence to support the assertion that litigation was the dominant purpose of the creator of all the information at issue and, in our view, the city failed to do so beyond stating that the making of a claim was sufficient to establish the application of litigation privilege to all records created thereafter. It is our view that, although the decision not to pay a claim may lead to litigation eventually, there is another (and we submit, more dominant) purpose for record creation in the circumstances of this complaint, at least in the early stages of the claim process.

Our office also considered the city's application of clause 27(1)(b) to the withheld information. The city has explained that 27(1)(b) applies as the records were prepared by agents of the public body in relation to a matter involving legal services. The nature of the legal services provided by the Risk Management Branch were not specified nor was evidence provided that they acted at the direction of Legal Services. We note that the exception under 27(1)(b) requires that the information be prepared by or for an agent or lawyer of the public body in relation to a matter involving the provision of legal advice or legal services. In our view, communication between Risk Management Branch and Wastewater Services regarding a damage claim does not involve the provision of legal advice or services and does not meet the plain language requirements of the provision.

It is our view that the city has failed to establish the application of clauses 27(1)(a) and (b) of FIPPA to the information withheld from access.

FINDINGS

Based on our consideration of the requirements of clauses 27(1)(a) and (b) and the city's representations, we find that these exceptions do not apply.

The city also relied on clause 25(1)(n) to refuse access to some information in the records. However, the city claimed that solicitor-client privilege exceptions also applied to that information and refused to provide the withheld information for our review. Therefore, we are unable to find that clause 25(1)(n) applies.

RECOMMENDATION

Based on the findings, the ombudsman makes the following recommendation:

1. The ombudsman recommends that the public body release the records at issue without severing to the applicant, except for the personal information of a third party to which the city refused access under section 17.

HEAD'S RESPONSE TO THE RECOMMENDATION

Under subsection 66(4), the City of Winnipeg must respond to the ombudsman's report in writing within 15 days of receiving this report. As this report is being sent by email to the head on this date, the head would be required to respond by March 31, 2021. The head's response must contain the following information:

> ***Head's response to the report***
> ***66(4)*** *If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating*
> *(a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or*
> *(b) the reasons why the head refuses to take action to implement the recommendations.*

OMBUDSMAN TO NOTIFY THE COMPLAINANT OF THE HEAD'S RESPONSE

When the ombudsman has received the City of Winnipeg's response to her recommendation, she will notify the complainant about the head's response as required under subsection 66(5).

HEAD'S COMPLIANCE WITH RECOMMENDATION

If the head accepts the recommendation, subsection 66(6) requires the head to comply with the recommendation within 15 days of acceptance of the recommendation or within an additional period if the ombudsman considers it to be reasonable. Accordingly, the head should provide written notice to the ombudsman and information to demonstrate that the public body has complied with the recommendation and did so within the specified time period.

March 16, 2021
Manitoba Ombudsman

Manitoba Ombudsman

REPORT ON COMPLIANCE WITH RECOMMENDATION UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0424

CITY OF WINNIPEG

ACCESS COMPLAINT: REFUSED ACCESS

SUMMARY: In a letter dated March 30, 2021, the City of Winnipeg (the city) provided its response to the ombudsman's report with recommendation under the Freedom of Information and Protection of Privacy Act advising that it did not accept the recommendation. As the city did not accept the recommendation, our office has decided to refer this matter to the information and privacy adjudicator.

COMPLIANCE WITH THE RECOMMENDATION

On March, 16, 2021, the ombudsman issued a report with a recommendation in this case following the investigation of a complaint against the City of Winnipeg (the city) about its decision to refuse access to the requested records under section 27 of the Freedom of Information and Protection of Privacy Act (FIPPA).

Specifically, our office made the following recommendation:

1. The ombudsman recommends that the public body release the records at issue without severing to the applicant, except for the personal information of a third party to which the city refused access under section 17.

On March 30, 2021, the city responded to the ombudsman, indicating that it did not accept the recommendation:

> *We have reviewed and considered the report in full; however, we do not agree with the counterarguments presented and cannot accept the recommendation to release the records at issue without severing to the applicant.*

CONCLUSION

As required by subsection 66(5) of the Freedom of Information and Protection of Privacy Act, the ombudsman is advising the complainant by this report that the city has refused to take action to implement the recommendation. On April 12, 2021, in accordance with subsections 66.1(1) and 66.1(2) the ombudsman referred the matter to the information and privacy adjudicator and notified the complainant and the public body of the request for review.

Jill Perron
Manitoba Ombudsman
April 13, 2021

File No. CI21-01- 33372

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

THE CITY OF WINNIPEG,

Applicant,

– and –

MANITOBA OMBUDSMAN and IRENE MIKAWOZ,

Respondents.

APPLICATION UNDER: *The Court of Queen's Bench Act*, CCSM c C280 and the *Court of Queen's Bench Rules,* MR 553/88;

AND UNDER: *The Freedom of Information and Protection of Privacy Act,* CCSM c F175

FILED NOV 0 8 2021

NOTICE OF APPLICATION
Civil Uncontested List
Date of Hearing: November 25, 2021 at 10:00 a.m.

DOUGLAS BROWN
Director of Legal Services and City Solicitor
The City of Winnipeg
Legal Services Department
3rd Floor, 185 King Street
Winnipeg, Manitoba
R3B 1J1

ASHLEY L. PLEDGER/ VIVIAN F.Y. LI
Tel: 204-986-2595/ 204-986-2285
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[File No. CL.1/21021 (193)]

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

THE CITY OF WINNIPEG,

Applicant,

– and –

MANITOBA OMBUDSMAN and IRENE MIKAWOZ,

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AND UNDER: *The Freedom of Information and Protection of Privacy Act,* CCSM c F175

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following pages.

THIS APPLICATION will come on for a hearing before a judge on Thursday, the 25th day of November, 2021 at 10:00am or as soon after that time as the Application can be heard, at the Law Courts, 408 York Avenue, Winnipeg, Manitoba via teleconference at 1-800-974-5902, with the conference ID 5148840.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or a Manitoba lawyer acting for you must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant and file it, with proof of service, in the court office where the Application is to be heard as soon as possible, but not later than four (4) days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

November 8,2021

Issued by: D. CHAMPAGNE DEPUTY REGISTRAR COURT OF QUEEN'S BENCH FOR MANITOBA
Deputy Registrar

TO: GANGE COLLINS
Barristers & Solicitors
760 - 444 St. Mary Avenue
Winnipeg, MB R3C 3TI

Jacqueline G. Collins
Counsel for the Manitoba Ombudsman

AND TO: IRENE MIKAWOZ
763 Carruthers Avenue
Winnipeg, MB R3R 2K8

APPLICATION

1. The Applicant The City of Winnipeg (the "City") makes application for:

   a. A judicial review of a decision of the Information and Privacy Adjudicator (the "Adjudicator") rendered on October 14, 2021 in relation to Manitoba Ombudsman Case 2018-0424 (the "Decision");

   b. An order in the nature of *certiorari* quashing the Decision, whereby the Adjudicator granted the Respondent, Irene Mikawoz (the "Complainant") access to unsevered copies of all of the material at issue, with the exception of the material contained in redactions 7, 8, 9 and 10 (the "Records");

   c. Costs of this application; and

   d. Such further and other relief as counsel may advise and this Honourable Court may deem just.

2. The grounds for the Application are:

   a. The Adjudicator erred in finding that the City's internal claims process was not part of the adversarial process over which litigation privilege applies;

   b. In ordering the City to disclose the records, the Adjudicator:

      i. erred in finding that the Records were not subject to litigation privilege;

ii. erred in finding that he had the jurisdiction to require the production of and to view the Records without it constituting a waiver of privilege;

iii. erred in considering limitations and the exceptions to disclosure at the time of the Decision instead of at the time of the City's access decision under review; and

iv. erred in finding that the City was not authorized to refuse access to the Records, and in failing to confirm the City's decision or requiring the City to reconsider its decision;

c. The Decision was contrary to the public interest, was inconsistent with public policy and the purposes of FIPPA;

d. The Decision was unreasonable, incorrect and/or an error of mixed fact and law;

e. The Adjudicator engaged in a review process that violated the principles of procedural fairness and the rules of natural justice;

f. The City pleads and relies on:

i. FIPPA, and in particular, sections 2, 23, 25, 27, 66.10 thereof; and

ii. *The Court of Queen's Bench Rules*, 1.04, 1.05, 14.05(2), 38, 39 and 68; and

g. Such further and other grounds as counsel may advise and this Honourable Court may allow.

3. The following documentary evidence will be used at the hearing of the application:

a. Affidavit(s) in support of the Application, to be filed; and

b. Such further and other evidence or documentary as counsel may submit and this Honourable Court may allow.

November 8, 2021

DOUGLAS BROWN
Director of Legal Services and City Solicitor
The City of Winnipeg
Legal Services Department
3rd Floor, 185 King Street
Winnipeg, Manitoba, R3B 1J1

ASHLEY L. PLEDGER/ VIVIAN F.Y. LI
Lawyers for the Applicant, the City of Winnipeg