



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-2222**

**Appeal MA06-417**

**Township of Scugog**



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## **NATURE OF THE APPEAL:**

The Township of Scugog (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

[I am seeking access to a] “legal opinion” requested by Council on Sept. 25, 06 regarding notes of [name of requester] of July 6/06. [I also wish to] see a copy of account for said legal opinion.

The Township located a legal opinion that was responsive to the request. It issued a decision letter to the appellant denying access to this record pursuant to the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*.

With respect to the “copy of account for said legal opinion,” the decision letter informed the requester that no such invoice exists. The Township later clarified that it had asked the Regional Municipality of Durham’s solicitor to provide it with the legal opinion, and the Township was not charged for this service.

The requester (now the appellant) appealed the Township’s decision to the Commissioner’s office. In the appeal form that he submitted, the appellant indicated that he was specifically appealing the Township’s decision to deny him access to the legal opinion.

During the mediation stage of the appeal process, the mediator noted that the legal opinion appears to contain information relating to the appellant. If this information constitutes the appellant’s “personal information,” as that term is defined in section 2(1) of the *Act*, the discretionary exemption in section 38(a) (refuse to disclose requester’s own personal information) may be at issue in this appeal, in conjunction with section 6(1)(b).

This appeal was not settled in mediation and was transferred to adjudication. After reviewing the record at issue, I noted that it also appears to contain information relating to the Township’s Director of Parks, Recreation and Culture. If this information constitutes that individual’s “personal information,” as that term is defined in section 2(1), the discretionary exemption in section 38(b) (invasion of privacy) of the *Act* may also be at issue. Consequently, I concluded that the Town’s Director of Parks, Recreation and Culture may have an interest in the information at issue and, accordingly, is an affected party in this appeal.

I issued a Notice of Inquiry to the Township and the affected party, initially, and invited them to submit representations. The Township’s external legal counsel submitted representations to this office on behalf of both the Township and the affected party.

In its representations, the Township raises a new issue. It claims that the legal opinion is exempt from disclosure under the discretionary exemption in section 12 (solicitor-client privilege) of the *Act*.

The Township did not claim this discretionary exemption in the decision letter that it issued to the appellant. Consequently, the application of section 11.01 of this office’s *Code of Procedure*, which governs new discretionary exemption claims, may be at issue in this appeal.

I then issued a Notice of Inquiry to the appellant, along with a complete copy of the Township's representations. In response, the appellant also submitted representations to this office.

Finally, I sent a complete copy of the appellant's representations to the Township and invited it to submit reply representations. The Township submitted representations by way of reply.

## **RECORD:**

The record at issue is a six-page legal opinion.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and

- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The Township takes the position that the legal opinion contains information relating to both the appellant and the Township's Director of Parks, Recreation and Culture (the Director).

With respect to the appellant, the Township submits that the legal opinion contains "statements, remarks or other information attributable to [the appellant] ..." However, it further states that this information relates to the appellant in his capacity as Secretary/Treasurer of a local board. Consequently, it submits that this information is not the appellant's personal information, because it relates to him in a professional capacity.

With respect to the Director, the Township states that the legal opinion contains "statements, remarks or other information attributable to or about [this individual] ..." It submits that although this information relates to the Director in a professional capacity, it reveals something of a personal nature about him. Consequently, it submits that this information constitutes the Director's personal information.

In his representations, the appellant states that it is difficult for him to assess whether the legal opinion contains the personal information of either himself or the Director because he has not seen it. In addition, he takes issue with the Township's submission that the information relating to him in the records is "professional information," but the information relating to the Director qualifies as "personal information."

I have carefully reviewed the legal opinion, which contains information about both the appellant and the Director. On its face, this record appears to contain the personal information of the appellant, because it includes the views or opinions of another individual about him, as specified in paragraph (g) of the definition of "personal information" in section 2(1). In addition, the legal opinion contains the appellant's name along with other personal information relating to him, as contemplated by paragraph (h) of the definition.

I am not persuaded by the submission made by the Township that the information in the legal opinion is professional information relating to the appellant. Although the information relates to the appellant in his capacity as Secretary/Treasurer of a local board, it also touches on his conduct, particularly with respect to the substance of the “journal notes” that he prepared after board meetings. In my view, this information reveals something of a personal nature about the appellant, which brings it within the realm of personal information for the purposes of section 2(1).

With respect to the Director, the information in the legal opinion includes the views or opinions of another individual about him, as specified in paragraph (g) of the definition of “personal information” in section 2(1). In addition, the legal opinion contains the Director’s name along with other personal information relating to him, as contemplated by paragraph (h) of the definition.

I agree with the Township that although the information in the legal opinion relates to the Director in a professional capacity, it reveals something of a personal nature about him. Consequently, this brings it within the realm of personal information.

In summary, I find that the legal opinion contains both the appellant’s and the Director’s personal information. I will now consider whether it qualifies for exemption under sections 38(a) or (b) of the *Act*.

## **RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE**

### **General principles**

I have found that the legal opinion contains the appellant’s personal information. Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information (my emphasis).

In this case, the Township relies on section 38(a) in conjunction with the closed meeting exemption in section 6(1)(b) of the *Act*. Moreover, the Township submits that the solicitor-client privilege exemption in section 12 also applies to the information at issue.

Given that the record at issue in this appeal is a legal opinion, I have decided to first consider whether the exemption in section 38(a), in conjunction with the solicitor-client privilege exemption in section 12, applies to this record.

**Preliminary issue: New discretionary exemption claim**

Section 11.01 of this office's *Code of Procedure*, which governs new discretionary exemption claims, states the following:

In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

The Township did not claim the discretionary exemption in section 12 of the *Act* in the decision letter that it issued to the appellant. Instead, the Township claimed the application of this exemption in the representations submitted by its legal counsel.

The Commissioner's office issued a Confirmation of Appeal to the Township, which stated that if the Township wished to claim discretionary exemptions in addition to those set out in its decision letter, it was permitted to do so by February 1, 2007. However, the Township's representations, which include the section 12 exemption claim, were received in this office on April 16, 2007.

Consequently, the Township did not make the section 12 exemption within 35 days after being notified of the appeal, as required by the opening wording of section 11.01 of the *Code of Procedure*. In addition, the Township did not issue a new decision letter containing this exemption claim to the appellant and the Commissioner's office, as required by the subsequent wording in section 11.01.

In the Notice of Inquiry that I issued to the appellant, I asked him to provide representations on whether I should consider the Township's claim that the section 12 exemption applies to the information at issue. In his representations, the appellant does not object to the late raising of this exemption, other than pointing out that, "The [Township] is now claiming solicitor-client privilege ... " and explaining why he believes that this exemption does not apply to the legal opinion.

After carefully considering the particular circumstances of this appeal, I have decided to allow the Township the opportunity to claim the section 12 exemption [in conjunction with section 38(a) of the *Act*] for the following reasons.

Previous orders issued by this office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its

decision letter, subject, of course, to a consideration of the particular circumstances of each case. This approach was upheld by the Divisional Court in the judicial review of Order P-883 [*Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

The objective of section 11.01 of this office's *Code of Procedure* is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced (Order P-883).

Section 11.01 of the *Code of Procedure* states that if the appeal proceeds to the Adjudication stage, the Adjudicator *may* decide not to consider a new discretionary exemption claim made after the 35-day period. Consequently, it is clear that an Adjudicator has the discretion to consider a new discretionary claim, even if it is made after the 35-day timeframe.

In considering whether the Township should be allowed to claim the section 12 exemption at a late stage in this appeal, I have taken into account the importance that the courts have attached to the principle of solicitor-client privilege. For example, in the recent case of *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, Mr. Justice Fish of the Supreme Court of Canada stated the following:

... 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.

In my view, given the importance that the courts have ascribed to the principle of solicitor-client privilege, the Township should, in the circumstances of this particular appeal, be given an opportunity to claim the section 12 exemption at the adjudication stage of the appeal process.

I have also considered whether the appellant's interests would be prejudiced by allowing the Township to claim the section 12 exemption late in the appeals process. In his representations, the appellant does not object to the Township's decision to claim the section 12 exemption at this stage of the appeal.

In addition, I would note although the section 12 exemption was claimed at a late stage in this appeal, the appellant was provided with an opportunity to provide full representations as to whether the legal opinion qualifies for exemption under this provision and to respond to the Township's representations on section 12. Consequently, I find that the appellant's interests

would not be prejudiced by allowing the Township to claim the section 12 exemption at the adjudication stage of the appeal process.

Given that I have decided to allow the Township to make the section 12 exemption claim, I will now consider whether the information in record at issue is exempt from disclosure pursuant to section 38(a) of the *Act*, in conjunction with section 12.

### **Solicitor-client privilege**

#### ***General principles***

Section 12 states as follows:

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

Section 12 contains two branches: common law privileges (branch 1) and statutory privileges (branch 2). The institution must establish that one or the other (or both) branches apply.

Branch 1 arises from the opening words of section 12, which give an institution the discretion to refuse disclosure of a record "... that is subject to solicitor-client privilege." This branch encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the record at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), *supra*].

Branch 2 arises from the latter part of section 12, and in particular, gives an institution the discretion to refuse disclosure of a record "... that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." It is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation.

The common law and statutory exemption privileges, although not necessarily identical, exist for similar reasons.

#### ***The parties' representations***

In its representations, the Township submits that the legal opinion qualifies for exemption under branch 1 of section 12 of the *Act*.



The Township submits that the legal opinion is subject to common law solicitor-client (communication) privilege. In particular, it cites Order M-19 and asserts that this decision established that for common law solicitor-client privilege to apply to a record, four factors must be met:

- there must be written or oral communication;
- the communication must be of a confidential nature (the potential for litigation);
- the communication must be between a client (or his agent) and a legal advisor;  
and
- the communication must be directly related to seeking, formulating or giving legal advice.

The Township submits that all four factors are present with respect to the legal opinion that is at issue in this appeal. As a result, it asserts that this record qualifies for exemption under section 12 of the *Act* because it is subject to common law solicitor-client communication privilege.

With respect to branch 2 of section 12, the Township submits that the legal opinion was prepared by the Region's solicitor at the request of the Township, for use in giving legal advice and in contemplation of litigation. Consequently, it submits that the Township is entitled to refuse to disclose the legal opinion pursuant to the second branch of the section 12 solicitor-client exemption.

The Township further asserts that it did not, either explicitly or implicitly, waive its solicitor-client privilege with respect to the legal opinion.

In his representations, the appellant suggests that the Township did, in fact, waive solicitor-client privilege. He has provided me with a letter that he received from the Township's Chief Administrative Officer stating that, "... the legal opinion we received indicates that your comments taken as a whole may indeed be defamatory." The appellant submits that this demonstrates that some parts of the legal opinion have been made public. He further states that the Township obtained the legal opinion in contemplation of litigation, but did not bring any legal action against him.

In addition, the appellant asserts that the taxpayers of Scugog are the client and have a right to access the legal opinion. He submits that because the Township decided not to sue him, the public has a right to know why the Township sought the legal opinion and what this document says.

In its reply representations, the Township disputes that there has been any waiver of solicitor-client privilege by the Township. It submits that the contents of the legal opinion have never been discussed in any public meeting of the Township, and neither Council nor staff "have done or said anything that would constitute waiver of its privilege over the [legal opinion]."

The Township further submits that it may rely on either solicitor-client communication privilege or litigation privilege, and that either privilege, on its own, is a full and complete basis for denying access to the legal opinion.

With respect to the appellant's argument that the Township did not bring any action against him, the Township submits that the chance of success of contemplated litigation for which the legal opinion was prepared is not relevant to the determination of whether litigation privilege applies. It further asserts that it is beyond the jurisdiction of the Commissioner to assess the chance of success of contemplated litigation for which the legal opinion was prepared.

The Township also disputes the appellant's submission that the Scugog taxpayers are the client and have a right to access the legal opinion. It argues that the municipality, not its residents or ratepayers, is the client for the purpose of solicitor-client privilege and litigation privilege.

### *Analysis and findings*

I have carefully reviewed the record at issue and considered the representations of both the Township and the appellant. In my view, this record is subject to solicitor-client privilege under section 12 of the *Act*, for the reasons that follow.

#### *Who is the solicitor's client?*

At the outset, I will address the appellant's assertion that he should have the right to access the legal opinion because the taxpayers of Scugog are the "clients" of the lawyer who prepared it. In my view, although it is certainly true that elected and appointed officials are public servants who are accountable to taxpayers, this does not mean that any resident or ratepayer in a municipality is the "client" of a lawyer who prepares a legal opinion at the request of a municipality.

In Order MO-1172, Adjudicator Laurel Cropley addressed this issue in the following manner:

The appellant submits that the "taxpayers" are the true clients within the meaning of section 12 of the *Act* since the taxpayers ultimately pay the salary of the Council and the City's solicitor. If I were to accept this argument, there would effectively be no need for the exemption in section 12. Moreover, section 1 of the *Act* provides that the public has a right to information held by government institutions, but also stipulates that this right to information is not absolute. Through section 12, the *Act* recognizes the confidential relationship between public officials and their counsel to the same extent that the common law recognizes the private solicitor and client relationship (Orders P-1551 and P-1561). Further, section 12 acknowledges that public officials may be "clients", distinct from the public at large, notwithstanding the special duties and responsibilities these officials have with respect to the public. Accordingly, I find that the appellant's arguments in this regard are without merit.

I agree with this reasoning. The Ontario legislature included the section 12 exemption to ensure that institutions covered by the *Act* could exercise their discretion in deciding whether to disclose records subject to the common law privileges or statutory privileges in this exemption.

If municipal residents or ratepayers were deemed to be the “clients” in such situations, there would be little reason for the exemption to exist in the *Act*, because the public would have unfettered access to any records that fall within the ambit of the section 12 exemption. Clearly, this is not what the Ontario legislature intended when it decided to include this exemption in the *Act*.

I find, therefore, that for the purpose of the section 12 exemption, the client in this particular appeal is the Township, not the taxpayers of Scugog.

*Branch 1 of section 12*

I will now consider whether the legal opinion qualifies for exemption under the section 12 exemption and will start by examining the applicability of branch 1. As noted above, the first head of privilege encompassed by branch 1 is solicitor-client communication privilege, as derived from the common law.

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

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

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The six-page legal opinion was prepared by a senior solicitor at the Regional Municipality of Durham, who submitted it to the Township of Scugog’s Chief Administrative Officer. It was then submitted for consideration to a closed meeting of the General Purpose and Administration Committee of the Scugog Township Council on October 23, 2006. The legal opinion provides legal advice to the Township and contains a recommended course of action.

In my view, the substance of this record constitutes direct communications of a confidential nature between the solicitor and the Township that was made for the purpose of giving professional legal advice. The fact that the legal opinion was considered by Council members at a closed meeting of the General Purpose and Administration Committee, demonstrates that it was communicated by the solicitor in confidence. Consequently, the information in this record falls squarely within the ambit of solicitor-client communication privilege.

In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the record at issue. Given that I have found that the first head of privilege encompassed by branch 1 (solicitor-client communication privilege) applies to the legal opinion, it is not necessary for me to consider whether the second head of branch 1 (litigation privilege) also applies.

In his representations, the appellant suggests that because the Township decided not to sue him, the public has a right to know why the Township sought the legal opinion and what this document says. I am not persuaded by this argument.

In order to claim the first head of privilege encompassed by branch 1 (solicitor-client communication privilege) of section 12, the institution must establish that the record at issue contains direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice. Whether an institution decides to initiate litigation after considering the legal advice obtained is not relevant in determining whether the record is subject to solicitor-client communication privilege.

As noted above, section 12 contains two branches: common law privileges (branch 1) and statutory privileges (branch 2). The institution must establish that one or the other (or both) branches apply. Given that the Township has established that branch 1 of the section 12 exemption applies to the legal opinion, it is not necessary for me to consider whether branch 2 is also applicable.

#### *Waiver of privilege*

The appellant suggests that the Township waived solicitor-client privilege with respect to the record at issue by sending him a letter stating that, "... the legal opinion we received indicates that your comments taken as a whole may indeed be defamatory."

The Township disputes that there has been any waiver of solicitor-client privilege. It argues that the contents of the legal opinion have never been discussed in any public meeting of the Township, and neither Council nor staff "have done or said anything that would constitute waiver of its privilege over the [legal opinion]."

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

I have reviewed the legal opinion at issue in its entirety and compared it with the letter that the appellant received from the Township's Chief Administrative Officer. The sentence in the letter that the appellant has referred me to reads, "... the legal opinion we received indicates that your comments taken as a whole may indeed be defamatory." This represents just one portion of the conclusion reached in the legal opinion. I find that the letter does not disclose the bulk of the legal opinion, including the remaining elements that make up the conclusion, the legal analysis that led to this conclusion, or the recommendation.

In Order MO-1172, Adjudicator Laurel Cropley found that disclosing the "bottom line" of a legal opinion did not constitute waiver of solicitor-client privilege in the particular circumstances of that appeal. In reaching this conclusion, she stated, in part:

In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication.

Later in this order, she further states:

... This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.

In the circumstances of the current appeal, I am satisfied that in making the relatively minimal disclosure of a small portion of the "bottom line" of the advice, the City did not intend to waive privilege with respect to the record. Accordingly, I find that the City has not expressly waived privilege.

There is no evidence that the City provided access to the legal opinion to anyone other than City officials. As well, the City took active steps to preserve the confidentiality of the opinion. I am satisfied that the City treated the record as

confidential. In the circumstances, although the City did provide a small portion of the “bottom line” of the advice, I am not satisfied that fairness or consistency would require a finding that the privilege ceased. Therefore, I conclude that the City did not implicitly waive privilege.

I agree with this reasoning. In my view, although the Township did disclose one portion of the legal opinion’s bottom line to the appellant, this does not constitute waiver, either express or implied, of the solicitor-client privilege that attaches to the legal opinion as a whole. There is no evidence before me to suggest that the Township has disclosed the legal opinion to anyone outside the municipality or engaged in other acts that would constitute waiver of solicitor-client privilege. I find, therefore, that the Township has not waived solicitor-client privilege with respect to this record.

### **Conclusion**

I am satisfied that the Township has established that the section 12 exemption applies to the entire legal opinion, including the personal information of the appellant found in that record.

Under section 38(a) of the *Act*, an institution has the discretion to deny an individual access to their own personal information where the section 12 exemption would apply to the disclosure of that information. Because the section 12 exemption applies to all of the information in the legal opinion, including the personal information of the appellant, I find that the legal opinion qualifies for exemption under section 38(a) of the *Act*.

Given that I have found that the legal opinion is exempt under section 38(a) of the *Act*, it is not necessary to consider whether it is also exempt under section 38(a) in conjunction with the closed meeting exemption in section 6(1)(b), or under section 38(b).

### **EXERCISE OF DISCRETION**

The section 38(a) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

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

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that:
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Township submits that it exercised its discretion to refuse to disclose the legal opinion pursuant to section 38(a) of the *Act* in good faith. It asserts that it took into account all relevant considerations and did not take into account any irrelevant considerations.

In his representations, the appellant does not directly address whether the Township properly exercised its discretion in refusing to disclose the legal opinion pursuant to section 38(a) of the *Act*. However, he provides a significant amount of evidence with respect to his conflicts with the Township, including his harassment complaint against the Mayor and the Township's threat to sue him for defamation.

Although I appreciate that the appellant has had a difficult time in his dealings with the Township, I am not persuaded that the Township erred in exercising its discretion to refuse disclosure of the legal opinion. In my view, the Township exercised its discretion based on proper considerations. There is no evidence before me to suggest that the Township failed to take relevant factors into account or that it considered irrelevant factors in applying the 38(a) exemption. I find, therefore, that its exercise of discretion was proper.

**ORDER:**

I uphold the Township's decision to deny access to the six-page legal opinion.

Original Signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

\_\_\_\_\_ August 31, 2007