Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

INTERIM ORDER MO-3449 - I

Appeal MA14-542

Regional Municipality of Waterloo

May 26, 2017

Summary: The appellant made a request to the Regional Municipality of Waterloo (the region) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the possibility of making a complaint about the appellant to the Law Society of Upper Canada. The region identified records responsive to the request and denied access to them, citing the exemptions for solicitor-client privilege (section 12 of the *Act*) and closed meetings (section 6(1)(b)). The appellant appealed. In this order, the adjudicator finds that the exemption at section 38(a) (discretion to refuse requester's own personal information) in conjunction with section 12 applies to records 1-6 and orders the region to exercise its discretion under section 38(a). The adjudicator finds that section 38(a) in conjunction with section 12 does not apply to records 7-9, and remains seized to address outstanding issues relating to those records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 (definition of "personal information"), 12 and 38(a).

Orders Considered: Orders PO-2225, P-1117, MO-1577-I, PO-2516, PO-3467 and PO-1994.

Cases Considered: *R v Campbell*, [1999] 1 S.C.R. 565, *Confederation Treasury Services Ltd. (Re)*, [1997] O.J. No. 3598, *Descôteaux v Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.), and *General Accident Assurance Co. v Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

BACKGROUND:

[1] The appellant is a lawyer who was involved in an application for judicial review of a decision of the Regional Municipality of Waterloo (the region) to replace the board of directors of a housing co-operative. Following the termination of the application for judicial review, a complaint about the appellant was made to the Law Society of Upper Canada (the Law Society).

[2] The appellant then submitted an access request to the region pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant's request was for the following information:

> All records related to the possibility of making a complaint to the Law Society of Upper Canada about my law firm, … or myself
>
> I request that the Regional Municipality of Waterloo release to me any and all records that refer or relates to the possibility of commencing a complaint to the Law Society of Upper Canada about my law firm … or myself.

[3] The region located six records responsive to the request and issued a decision denying access to them. The region relied on the discretionary exemption at section 6(1)(b) (closed meeting) for a report to the Community Services Committee, on the basis that the report contains solicitor-client advice and was submitted in a closed meeting pursuant to section 239(2)(f) of the *Municipal Act*. It indicated that it was also relying on section 6(1)(b) to withhold the 5 other records, on the basis that the information in them relates to the subject-matter of the closed meeting and solicitor-client advice.

[4] The appellant appealed the region's decision to this office, which appointed a mediator to clarify the issues under appeal and to attempt a resolution. During mediation, the region issued a supplemental access decision in which it indicated that in addition to section 6(1)(b), it was also claiming the exemption at section 12 (solicitor-client privilege) for all six records at issue.

[5] With the appellant's consent, the mediator provided the region with a copy of the appellant's appeal letter, in which he outlined his arguments as to why he disagreed with the region's access decision.

[6] No mediated resolution was reached and the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by seeking and receiving representations from the region. Because it appeared to me that the records may contain the appellant's personal information, I added section 38(a) (access to one's own personal information) as one of the issues listed in the Notice of Inquiry I sent to the region. I also asked the

region to provide me with a copy of the records at issue.

[7] In its representations, the region advised that it had determined that three additional records are responsive to the appellant's request, but indicated that it was denying access to the three additional records on the basis of sections 12 and 6(1)(b) of the *Act.*[1] As a result, these records and the applicability of the exemptions at sections 12 and 6(1)(b) were added to the issues in this appeal.

[8] The region also advised that it would not provide copies of any of the records at issue to me as they "reveal solicitor-client privilege." I wrote to the region and asked for additional information about the records at issue. The region provided an affidavit setting out further information about the records at issue and the basis for the claimed exemptions. The appellant then provided representations and the region provided representations in reply.

[9] The parties' representations were shared with one another in accordance with the IPC's *Practice Direction 7: Sharing of Representations,* with portions withheld in accordance with the confidentiality criteria set out in section 5 of the practice direction.

[10] I also sought and received representations from a lawyer whose information appears in some of the records (the affected party). The affected party took the position that the records contain his personal information and objected to the records being disclosed to the appellant.

[11] Having reviewed the parties' representations and the region's additional affidavit, I am satisfied that I have enough information before me upon which to reach a determination regarding the applicability of the section 12 exemption to the records at issue, without ordering production of the records to me pursuant to section 41(4) of the *Act*.[2]

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[1] In its reply representations, the region identified another responsive record, the Closed Minutes of the Community Services Committee, but denied access to this record on the basis that it is exempt from disclosure pursuant to the closed meeting exemption at section 6(1)(b) and the solicitor-client privilege exemption at section 12. The appellant did not pursue access to that record, and as a result the minutes are not at issue in this appeal.

[2] Section 41(4) of the *Act* states:

> In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts I and II of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, the Supreme Court of Canada found that the production power of Alberta's Information and Privacy Commissioner did not include the power to compel the production of privileged records. The Court addressed only the powers of the Alberta Commissioner. Ontario's legislation, which differs from Alberta's, was not

[12] In this order, I find that the discretionary exemption at section 38(a) in conjunction with section 12 applies to records 1-6. However, I order the region to exercise its discretion with respect to those records, taking into account relevant considerations including the fact that they contain the appellant's personal information. I find that the section 38(a) exemption in conjunction with section 12 does not apply to records 7-9 and I remain seized to address outstanding issues relating to those records.

RECORDS:

[13] The records at issue are listed in the region's "Updated Index of Records for Appeal MA14-542" and its additional affidavit as follows:

1. Email from region counsel

2. Email from region counsel

3. Closed report prepared by region counsel

4. Email from region counsel

5. Email from region counsel

6. Email from region counsel

119-125. Email from affected party to region counsel and other region personnel

126. Email thread between affected party and region counsel

127-132. Email thread between affected party, region counsel and others

[14] For ease of reference in this order, I will refer to the record that the region labelled "119-125" as record 7, "126" as record 8 and "127-132" as record 9.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?

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considered. See also *Saskatchewan Information and Privacy Commissioner v University of Saskatchewan*, 2017 SKQB 140.

C. Did the institution exercise its discretion under section 38(a), in conjunction with section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Additional background

[15] In order to effectively consider the application of the exemption at section 38(a) in conjunction with section 12 to the records, it is necessary to set out some additional background. This background is taken from the parties' representations.

[16] The region, relying on its statutory authority under the *Housing Services Act*, removed the board of directors of a housing co-operative (the co-op) and replaced it with a new board of directors. A judicial review application challenging the region's legal authority to replace the board was then brought by former board members in the name of the co-op. The region, the respondent in the application, was represented by external counsel, with internal counsel providing instructions. The appellant represented one of the parties involved in the litigation, while the affected party was retained as counsel for another of the parties involved in the litigation.

[17] The region took the position that the former members of the co-op had no authority to commence the application in the name of the co-op, and brought a motion to dismiss the application on that basis. Ultimately, the application was abandoned.

[18] Two small claims court actions were also commenced against the region and others following the region's replacement of the co-op's board of directors. The region was represented by its internal counsel, while the affected party represented other parties. The actions were dismissed. Two access to information requests under the *Act* were also made to the region for records relating to the co-op. The region's access decisions were appealed to this office.

[19] Several months after the application for judicial review was abandoned, a complaint was made to the Law Society about the appellant. There is no evidence before me that any disciplinary proceedings have resulted from the complaint.

[20] The following is a timeline of key events:

April, Year 1	The region removes the board of the co-op and appoints a new board.
April, Year 1	A group of former co-op board members commences an application for judicial review in the name of the co-op against the region.

June, Year 1	Two Small Claims Court actions are commenced against the region and others.
July, Year 1	An access request under the *Act* is made (not by the appellant) to the region. The requester subsequently appealed the region's decision to this office.
August, Year 1	The Small Claims Court actions are dismissed.
February-March, Year 2	Records 1-5 (communications between the region and its counsel) are created.
April, Year 2	The judicial review application is abandoned.
May-June, Year 2	Records 6-9 (communications between the region and its counsel, and between the region's counsel and the affected party) are created.
June, Year 2	A complaint is made to the Law Society about the appellant's conduct in relation to the application for judicial review.
August, Year 2	An access request under the *Act* is made (not by the appellant) to the region. The requester subsequently appealed the region's decision to this office.

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[21] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "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,
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> > (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,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (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
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> (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;

[22] 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.[3] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[23] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[24] To qualify as personal information, the information must be about the individual

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[3] Order 11.
[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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.[5]

[25] However, 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.[6]

Representations

[26] The region submits that the records do not contain the appellant's "personal information" as defined in section 2(1) of the *Act.* Rather, the records contain information about the appellant in his professional capacity as a lawyer involved in the application for judicial review.

[27] The appellant submits that the records likely contain both his personal information and information about him that is in his professional capacity. He submits that information about his "conduct" during the judicial review application and information about him as a lawyer is his personal information. The appellant relies on Order MO-1550-F for the proposition that only in limited circumstances is information relating to an individual not "about" the individual for the purposes of the definition of personal information. The appellant submits that in this case, the information in the records is not about what he stated on behalf of a client in a professional capacity, but rather is about his "conduct" during his dealings with the region. Accordingly, the appellant submits, the information is his personal information.

[28] The affected party submits that the records contain his personal information. I cannot be more specific without referring to confidential portions of his representations.

Analysis and findings

Do the records contain the appellant's personal information?

[29] 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.

Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,

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[5] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[6] Orders P-1409, R-980015, PO-2225 and MO-2344.

> if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[30] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[7] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[31] The region raised the applicability of the exemptions at sections 12 and 6(1)(b). However, if the records contain the appellant's personal information, the appropriate exemption to consider is section 38(a), in conjunction with sections 12 and 6(1)(b). If, on the other hand, the records at issue do not contain the appellant's personal information, section 38(a) is not applicable and the appropriate exemptions to consider are the exemptions at sections 12 and 6(1)(b).

[32] For the following reasons, I find that the records at issue contain the appellant's personal information and that, therefore, the appropriate exemption to consider is the exemption at section 38(a) in conjunction with sections 12 and 6(1)(b).

[33] As noted above, 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.[8] However, 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.[9]

[34] This contextual approach to deciding whether information about an individual constitutes personal information is set out in Order PO-2225. In that Order, former Assistant Commissioner Tom Mitchinson set out the following two-step analysis for determining whether information should be characterized as "personal" or "professional":

1. In what context do the names of the individuals appear? Is it in a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

2. Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual? Even if the

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[7] Order M-352.
[8] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[9] Orders P-1409, R-980015, PO-2225 and MO-2344.

> information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[35] As noted above, the appellant's request was for records related to the possibility of making a complaint to the Law Society about him or his law firm. While I do not have the records before me, given the wording of this request, all of the records that the region found to be responsive to the request necessarily relate to the possibility of making a complaint to the Law Society about the appellant or his firm. Further, from my review of the region's affidavit, I find that the records relate to the possibility of bringing a complaint against the appellant, as opposed to anyone else at his firm.

[36] I find, based on the parties' representations, that the complaint arose out of the appellant's professional dealings as counsel representing a party or parties involved in litigation. However, although the appellant's information in the records relates to him in his professional capacity, I must also consider whether the information reveals something of a personal nature about him.

[37] Previous orders of this office have found that formal allegations of wrongdoing against an individual in practicing his or her profession constitute the individual's personal information.[10] For example, in Order P-1117, the adjudicator found that the fact that the records at issue pertained to a complaint against certain coroners removes the information about them in the records from the usual "professional" context. The adjudicator found that such information constitutes the personal information of the coroners.

[38] Similarly, in Order MO-1577-I, the adjudicator found that information in records relating to a complaint about the conduct of an individual contains that individual's personal information under the definition at section 2(1) of the *Act*. In that case, the adjudicator found that records relating to a complaint to the Special Investigations Unit contained the personal information of the subject officer.

[39] In Order PO-2516, also an appeal involving records created in the course of an SIU investigation, the adjudicator stated:

> In my view, because the information in the records was created for the purpose of or used as part of an examination into the conduct of the subject officers, it has taken on a different, more personal quality. As such, I find that its disclosure would reveal something personal about the individual officers, specifically whether their conduct in dealing with the deceased person was appropriate.

[40] I agree with the reasoning found in these orders and will apply it to this appeal. In the present case, the records at issue contain information relating to a potential

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[10] See Orders P-1117, P-721, M-720, M-757, P-165, P-448, P-1180, PO-1912 and PO-2525.

complaint to the Law Society about the conduct of the appellant. In my view, the information in these records (which I have not seen) would be expected to have a personal quality to it, as the conduct of the appellant was called into question and resulted in a formal complaint to the Law Society.

[41] I also distinguish this case from another order involving the definition of personal information in a professional context. In Order PO-3467, Assistant Commissioner Sherry Liang applied the two-step analysis from Order PO-2225 and found that the fact that certain driving instructors' licences had been revoked was not personal information of the driving instructors, because there were many possible grounds for the revocation, many of which do not reveal anything personal about that individual, for example, administrative matters such as driver licence exchanges with other jurisdictions. In the present appeal, however, the basis for the Law Society complaint was the "conduct" of the appellant. While I do not have the records at issue before me, I find that alleged "conduct" of the appellant leading to a complaint to the Law Society would reveal something of a personal nature about the appellant in a way that administrative matters pertaining to an instructor's licence would not.

[42] I conclude that the records contain the personal information of the appellant, within the introductory wording of the definition. As a result, the appellant's request is treated as a request for his own personal information, such that section 38(a), found in Part II of the *Act*, applies.

Do the records contain the affected party's personal information?

[43] The region did not claim the application of any personal privacy exemption to the records at issue. However, the affected party submits that records 7-9 contain his personal information and he may, therefore, be implicitly raising the potential application of the discretionary personal privacy exemption at section 38(b). I have not seen the records. However, from reading the parties' representations, including the region's affidavit, I am of the view that the communications at issue arise out of the affected party's professional involvement in the application for judicial review. Further, I have not been provided with any information to suggest that the records contain anything of a personal nature about the affected party. It is my preliminary view, therefore, that the withheld information reveals information about the affected party in his professional capacity, and that its disclosure would not reveal anything of a personal nature about him. I am not, however, making a finding on that issue at this time.

B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?

[44] Section 38(a) of the *Act* reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,

> if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[45] The region claims that section 12 of the *Act* applies to all of the records at issue. Section 12 states:

> 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.

[46] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply. In this case, the region argues that both branches apply.

[47] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[48] Branch 2 is a statutory privilege that applies where the records were "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." The statutory and common law privileges, although not identical, exist for similar reasons.

[49] In its initial representations, the region argued that both litigation privilege (branch 1 and branch 2) and communication privilege (branch 1 and branch 2) apply to all of the records. However, the region's subsequent affidavit does not argue the application of communication privilege to records 7-9. This is discussed further below.

Branch 1: common law privilege

Solicitor-client communication privilege

[50] 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.[11] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[12] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[13]

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[11] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[12] Orders PO-2441, MO-2166 and MO-1925.
[13] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[51] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[14]

[52] 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.[15] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[16]

Litigation privilege

[53] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[17] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[18] It does not, however, apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[19] The litigation must be ongoing or reasonably contemplated.[20]

[54] Common law litigation privilege generally comes to an end with the termination of litigation.[21]

Branch 2: statutory privilege

Statutory solicitor-client communication privilege

[55] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

Statutory litigation privilege

[56] This privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the

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[14] *Susan Hosiery Ltd. v Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[15] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[16] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[17] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[18] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[19] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[20] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[21] *Blank v. Canada (Minister of Justice)*, cited above.

litigation privilege, such as communications between opposing counsel.[22]

[57] The statutory litigation privilege in section 12 also protects records prepared for use in the mediation or settlement of litigation.[23]

[58] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[24]

Loss of privilege

Waiver

[59] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[25]

[60] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[26]

[61] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[27] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[28]

The region's original representations

[62] As noted above, the region submitted representations, and at my request, later submitted an affidavit containing further details regarding the records and the region's exemption claims.

[63] In its representations, the region submits that records 1-6 are covered by the

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[22] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[23] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[24] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[25] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[26] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[27] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[28] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

common-law and statutory litigation and communication privileges.[29] It submits that records 1, 4 and 5 (emails from the region's counsel) were created by the region's legal counsel and were received by its external counsel. It submits that each record contained a confidentiality notice and that the substance of the records relates to the application for judicial review, and the seeking of legal advice by the region.

[64] The region submits, further, that records 2 and 6 (emails from the region's counsel) were created by the region's counsel and were received by region councillors and employees. It submits that each record contained a confidentiality notice and that the substance of the records relates to the application for judicial review, and the seeking of legal advice concerning that application.

[65] With respect to record 3, the closed report, the region submits that the region's legal counsel prepared it for and provided it to the Community Service Committee (the committee) as the client. It submits that the report was confidential and was received by the committee in a closed session. The region submits that the substance of the report relates to the judicial review application and legal advice concerning the application.

[66] The region submits that records 7-9 (emails passing between the region, the region's counsel and the affected party) are covered by communication privilege and litigation privilege (though, as noted below, its subsequent affidavit claims only the application of litigation privilege for these records). The region claims that each record contains a confidentiality notice, and that the substance of the records relates to the conduct of the appellant during the judicial review application. The region submits that the records assisted legal counsel for the region in giving legal advice, specifically whether the region should make a complaint to the Law Society. The region submits that the privilege was not waived because the affected party's client had a common interest with the region in the application as well as other disputes.

The region's subsequent affidavit

[67] The region provided further information in its subsequent affidavit, including a detailed listing of the records at issue with a description of the author, the recipient(s), the matter discussed, the grounds for the section 12 exemption claim, and why there was no waiver of privilege. In my analysis, below, I refer in further detail to the information the region provided about each record.

The representations of the affected party

[68] The affected party was given the opportunity to make representations on whether section 12 applies to the records, but did not do so.

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[29] The region refers to the communication privilege as simply "solicitor-client privilege" but it is clear from the context that the region is referring to solicitor-client communication privilege.

The representations of the appellant

[69] The appellant made submissions both in his letter of appeal (which, as noted above, was shared with the region) and in his representations during my inquiry in the adjudication stage of the appeal. While I do not refer in detail to all aspects of the appellant's arguments, I have considered them all.

Records 1-6 (communications within the region)

[70] The appellant submits that communication privilege does not apply to records 1-6, because the records do not relate to the seeking, giving or formulating of legal advice, but rather contain information about him and the possibility of complaining about him to the Law Society. He states that this is not information about legal matters; it is about making a decision about whether or not to continue to attempt to intimidate him through the Law Society's processes.

[71] The appellant also submits that litigation privilege does not apply to records 1-6, because litigation privilege expires when the litigation ends, and the application for judicial review has ended.

Records 7-9 (communications between the affected party and the region)

[72] The appellant submits that communication privilege cannot apply to communications between the region and the affected party because there was no solicitor-client relationship between the region and the affected party. He also argues, as he did in respect of records 1-6, that the emails do not contain legal advice but rather information about the possibility of complaining about him to the Law Society.

[73] With respect to the region's "common interest" argument, the appellant submits that the emails are not inherently privileged, which is a requirement of common interest privilege. They are not about any ongoing litigation, and are not solicitor-client communications for the purpose of giving or receiving legal advice.

[74] In the alternative, he submits that even if the communications were privileged, the privilege was waived because the communications were shared with a third party, the affected party. The appellant submits that the region and the affected party's client did not share a common interest. He implies, further, that the affected party was communicating on his own behalf and not on behalf of his client.

[75] With respect to litigation privilege, the appellant submits that it cannot apply, because the application for judicial review has concluded.

The region's reply representations

[76] The region submits that the affected party's client shared a common interest with the region in having the judicial review application dismissed.

[77] The region submits that the affected party assisted it in developing a strategy to respond to the application and attended at various court hearings to observe and strategize with the region's counsel. It submits that the statutory litigation privilege under section 12 continues even if the litigation is concluded. Moreover, the region takes the position that the application was just one of several legal proceedings brought by various individuals as against the region and others. As a result, the region submits, the litigation should be considered on a "global" and ongoing basis.

Analysis and findings

Records 1-5

[78] According to the region's affidavit,

- Record 3 is a closed report prepared by the region's internal counsel. The region states that the report, which was presented to members of the region's council in closed session, gives a background on the application for judicial review, and sets out options and a legal assessment including a legal assessment on a possible complaint to the Law Society about the appellant. The region states that the other records relate either to the preparation of the report or the carrying out of directions arising from the report.

- Record 1 is an email from the region's counsel to the region's external counsel as well as a number of region employees relating to the application for judicial review.

- Record 2 is an email from the region's counsel to various region employees and councillors providing an update on the application for judicial review and certain matters related to that application, including a possible Law Society complaint.

- Record 4 is an email from the region's counsel to its external counsel and other region employees regarding the application for judicial review and a possible Law Society complaint.

- Record 5 is an email from the region's counsel to its external counsel and other region staff regarding the application for judicial review.

[79] 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.[30] The privilege covers not only the document containing the legal advice, or the request for advice, but information passing between the solicitor and client aimed at keeping both informed so

[30] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

that advice can be sought and given.[31]

[80] Records 1-5 all consist of communications passing between the region's counsel and region staff and councillors. All contained a confidentiality notice, and no third parties outside of the region were copied on the emails. The region's affidavit states that all of the communications relate to the application for judicial review (which was ongoing at the time the records were created), and that some of them also relate to the possibility of bringing a Law Society complaint against the appellant. I am satisfied that communications for these purposes amount to "legal advice", as both the judicial review application and the potential Law Society complaint are legal matters.

[81] I have taken into account the appellant's submission that the communications in question do not relate to the seeking, giving or formulating of legal advice, but rather contain information about him and the possibility of continuing to attempt to intimidate him by complaining about him to the Law Society.

[82] It is well established that not all advice from a lawyer constitutes legal advice. In *R. v. Campbell*,[32] the Supreme Court of Canada pointed out that

> [i]t is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege.

[83] After describing the various functions performed by government and in-house lawyers, the Court stated:

> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[84] In *Confederation Treasury Services Ltd. (Re)*,[33] Justice Farley of the Ontario Court (General Division) stated as follows:

> … I would also note that [solicitor client] privilege does not automatically come into play merely because a lawyer is engaged by a client. The privilege attaches to the request for and obtaining of legal advice. It does not attach to communications between a client and his retained counsel when that counsel is either not acting as a lawyer or where it is not legal advice but rather some other form of advice or other assistance being offered.

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[31] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[32] 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565.
[33] [1997] O.J. No. 3598.

[85] In *Descôteaux v. Mierzwinski*,[34] the Supreme Court of Canada stated:

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

[86] I am satisfied that the communications at issue in records 1-5 were for the purpose of giving and receiving legal advice. In my view, under the circumstances as they are described in the parties' representations, including the region's affidavit, region counsel's advice relating to the possibility of making such a complaint was legal advice. As noted above, in *Descôteaux* the Supreme Court stated that the confidentiality attaches to all communications made within the framework of the solicitor-client relationship. Having reviewed the confidential portions of the region's affidavit (for example, in respect of record 4), I find that the region's counsel was engaged in the application of legal principles to facts as part of his advice on whether or not to bring a Law Society complaint.

[87] I conclude, therefore, that records 1-5 are subject to solicitor-client communication privilege under both branch 1 and branch 2.

[88] Given my conclusion, I do not need to determine whether the records are also subject to litigation privilege. However, they would appear to be protected by the statutory litigation privilege, as they were created in contemplation of or for use in the application for judicial review or the settlement of that application.[35] While the appellant is correct that the common law litigation privilege expires once the litigation is terminated, the statutory litigation privilege continues to apply notwithstanding that the application has now concluded.[36]

Record 6

[89] Record 6 is an email that the region's counsel sent to region employees following the termination of the application for judicial review. According to the region's affidavit,

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[34] [1982] 1 S.C.R. 860.
[35] See *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, cited above.
[36] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

the email related to the application and a possible complaint to the Law Society.

[90] The region claims that section 12, branches 1 and 2, communication privilege and litigation privilege apply to this record.

[91] For the reasons articulated above with respect to records 1-5, I find that solicitor-client communication privilege applies to this email. I find that the decision of whether to make a Law Society complaint is a legal matter upon which the region's counsel provided legal advice. The email is a direct communication of a confidential nature between a solicitor and client, made for the purpose of obtaining or giving professional legal advice.[37]

[92] Given my conclusion, I do not need to determine whether the statutory litigation privilege also applies to record 6.[38]

Severances

[93] The appellant submits that there is no indication that the region considered severing the records to release portions to which an exemption does not apply. Section 4(2) is the severance provision of the *Act* and provides as follows:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15 … the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[94] For example, according to the appellant, the region could release the portions of record 3 (the closed report) that deal with the possibility of making the Law Society complaint, and withhold the other portions of the report, which almost certainly relate to the application.

[95] The application of the severance provisions of the *Act* to documents subject to solicitor-client privilege was considered in *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)*,[39] where the Divisional Court stated**:**

> Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege…

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[37] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[38] In any event, for the reasons articulated below under records 7-9, it would appear that litigation privilege does not apply to record 6.
[39] [1997] O.J. No. 1465 (Ont. Div. Ct.) (QL).

> I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision,[40] for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I would also emphasize that the privilege protects only the communication to legal counsel. ...documents authored by third parties and communicated to counsel for the purpose of obtaining legal advice do not gain immunity from disclosure unless the dominant purpose for their preparation was obtaining legal advice: *Ontario (Attorney General) v. Hale (1995), 85 O.A.C. 299 (Div.Ct.).*

[96] From my review of the region's affidavit, I am satisfied that the communications in records 1-6 were, in their entirety, made for the purpose of giving or obtaining legal advice. There is no indication in the region's affidavit that matters clearly unrelated to legal advice were discussed.

[97] I find, therefore, that these records cannot be reasonably severed under section 4(2) of the *Act.*

Conclusion

[98] I conclude that section 12 applies to records 1-6. As a result, subject to my findings on the region's exercise of discretion, below, the records qualify for exemption from disclosure pursuant to section 38(a) of the *Act,* in conjunction with section 12. Given my finding, I do not need to determine whether the exemption at section 38(a) in conjunction with section 6(1)(b) also applies to these records.

Records 7-9

[99] Records 7-9 post-date the termination of the application for judicial review. According to the region's affidavit, record 7 is an email from the affected party to the region's counsel, the region's external counsel and other region staff, discussing the conduct of the appellant during the application. Records 8 and 9 are emails between the region's counsel, the affected party and region staff, also discussing the appellant's conduct during the application.

[100] I agree with the appellant that these records are not protected by solicitor-client communication privilege. Indeed, the region appears to have abandoned its claim that they are subject to communication privilege. While the region initially submitted that these records are protected by communication privilege, its subsequent affidavit does not make that claim. However, for the sake of completeness, I will briefly address the applicability of communication privilege to these records.

[101] First, for communication privilege to apply, the communication must generally be

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[40] The *Freedom of Information and Protection of Privacy Act* equivalent to section 4(2) of the *Act.*

a direct communication between solicitor and client. The communications at issue are between the region's counsel and the affected party. There is no solicitor-client relationship between these parties.

[102] Second, I do not accept the region's initial submission that the records assisted its legal counsel in giving legal advice, specifically with respect to whether the region should make a complaint to the Law Society. In some cases, a communication by a third party to a lawyer which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege.[41] However, these emails post-date the communications between the region's counsel and the region regarding the possibility of making a Law Society complaint, and so cannot have facilitated the giving and receiving of legal advice in those communications.

[103] I conclude that these records are not subject to solicitor-client communication privilege. I will now consider the region's main argument, which is that litigation privilege applies to them.

[104] From my review of the region's affidavit, it is clear that these emails related to the concluded application as well as a possible Law Society complaint. There is no indication that the emails related to any other litigation. I find, therefore, that neither the common law nor the statutory litigation privilege apply. The common law privilege requires that the communication be for the dominant purpose of reasonably contemplated or ongoing litigation, while the statutory privilege requires that the communication be "in contemplation of or for use in litigation." In my view, both privileges require that the litigation be reasonably contemplated or ongoing *at the time of the communication.* A communication cannot be in contemplation of or used in litigation that has already been concluded.

[105] I have also considered the region's argument that the judicial review application was but one part of the ongoing litigation between members of the old board of directors, the region and the new board. As a result, the region submits, the litigation should be considered on a "global" and ongoing basis. At the time of the communications in question, however, the application for judicial review had been concluded, as had the small claims actions. One of the two requests under the *Act* had been made, while the other had not.

[106] It is clear, however, from the region's affidavit, that the communications at issue relate to the concluded application and the possibility of making a complaint against the appellant. Although the region argues that the litigation ought to be considered on a global basis, there is no indication in its affidavit that the dominant purpose of the communication was in relation to the access proceedings or that the communication was made for use in the access proceedings. Rather, the communications arose out of

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[41] See *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

past litigation and the possibility of bringing a Law Society complaint arising out of the past litigation.[42]

[107] Therefore, while I acknowledge that the statutory litigation privilege, unlike the common law litigation privilege, does not expire with the termination of litigation, that fact does not assist the region, because litigation privilege never applied to these records.

[108] Much of the parties' representations addressed whether the affected party's role in the application for judicial review did or did not create a "zone of privacy" such that litigation privilege would apply to communications between the affected party and counsel for the region. While there may have been a zone of privacy including the region's counsel and the affected party for the purposes of litigation privilege while the application was ongoing (though I do not need to make any finding on that matter), the communications in records 7-9 took place following the conclusion of the application, and the evidence does not lead me to conclude that the dominant purpose of those communications was in relation to any other reasonably contemplated litigation, or that those communications were made for use in any other reasonably contemplated litigation.

[109] I also note that neither the region nor the affected party argued that the Law Society complaint itself (or any subsequent review of the dismissal of the complaint) constitutes "litigation" for the purposes of litigation privilege.[43]

Conclusion on section 38(a) in conjunction with section 12

[110] I conclude, therefore, that records 7-9 are not subject to either common-law or statutory litigation privilege. I have found above that they are not subject to communication privilege. As a result, section 12 would not apply to them and they are not exempt from disclosure pursuant to section 38(a) in conjunction with section 12 of the *Act.*

[111] However, I remain seized of this appeal to address outstanding issues relating to these records, for which I may require further information and/or representations. The region claims the application of section 6(1)(b) to these records, and the affected party has suggested that these records contain his personal information.

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[42] I do not, therefore, need to determine the issue of whether requests and/or appeals under the *Act* constitute litigation for the purposes of litigation privilege.

[43] The case law suggests that the complaint to the Law Society does not constitute litigation for the purposes of litigation privilege: see, for example, *College of Physicians of British Columbia v. British Columbia (Information and Privacy* Commissioner, [2002] B.C.J. No. 2779 (B.C.C.A).

C. Did the institution exercise its discretion under section 38(a), in conjunction with section 12? If so, should this office uphold the exercise of discretion?

[112] I have found that records 1-6 qualify for an exemption pursuant to section 38(a) in conjunction with section 12. This 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.

[113] 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.

[114] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[44] This office may not, however, substitute its own discretion for that of the institution.[45]

[115] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[46]

- 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

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[44] Order MO-1573.
[45] Section 43(2).
[46] Orders P-344 and MO-1573.

- 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.

Representations

[116] The region did not make representations on its exercise of discretion, either pursuant to section 12 or pursuant to section 38(a) in conjunction with section 12.[47]

[117] The appellant submits that the region decided on a course of intimidation during the application for judicial review and that the region's exercise of discretion has been tainted by the previous legal proceedings. He submits that the region has exercised its discretion for an improper purpose: to shield its involvement in the Law Society complaint.

Analysis and findings

[118] Absent any representations from the region on its exercise of discretion, I am unable to find that it exercised its discretion. I will, therefore, order the region to exercise its discretion pursuant to section 38(a) in conjunction with section 12. In exercising its discretion, the region is to take into account relevant factors including the fact that the records contain the appellant's personal information.

ORDER:

1. I find that section 38(a) in conjunction with section 12 applies to records 1-6. I order the region to exercise its discretion pursuant to section 38(a) in conjunction with section 12, and to provide this office with written notification of

[47] Although the region took the position that the records do not contain the appellant's personal information, the section 12 exemption, taken alone, is also a discretionary exemption.

its decision regarding the exercise of discretion. I order that this office be provided with such notification by **June 16, 2017.**

2. I find that section 38(a) in conjunction with section 12 does not apply to records 7-9. Outstanding issues relating to these records will be addressed separately.

3. I remain seized of this appeal.

Original Signed by: May 26, 2017

Gillian Shaw
Adjudicator