

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3879-I

Appeal MA17-165

Toronto District School Board

December 18, 2019

Summary: The appellant sought access to records concerning investigations connected to a specific property. The Toronto District School Board (the board) denied access to the records, applying the discretionary solicitor-client privilege exemption in section 12 of the *Municipal Freedom of Information and Protection of Privacy Act*. This order partly upholds the board's application of section 12 to the records. It also orders the town to re-exercise its discretion with respect to one of the exempt records and orders that the non-exempt information be disclosed to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12.

OVERVIEW:

[1] The requester made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto District School Board (the board) for information about "potential groundwater or soil investigations" relating to a specific property and any information about the property "being registered as a waste generator of halogenated solvents."

[2] The board located records responsive to the request and issued an access decision to the requester, denying access to the records in their entirety based on the discretionary exemption in section 12 of the *Act* (solicitor-client privilege).

[3] The requester, now the appellant, appealed the board's decision to this office. The appeal could not be resolved at mediation and the file was transferred to the

adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*. Representations were received and shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[4] In this order, I uphold the board's decision that the discretionary exemption in section 12 of the *Act* applies to all of the records except for pages 34 and 35 of Tab 4-1 and the report at Tab 7. I also uphold the board's discretion to withhold all of the information that I have determined section 12 applies to, with the exception of the report at Tab 6. I order the board to re-exercise its discretion under section 12 with respect to that information.

RECORDS:

[5] The records at issue consist of email communications and attachments, handwritten notes, site plans, and two reports. There are 784 pages in total. They can be described as follows:

Tab¹	Description	Number of Pages
1	Records from the board's Associate Director of Facilities	81
2	Records from the board's internal legal counsel	23
3	Records from the board's internal legal counsel	63
4-1	Records from the board's Central Services Manager of Facilities	192
4-2	Records from the board's Central Services Manager of Facilities	157
6	Report 1	202
7	Report 2	66

DISCUSSION:

Preliminary issue:

[6] The board states in its representations that the following pages are blank:

- Page 17 of Tab 1;

¹ The board use the term "Tab" to refer to different portions of the records at issue in its representations and I have adopted that term for ease of reference. The actual records are identified by number in the top right corner as "Rec #" 1, 2, 3, 4 and 6. There are two separately numbered sections of "Rec #4." I have identified these pages as Tab 4-1 and Tab 4-2. The last record (the 66 page Report) does not have a "Rec #" identified in the top right corner, so I have referred to it as Tab 7.

- Pages 13, 21, 33, 47 and 187 of Tab 4; and
- Page 135 of Tab 5.

[7] I have reviewed these pages and confirm that they are blank and do not contain any information. As such, they are non-responsive to the request and I will not consider them further.

Does the discretionary exemption at section 12 apply to the records?

[8] The board submits that the information at issue is subject to several categories of the discretionary solicitor-client privilege exemption at section 12 of the *Act*, including solicitor-client communication privilege, litigation privilege and settlement privilege.

[9] Section 12 of the *Act* 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.

[10] 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.

Branch 1: common law privilege

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

Solicitor-client communication privilege

[12] 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.² The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³ 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.⁴

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³ Orders PO-2441, MO-2166 and MO-1925.

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

[13] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁵

[14] 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.⁶ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁷

Litigation privilege

[15] 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.⁸ Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.⁹ It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.¹⁰ The litigation must be ongoing or reasonably contemplated.¹¹

Branch 2: statutory privilege

[16] 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."

[17] Statutory litigation 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 litigation privilege, such as communications between opposing counsel.¹²

[18] Statutory litigation privilege also protects records prepared for use in the

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

⁸ *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).

⁹ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

¹⁰ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹¹ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

¹² *Ontario (Attorney General) v. Big Canoe*, 2006 CanLII 14965 (ON SCDC), [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

mediation or settlement of litigation.¹³ In particular, the Ontario Court of Appeal has held that statutory litigation privilege encompasses confidential records used in or generated by settlement discussions between an institution and a third party, including records prepared by counsel for a private litigant.

[19] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.¹⁴

The board's representations

[20] The board provided contextual information about the records at issue in its representations. It says that it was named as a defendant in a lawsuit that alleged damages from contamination of a property. The board says that in preparing its response to that litigation, it conducted an investigation into the matter and determined that the contaminants originated with another property. The board says it then initiated its own legal action in relation to the contamination. An affidavit the board provided from one of its internal lawyers specifies that the first action was withdrawn and the latter action was settled with an express confidentiality clause.

[21] The board says that both its internal legal counsel and external legal counsel it retained were involved in the litigation process related to the legal action it took.

[22] In its representations, the board included a list of 22 individuals whose names appear in the communications it withheld at Tabs 1 through 4-2. It provided a description of each individual's position and their connection to the litigation. Four of the individuals are (or previously were) the board's internal legal counsel. Nine individuals are board employees from the facilities, legal or environmental and/or engineering departments. Three individuals are identified as lawyers representing the defendant in the litigation the board initiated. The remaining individuals are the board's external counsel, or agents retained by the external counsel, who assisted with the litigation.

[23] The board specified that the litigation was associated with facilities and environmental issues and it identified three employees that were involved as the "client" for the purposes of input and instruction with legal counsel. It says that other board staff were also involved to the extent the issues involved in the litigation impacted on their respective areas.

¹³ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII), 2010 ONCA 681 (*Magnotta*). *Magnotta* considered the solicitor-client privilege exemption in the *Freedom of Information and Protection of Privacy Act*; the reasoning has been adopted for the equivalent section in the municipal Act at issue in this appeal-see for example, Orders MO-3161 and MO-3092.

¹⁴ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (2002), 2002 CanLII 18055 (ON CA), 62 O.R. (3d) 167 (C.A.).

[24] The board says that it is clear from the face of the records at issue that they constitute a continuum of communications between internal counsel, external counsel, retained consultants and board officials with respect to the litigation as part of the continuum of communications between client and counsel. It further asserts that it is clear on the face of the records that they are communications between board counsel and officials to keep each other informed of the matters related to the litigation as well as legal advice and settlement discussions.

[25] The board also provided additional information about some of the pages at issue, including those that are not email communications. It says the following:

- Page 50 of Tab 1 identifies fees and disbursements associated with the litigation and there is a rebuttable presumption that that information is privileged;
- Pages one and two of Tab 2 are notes from its internal legal counsel's communications with its external legal counsel about the litigation;
- Pages one to four of Tab 3 are site plans that were provided to the board's legal counsel as part of the process of settling the litigation;
- The record at Tab 6 is a report from 2003 that was provided to the board's legal counsel for the purposes of settlement discussions;
- The record at Tab 7 is a "report that was provided by the plaintiff in the initial action against the Board."

[26] The board provided an affidavit from one of its internal lawyers attesting that the information set out above is true.

[27] In addition to its claim of solicitor-client communication privilege, the board says a number of the records are also subject to settlement privilege.¹⁵ The board also claims that the records were prepared for the dominant purpose of the litigation.

The appellant's representations

[28] The appellant says that the board's section 12 claim is untenable and improper. It submits that the board has failed to provide sufficient information to determine whether all of the responsive records are protected by solicitor-client communication privilege, litigation privilege, and/or settlement privilege.

¹⁵ Specifically, the board says that the following pages constitute communications made for the purposes of pursuing settlement: Tab 1, pages 9-16, 19-32, 35, 39-49, 51-55, 57-62, 68-69, 72-75; Tab 2, pages 10-20 and 23; Tab 4, pages 5-12, 49-60, 62-73, 76-87, 90-102, 105-130, 134-136, 154-166, 170-182; Tab 4-2, pages 4-15, 17-29, 35-46, 48-60, 70-82, 84-96, 106-118, 123-134 and 138-149.

[29] Specifically, the appellant asserts that the board has not identified the individual documents that fall within the categories of records that it described, nor has it identified the date, author or recipient of any of the documents, with the exception of the report at Tab 6. The appellant asserts that without this information, it is impossible to determine the nature of the communications between the board's internal counsel, external counsel, retained consultants and board officials. As a result, it says that the board has not established that the exemption in section 12 of the *Act* applies.

[30] The appellant asserts that the protections afforded to solicitor-client communications have limits. For example, it submits that while in-house corporate counsel are covered by solicitor-client privilege in their communication of legal advice, they may also be consulted for their business advice, which is not covered by solicitor-client privilege.

[31] The appellant asserts that the determination of whether a document is subject to solicitor-client privilege becomes more complex when third parties originate, or are copied in, communications. It says that the mere fact that a communication was sent to or from a lawyer does not automatically make the communication subject to solicitor-client or litigation privilege and that without any evidence regarding the date, author, recipient or document type of the responsive records, it is impossible to determine whether the responsive records are protected by solicitor-client or litigation privilege.

[32] The appellant also points me to an Ontario Superior Court of Justice decision it says confirms that communications to or from in-house counsel acting as intermediaries for the purpose of transmitting information and documentation are not privileged if they do not contain legal advice or requests for legal advice.¹⁶

[33] With regard to the report at Tab 6, the appellant says that the board has failed to identify any communications with the consultant that prepared the report. It says that since the report at Tab 6 pre-dates any litigation relating to the board's property by approximately six years, those communications should not be protected by solicitor-client or litigation privilege.

[34] The appellant submits that litigation privilege does not protect documents prepared after the time of litigation was contemplated, where there is no evidence that the subject documents were prepared for the dominant purpose of litigation. The appellant says that the board must establish that litigation was contemplated at the time the responsive records were created and that they were created for the purpose of preparing for litigation. It says that litigation privilege is intended to protect the "zone of privacy" that counsel has in which to investigate and prepare a case for trial and that litigation does not protect work product or materials created outside of that zone.

¹⁶ *XCG Consultants Inc. v. ABB Inc.*, 2014 ONSC 1111 at paras. 61-63.

[35] The appellant also refers me another Ontario Superior Court of Justice case where it says that the court held that a party may be required to disclose the contents of a statement taken from a witness that would otherwise be protected from disclosure by litigation privilege.¹⁷ Relying on this decision, the appellant argues that the factual information within the report is not privileged. Specifically, it submits that even if the report at Tab 6 was subject to a proper claim of litigation privilege, the “underlying data and foundational information” used by the board’s consultant to prepare the report would be subject to disclosure.

The board’s reply

[36] In reply to the appellant’s representations, the board disagreed with the appellant’s assertion that it was required to individually describe each of the responsive records and asserted that it provided sufficient information for the appellant to make representations by identifying the parties involved in the communications and listing the pages under general descriptive categories.

[37] The board says that the appellant claims in its representations that solicitor-client privilege does not apply if the information at issue does not contain legal advice. The board says this is not an accurate statement of law and it reiterates its position that privilege applies to the continuum of records between counsel and the client for the purposes of legal advice.

[38] Relying on Order PO-3715, the board also states that documents communicated to counsel for the purposes of providing legal advice are also captured by solicitor-client privilege.

Findings and analysis

[39] I have reviewed all of the records at issue and for the reasons that follow, I find that, with the exception of pages 34 and 35 of Tab 4-1 and all of Tab 7, the solicitor-client communication privilege exemption in section 12 of the *Act* applies to all of the information at issue, subject to my consideration of the board’s exercise of discretion.

[40] I will now review of the records set out in the table above at paragraph 6, starting at Tab 1.

Tab 1

[41] As noted above, Tab 1 is comprised of responsive records from the board’s Associate Director of Facilities. There are 19 email chains in Tab 1 that consist of communications between the Associate Director of Facilities and the board’s internal

¹⁷ *White v. 123627 Canada Inc.*, 2014 ONSC 2682 at para. 35.

counsel, external counsel, retained consultants and other board officials. The communications all relate to the litigation commenced by the board and settlement discussions regarding that litigation. Many of the emails are duplicates.

[42] Some of the email communications forward the board's external legal counsel's correspondence with the defendant's legal counsel to the board's internal legal counsel and officials. Most of these communications contain legal advice provided to the board regarding the forwarded communications. In cases where they do not, it is clear to me that the communications were being forwarded to the recipients for the purpose of keeping the client informed of the matters related to the litigation and the settlement of that litigation.

[43] I note that the majority of the emails are marked as "privileged and confidential." There are no outside parties to the communications and I am satisfied that they are confidential in nature. As such, I find that all of the emails in Tab 1 are subject to the solicitor-client communication privilege exemption in section 12 of the *Act*.

Tabs 2 and 3

[44] Tabs 2 and 3 are comprised of responsive records from one of the board's internal lawyers. I confirm the board's representation that the first two pages of Tab 2 are notes from the board's internal lawyer. They relate to a telephone conversation that the lawyer had with the board's external legal counsel regarding the litigation. I am satisfied that the notes are the internal lawyer's working papers that directly related to seeking, formulating or giving legal advice for the board in relation to the litigation and as such, they are subject to solicitor-client communication privilege under section 12 of the *Act*.¹⁸

[45] The remaining records in Tab 2 are comprised of 6 email chains, some of which are duplicative. One of the emails attaches copies of communications from the defendant regarding the settlement of the litigation and provides advice in relation to those communications. As with Tab 1, the emails are identified as "privileged and confidential" and there are no outside parties to the communications. As such, I am satisfied that all of the records in Tab 2 meet the criteria for solicitor-client communication privilege under section 12 of the *Act*.

[46] I confirm the board's representation that the first two pages of Tab 3 are site plans. The board referred me to pages 61 and 62 of Tab 5 of the records, which it says indicate that the site plans were provided to the board's legal counsel as part of the settlement process related to the litigation. I have reviewed pages 61 and 62 of Tab 5 and confirm that those pages identify the site plans and while I cannot reveal the

¹⁸ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

context of how these pages relate to the litigation and/or give any details about the advice provided in relation to the settlement of that litigation, it is clear to me that the site plans were delivered to the Board's legal counsel to assist with settlement discussions.

[47] Furthermore, based on my review of the records at issue, it is clear to me that the site plans in Tab 3 were attached to an email chain between the board's internal legal counsel and board officials at pages 150 and 151 of Tab 4-2. As I will find below, that email chain is a confidential communication between a lawyer and its client made for the purpose of seeking and receiving legal advice. The site plans are part of that communication and as such, they are also subject to the exemption for solicitor-client communication privilege under Branch 1 of section 12 of the *Act*.

[48] The remaining records in Tab 3 consist of 12 email chains, many of which duplicate other email chains—or portions of email chains—in the records at issue at Tabs 1 and 2. As with the previous email chains in Tabs 1 and 2, most are marked as privileged and/or confidential, they contain no outside parties, and they directly relate to the litigation or the settlement of that litigation. I am satisfied that all of the communications in Tab 3 are part of the continuum of confidential communications between the board and its lawyers aimed at keeping both informed so that advice can be sought and given, as required. As such, all of the records in Tab 3 are subject to the exemption for solicitor-client communication privilege in section 12 of the *Act*.

Tabs 4-1 and 4-2

[49] Tabs 4-1 and 4-2 are comprised of responsive records from the board's Central Services Manager. Tab 4-1 contains 192 pages comprised of 32 email chains. Tab 4-2 contains 157 pages comprised of 17 email chains. As with the records in the previous tabs, there is a significant amount of duplication.

[50] With the exception of pages 34 and 35 of Tab 4-1, I find that all of the email chains contain communications between the Central Services Manager and the board's internal counsel, external counsel, retained consultants and other board officials. The email chains all relate to the legal advice provided in relation to the litigation and/or the settlement of the litigation. I am satisfied that all of these communications were made for the purpose of seeking or receiving legal advice and/or to keep the lawyers and the client informed so that advice could be sought and given. As with the previous tabs, there are no outside parties to the communications and most are marked confidential. I am satisfied that they were intended to be kept that way.

[51] I note that many of the email chains are copies of the same advice provided by the board's external counsel that is forward and discussed by the board's internal legal counsel and its officials. Some parts of these email chains are informational and simply confirm the date and time the information in the email would be discussed or they contain "for your information" type messaging. Previous orders of this office have held that where this type of information appears in conjunction with legal advice, it forms

part of the continuum of communications aimed at keeping both the solicitor and client informed so that advice could be sought and given as required.¹⁹ I make the same finding here.

[52] However, I find that the email chain on pages 34 and 35 does not meet the criteria for exemption from disclosure under section 12 of the *Act*. The emails on these pages relate to invoices for legal work, but do not contain any actual invoices. As set out in the Notice of Inquiry the parties each received at the commencement of this inquiry, legal billing information is presumptively privileged unless the information is “neutral” and does not directly or indirectly reveal privileged communications.²⁰ In my view, the information on pages 34 and 35 is neutral. There is no lawyer involved in the communications and no legal advice is discussed or revealed. Furthermore, the emails on these pages do not reveal any information about the amount of fees paid in relation to the litigation. As such, I find that the exemption in section 12 does not apply to these pages and they must be disclosed to the appellant.

[53] In making the finding that all of the communications in Tabs 1 to 4-2 (with the exception of pages 34 and 35 of Tab 4-2) are subject to Branch 1 of the solicitor-client communication privilege exemption at section 12 of the *Act*, I have considered the appellant’s assertion that the board failed to provide sufficient information for it to respond to that claim or for an adjudicator to make a determination in that regard. I disagree. In my view, the approach the board took to describe the records was appropriate, in the circumstances. There are over 500 pages of email communications in the Tabs 1 to 4-2, many of which are duplicates. I agree with the board that individually describing each of the communications would be largely repetitive.

[54] Having reviewed the records at issue, I also do not believe that having individual descriptions would have offered the appellant any new or different information upon which it could make further representations. The information provided by the board at paragraphs 12 to 23 of its representations identifies the parties to the communications and provides a description of those individuals’ involvement in the relevant legal matters. The board identified which of the parties provided the responsive records in each tab, categorized the communications, and explained why it was asserting that section 12 of the *Act* applied. I am satisfied that the appellant had sufficient information to make representations on the issues. Further, based on my review of the records, the descriptions provided by the board were accurate and I am satisfied that I had sufficient information to make the findings above.

¹⁹ See, for example, Order PO-3078 at paras. 34 and 35 and Order MO-3311 at para. 52.

²⁰ *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769, 2007 CanLII 65615 (ONSCDC); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

[55] I have also considered the appellant's assertions that communications where internal legal counsel are providing business advice, or where they are merely transmitting information or documentation that does not contain legal advice or a request for legal advice, are not privileged. In my view, it is not necessary to consider these points since I have concluded that the information that is subject to the solicitor-client communication in section 12 forms part of the continuum of confidential communications between a lawyer and a client that were made for the purpose of seeking or receiving legal advice. To be clear, the information at issue is not business advice, nor are the lawyers merely transmitting information or documentation.

Tab 6

[56] The record at Tab 6 is a 202 page report. I accept the evidence of the board's lawyer in her affidavit that this report was provided by the board to its legal counsel for the purposes of the settlement process. I find that the board's evidence on this point is supported by the communications on pages 22 to 28 of Tab 4-2, which it directed me to in its representations. I have reviewed those pages and it is clear to me that a board official sought a copy of the report from other board employees or officials for the purpose of providing it to the board's legal counsel. I confirm that the title of the report matches the names of the attachments to the emails on pages 22 to 28.²¹

[57] I noted earlier in this decision that the communications at Tab 4-2 were subject to solicitor-client communication privilege. I now find that the report at Tab 6 was attached to those communications and was clearly provided by the board to its legal counsel as part of a legal advice-seeking process. As such, it is also subject to the solicitor-client communication privilege exemption in section 12 of the *Act*.

[58] Given that I have found that the report at Tab 6 is privileged pursuant to the Branch 1 solicitor-client communication privilege exemption at section 12, it is not necessary for me to address the arguments the appellant made regarding the application of litigation privilege.

Tab 7

[59] The record at Tab 7 is a 66 page report. The board says only that it was "provided by the plaintiffs in the initial action against the board." The affidavit from the board's lawyer reiterates that she understands that the second report was provided by the plaintiffs in the initial litigation commenced against the board.

[60] This information is insufficient for me to base a finding that the report is exempt pursuant to the exemption in section 12 of the *Act*. The board has not directed me to

²¹ I note that the report is in two parts, both of which match the names of the attachments to the emails on pages 22 to 28.

any communications associated with the report at Tab 7 and it has not asserted that the report was part of any advice-seeking process. Furthermore, the board specified that it obtained the report from an opposing party in the initial litigation, which its lawyer attested was withdrawn. The board did not specify the terms under which the initial litigation was withdrawn, nor did it indicate that the initial action was settled.

[61] In my view, the board has not satisfactorily explained the basis for its claim that section 12 applies. In circumstances where I have no further evidence about how the board came to possess a copy of the report, or why section 12 of the *Act* would be engaged, I find section 12 does not apply to the report at Tab 7.

Exercise of discretion

[62] Where a record falls within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The solicitor-client privilege exemption in section 12 is discretionary, which means the board could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[63] Therefore, in applying the exemption at section 12 to the records, the board was required to exercise its discretion. On appeal, the Commissioner may determine whether the board failed to do so. In addition, the Commissioner may find that the board erred in exercising its discretion where it took into account irrelevant considerations or failed to take into account relevant considerations. In either case, I may send the matter back to the board for an exercise of discretion based on proper considerations.²² However, I may not substitute my own discretion for that of the board.²³

[64] In its representations, the board says that it acknowledges that, as a general rule, records should be available to the public and exemptions should be limited and specific. However, it says that the records in dispute do not contain the appellant's personal information and it submits that the appellant has not presented a sympathetic or compelling reason for disclosing the records.

[65] The board says that it has not been presented with any evidence that the records are necessary for the purpose of increasing public confidence in the board. It says that the matters in question involved specific parties and that in the case of the initial litigation, the matter has been withdrawn by the parties. In the case of the board's litigation, it says that matter has been resolved, subject to the conditions of the resolution.

²² Order MO-1573.

²³ Section 43(2).

[66] The board says it also considered the policy importance of preserving privilege in order to permit candid discussions between client and counsel in order for matters to be resolved in an efficient, just and cost effective manner as possible.

[67] In its responding representations, the appellant said that it was not reasonable for the board to withhold the report at Tab 6. It says that the board's decision runs contrary to the general rule that records should be made available to the public and that exemptions should be limited and specific.

[68] Furthermore, the appellant says that it provided a compelling and specific reason for requesting access to the report at Tab 6. It says it is seeking access to the technical reports and analyses relating to the condition of the property subject to the report because that information may be of assistance in remedial planning to address contaminants found on an adjacent property. The appellant also says that information in the report at Tab 6 may also assist in preventing further offsite migration of the same contaminants.

[69] The appellant argues that given the risk that the contaminants may impact neighboring properties, the disclosure of the technical information and analyses relating to the condition of the property subject to the report may promote public health and safety.

[70] The board was provided a copy of the appellant's representations and offered an opportunity to reply. Although the board made representations in reply it did not address the appellant's representations related to the board's exercise of discretion. As such, it is not clear to me that the board considered the appellant's arguments about why the report at Tab 6 should be disclosed.

[71] In my view, the points raised by the appellant are relevant factors that the board should have taken into account when deciding whether to exercise its discretion to withhold the report at Tab 6 pursuant to the discretionary exemption at section 12 of the *Act*.

[72] Accordingly, I will order the board to re-exercise its discretion regarding the report at Tab 6 and to provide me with representations on this issue that take the above factors in paragraphs 68 and 69 into consideration.

[73] The appellant made no representations about the board's exercise of discretion for the remaining information it withheld that I have found is subject to section 12 of the *Act*. In my view, the factors the board considered when determining whether to withhold the remaining information were appropriate in the circumstances and I will uphold its exercise of discretion in that regard.

ORDER:

1. I do not uphold the board's decision to apply section 12 to pages 34 and 35 of Tab 4-1 and the report at Tab 7 and I order it to provide the appellant with copies of this information by **January 29, 2020** but not before **January 24, 2020**.
2. I uphold the board's application of section 12 to the information at issue in Tabs 1, 2, 3, 4-2 and the remaining information in Tab 4-1. I also uphold the board's exercise of discretion to withhold that information.
3. I uphold the board's application of section 12 to the report in Tab 6 of the records, but I order it to re-exercise its discretion with respect to that information, taking into account the relevant considerations, including those identified by the appellant in its submissions set out above. If the board continues to withhold all or part of the report in Tab 6, I also order it to provide the appellants with an explanation of the basis for re-exercising its discretion and to provide a copy of this explanation to me. The board is required to send the results of its re-exercise of discretion and its explanation to the appellant, with a copy to this office, by no later than **January 29, 2020**. If the appellant wishes to respond to the board's re-exercise of discretion, it must do so within 21 days of the date of the board's correspondence by providing me with written representations.
4. I remain seized of this matter pending the outcome of the issue outlined in order provision 3.

Original Signed by: _____
Meganne Cameron
Adjudicator

December 18, 2019 _____