

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3995

Appeal MA16-361

Town of Oakville

January 4, 2021

Summary: The Town of Oakville (the town) received an access request for information related to the passing of a specified by-law. The town decided to grant access to some records but denied access to a number of records under sections 7(1) (advice or recommendations), and 12 (solicitor-client privilege). In this order, the adjudicator upholds the town's decision under section 7(1) and section 12, in part, and orders the town to disclose other information withheld under these sections.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1) and 12.

Orders and Investigation Reports Considered: Orders PO-2624, PO-2858-I, PO-3078 and PO-3946.

Cases Considered: *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997) 102 O.A.C. 71, 46 Admin. L.R. (2d) 115 (Div. Ct.), *Balabel v. Air India*, [1988] 2 W.L.R. 1036 (Eng. C.A.), *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, *Blank v. Canada (Minister of Justice)*, [2007] F.C.J. No. 306 and *Richmond Hill Naturalists v. Corsica Developments Inc.*, 2013 ONSC 7894 (Div. Ct.).

OVERVIEW:

[1] After the town passed a specified by-law which affected the appellant's land, the appellant filed the request in this appeal. The appellant made the following request under the *Municipal Freedom of Information and Protection of Privacy Act*, (the *Act*) to the Town of Oakville (the town) for the following records relating to the by-law:

1. All records pertaining to any communications among Town staff and/or between Town staff and any member of Town Council (and/or any member of his/her office) regarding the Pre-Application Meetings and/or the Proposed Development, either before or after the Pre-Application Meetings;
2. All records pertaining to Town staff's consideration of and decision to prepare the Staff Report, including its content, together with any draft(s) of the Staff Report;
3. All records pertaining to any communications among Town staff and/or between Town staff and any member of Town Council (and/or any member of his/her office) regarding a potential [specified] by-law to be applied to all or any portion of the [specified location];
4. All records pertaining to any communications among Town staff and/or between Town staff and any member of Town Council (and/or any member of his/her office) regarding the Staff Report and/or the [specified] By-law (including any draft(s) of such documents);
5. All records pertaining to any communications between any member of Town Council (and/or any member of his/her staff) and/or Town staff with any other person or other public body concerning the Proposed Development and/or a potential [specified] by-law to be applied to all or any portion of the [specified location];
6. All records pertaining to any proposed or final terms of reference for the Urban Structure Review that is referenced in the Staff Report;
7. All records pertaining to any proposed or final terms of reference for the Land Use Economic and Impact Analysis study that is referenced in the Staff Report;
8. All records pertaining to any communications between the Town (staff and/or a member of Council) and [named company] regarding any of the Pre-Application Meetings, the Proposed Development, the Staff Report, the Urban Structure Review and/or the Land Use Economic and Impact Analysis study that are referenced in the Staff Report, or the [specified] By-law; and
9. All records pertaining to any communications between the Town (staff and/or a member of Council) and [named company] (including [named individual]) regarding any of the Pre-Application Meetings, the Proposed Development, the Staff Report, the Urban Structure Review and/or the Land Use Economic and Impact Analysis study that are referenced in the Staff Report, or the [specified] By-law.

[2] The town advised the appellant that many of the requested records are publicly available and asked him to narrow the request to reduce the search time and duplication of responsive records. The appellant responded that he did not seek copies of reports

and public notices that are available on the town's website. The appellant also asked the town to search its database of current emails and said that his request includes any responsive records that were sent to and/or from any personal email accounts or from other personal electronic devices.

[3] The town then issued a number of decisions to the appellant, and engaged in further discussions to clarify the appellant's request and minimize the number of records sought.¹ The town issued two decisions granting partial access to a number of responsive records and denying access to others pursuant to the discretionary exemptions in sections 6 (draft by-law/closed meeting) and 12 (solicitor-client privilege), and the mandatory exemption in section 14(1) (personal privacy) of the *Act*.

[4] The appellant appealed the town's access decision to this office.

[5] During mediation, the town issued a further revised decision, now claiming sections 7(1) (advice or recommendations), 11 (economic and other interests)² and continuing to claim sections 6, 12 and 14 of the *Act*. The appellant also provided further clarification on the records he sought and the town disclosed 36 records that it had previously withheld. The town also provided the appellant with an index of all of the records at issue in this appeal. The appellant confirmed that he seeks access to all of the withheld information as set out in the index. The appellant also indicated that although he is not pursuing personal information, some of the information denied pursuant to section 14(1) of the *Act* could be business information, and as a result, the information withheld under section 14(1) remained at issue in the appeal.

[6] As a mediated resolution of the appeal was not possible, the appeal moved to the adjudication stage where an adjudicator may conduct an inquiry under the *Act*. The IPC adjudicator assigned to the file sought and received representations from the parties which were shared in accordance with the IPC's *Code of Procedure*. The appeal was then assigned to me to continue with the inquiry and issue the decision.

[7] For a number of records at issue withheld under section 12, the town submits that the Ontario Municipal Board (the OMB), in a proceeding concerning the specified by-law, found that the twelve emails³ were privileged under the solicitor-client communication privilege and that the town had not waived that privilege. The town submits that issue estoppel applies to the records as the OMB has previously decided that they are subject to solicitor-client privilege. Accordingly, issue estoppel was added as an issue in this appeal.

¹ It is not necessary to describe the various decisions, which addressed, among other things, the search fee and time for responding.

² In its representations, the town withdrew its reliance on the section 11 exemption and thus the application of this exemption is no longer within the scope of this appeal.

³ The 12 emails are contained in a chain that appear in records 122, 124, 126, 330, 334, 338, 638, 639, 702 and 703.

[8] In this order, I uphold the town's decision to withhold the records claimed exempt under sections 7(1) and 12, in part. I find that a number of records are not exempt and order the town to disclose that information. I do not discuss the personal privacy exemption at section 14 or the exemption at section 6(1)(b) of the *Act* because all records where the town has claimed these exemptions have been found exempt under section 12.

RECORDS:

[9] There are 518 records at issue in this appeal, set out on in a "table of withheld documents" which was provided with the town's representations. A redacted version of this table was shared with the appellant.

ISSUES:

- A. Does issue estoppel apply to records 122⁴, 124, 126, 330, 334, 338, 638, 639, 702 and 703?
- B. Does the discretionary exemption at section 12 apply to the remaining records for which the town claimed section 12?
- C. Does the discretionary exemption at section 7(1) apply to the records for which the town has claimed it?
- D. Did the town exercise its discretion under sections 12 and 7(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does issue estoppel apply to records 122, 124, 126, 330, 334, 338, 638, 639, 702 and 703?

[10] A number of emails initially withheld under section 12 were disclosed to the appellant during the request stage. As a result, a motion was brought in front of the OMB to determine if the appellant could rely upon those particular emails in the specified by-law proceeding. The OMB found that the appellant could not rely on the emails because they were subject to solicitor-client privilege and the OMB found that the town's earlier disclosure was inadvertent and therefore the privilege was not waived. In this appeal, the appellant continues to seek access to these 12 emails, which appear in 10 records, despite the OMB's decision. The town takes the position that since the OMB has already

⁴ This order will only refer to the actual record number and not the prefix T0000 which appears before each number.

determined that the emails are subject to solicitor-client privilege and that the privilege has not been waived, issue estoppel applies. I will deal with the submissions and my finding regarding these records first and then turn to the remaining records for which the town claimed the section 12 exemption.

Representations

[11] The town submits that in its written decision, the OMB held that 12 of the 15 emails that the town has disclosed were subject to solicitor-client privilege as they were "made between Town staff, representatives and agents retained by the Town and the Town's legal counsel for the primary purpose of obtaining legal advice regarding certain documents that are the subject of these emails." Moreover, the town submits, the OMB held that solicitor-client privilege had not been waived as a result of the inadvertent release, and there was no unfairness to the appellant if the privilege was preserved.

[12] The town submits that the OMB ruling has a bearing on this appeal in three ways:

1. Since the OMB made a conclusive finding of fact that the relevant emails were subject to solicitor-client privilege, the records should be found to be exempt in the present appeal
2. To render a consistent decision, other withheld emails involving a similar confidential exchange of legal advice concerning drafts, should also be found to be exempt in the present appeal
3. The appellant is estopped from relying on any of the information in the inadvertently released privileged emails in the within appeal and as such certain paragraphs in the appellant's representations should not be considered absent the appellant establishing that he may rely on the privileged information.

[13] The town submits that the parties engaged the "exclusive jurisdiction" of the OMB to address a motion on these emails and all related "questions of law and fact." The town submits that following this motion, a decision was rendered that the records in question were privileged, and there was no waiver of that privilege. The town submits that under the *Ontario Municipal Board Act (OMB Act)* section 93(3) provides that: "The finding or determination of the Board upon any question of fact within its jurisdiction is binding and conclusive." Further, it submits that section 96(4) provides that "every decision or order of the Board is final," subject to a right of appeal to court.

[14] The town submits that the doctrine of issue estoppel "prevents the relitigation of an issue that a court or tribunal has decided in a previous proceeding." The town submits that the goal of the doctrine is judicial finality and reflect "the law's refusal to tolerate needless litigation."

[15] In his representations, the appellant, represented by counsel, specifically requests the release of these emails that were subject to the OMB motion. The appellant makes

specific arguments on the circumstances surrounding the disclosure of these emails by the town, which I will not set out here.

[16] The appellant submits that the OMB held that most but not all of the email chain was privileged. He submits that the OMB decision is restricted to the email chain and does not relate to the documents that were attached to the emails. The appellant also submits that the *OMB Act* does not displace the IPC's jurisdiction to make decisions under the *Act* and refers to the following reasons:

- The OMB and the IPC are separate and independent tribunals. The decisions of one tribunal are not binding on another tribunal absent specific statutory wording to that effect
- The OMB was asked to determine whether the appellant could rely on the email chain for the purpose of its proceedings. By contrast, the issue before the IPC is whether the town has properly applied the section 12 discretionary exemption under the *Act* and whether the town has properly applied subsection 4(2) of the *Act* to such records
- The IPC must apply its own statute, case law and policies, and come to an independent determination with respect to every record placed before it in this adjudication
- A freedom of information request is a separate process from determining whether documents can be used in an OMB proceeding. Subsection 51(2) of the *Act* states that "[t]his Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document." The corollary is that a decision of the OMB does not affect the power of the IPC to exercise its statutory obligations
- The provisions of the *OMB Act* cited by the town have been misapplied and are inapplicable to this situation.

[17] The appellant submits that for issue estoppel or *res judicata* to apply, the town must satisfy the IPC that:

- The same question has been decided
- The judicial decision which is said to create the estoppel was final
- The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.⁵

[18] The appellant refers to *Richmond Hill Naturalists v. Corsica Developments Inc.*,

⁵ *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

and submits that the Divisional Court held "that where two tribunals make decisions on related matters but pursuant to different statutory purposes, issue estoppel does not apply." Further, the appellant submits that the Divisional Court held that even if the elements of issue estoppel had been established, it was:

a case where there is "a significant difference between the purposes, processes or stakes involved in the two proceedings" such that an injustice may arise from using the results of the proceeding before the CRB to preclude the subsequent proceedings before the OMB.

[19] The appellant also submits that in Order PO-2858-I, it was held that issue estoppel did not apply to a previous decision of the Canadian Nuclear Safety Commission (CNSC) regarding the disclosure of a document that contained the record in question before the IPC. The appellant submits that the CNSC had "decided whether, in the context of the hearing before it, the appellant should have access to the full PRA . . . in order to be able to effectively intervene in the hearing."

[20] The appellant submits that neither the IPC nor the OMB has adjudicated the question of whether the town has properly applied the discretionary exemption at section 12 to the email chain in question and whether it has applied subsection 4(2) to the same records.

[21] In its reply, the town submits that the appellant does not dispute that the email chain that was inadvertently disclosed, is privileged. The town submits that it is clear from the OMB's decision that its findings of fact were not limited to the specified by-law proceeding and that nowhere in the decision does it limit its finding of fact for the purpose. Further, the town submits that the OMB decision and sealing orders require that the material filed during the motion are to remain sealed and not to be used in the proceeding. The town submits that, as such, the use of the materials in any proceeding would contravene both the sealing order and the OMB's finding of privilege and non-waiver.

[22] The town refers to the OMB decision and submits that the OMB has found conclusively that the emails were privileged and produced inadvertently. The town submits that the OMB was asked to answer the very same questions as in this appeal (whether the email chain subject to solicitor-client privilege and has the privilege been waived). The town submits that the law applicable to the OMB's determination is the same as the law applicable to my determination. The town also submits that the appellant's reference to subsection 51(2) of the *Act* is not relevant to the present issue as this section simply recognizes that Courts or tribunals maintain their full powers to compel evidence.

[23] The town refers to the appellant's reliance on *Richmond Hill Naturalists* and submits that this case states that issue estoppel does not apply where there is "a significant difference between the purposes, processes and stakes involved in the two proceedings," not where the overarching statutory purposes are not the same, as

proposed by the appellant. The town submits that the purposes, processes and stakes involved in this appeal and the OMB proceeding are the same. He submits that the purpose of this appeal is to provide a right of access to information under the control of institutions with the purpose of the *Act* that "(i) information should be made available to the public, (ii) necessary exemptions from the right of access should be limited and specific, and decisions of disclosure of information should be reviewed independently of the institution controlling the information." The town submits that, as in this appeal, the purpose of the OMB motion was to consider whether the records ought to be public. The town submits that the statutory scheme applicable to the OMB provides for public hearings unless necessary exemptions applies - i.e. where "the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public."⁶ The town also submits that with the OMB motion, a body independent from the institution reviewed the decision on disclosure.

[24] The town also submits that in Order MO-2494, referenced by the appellant, the adjudicator held that *res judicata* did not apply because the records at issue were different, however, in the present appeal, the records at issue are the exact same documents, appearing in the exact same form, context and circumstances as the email chain sought to be included as part of the public record in the motions decided by the OMB.

[25] In his sur-reply, the appellant submits that in the OMB's decision it explicitly refers to the specified by-law proceeding when it made its sealing order. The appellant submits that the OMB determined that he could not rely on the email chain for the purpose the proceeding and the question at the IPC is whether the records should be released pursuant to the *Act*.

Analysis and finding

[26] For the following reasons, I find that issue estoppel applies to the 12 emails at issue, which appear in various records that were withheld in full by the town.

[27] The leading case that considers the doctrine of issue estoppel in the context of prior tribunal decisions is the Supreme Court of Canada's decision, *Danyluk v. Ainsworth Technologies Inc.* In that decision, the Supreme Court stated,

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry.... An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same

⁶ Rule 89 of the OMB Rules.

cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice.

[28] The Supreme Court also confirmed that the doctrine of issue estoppel applies to administrative tribunals:

These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

[29] The test set out in *Danyluk* for establishing the operation of issue estoppel has been adopted by the IPC. In Order PO-3946, the adjudicator stated:

Danyluk sets out a two-step analysis for the application of issue estoppel. First, the decision maker must determine whether the moving party ... has established the three conditions to the operation of issue estoppel. These conditions are:

1. that the same question has been decided,
2. that the judicial decision which is said to create the estoppel was final; and,
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[30] Once these three conditions are met, the adjudicator noted that the decision maker [the IPC] must still determine "whether, as a matter of discretion, issue estoppel ought to be applied." The adjudicator quoted from *Danyluk* that:

...the underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.

[31] As noted, the first condition for a finding of issue estoppel is that the same question has been decided. Before me, the question is whether the records are exempt under

section 12, which 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.

[32] The question before me in determining if these records are exempt from disclosure is therefore the exact question that the OMB determined in its motion: whether the records were subject to solicitor-client privilege and if that privilege has been waived. In my view, whether the OMB was making this determination in the context of its own proceeding is not relevant since ultimately the question they examined is whether the information was subject to solicitor-client privilege and whether that privilege was waived.

[33] There is no suggestion that the OMB examined anything other than the relevant case law which it has detailed in the decision. The OMB's analysis in its determination of solicitor-client privilege found that the 12 emails were "within a continuum of communication in which the Town's lawyer tendered legal advice and within the framework of the solicitor-client relationship." The OMB went on to determine that the solicitor-client privilege had not been waived as a result of the town's inadvertent release of the information to the appellant. In my review of the OMB's decision, it considered the motion materials and applicable law and found that the email chain was privileged and that the town had not waived that privilege when it inadvertently disclosed that information to the appellant.

[34] In Order PO-2858-I, referenced by the appellant, the adjudicator concluded that the first condition had not been met and therefore the doctrine of issue estoppel did not apply. The adjudicator found that the CNSC did not decide "the same question" as the one before him as there was "a material difference in nature and scope between the information that was at issue before the CNSA and the information that is at issue in this appeal."⁷ The adjudicator found that this analysis of the facts was sufficient to reject the issue estoppel argument. However, in this appeal, I find that the OMB was deciding the same question as the one before me with no difference in the nature and scope of the information at issue. Although the appellant submitted that the OMB's order only applied to the actual emails and not to any attachments, he failed to provide any evidence for this proposition and did not refer to any passage from the OMB decision that would support it. Further, in reviewing the OMB decision, I note that it did not make a distinction between emails and an attachment and in its order, other than the records that were public, it found that "[a]ll other materials filed in these proceedings remain confidential and under seal."

[35] I also find the decision which is said to create the estoppel was final. Section 93(4)

⁷ The adjudicator noted that the CNSC was examining the full PRA report and the record in front of the adjudicator was the source term data which formed a very small part of the full PRA report.

of the *OMB Act* provides that “every decision or order of the Board is final.” As pointed out by the town, and not disputed by the appellant, there was no appeal of the OMB decision. I therefore find that second condition for issue estoppel has been met.

[36] Finally, it is clear from the representations of the parties and the title of proceedings in the OMB decision that the parties are the same in this appeal. Therefore, the third condition is also met.

[37] As noted, once these three conditions are met, the decision maker must determine “whether, as a matter of discretion, issue estoppel *ought* to be applied” (emphasis in original).⁸ I find that it should.

[38] As set out above, *Danyluk* confirmed the importance of finality in litigation and stated, “an issue, once decided, should not generally be relitigated to the benefit of the losing party and the harassment of the winner.” In considering whether issue estoppel applies, the Supreme Court directs a decision maker to “balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.”

[39] In this appeal, the appellant is seeking emails that the town has claimed the section 12 exemption to but were inadvertently disclosed. The town brought a motion on this issue in front of the OMB who determined that these emails were and remained privileged solicitor-client information. It is apparent from the OMB’s decision that the parties were given the opportunity to present their case at an oral hearing. I find that on balance, in the circumstances of this appeal, the balance lies in favour of the finality of litigation. As such, I will not re-adjudicate the issue of whether or not these emails are subject to solicitor-client privilege.

[40] From my review of *Richmond Hill Naturalists v. Corsica Developments Inc.*,⁹ also relied upon by the appellant, I note that the Divisional Court found that issue estoppel does not apply where there is “a significant difference between the purposes, processes and stakes involved in the two proceedings,” not where the overarching statutory purposes are not the same as submitted by the appellant. I agree with the town that the “purposes, processes and stakes” involved in this proceeding and the OMB proceeding are similar. The purpose of this proceeding is to examine a right of access to information under the control of the town in accordance with the *Act*. Similarly, the purpose of the OMB motion was to consider whether the records ought to be public because the town claimed they were privileged and that the privilege had not been waived because of inadvertent disclosure.

[41] Accordingly, following the two-step analysis for the application of issue estoppel in *Danyluk*, I find that issue estoppel applies in the circumstances of this appeal to records

⁸ *Danyluk*, supra, paragraph 33.

⁹ *Richmond Hill Naturalists v. Corsica Developments Inc.*, 2013 ONSC 7894 (Div. Ct.).

122, 124, 126, 330, 334, 338, 638, 639, 702 and 703, and I will not consider those records further.

[42] I will now discuss the remainder of the records for which the town claimed the section 12 exemption.

Issue B: Does the discretionary exemption at section 12 apply to the remainder of the records withheld under section 12?

[43] The town has withheld a large number of additional records¹⁰ under section 12, which, as noted above, states as follows:

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

[44] 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

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

Solicitor-client communication privilege

[46] 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

[47] The privilege may also apply to the legal advisor's working papers directly related

¹⁰ The town indicated that it applied this exemption to 498 records.

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.).

to seeking, formulating or giving legal advice.¹⁴

[48] 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

Branch 2: statutory privilege

[49] 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.

Statutory solicitor-client communication privilege

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

Loss of privilege

Waiver

[51] 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.¹⁷

[52] 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.¹⁸

[53] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.²⁰

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

¹⁸ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹⁹ 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.).

²⁰ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

Representations

[54] The town claims section 12 applies to the majority of the records at issue in this appeal. The town submits that the withheld records are exempt under section 12 as they are subject to common-law solicitor-client communication privilege and statutory solicitor-client communication privilege.

[55] It submits that solicitor-client privilege protects communications within "a continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and includes advice as to what should be done in the relevant legal context."

[56] The town submits that it has reviewed the withheld information and confirms that each and every one of the records meets the factors attracting solicitor-client privilege as they are communications, intended to be confidential, between the town, including its agents and employees, and its legal counsel acting in their professional capacity as lawyers, and given in the context of seeking or giving legal advice.

[57] The town submits that the records contain communications within "a continuum of communications" in which its lawyer tenders advice and communications within the framework of the solicitor-client relationship, including:

- Town staff seeking legal advice from legal counsel
- Instructions given by the town to legal counsel
- Legal advice given by legal counsel to the town including town staff and agents
- Legal counsel's review of and advice regarding draft materials
- Documents prepared for legal review
- Participation of legal counsel in developing communications strategies designed to avoid legal consequences
- The provision of information to legal counsel in order to obtain legal advice.

[58] The appellant refers to the test for determining if a communication is protected by solicitor-client privilege. Citing Order MO-1338, he submits that if one of the characteristics of privilege is missing, there is no solicitor-client privilege. The appellant submits that neither common law nor statutory solicitor-client privilege extends to:

- Any non-legal document or non-legal communication of a lawyer
- Any legal document or communication not involving a lawyer

- Any legal document or communication that is not for the purpose of seeking or obtaining legal advice.

[59] The appellant submits that solicitor-client privilege does not attach to all communications involving a lawyer, especially in the context of in-house counsel and public sector lawyers. He submits that the context of each record must be assessed on a case-by-case basis as the following principles demonstrate:

- The privilege is intended to allow the client and lawyer to communicate in confidence, but "[i]t is not intended to protect all communications or other material deemed useful by the lawyer to properly advise his or her client"²¹
- Privilege does not extend to facts that may be referred to in communications²²
- Simply giving counsel a document or copying counsel on correspondence does not cloak the document or correspondence with privilege. The adjudicator "must always examine the underlying realities to determine whether the three basic criteria for solicitor-client privilege have been established."²³

[60] The appellant submits that the town's process for determining if records are exempt under section 12 was deficient. He submits that the town has claimed privilege over records that are clearly not privileged. For example, the appellant submits that the town claimed privilege over records where a specified employee, not a lawyer, sent an email to himself and also where a specified employee sent an email to another specified employee, neither of whom are lawyers. The appellant also submits that merely using the word "privileged" in an email subject line does not attract privilege nor does the fact that a lawyer sends or receives an email, or is provided with a document.

[61] The appellant also submits that even where it has been determined that the town properly claimed privilege over a portion of a record, the IPC should ensure that only privileged information is redacted and that the record is otherwise produced in accordance with the *Act*.²⁴ The appellant submits that to exempt an entire email or other record because it contains legal advice would allow a municipality to exempt otherwise producible information from disclosure by including it in the same record as legal advice.

[62] In its reply representations, the town submits that the appellant's submissions on solicitor-client privilege do not accord with the leading case law. The town submits that the legal test for solicitor-client privilege does not require a determination of whether or

²¹ *Nova Chemicals (Canada) Ltd. v. CED A-Reactor Ltd.*, 2014 ONSC 3995 at para. 34; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) at para. 127.

²² *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) at para. 90.

²³ *Nova Chemicals (Canada) Ltd. v. CEDA-Reactor Ltd.*, 2014 ONSC 3995 at para. 34.

²⁴ Section 4(2) of the Act.

not a document or communication is “legal” or “non-legal” nor does it involve that the document or communication has to “involve a lawyer” for the privilege to apply. The town submits that it is well-established that solicitor-client privilege protects communications within “a continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and includes advices as to what should be done in the relevant legal context.”²⁵ The town submits that the IPC has repeatedly held, for example, that email exchanges between non-legal ministry staff may qualify as solicitor-client privileged communications. It refers to Order PO-3582 where it submits the adjudicator found that two emails between non-legal staff reviewing a draft protocol provided by the ministry’s legal counsel formed part of the continuum of communications between a solicitor and client, despite the absence of legal counsel from the two emails. The town also submits that the IPC regularly finds records privileged where disclosure of information would reveal the nature of a confidential communication provided in the context of a confidential solicitor-client communication or would reveal the substance of the confidential communication or legal opinion provided (Order PO-3780).

[63] In his sur-reply, the appellant submits that the “continuum of communication in which the solicitor tenders advice,” is not unlimited in scope. Referring to *Oleynik v. Canada (Privacy Commissioner)*,²⁶ the appellant submits that the Court held that the following documents were not privileged and therefore not exempt from disclosure:

- a. Background information that was not legal advice or strategy provided by the lawyer
- b. A publicly reported case
- c. An email from the Federal Court, because it did not constitute legal advice or strategy within a solicitor-client relationship.

[64] The appellants submits that the town only provided one IPC decision to support its submission that the IPC “regularly” finds records privileged where disclosure would “reveal the nature of a confidential communication” and submits that all determinations of privilege are made on a case-by-case basis, in the specific context of the record in question.

Analysis and findings

[65] The town submits that the remainder²⁷ of the records, all withheld in full, under section 12 are subject to solicitor-client branch 1 common law communication privilege as well as branch 2 statutory solicitor-client communication privilege. I have reviewed the records and considered the representations of both the town and the appellant. In my view, these records qualify for exemption under Branch 1 of the section 12 exemption,

²⁵ *Oleynik v. Canada (Privacy Commissioner)*, 2016 FC 1167 at para 59.

²⁶ Ibid.

²⁷ That is, the records withheld under section 12, other than the ones to which issue estoppel applies.

with a few exceptions.

[66] As noted, 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.²⁸ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.²⁹ 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.³⁰

[67] 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.³¹ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.³²

[68] I note that the town provided brief representations as to the application of section 12 for each record on its index and also made general submissions about the type of privileged information in the withheld records.

[69] The records are all email chains, many with attachments. The appellant has been provided with a redacted index of records by the town that includes the subject line of the records and the names and titles of the emails, the senders and recipients. Although the town has treated the emails and their attachments (if there is one) as separate records in its index, in my view, any attachments to an email are part of that email. I begin by examining records 573 and 758. Record 573 appears to be minutes that were taken by the appellant's representative. Record 758 is an email from a town employee to the same appellant's representative. I find that section 12 does not apply to Record 758 because it is an email between an employee of the town and a representative of the appellant. Although the town submits on its index of withheld records that this email was reviewed by its counsel, in my review of the record, it is a direct email from an employee of the town to a representative of the appellant and is not an attachment to another email. I find that this record is not exempt under section 12 because it does not constitute confidential communication between the town and its lawyer for the purpose of seeking or providing legal advice, nor would it form part of the confidential continuum of communications for that purpose. Therefore, I will order the town to disclose this record.

[70] With regard to Record 573 which are minutes of a meeting prepared by a representative for the appellant, I find that the section 12 exemption applies to this information. Record 573 was attached to an email which was sent from one town employee to another. It is evident when reviewing the email that it was forwarding

²⁸ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

²⁹ Orders PO-2441, MO-2166 and MO-1925.

³⁰ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

³¹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

³² *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

another email received from town counsel. In reviewing Record 573, I note written notations on it that were clearly completed by legal counsel. These notations are discussed in the attaching email. I find that Record 573 is exempt under section 12 because it constitutes confidential communication between the town and its lawyer for the purpose of providing legal advice.

[71] I find that the remainder of the records are solicitor-client privileged either because they contain legal advice or a request for legal advice, or because they otherwise form part of a continuum of communication. I note that in *Balabel v. Air India*³³, Lord Taylor when commenting on privilege being extended to non-litigious business, stated:

. . . the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

[72] I find that the withheld information consists of 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. I am satisfied that these records form part of the continuum of communications aimed at keeping both legal counsel and the client informed so that advice may be sought and given as required. Accordingly, I find that the withheld information in the remaining records claimed to be exempt are exempt under section 12.

[73] As stated above, a number of the records at issue are email chains. Some of the emails initially circulated amongst town employees only, including one email sent by an employee to himself, but subsequently forwarded to legal counsel as part of an email chain. The email chains pertain to issues regarding the preparation of the specified by-

³³ [1988] 2 W.L.R. 1036 (Eng.C.A.).

law and resulting issues. In this context, as stated, I accept that these emails form part of the continuum of communications between the town and its legal counsel aimed at keeping both the solicitor and client informed so that advice may be sought and given as required.

[74] I note that this office has repeatedly held that email exchanges between non-legal town staff may qualify as solicitor-client privileged communications in certain circumstances. For example, in Order PO-3078, the adjudicator found that email chains, including emails that were forwarded to counsel as part of an email chain, formed part of the continuum of communications aimed at keeping the solicitor informed so that advice could be sought and given as required, and on this basis, the entire email chain was exempt under section 19 (the provincial equivalent to section 12). I note that the adjudicator made this finding even though some of the emails in the email chains were “informational, simply confirming that revisions are made to an attached document, or confirming the date or the attendees at meetings.” Further, in Order PO-2624, the adjudicator held that emails between non-legal ministry staff that clearly address the subject matter for which legal counsel had been consulted, and that refer to the legal advice provided by counsel, form part of the continuum of communications and accordingly qualify for exemption under section 12. I adopt this approach and find that all of the email communications in the remaining records that do not directly involve legal counsel and are emails between town staff form part of the continuum of communications aimed at keeping counsel informed so that advice could be sought and given or address the subject matter for which legal counsel had been consulted and refer to the legal advice provided.

Severance of the records

[75] As noted by the appellant, under section 4(2) of the *Act*, an institution must disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, I am not persuaded by the appellant’s position that solicitor-client privilege information in the records can reasonably be severed and the remainder of any records ordered disclosed.

[76] In *Blank v. Canada (Minister of Justice)*, [2007] F.C.J. No. 306³⁴, the Federal Court of Appeal found that the severance provision in section 25 of the federal *Access to Information Act* does not require a government institution to sever information which forms part of a privileged solicitor-client communication:

... section 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament’s intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of

³⁴ *Blank v. Canada (Minister of Justice)*, [2007] F.C.J. No. 306.

material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.

[77] Similarly, in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*³⁵, the Divisional Court has found that solicitor-client privilege is a "class-based" privilege that protects the entire communication and not merely those specific items that involve actual advice. Once it is established that a record constitutes a communication to legal counsel for advice, the communication in its entirety is subject to privilege.

[78] However, the Divisional Court noted that the maximum disclosure principle in section 10(2) of the *Freedom of Information and Protection of Privacy Act*, which is the provincial equivalent to section 4(2) of the *Act*, could apply in limited circumstances:

I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, 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.

[79] I have reviewed the records and find that they communicate legal advice and related information. They do not contain communications for other purposes which are clearly unrelated to legal advice. Given that solicitor-client privilege is a "class-based" privilege that protects the entire communication and not merely those specific items that involve actual advice, I find that the emails and any attached documents are subject in their entirety to solicitor-client communication privilege. Consequently, the town is not required to apply the severance provision in section 4(2) of the *Act* to them.

[80] Lastly, the appellant did not argue that the town waived its privilege for the remaining records at issue, outside of the 12 emails addressed above under issue estoppel. In my review of these records, it is not apparent that the town has waived its privilege. As a result, I find that there has not been a waiver of solicitor-client privilege in relation to the records at issue and I find that section 12 applies, subject to my finding on the town's exercise of discretion.

Conclusion

[81] I find that issue estoppel applies to records 122, 124, 126, 330, 334, 338, 638, 639, 702 and 703.

[82] I do not uphold the town's claim that record 758 is exempt under section 12 of the *Act*. As the town has not claimed additional discretionary exemptions for this record and

³⁵ *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71, 46 Admin. L.R. (2d) 115 (Div. Ct.).

no mandatory exemptions apply, I will order that it be disclosed.

[83] I find the remaining records are exempt under section 12, subject to my finding on the exercise of discretion below.

[84] Given my findings that most of these records qualify for exemption under Branch 1 of the section 12 exemption, and that all of the records for which the town has claimed the section 6(1)(b) and section 14(1) exemption were found to be exempt under section 12, it is unnecessary for me to consider the application of these exemptions.

Issue C: Does the discretionary exemption at section 7(1) apply to the records for which the town claimed it?

[85] Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[86] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.³⁶

[87] “Advice” and “recommendations” have distinct meanings. “Recommendations” refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[88] “Advice” has a broader meaning than “recommendations”. It includes “policy options”, which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant’s identification and consideration of alternative decisions that could be made. “Advice” includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.³⁷

[89] “Advice” involves an evaluative analysis of information. Neither of the terms “advice” or “recommendations” extends to “objective information” or factual material.

[90] Advice or recommendations may be revealed in two ways:

³⁶ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

³⁷ See above at paras. 26 and 47.

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.³⁸

[91] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.³⁹

[92] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 7(1).⁴⁰

[93] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information⁴¹
- a supervisor's direction to staff on how to conduct an investigation⁴²
- information prepared for public dissemination.⁴³

Representations

[94] The town claims section 7(1) to withhold records 467, 468, 472-474, 545-547, 614-616 and 761 and provided representations on these records. From the index of records, it is also apparent that the town claimed this exemption for records 673, 701 and 760 and claimed no other exemption for these records. The records were withheld in their entirety.

[95] The town claimed the section 7(1) exemption to 94 records but since section 12 was also claimed (and upheld) for most of them, I will only consider its submissions for the specific records identified above. The town's representations concerning how these records meet the exemption at section 7(1) actually referred to the content of the records

³⁸ Order P-1054

³⁹ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

⁴⁰ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

⁴¹ Order PO-3315.

⁴² Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

⁴³ Order PO-2677

and most of those representations were deemed confidential by the previous adjudicator.

[96] The appellant submits that for advice or recommendations to be exempt under section 7(1), they must:

- Recommend a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision-making (Order MO-2337)
- Be communicated from one person to another. It is insufficient if a course of action is considered by one person and not communicated to someone else (Order M-396)
- Be "related to the actual business" of the institution (Order M-396).

[97] The appellant refers to the types of information that have been found not to qualify as advice or recommendations and submits that this includes draft presentations that were prepared for public dissemination.

[98] The appellant submits that the town provides no authority for the proposition that communications with third parties – such as former officials of other municipalities, or officials from a specified region – are covered under section 7(1). He submits that such individuals are not "officers or employees" of the town, or "consultants" retained by the town.

[99] The appellant submits that any attachments to the emails are not presumptively covered by the exemption and must independently meet the requirements. Finally, the appellant submits that some of the exceptions in subsection 7(2) may apply.

[100] In its reply, the town agrees that a record cannot be exempt solely on the basis that it is in draft form. However, it submits that where a draft document contains recommendations to be used for that particular document, the record qualifies for exemption under section 7(1). The town refers to MO-3253-I and submits that the IPC found that the section 7(1) applied to a draft document that contained recommendations with respect to the language the board should adopt for the document in question. The town submits that this should also apply to its draft presentations.

Analysis and finding

[101] I have reviewed the emails the town claims are exempt under section 7(1). The following records I find are not exempt under section 7(1). I am unable to find that Records 467 and the attached Record 468 contain advice or recommendations. Record 467 is an email that does not contain information that I would characterize as advice or recommendations and it appears that its purpose was to attach a slide (Record 468) for the recipient. Record 468, identified on the redacted index is an "official plan review timeline" from the city of Sudbury, and in examining the record and the confidential

representations of the town, I am not convinced that this contains advice or recommendations that would be exempt under the *Act*. In addition, in my review of Record 472, I find that it is an email attaching documents that contain advice or recommendations (Record 473, see below) but itself does not contain either and should be disclosed. I find that Record 472 is not exempt under section 7(1). Finally, in my review of Record 761, I find the author of this email is possibly requesting advice but the record itself does not contain any advice or recommendations. As stated, “recommendations” refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred, and “advice” involves evaluative analysis of information. I find that disclosure of this request for advice would not permit the inference of the actual advice sought or recommendation provided.

[102] However, for the following records, I find that the exemption at section 7(1) applies as they contain advice or recommendations of a city employee. I agree with the town that records 614, 615 and 616 contain recommendations. Record 614 is an email where the author discusses a recommendation given at an internal town meeting in Record 615. Record 616 is a draft document that contains the subject of the recommendation. I agree with the town that these records are exempt under section 7(1) and I find that severance would not be appropriate, as the remaining information would be disconnected snippets.

[103] I find that Record 473 contains advice and recommendations throughout on a slide deck PowerPoint presentation. Record 474 is an email where the implementation of a recommendation is discussed. For both of these records I find that severance would not be appropriate because the remaining information would be disconnected snippets.

[104] Records 546 and 547 represent two versions of a draft document identified on the index of records as the “town wide planning studies and an [specified] by-law for [a specified property]” with one version including advice from its legal counsel. I agree that both of these records contain advice and recommendations and also, when compared to each other would also reveal the advice of legal counsel, although section 12 was not claimed for either record.

[105] Although I agree with the town that Record 545 contains a recommendation, I find this recommendation can be severed from the record with the remaining information disclosed. The remaining information will not allow for the inference of the actual advice sought or recommendation provided.

[106] Record 760 is an email identified on the redacted index as “urban structure review.” I find that it contains a discussion about future steps and a recommendation. Similarly, Record 701 is an email chain which contains a discussion similar to that in Record 760 and I find contains a discussion about decisions to be made at an upcoming meeting which contains recommendations. I agree with the town that these records are exempt under section 7(1) and I find that severance would not be appropriate, as the remaining information would be disconnected snippets.

[107] Finally, Record 673 identified as an email with the subject “estimate” on the redacted index of records, and in my view is an email chain with each one of the emails containing financial estimates. In reviewing this record, I find that it contains advice and recommendations and is exempt under section 7(1).

[108] The appellant suggests that one or more of the exceptions at section 7(2) may apply to the withheld information. I considered whether the exempt information would fit within one of the exceptions at section 7(2) including, if the information consists of factual information, and I find that it does not. I note that some of the information I have found exempt under section 7(1) contains some information that is of a factual nature. However, the exception in section 7(2)(a) does not refer to occasional assertions of fact in a record, but to a coherent body of facts separate and distinct from the advice and recommendations the record contains.⁴⁴ Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) will not apply.⁴⁵

Issue D: Did the institution exercise its discretion under sections 12 and 7(1)? If so, should this office uphold the exercise of discretion?

[109] The sections 7(1) and 12 exemptions are discretionary, and permit 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.

[110] 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.

[111] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴⁶ This office may not, however, substitute its own discretion for that of the institution.⁴⁷

[112] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁴⁸

⁴⁴ Order 24.

⁴⁵ Order PO-2097.

⁴⁶ Order MO-1573.

⁴⁷ Section 54(2) of the Act.

⁴⁸ Orders P-344 and MO-1573.

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

Representations

[113] The town submits that it exercised its discretion to withhold the records under sections 7(1) and 12 and refers to the considerations that the IPC has found relevant. The town submits that in this matter, it took into account all relevant considerations and did not consider irrelevant considerations in making its determination.

[114] The town submits that it considered the principles of transparency, accountability and that exemptions from the right of access should be limited and specific. The town submits that it weighed these interests against the wording of sections 12 and 7(1), as well as the interests that these exemptions seek to protect. The town submits that it made efforts to disclose as many documents as possible.

[115] The town submits that it also considered the importance of the interests the relevant exemptions were meant to protect. In respect of the section 12 solicitor-client privilege exemption, it submits that the Courts have consistently and repeatedly emphasized the breadth and primacy of solicitor-client privilege. It submits that as a substantive rule, it is zealously protected to maintain confidentiality "as close to absolute

as possible" and should not be interfered with unless absolutely necessary. The town submits that there is no balancing of competing interests, unlike other forms of privilege, except in defined and strictly limited circumstances, not applicable to the present case.⁴⁹ The town submits that if the privileged records were released it would have a chilling effect on its ability to carry out its function because it could not know in advance that privileged material would not be subject to disclosure.

[116] The town submits that with respect to section 7(1), it also considered that the purpose of the exemption is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to "provide full, free and frank advice" and to make recommendations within the deliberative process of government decision-making and policy-making.

[117] The town submits that it also considered the nature of the appellant's request and his identity. It submits that as the appellant is a corporation with an economic interest in the information, as opposed to an individual or organization that requested the information for a public interest purpose, this was considered in the balancing of competing interests.

[118] The town also submits that it was guided by its historic practice, especially in respect of the section 12 exemption. The town submits that its historic practice has been not to disclose advice subject to solicitor-client privilege, including communications necessary for that purpose. The town submits that, in the present appeal, it went beyond its historic practice in a manner favourable to the appellant by disclosing some documents subject to solicitor-client privilege, in redacted form.

[119] The appellant submits that the town did not exercise its discretion to disclose any records that are allegedly exempt under the *Act*. The appellant notes the town's submission that it considered that the appellant was a corporation with an economic interest in the information and submits that anyone making a freedom of information request has some interest in the information being sought, whether financial or otherwise. The appellant submits that it is not clear why having an interest in a record should impact whether a requester should have access to that record and submits that this is an irrelevant consideration.

[120] The appellant submits that in exercising its discretion, the town did not consider the fact that all information requested pertains to the specified land owned by the appellant and that he is not seeking information about other entities or other properties. The appellant submits that given the nature of the request, it is anticipated that many of the requested records also pertain to the town's attempts to restrict the appellant's ability to use the specified property for certain purposes.

[121] The appellant submits that the fact that the requested records pertain to his

⁴⁹ *R. v. McClure*, 2001 SCC 14; *Alberta (Information and Privacy Commissioner)*, supra note 14.

property and his property rights are relevant considerations that were ignored by the town.

[122] The appellant submits that the fact that the town may have gone "beyond its historic practice in a manner favourable to the appellant by disclosing some documents subject to solicitor-client privilege, in redacted form" is not to be commended; it would only mean that the town was complying with its statutory obligation.

[123] In its reply, the town submits that in its original decision-making about the disclosure of records, it looked at each record and determined that the exemption at section 12 applied to most of the records at issue because they are solicitor-client privileged. Nevertheless, it submits that during mediation, the town exercised its discretion to release 31 records that had previously been withheld. The town submits that this demonstrates its willingness to disclose records which, although arguably solicitor-client privileged, would not prejudice the solicitor-client relationship. The town submits that it was not "required" to release these records but did so on its own discretion.

[124] The town submits that it has exercised its discretion and has done its utmost on reconsideration to balance public access against the exemption by disclosing to the appellant as much as possible while also protecting the core of the solicitor-client privilege contemplated in section 12 of the *Act*.

[125] The town submits that it disagrees with the appellant's suggestion that it did consider that the information request pertains to the specified property owned by the appellant. It submits that it considered the nature of appellant's requests and "the identity of the Requestor." The town submits that in balancing competing interests, it also considered that since the appellant was a corporation with an economic interest in the information, as opposed to an individual or organization that requested the information for a public interest purpose.

[126] The appellant did not address this issue further in his sur-reply representations.

Finding

[127] Since I did not uphold the town's decision in full with respect to its application of the section 7(1) and section 12 exemptions and I have ordered it to release portions of the records at issue, I will only be addressing whether the town properly exercised its discretion with respect to the remaining information that I found to be exempt under these exemptions.

[128] Based on my review of the withheld information, the parties' representations and the circumstances of this appeal, I find that the town did not err in exercising its discretion to withhold information under section 7(1) and section 12 of the *Act*.

[129] I am not persuaded by the appellant's arguments that the town may have considered irrelevant factors, or that the town failed to account for relevant factors, in

exercising its discretion. Based on the information before me, I am satisfied that the town did not exercise its discretion in bad faith or for an improper purpose. I am also satisfied that the town considered relevant factors and did not consider irrelevant factors in the exercise of its discretion.

[130] In particular, I am satisfied that when the town considered applying the various exemptions to this information, it properly considered the purpose of the exemptions and the interests sought to be protected under section 7(1) and section 12.

[131] Having regard to the circumstances of this appeal including the records at issue, the parties' representations, as well as the importance of solicitor-client privilege as recognized by the Courts, I am satisfied that the town appropriately exercised its discretion under section 12 of the *Act*. Further, I am satisfied that the town considered any public interest in the release of the information. Accordingly, I uphold the township's exercise of discretion to withhold the information that I found to be exempt under section 12. I am also satisfied that the town properly considered the purpose of the exemption and the interests sought to be protected under section 7(1) and whether or not disclosure of this information at issue would increase public confidence in the institution.

[132] Accordingly, I uphold the town's exercise of discretion.

ORDER:

- 1.** I uphold the town's decision regarding section 7(1) of the *Act*, in part, and order it to disclose records 467, 468, 472 and 761 as well as the information that is not highlighted in Record 545 which is provided with the town's copy of this order. To be clear, records 467, 468, 472 and 761 as well as the information that is not highlighted on Record 545 should be disclosed to the appellant by **February 8, 2021 but not before February 3, 2021**.
- 2.** I uphold the town's decision regarding section 12 of the *Act*, in part, and order it to disclose Record 758 to the appellant by **February 8, 2021 but not before February 3, 2021**.

The remainder of this appeal is dismissed.

Original Signed by: _____
Alec Fadel
Adjudicator

January 4, 2021