Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER MO-4022-F

Appeal MA15-632

Township of Clearview

March 12, 2021

Summary: The Township of Clearview (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records relating to four decisions it made regarding certain municipal road matters. After its search, the township issued a decision allowing partial access to the records. Ultimately, the township claimed the exemptions at sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations) and 12 (solicitor-client privilege) to withhold the remainder of the information. The appellant raised the possible application of the public interest override at section 16 of the *Act*, which was added as an issue to the appeal. In Interim Order MO-3959-I, the adjudicator found that the section 12 exemption applied to a group of records and reserved his decision on the remaining records, including other records claimed to be exempt under section 12. In this final order, the adjudicator upholds the township's decision with respect to sections 6(1)(b) and 12, in part. The adjudicator does not uphold the township's reliance on section 7(1). He orders the township to disclose the non-exempt information to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 7(1) and 12.

Orders and Investigation Reports Considered: Orders M-64, M-98, M-102, M-208, MO-1248, MO-1344, MO-2726, MO-2914.

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.), *Blank v. Canada (Minister of Justice)*, [2007] F.C.J. No. 306, *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

OVERVIEW:

[1] The Township of Clearview (the township) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to four decisions it made regarding certain municipal road matters. The requester sought access to records about the township's decision to enter into settlement agreements with a specified party which would result in the closing of a section of a specified county road, and records relating to a Joint Board hearing on the matter. In its representations, the township explains that the "Joint Board" consists of the Niagara Escarpment Hearing Office and the Ontario Municipal Board, and that the "Joint Board" hearing refers to a proceeding conducted by the Ontario Environmental Review Tribunal, Office of Consolidated Hearings Panel, that commenced in May 2010.

[2] The request states:

1. We request the following information in relation to [the township's] decision to enter into Minutes of Settlement (the MoS) with [named company] effective January 25, 2010, for the time period between September 1, 2008 and February 25, 2010:

    a. All records (including notes, emails, correspondence, meeting minutes and agendas, staff or committee reports, drafts of the MoS, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, and agents or representatives thereof) in relation to the negotiation and finalization of the MoS.

2. We request the following information in relation to Clearview's decision to execute a three-party Road Settlement Agreement (the RSA) with [named company] and the County of Simcoe on or about February 25, 2010, for the time period between September 1, 2008 and March 25, 2010:

    a. All records (including notes, emails, correspondence, meeting minutes and agendas, staff and committee reports, drafts of the RSA, appraisals of the land value of County Road 91, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, and agents or representatives thereof) in relation to the negotiation and finalization of the RSA;

    b. All records (including notes, emails, correspondence, meeting minutes and agendas, staff and committee reports, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, and agents or representatives thereof) regarding estimate(s) of the cost to Clearview to implement the proposed road improvements in the RSA; and

c. All records (including notes, emails, correspondence, meeting minutes and agendas, staff or committee reports, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, and agents or representatives thereof) regarding any appraisal(s) of the land value of the closed portion of County Road 91.

3. We request the following information in relation to Clearview's decision to proceed with a Schedule A+ Road Works Municipal Class Environmental Assessment (Class EA) per the Ontario *Environmental Assessment Act* for the development of Sideroad 26/27 in Clearview, for the time period between September 1, 2008 and October 28, 2014:

    a. All records (including notes, emails, correspondence, meeting minutes and agendas, staff or committee reports, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, consultants, and agents or representatives thereof) in relation to Clearview's decision to proceed with a Schedule A+ Road Works Class EA for Sideroad 26/27.

4. We request the following information in relation to Clearview's decision to execute Municipal Road Transfer Agreement (MRTA) with the County of Simcoe regarding County Road 91, for the time period between September 1, 2008 and March 25, 2010.

    a. All records (including notes, emails, correspondence, meeting minutes and agendas, staff or committee reports, MRTA drafts, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, and agents or representatives thereof) in relation to the negotiation and finalization of the MRTA.

[3] In response, the township issued a decision granting the appellant partial access to the records it identified as responsive to the request. Initially, the township relied on the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 9(1)(d) (relations with government agency) and 12 (solicitor-client privilege), as well as the mandatory exemption in section 10(1)(a) (third party information) to withhold the remainder of the records.

[4] The appellant was not satisfied with the decision and appealed it to this office. Mediation of the appeal was attempted. During mediation, the township issued a revised decision granting the appellant access to additional records. The township maintained its denial of access to the remaining records pursuant to the same exemptions it initially relied on. It also relied on the mandatory personal privacy exemption in section 14(1) of the *Act* to withhold some information in the records. Also during mediation, the appellant raised the issue of the possible application of the public interest override in section 16 of the *Act*.

[5] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*. The IPC adjudicator assigned to the file sought and received representations from the town, an affected party and the appellant. These representations 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.

[6] After I reviewed the parties' representations along with the withheld information, I issued an interim order, Order MO-3959-I that addressed a group of records claimed to be exempt under section 12, Branch 1 solicitor-client privilege. In that order, I upheld the exemption claimed by the township for all of those records. With regard to the remainder of the records, including other records withheld under section 12, Branch 2 privilege, I sought further representations from the parties which were shared in accordance with section 7 of the IPC's *Code of Procedure*.

[7] In this final order, I uphold the township's decision to withhold the records under section 6(1)(b) and section 12, in part. I do not uphold the township's decision to withhold Record 33 under section 7(1), and I order it to disclose the non-exempt information to the appellant.

RECORDS:

[8] The records claimed exempt under section 12 consist of emails, letters, draft settlement documents and are records 1, 5, 16, 19, 20, 21, 22, 25, 26, 27, 29, 30, 32, 35, 37, 41, 44, 49, 50, 51, 52, 53, 55, 56, 62, 63, 64, 65, 66, 67, 70, 94, 95, 96, 97, 105, 108, 109, 117, 118, 124, 127, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 144, 145, 146, 148, 150, 151, 153, 154, 156, 162, 172, 187, 197, 198, 199, 200, 201, 202, 203, 204, 208, 209, 212, 213, 215, 220, 231, 242, 243, 247, 250, 252, 253, 254, 258, 259, 260, 261, 263, 264, 265, 266, 288, 291, 296, 391, 401, 402, 403, 404, 406, 407, 408, 410, 413, 420, 422, 438, 439, 445, 457, 458, 459, 460, 462, 463, 464, 466, 468, 473, 476, 477, 478, 482, 483, 488, 491, 495, 501 and 502.

[9] The remaining records claimed exempt under section 6(1)(b) consist of emails, closed session minutes, reports and are records 3, 31, 59, 61, 68, 69, 76, 77, 78, 79, 80, 84, 119, 120, 121 and 126.

[10] The remaining record claimed exempt under section 7(1) is an email and is Record 33[1].

[1] All of the records listed were withheld in full except for records 1, 22 and 44 which were withheld in part.

ISSUES:

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

B. Does the discretionary exemption at section 6(1)(b) (closed meeting) apply to the records?

C. Does the discretionary exemption at section 7(1) (advice and recommendations) apply to the records?

D. Did the institution exercise its discretion under sections 6(1)(b) and 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 12 apply to the records?

[11] The records at issue under section 12 have all been withheld under branch 2 litigation privilege. Since the township applied this section to most of the remaining records in dispute, including many also withheld under sections 6(1)(b) and 7(1), I will deal with this section first.

[12] Section 12 states as follows:

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

Branch 2: statutory privilege

[13] 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."

Statutory litigation privilege

[14] This privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[2]

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[2] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

[15] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege.[3] Documents not originally created for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are also covered by this privilege.[4] However, the privilege does not apply to records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."[5]

[16] The statutory litigation privilege in section 12 also protects records prepared for use in the mediation or settlement of litigation.[6]

Representations

[17] The township submits that it relies on section 12, more specifically the second branch, litigation privilege for most of the records remaining in dispute. It submits that to rely on this branch requires satisfaction of a three-part test:

a. The record must have been created with existing or contemplated litigation in mind

b. The record must have been created for the dominant purpose of existing or contemplated litigation

c. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at the time.

[18] The township submits that the nature and timing of the request captures records that were created during litigation, specifically the Joint Board hearing, thus satisfying the first part of the test.

[19] The township submits that all of the records claimed to fall within the litigation privilege are records that were created for the purpose of negotiating the settlement of the Joint Board Hearing or for the purpose of strategy going forward with the hearing process.

[20] The township submits that the request focuses on the nature of communications and records leading up to the settlement between the municipalities and the specified party. It submits that settlement privilege attaches to these communications, as explained in *Ontario (Liquor Control Board) v. Magnotta Winery Corp., (Magnotta)*[7]:

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[3] Order PO-2733.
[4] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.
[5] Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.
[6] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[7] *Ontario (Liquor Control Boord) v. Magnotta Winery Corp*. 102 O.R. (3d) 545, at paras. 29 and 36.

> The public policy interest in encouraging settlement, ... trumps the public policy interest in the transparency of government action... No one would willingly entertain settlement discussions with a government institution if it knew its confidential discussions would be made public. This is particularly so as during the settlement process the parties may make admissions and offer concessions that would otherwise be to their detriment.

[21] The township submits that the statutory language actually does not identify the second branch as the common law "litigation privilege" but as a broader exemption, capturing any record that was prepared by or for counsel ... for use in giving legal advice or in contemplation of or for use in litigation." It submits that it is this broadened concept that has been found to encompass all stages of litigation, including mediation and settlement.

[22] Further, the township refers to Order MO-3212 and submits that privilege attached to records pursuant to the second branch does not end when the litigation ends.

[23] The township submits that some of the records include communications between staff and consultants for the purpose of preparing records to pass on to counsel to effect a settlement. For example, it submits that technical details of engineering standards or quarry operations were agreed to at a professional level and then provided to legal counsel to incorporate into the agreement. The township submits that it identified records that include communications between parties of common interest that were working toward settlement, which was ultimately achieved and lists the various parties.

[24] The township submits that privilege was not waived for these records, although communications did occur between consultants and counsel who had a common interest in settlement. The township submits that the common interest principle preserves privilege because to waive would have defeated settlement, if parties had a real concern that their discussions to achieve a common goal could be revealed publicly. The township submits that privilege attaches to the communications between the various parties in the records identified above because each party had a common interest in completing the transaction that the sharing of privileged information was made to facilitate.[8]

[25] The township submits that communications between it and the affected party were clearly intended to be confidential in nature, noting that most of these records are marked "confidential." However, it also submits that there are other factors to take into consideration, including the context of the attempts to settle litigation.

[26] The appellant submits that the records are not captured by the section 12

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[8] *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)* [2002] B.C.J. No. 2146 at para. 17.

exemption because the records were discussions between staff on the various aspects of the proposal to change the road network. She submits that the records were not solely created to advise or inform counsel, but to assist with the municipality's decision making process. The appellant submits that the records should be disclosed, particularly in light of the fact that the "litigation" ended years ago.

[27] The appellant submits that communications between township staff/consultants and the affected party/consultants may also discuss technical details of engineering standards or quarry operations that are not solely related to the settlement process. She submits that these records relate to temporally relevant matters such as road safety, road geometry, maintenance, costs, etc. - matters that are not only related to the settlement agreements and discussions. The appellant submits that records revealing objective information or reports that are required to be disclosed by subsection 7(2) must be scrutinized to ensure settlement privilege is not inappropriately claimed in cases that are not truly captured by the purpose of the section 12 exemption.[9]

Analysis and finding

[28] Branch 2 of the section 12 exemption, relied upon by the township, 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."

[29] As noted, the statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[10]

[30] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[11]

[31] After reviewing the records at issue, I am satisfied that most are exempt under the Branch 2 statutory litigation privilege. However, for records 162 and 172, I do not agree that these records are exempt under section 12 as submitted by the township. In my review of these two records, I find that they consist of communications between opposing counsel concerning witnesses at an upcoming hearing with no mention of ongoing settlement discussions. While the section 12 exemption would protect records concerning the settlement of litigation, it does not protect records between opposing counsel concerning the witnesses at an upcoming hearing. As the township did not claim these records exempt under any other discretionary exemptions and no mandatory exemptions apply to them, I will order the township to disclose records 162

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[9] Section 7(2) is a mandatory exception to the advice or recommendation exemption in section 7(1) and is not relevant to my consideration of the application of section 12.
[10] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[11] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer),* cited above.

and 172.

[32] However, as stated, I find that the remaining records claimed under section 12 are exempt under the Branch two statutory litigation privilege, for the following reasons.

[33] In *Magnotta*, referred to by the township, the Court of Appeal held that records prepared for use in the mediation or settlement of litigation are exempt under the statutory litigation privilege in section 19 of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent of section 12 of the *Act*). The Court's rationale was stated in the following terms:

> Alternative dispute resolution now forms an integral part of the civil litigation process in Ontario. Various alternative dispute resolution methods have been incorporated into the litigation process as can be seen by reference to the Rules of Civil Procedure, which regulate and help define the parameters of the litigation process. The Disputed Records were delivered as part of a mediation. In *Rogacki v. Belz*,[12] at paras. 44-47, this court observed that mandatory mediation is a part of the litigation process. There is no principled reason to treat mandatory and consensual mediations differently when considering whether they are part of the litigation process. Furthermore, interpreting the word "litigation" in the second branch to encompass mediation and settlement discussions is consonant with public interest considerations because the public interest in transparency is trumped by the more compelling public interest in encouraging the settlement of litigation….
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> Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records -- both those prepared by Crown counsel and those prepared by Magnotta -- fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions.

[34] In her representations, the appellant suggests that the information in these records is not exempt under section 12 because the records were discussions between staff on the various aspects of the proposal to change the road network. She also suggests that the records were not solely created to advise or inform counsel, but to assist with the municipality's decision-making process which she submits might be

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[12] *Rogacki v. Belz*, [2003] O.J. No. 3809, 232 D.L.R. (4th) 523, 41 C.P.C. (5th) 78, 125 A.C.W.S . (3d) 806 (C.A.).

exempt under the discretionary exemption at section 7(1) of the *Act*. However, in my review of the records, I find that most of them were prepared by or for counsel in contemplation of or for use in settlement. Discussions between township employees which are claimed exempt under this section are all discussions concerning the possible settlement and the process involved with doing so. I find that the communication that are reflected in these records took place within the requisite zone of privacy necessary to establish the statutory litigation privilege.

[35] The records consist mostly of emails many with attachments containing correspondence and/or draft minutes of settlement. In my review of these records, it is apparent that they were created with a view to effect settlement and as per *Magnotta*, these records fall within of Branch 2 of the section 12 exemption.

Severance of the records withheld under section 12

[36] The appellant refers to section 4(2) of the *Act*, which sets out that an institution must disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Although the appellant does not specifically submit that records withheld under section 12 should be severed, she does suggest that technical information in the records should be provided.

[37] In *Blank v. Canada (Minister of Justice)*, [2007] F.C.J. No. 306[13], 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 material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.

[38] Similarly, in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*[14], 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.

[39] However, the Divisional Court noted that the maximum disclosure principle in

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

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

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.

[40] Although these cases address communication privilege and not litigation privilege, similar considerations apply here. I have reviewed the records and find that they do not contain communications for other purposes which are clearly unrelated to settlement of litigation. I find that the emails and any attached documents along with draft minutes of settlement are subject in their entirety to settlement privilege. Consequently, I will not order these records severed.

[41] Lastly, the appellant did not argue that the township waived its privilege for the records at issue under section 12. Based on my review of the records, it is not apparent that the township 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 township's exercise of discretion below.

Issue B: Does the discretionary exemption at section 6(1)(b) apply to the records?

[42] Section 6(1)(b) reads:

> A head may refuse to disclose a record,
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> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[43] For this exemption to apply, the institution must establish that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.[15]

[44] Previous orders have found that:

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[15] Orders M-64, M-102 and MO-1248.

- "deliberations" refer to discussions conducted with a view towards making a decision;[16] and

- "substance" generally means more than just the subject of the meeting.[17]

[45] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.[18]

[46] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.[19]

[47] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[20]

[48] Section 6(2) of the *Act* sets out exceptions to section 6(1)(b). It reads, in part:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
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> > (b) in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public.

[49] In determining whether the records at issue qualify for exemption under section 6(1)(b) of the *Act*, I will consider the three part test set out above.

Representations

[50] The remaining records that the township claims exempt under section 6(1)(b) are records 3, 31, 59, 61, 68, 69, 76, 77, 78, 79, 80, 84, 119, 120, 121 and 126.

[51] The township sets out that four council meetings were held in a closed meeting authorized under the *Municipal Act*, where issues relating to the litigation and settlement relating to same were discussed. Respectively, the meetings dealt with the

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[16] Order M-184.
[17] Orders M-703 and MO-1344.
[18] Order MO-1344.
[19] Order M-102.
[20] Orders MO-1344, MO-2389 and MO-2499-I.

following issues: quarry operation and road network that could potentially lead to settlement of the Joint Board hearing; the component of the Joint Board hearing potential settlement of the road issues; authorizing the entering into of a settlement with the specified party; and, considering minutes of settlement. The township attached the agenda and minutes of each meeting with its representations.

[52] The township refers to section 239(2) of the *Municipal Act* and submits that the closed meetings were authorized under sections 239(2)(e) and/or (f), which state:

> (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
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> …
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> (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
>
> (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

[53] The township submits that the records at issue were considered in closed sessions as the subject matters of the meetings was both litigation and/or advice that is subject to solicitor-client privilege. The township provided a list setting out each record and indicating if one or both categories (section 239(2)(e) or (f)) applied.

[54] The township submits that release of any of the records would reveal its internal deliberations with respect to entering into the various settlement agreements. It submits that meeting *in camera* is the only opportunity that council as a whole has to receive legal advice and have an open discussion about litigation. The township submits that similar to the policy reasons for ensuring the sanctity of solicitor-client privilege and litigation privilege, council needs a forum in which they may speak and negotiate freely without worry that their deliberations will be made public. It submits that this is an important public policy consideration to encourage settlement in litigation.

[55] In her representations, the appellant submits that the township has not released any portion of the records it is withholding under section 6(1)(b). The appellant submits that she does not dispute that *in camera* meetings were held in accordance with the *Municipal Act* for reasons of litigation or solicitor-client advice. She submits that the matters relate "not to private litigation of a *lis* between parties, but were the subject of a public hearing on matters of public interest: *Planning Act* and *Aggregate Resources Act* approvals." She also submits that the litigation matters have long since terminated.

[56] The appellant submits that section 6(2)(b) of the *Act* requires the release of a record from an *in camera* council meeting if the subject matter of the deliberations was considered in a meeting open to the public. She submits that the subject matter of the deliberations (settlement agreements) was considered in a meeting open to the public.

She submits that at a specified council meeting, the township briefed meeting attendees from the public on the proposed settlement, and council members asked questions regarding the proposed settlement and updated information. She submits that the minutes of that meeting do not refer to a vote regarding this item.

[57] The appellant submits that if it is found that section 6(2)(b) does not apply, not every record or part of every record is exempt. She submits that there is likely information contained in the records that is not exempt such as meeting dates, attendees, report dates, report authors, and subject matter/title of report. She refers to Order MO-1344 to support that this sort of information should be released. The appellant submits that it is not clear how records, some prepared in advance of a meeting, would disclose the substance of the deliberations at the meeting, and not merely the subject matter of the council's meeting. She refers to Order MO-2932 and submits that "substance" generally means more than just the subject of the meeting, while "deliberations" refer to discussions conducted with a view to making a decision.

[58] The appellant refers to Order MO-2982 and submits that the IPC is clear that records considered *in camera* may be severed, "and portions disclosed, based on whether disclosing those portions would reveal the substance of the deliberations of the *in camera* meeting". The appellant submits that each staff report must be reviewed in its entirety to consider whether any part of the report could reveal the actual substance of the deliberations that took place at the four meetings. She submits that the township references "technical information" provided by staff and that such information would not reveal deliberations at the meeting and ought to be released. She submits that such technical information may include road safety standards, valuations of land/aggregate, or environmental assessment classification, which are not exempt under the *Act*. She submits that this information is critical to understanding council's decision, not its deliberations.

[59] In its reply representations, the township maintains that the records are protected under section 6(1)(b). The township submits that the records, consisting of various staff reports, correspondence, notes etc., are such that if released would reveal the township's internal deliberations with respect to entering into the various settlement agreements.

[60] The township refers to Order MO-2914 which sets out the three requirements that an institution must establish (set out above) and submits that the records satisfy the three requirements of the exemption at section 6(1)(b).

[61] The township submits that despite the open meeting the appellant refers to in her representations, the release of the records at issue would expose the deliberations of the substance of the discussions. The township submits that the records at issue were all considered in closed session as both litigation and/or advice that is subject to solicitor-client privilege.

[62] The township also refers to Order MO-2726 where the adjudicator found that the exception in section 6(2)(b) did not apply. In that decision, the adjudicator stated:

> Although I accept the appellant's position that the public was generally aware of the nature of some of the matters which resulted in the discussion at the November 15th meeting, and that specific questions about a particular action the township council ought to take were dealt with at an earlier open meeting, I am not satisfied that these meetings or disclosures satisfy the requirement that the subject matter of the deliberations has been considered in a meeting open to the public.

[63] In her sur-reply representations, the appellant submits that Orders MO-2914 and MO-2726 are distinguishable from this case. She submits that in Order MO-2914, staff reports on the subject were provided to the public and enabled them to understand the reasoning for the recommendations made. She notes that the adjudicator stated:

> Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings

[64] The appellant submits that not all of the records are exempt under section 6(1)(b). Additionally, the appellant reiterates her position that portions of the records should still be provided as they may be severed as not all information within the documents could properly be considered to reveal the protected deliberation process.

Analysis and finding

[65] As noted, in order to establish that the exemption in section 6(1)(b) applies, the township must establish that each part of the following three-part test has been met:

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. the disclosure of the record would reveal the actual substance of the deliberations of the meeting.[21]

[66] In the circumstances of this appeal, and for the following reasons, I find that the requirements in section 6(1)(b) have been met for most of the information in dispute.

[21] Orders M-64, M-102 and MO-1248.

Part 1 - a council, board, commission or other body, or a committee of one of them, held a meeting

[67] In reviewing the township's submissions along with the records that it claims are exempt under section 6(1)(b), I accept that the four referenced meetings did, in fact, take place. Therefore, part one of the test has been met.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

[68] The township relies on section 239(2) of the *Municipal Act* as its authority to hold the four meetings in question in the absence of the public or *in camera*. In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, the township must establish that the purpose of the meeting was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.

[69] Under section 239(1) of the *Municipal Act, 2001*, all meetings of council must be open to the public unless they fall within one of the prescribed exceptions set out in section 239(2), which provides authorization for the convening of a meeting in the absence of the public. The township submits that sections 239(2)(e) and (f) apply in the context of this appeal. Those sections read:

> (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> > (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
> >
> > (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

[70] In her representations, the appellant does not dispute that *in camera* meetings were held in accordance with the *Municipal Act* for the reasons set out by the township. However, she submits that the matters do not relate to private litigation but were the subject of a public hearing on matters of public interest.

[71] On my review of the evidence before me, including the parties' representations and my review of the records at issue, I accept that during each of the specified meetings, council passed a resolution to move into closed session to discuss issues surrounding litigation and a potential settlement of same. I also find that council followed the procedural requirements of the *Municipal Act* to hold the meetings in the absence of the public to consider the subject matter of the potential settlement of litigation affecting the township and to consider advice that is subject to solicitor-client privilege. It makes no difference that the litigation was not "private"; section 239(2)(e) of the *Municipal Act* makes no such distinction.

[72] Accordingly, for the reasons set out above, I am satisfied that the township has met the second part of the test under section 6(1)(b).

Part 3: disclosure of the record would reveal the actual substance of the deliberations of the meeting

[73] The wording of the provision and previous decisions of this office make clear that in order to qualify for exemption under section 6(1)(b), there must be more than the mere authority to hold a meeting in the absence of the public. Section 6(1)(b) specifically requires that disclosure of the record would reveal the actual substance of deliberations that took place at the township's *in camera* council meetings, not merely the subject of the deliberations.[22]

[74] Under Part 3 of the test:

- "deliberations" refer to discussions conducted with a view towards making a decision[23]

- "substance" generally means more than just the subject of the meeting[24]

[75] Previous orders of this office have established that it is not sufficient that the record itself was the subject of deliberations at the meeting in question,[25] where the record does not reveal the actual substance of the deliberations or discussions that took place leading up to the decisions that were made.

[76] In my review of the records claimed exempt under section 6(1)(b), I find that records 119 and 120 do not contain information that would reveal the actual substance of the deliberations of the meeting the record pertained to. In reviewing these records, I find that while they contain information that may reveal the *subject* of deliberations at a closed meeting, they would not reveal the actual substance of the deliberations and therefore these records are not exempt under section 6(1)(b).

[77] As submitted by the appellant, in Order MO-2914, relied upon by the township, the adjudicator noted that the city had, "upon review of IPC orders," decided to provide partial access to the records at issue. In my review of Order MO-2914, I note that the city had "disclosed portions of the minutes providing information about the persons in attendance, start and end times, motions to move into closed session, and declarations of conflict of interest."

[78] In this appeal, the township has fully withheld the records and it does not address whether or not, when making its access decision, it considered severing any of

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[22] Orders MO-1344, MO-2389 and MO-2499-I
[23] Order M-184.
[24] Orders M-703, MO-1344.
[25] See Order M-98, M-208.

these or any other records in its representations.

[79] The appellant references Order MO-1344 in her representations to support that the township should disclose parts of the records that do not reveal the substance of the deliberations. In my review of that I order I note that the adjudicator stated:

> it is important to consider the section 6(1)(b) exemption claim in the context of the severance requirements of section 4(2) of the *Act* … The effect of section 4(2) of the *Act* is to require the [institution] to deny access only to the information which falls under the exemption in section 6(1)(b) … The [institution] in this appeal must review the record and determine what information would reveal the substance of the deliberations and, subject to the other requirements being met, it may exclude those portions from disclosure. The [institution] may not, however, apply the exemption to information which does not disclose the substance of the deliberations.

[80] In my review of the remaining records for which the township has claimed the section 6(1)(b) exemption, I find that all of the requirements of the exemption have been met. However, I also find that disclosing some of the information would not reveal the substance of the deliberations in the closed meeting and should be disclosed. I will therefore order the township to disclose information that I have found does not reveal the actual substance of the deliberations of the closed meeting.

[81] With regard to the appellant's submission, I have considered whether the open public meeting where the settlement agreement was considered establishes that the "subject matter" of the closed meeting's deliberations was "considered in a meeting open to the public" within the meaning of section 6(2). After my review of the records, I agree with the township that release of the information in question would expose the deliberations of the substance of the discussions. I agree with the reasoning in Order MO-2726 referred to by the township, and although the public was provided with the settlement agreements and specific questions were asked of township council at an open meeting, I am not convinced that the open meeting or disclosures satisfy the requirement that "the subject matter of the deliberations has been considered in a meeting open to the public."

[82] While I appreciate the appellant's wish to have more information about the deliberations during the closed meetings, the *Act* protects those deliberations by way of section 6(1)(b).

[83] I therefore find that the third requirement for the application of section 6(1)(b) applies to much of the information in records, and none of the exceptions in section 6(2) apply. As all three requirements for the application of section 6(1)(b) have been met and no exception applies, I find that the information is exempt under section 6(1)(b) subject to my review of the township's discretion below.

Issue C: Does the discretionary exemption at section 7(1) apply to record 33?

[84] Since I have found most of the records which the township claimed exempt under section 7(1), exempt under either sections 6(1)(b) or 12, the only remaining record to examine under this exemption is Record 33.

[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(1) 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.[26]

[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. [27]

[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:

- 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.[28]

[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

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[26] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[27] See above at paras. 26 and 47.
[28] Order P-1054.

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.[29]

[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).[30]

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

- factual or background information[31]
- a supervisor's direction to staff on how to conduct an investigation[32]
- information prepared for public dissemination.[33]

Representations

[94] In its representations, the township identifies Record 33 as an email chain from a township employee with comments from the township's public works department. The township submits that it is technical input that formed the minutes of settlement, although this record is not specifically claimed exempt under section 12. It also submits that the record contains a recommendation with respect to the implementation of the road works as per the agreement.

[95] In her representations, the appellant disputes that section 7(1) applies and submits that the record does not contain the advice or recommendation of an officer or employee and even if the exemption applied, the record falls within one or more exceptions to the exemption in section 7(2).

[96] The appellant submits that recommendations and advice involve an evaluative analysis of the information. She refers to Order PO-2084 and submits that information sharing between staff must be viewed in the following context:

> A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the work "advice" in section 13(1) [the provincial equivalent to section 7(1)] is to consider the specific

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[29] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[30] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.
[31] Order PO-3315.
[32] 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.).
[33] Order PO-2677.

> circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

[97] The appellant also refers to Order PO-2028 and submits that the IPC drew a distinction between advising on a course of action versus drawing matters of potential relevance to the attention of the decision-maker. The appellant submits that information based on drawing attention to matters of potential relevance for the decision-maker's consideration would not qualify for the exemption at section 7(1).

[98] The appellant addresses each of the records claimed exempt by the township in her representations and regarding Record 33 submits that the township's reference to "technical input" may be factual in nature, without containing advice or recommendations. She gives an example of information containing a review or information to provide appropriate background information.

[99] The appellant also submits that it may be possible to sever and release parts of the records that do not contain advice or recommendations. She refers to Order M-916 where an inquiry officer reviewed documents related to an application to develop and operate a landfill site and found that the records withheld under section 7(1) included "comments, questions, remarks and exchanges of ideas related to the Company's application" and that "concerns expressed ... do not contain a suggested course of action." The appellant submits that the inquiry officer ordered additional parts of the records in dispute to be released as they did not contain advice/recommendations.

[100] The appellant refers to the exceptions in section 7(2) and submits that one or more may apply and makes specific submissions on sections 7(2)(c), (d) and (f). The relevant part of section 7(2) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (c) a report by a valuator;
>
> (d) an environmental impact statement or similar record;
>
> …
>
> (f) a feasibility study or other technical study, including a cost estimate, policy or project of an institution;

[101] The appellant submits that section 7(2)(c) would apply to the value of land/aggregate under a specified county road to be transferred to the specified party and that this information may simply be contained in an email from township staff (for

example referring to the value of land/aggregate). She also submits that this information may be an informal estimate by a third party. The appellant submits that knowing the value the township attributed to the aggregate beneath the portion of the road to be transferred to a private corporation is critical to understanding the eventual discussion.

[102] The appellant notes that her request included records related to the class environmental assessment for the development of a specified side road, per the *Ontario Environmental Assessment Act* and submits that no such records were released. The appellant submits that these records must exist, and be required to be released per the *Act*.[34] She submits that portions of certain records may directly and substantially relate to the content of the environmental assessment.

[103] Finally, the appellant submits that with regard to the exception at section 7(2)(f), the "government policy or project" in this case would be the proposal to change the township and country road network, by closing a county road and transferring it to private ownership. The appellant submits that the cost of the change to the road network due to the settlement agreement may also be contained in the records. She also submits that the records may also address related technical matters to the road network changes (for example, road standards, safety, emergency medical services response times, risk assessment and transportation engineering).

[104] In its reply representations, the township refers to Order MO-3600 where the adjudicator confirmed that a record contained a recommendation because it related "to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred." The township submits that similar to Order MO-3600, the recommendation in this appeal refers to a suggested course of action that will ultimately be accepted or rejected.

[105] In its sur-reply representations the appellant refers to Order MO-3600, referenced by the township above, and submits that it further supports the notion that only limited subset of information be protected under the *Act*. The appellant submits that in that order the adjudicator ordered the disclosure of large portions of the records in question, upholding the withholding of only those portions that specifically met the exemption criteria.

Analysis and finding

[106] As noted, the only remaining record to examine under section 7(1) is Record 33 which is an email chain containing four emails. The last two emails in the chain were withheld as privileged information under section 12 at Records 65 and 66 and I have upheld that exemption for this information in those records. The remaining emails in the chain (the first two emails) in Record 33 address whether that information can be

[34] I note that reasonable search was not an issue identified at mediation.

shared with a party directly involved in the settlement discussion involving the litigation. After reviewing the record, it appears that the township is claiming that the first two emails contain advice or recommendations. I do not agree. In my view, indicating whether a document can be shared with another party does not constitute advice or recommendations for the purpose of section 7(1). I will, therefore, order the township to disclose this information to the appellant.

[107] Since I find that none of the information in Record 33 is properly exempt under section 7(1), it is not necessary for me to examine whether the public interest override at section 16 applies to that information. Also, since the public interest override cannot apply to information I found exempt under sections 6(1)(b) and 12, I uphold the township's decision with regard to that information.[35]

Issue D: Did the institution exercise its discretion under sections 6(1)(b) and 12? If so, should this office uphold the exercise of discretion?

[108] The sections 6(1)(b) 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.

[109] 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.

[110] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[36] This office may not, however, substitute its own discretion for that of the institution.[37]

[111] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[38]

- the purposes of the *Act*, including the principles that
    - information should be available to the public

[35] Neither section 6 nor section 12 is listed in the public interest override provision at section 16.
[36] Order MO-1573.
[37] Section 54(2) of the *Act.*
[38] Orders P-344 and MO-1573.

    - 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

[112] The township submits that in exercising its discretion under sections 6(1)(b) and 12, it took into consideration the following factors:

- The purposes of the *Act* including that information should be made available to the public, and that exemptions from this right should be limited and specific
- Whether the disclosure would increase the public confidence in the operation of the institution
- The nature of the information
- The historic practice of the institution with respect to similar information
- The appellant does not seek their own information, or state a sympathetic or compelling need for the information

- The sensitivity of the information, as it is recent and related approvals for road improvements are still a matter of ongoing litigation in which the appellant is engaged.

[113] The township submits that is has provided as much of the information as possible without jeopardizing the sanctity of the settlement discussions and privileged communications.

[114] The township submits that while it has a relationship with the appellant, as a result of the lengthy Joint Board Hearing, the request was processed in good faith, in accordance with the historic practices with respect to similar requests.

[115] The appellant submits that the township failed to take into account relevant considerations. She submits that information that informs the township's decision to enter into road settlement agreements to change the road network (for example, considerations of road safety, emergency medical response time, environmental impacts, costs of revisions to the road network, impact of closure of a specific county road, loss of rights to aggregate resources beneath that same county road, and comparison of the above considerations of the proposed settlement to other options) should be made available to the public.

[116] The appellant submits that she, and others, have a compelling need to receive this information, primarily to ensure that the township acted in the public interest in its negotiation of the settlement agreements. The appellant provided a statement that details the interest of other residents, community groups, and even an adjacent municipality, in having the above type of records publicly released. She submits that disclosure of the records may increase public confidence in the township's decision-making process, including fact-finding and analysis.

[117] The appellant also submits that the information is no longer sensitive to the township as it entered into the settlement agreements and supported the specified party's applications before the Joint Board years ago. The appellant submits that the litigation has been terminated and no future litigation against the township is contemplated at this time.

Finding

[118] Since I did not uphold the township's decision in full with respect to its application of the sections 6(1)(b) and 12 exemptions and I have ordered it to release portions of the records at issue, I will only be addressing whether the township properly exercised its discretion with respect to the remaining information that I found to be exempt under these exemptions.

[119] Based on my review of the withheld information, the parties' representations and the circumstances of this appeal, I find that the township did not err in exercising its discretion to withhold information under sections 6(1)(b) and 12 of the *Act*.

[120] I am satisfied that the township did not exercise its discretion in bad faith or for an improper purpose. I am also satisfied that the township considered relevant factors and did not consider irrelevant factors in the exercise of its discretion.

[121] In particular, I am satisfied that when the township considered applying the various exemptions to this information, it properly considered the purpose of the exemptions and the interests sought to be protected under sections 6(1)(b) and 12.

[122] 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 township appropriately exercised its discretion under section 12 of the *Act*. Further, I am satisfied that the township 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 township properly considered the purpose of the exemption and the interests sought to be protected under section 6(1)(b) and whether or not disclosure of this information at issue would increase public confidence in the institution.

[123] Accordingly, I uphold the township's exercise of discretion.

ORDER:

1. I uphold the township's decision regarding section 12 of the *Act*, in part and order it to disclose records 162 and 172 to the appellant by **April 19, 2021** but not before **April 14, 2021**.

2. I uphold the township's decision regarding section 6(1)(b) of the *Act*, in part and order it to disclose records 119 and 120 and the information that is highlighted in records 31, 59, 61, 68, 69, 76, 77, 78, 79, 84 and 121 which is provided with the township's copy of this order. To be clear, records 119 and 120 and the information that is highlighted in records 31, 59, 61, 68, 69, 76, 77, 78, 79, 84 and 121 should be disclosed to the appellant by **April 19, 2021** but not before **April 14, 2021**.

3. I do not uphold the township's decision regarding section 7(1) of the *Act*, and order it to disclose the highlighted information in Record 33, which is provided with the township's copy of this order, by **April 19, 2021** but not before **April 14, 2021**.

4. In order to verify compliance with this order, I reserve the right to require the township to provide me with a copy of its correspondence to the appellant, disclosing the records in accordance with order provisions 1, 2 and 3.

5. The timeline noted in order provisions 1, 2 and 3 may be extended if the township is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such extension requests.

Original Signed by: March 12, 2021

Alec Fadel
Adjudicator