Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2525

Appeal MA08-421

Town of Richmond Hill

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NATURE OF THE APPEAL:

An individual submitted a request under the *Municipal Freedom of Information and Protection of Privacy* (the *Act*) to the Town of Richmond Hill for access to records related to the construction of a park facility by the requester's company. The requester sought "all written communications, [including letters, memos and emails] exchanged between" two named town employees, park staff, and the consultant retained by the town to oversee the project.

The town identified approximately 6000 pages of records as responsive to the request. Given the town's opinion that section 10(1) (third party information) of the *Act* may apply to some of the responsive records, it notified the named consulting company of the request pursuant to section 21 of the *Act*. Section 21 requires notification of parties whose interests may be affected by disclosure of information that might be subject to the third party information exemption at section 10(1) of the *Act*. Section 21 provides an opportunity for an affected party to make submissions on the proposed disclosure before a final decision respecting access is made. In response to the notification, the consulting company advised the town of its view that section 10(1) would not apply to the records.

The town subsequently issued a decision granting partial access to approximately 4500 pages of responsive records on CD-ROM, with additional records disclosed by email shortly afterwards. In its written decision, the town explained that access to approximately 773 pages of records was denied under sections 7(1) (advice or recommendations), 11 (economic and other interests) and 12 (solicitor-client privilege). The town provided an index of records to the requester.

The requester, now the appellant, appealed the town's decision to this office, which appointed a mediator to explore resolution of the issues. At the mediator's request, the town prepared an amended index of records, which contained more detail about the responsive records remaining at issue, and provided a copy to the appellant.

It was not possible to resolve the issues in dispute through mediation, and the appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. The adjudicator formerly assigned to this appeal commenced her inquiry by issuing a Notice of Inquiry to the town initially, seeking its representations. The town outlined its representations on the exemption claims in the index of records and advised that it would release approximately 536 additional pages to the appellant upon payment of the required fee. The town also suggested in its representations that disclosure of some of the information remaining at issue would constitute an unjustified invasion of personal privacy, but it did not identify the personal information at issue. Accordingly, the former adjudicator sought and received supplementary representations from the town to clarify the issue. At that point, the former adjudicator sent a modified Notice of Inquiry to the appellant, seeking representations. The appellant submitted representations and confirmed that it still sought access to the records remaining at issue.

The former adjudicator provided a copy of the appellant's representations to the town, asking it to provide reply submissions. In its reply representations, the town agreed to disclose an additional 550 of the 773 remaining pages of records at issue. For this purpose, the town

provided another revised index for this office and the appellant, and a new CD-ROM to reflect the revised decision. The town maintained its denial of access to 108 pages of records pursuant to section 7(1) and 114 pages under section 12, and provided brief submissions in support of the maintained exemption claims.

The appeal was then moved to the orders stage. Subsequently, the appeal was reassigned to me for the purpose of preparing the order.

RECORDS:

The records remaining at issue, either partially or in their entirety, consist of 222 pages (including duplicates) of emails and other communications between town staff, a consulting firm overseeing the project and the appellant. The records are described in greater detail in the town's August 2009 revised index of records.

DISCUSSION:

PRELIMINARY MATTERS

Duplicate records and inconsistent decisions

In the revised index submitted to this office, the town identified a number of records as duplicate copies of other records at issue in this appeal. My own review of the records in their entirety, including those disclosed by the town in the most recent revised decision (August 27, 2009) has identified many other instances of duplicate records.

Some of the duplicates include a brief cover or additional email. In some of these instances, the brief emails are not sufficiently significant to affect my finding as to whether the copies are duplicates. In such cases, I will not review the possible application of the exemptions to each of these duplicates. In other instances, the accompanying e-mail is significant enough that I will review these versions of the record separately.

In addition, my review of the records on the CD-ROM provided by the town shows that many records the town has purported to withhold under sections 7(1) and 12 have been effectively disclosed. There are inconsistent decisions with respect to the same record, or part of it, where it appears in different places. Some records marked as being withheld were included in the records provided to the appellant on the CD-ROM (as they appear in the folder titled "To be Disclosed"), although copies of the same record with a different page number were not included.

In addition, for the most part, where records were partially withheld, the town covered up portions of the pages they wished to withhold. However, not all the pages marked for partial disclosure were actually covered or marked on other copies of the same record located in a different part of the records. Accordingly, it follows that some uncovered portions were disclosed to the appellant in this manner notwithstanding the town's stated decision.

In appeals before the Commissioner, the issue to be determined is whether a record should be disclosed to a requester. Where the record has previously been disclosed by the institution, or in another context, the issue of mootness is raised. The issue before me, therefore, is whether the appeal is moot as regards the duplicated pages listed in the attached appendix which have been disclosed by the town and if so, whether I ought nonetheless to proceed to a determination of the exemptions claimed respecting them. In the circumstances, I conclude that I should not proceed with such a determination.

In Order P-1295, former Assistant Commissioner Irwin Glasberg outlined what is accepted as the appropriate approach to the determination of mootness in appeals adjudicated by this office (see also Orders PO-2046 and MO-2049-F). The former Assistant Commissioner stated:

> The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision [in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342]. There, the court commented on the topic of mootness as follows:
>
> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...
>
> In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

Given the facts of the present appeal, any live controversy which might have been said to exist between the town and the appellant relating to the pages enumerated in the appendix is now over. Certain records, or portions of records, were provided to the appellant on CD-ROM with the town's most recent set of disclosures in its August 2009 revised decision letter. I am satisfied that this meets the first requirement of the mootness test set out in *Borowski*.

In reviewing the second part of the test, I considered whether the question of access to the disclosed pages and records (as outlined in the attached appendix) is of sufficient public interest or importance to merit reviewing them notwithstanding their disclosure. In the circumstances of

this appeal, I have concluded that there is not sufficient public interest or importance in the disclosed records to merit such a review. Further, in my view, no useful purpose would be served by proceeding with my inquiry in relation to these records, and I will not proceed with a determination of the exemptions claimed for these particular records.

Where a record has already been partially disclosed, inadvertently or not, to the appellant, and the town's decision is inconsistent with respect to it, I will consider the possible application of the relevant exemptions only in relation to the portions of that record that remain withheld.

I acknowledge that this approach necessitates the separate review of certain pages or portions of records that the town had bundled together as one record when processing this request. Moreover, it may also be the case that (inadvertently) not all of the records which consist of email strings are outlined in the attached index, even though parts of each may duplicate the content of previous emails. However, each individual email has been considered as a separate record based on the exemption claims noted in the town's revised index. In my view, this approach is supportable in light of the definition of the term "record" contained in section 2(1) of the *Act*, since it contemplates that a record will typically constitute a single document.

As stated, my findings regarding the duplicate records are outlined fully in the attached appendix. Accordingly, the parties should note the findings set out with respect to the application of the exemption claims, below, cite only to the first occurrence of a duplicated record unless there is a significant enough difference between the versions. Reference to the appendix is necessary to cross-reference the application of these findings to other affected copies of the records.

Economic and other interests - section 11 exemption claim

Based on the revised decision letter, it appears that the town abandoned its claim that section 11 applied to the records remaining at issue. However, the most recent of several versions of the town's index of records was prepared in conjunction with its final revised decision of August 2009 and that index still refers to the application of the discretionary exemptions in section 11(e) and (f) to records. Although the town has not expressly stated that it is abandoning the section 11 claim, the town has not provided any explanation regarding the application of section 11 to the records nor have I been provided with any evidence to support the position that this discretionary exemption applies. Further, my review of the records themselves, and other material before me, does not provide a basis for upholding the application of section 11. Accordingly, in the absence of any evidence to establish that section 11 applies, I will not uphold the town's claim respecting it nor will I review the issue further in this order.

Personal information removed from scope of the appeal

As previously noted, the town identified certain pages (582, 583, 584, 585, 663, 664, 681, 682 and 759 of record 162) as containing personal information, the disclosure of which would constitute an unjustified invasion of personal privacy. The personal privacy exemption in section 14(1) of the *Act* is a mandatory exemption. Therefore, if a record contains personal information,

its disclosure to another individual would constitute an unjustified invasion of personal privacy and an institution must withhold it.

When asked for its views on access to personal information, the appellant advised that he did not wish to obtain "personal information" and would be prepared to accept copies of the relevant records with any personal information severed. Accordingly, if I find that the identified information qualifies as personal information, it would therefore be removed from the scope of the appeal.

For the purpose of deciding this preliminary issue, I reviewed the records to determine whether they contain "personal information" and, if so, to whom it relates. The definition of personal information is found in section 2(1) of the *Act*. In the circumstances of this appeal, the relevant parts of the definition state:

> "personal information" means recorded information about an identifiable individual, including, …
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225]. However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

The town submits that pages 582-585, 663-664, 681-682 and 759 contain personal information because they contain personal views and opinions. The town also submits that the presumption against disclosure in section 14(3)(g) and the consideration favouring non-disclosure in section

14(2)(f) apply. However, as the appellant has indicated that he does not seek access to "personal information" so qualified, it is not necessary to review the personal privacy exemption in section 14(1) of the *Act* nor, consequently, is it necessary to outline these submissions any further in this order.

Analysis and findings

I have reviewed the identified pages to determine whether they contain personal information as argued by the town and, if so, to whom the information relates. Having done so, I find that these pages contain the personal information of two individuals within the meaning ascribed to that term by paragraphs (e), (f), (g) and (h) of the definition in section 2(1) of the *Act*. In particular, I find that these pages contain identifying information about those individuals and that the pages, which are emails, constitute correspondence to the town that is implicitly confidential in nature. I also find that the emails contain the opinions of the named individuals who authored them, and that the personal information in these records, while provided in the context of their professional capacities, reveals something of a personal nature about them [Order P-1409].

Having reviewed all of the records remaining at issue in this appeal, I also note that pages 274 and 652 (and their duplicates) contain the personal information of these same two individuals. In my view, the omission of pages 274 and 652 in the list of pages said to contain personal information appears to have been merely an oversight as the personal information recorded there is related in subject matter to that which appears on the other pages identified by the town.

Furthermore, I find that the personal information in these particular emails cannot reasonably be severed from the information that may not qualify as personal information as they are inextricably intertwined. In my view, severing the records would result in the disclosure of meaningless snippets of information or text. Accordingly, I find that because these email communications contain personal information, they are removed from the scope of the appeal in their entirety. This finding applies to emails contained on pages 582, 584, 663, 664, 681, 682 and 759, with the addition of pages 274 and 652, either in their entirety or in part, as indicated on the copy of the records sent to the town with this order.

There are several qualifications to this finding. The town appears to have already disclosed pages 583 and 585 to the appellant (see previous section and the attached appendix) and so the issue of whether or not they are removed from the scope of the appeal as containing "personal information" is moot. It must also be noted that there are other partially duplicated versions of the email records that I have found to contain personal information in other pages for which the solicitor-client privilege exemption in section 12 is also claimed. Where there is a sufficiently significant difference in their form, I will review those emails under section 12.

ADVICE OR RECOMMENDATIONS

The town relies on the discretionary exemption in section 7(1) to deny access to approximately 108 pages of the records remaining at issue.

Section 7(1) states:

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

This exemption is subject to certain mandatory exceptions listed in section 7(2) and 7(3).

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner),* [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways: the information itself consists of advice or recommendations; or the information, if disclosed, would permit one to accurately infer the advice or recommendations given [Orders PO-2028, PO-2084, upheld on judicial review, as cited above].

The types of information that have been found not to qualify as advice or recommendations include: factual or background information; analytical information; evaluative information; notifications or cautions; views; draft documents; and a supervisor's direction to staff on how to conduct an investigation [Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; 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.); Order PO-2028, upheld on judicial review, as cited above].

Representations

The town submits that the records over which it is maintaining its claim for exemption under section 7(1) provide "advice, a course of action or concerns" related to the problems encountered with the contractor's fulfillment of its obligations to construct the park facility within the requirements of the contract. The town submits that its employees can freely discuss their views and advice only if they feel confident that the information they provide will be kept secure and

confidential and not be disclosed to the public. According to the town, the release of the records would "cause harm to the established free flow of information between the town and its staff, in matters that require complete and open discussion, suggestions, opinions and plans of action."

The town's representations on the possible application of section 7(1) to each of the individual records were set out in the index, which was amended (at least in part) along with the revised decision. The town identifies the senders and recipients of the emails and other documents and offers brief submissions about why section 7(1) should apply to each record.

In response, the appellant submits that neither communications from town staff to its consultant nor draft documentation can qualify as "advice" under the *Act*. Further, the appellant argues that information that is factual, analytical, or evaluative in nature or contains the views of town staff does not constitute "advice" within the meaning of section 7(1). The appellant provided submissions related to individual records in a version of the index of records created for this purpose. These submissions largely reflect the general arguments made in the appellant's written representations.

Analysis and findings

The town claims that various records remaining at issue are exempt under section 7(1). It is, therefore, necessary for me to review these records to determine whether they reveal, either directly or by inference, a course of action that would ultimately be accepted or rejected by the decision-maker being advised.

Past orders of this office provide a helpful context for my determination of whether the information in the records at issue constitutes "advice or recommendations" for the purposes of section 7(1). To begin, previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [Orders 118, PO-2681 and PO-2668].

In Order PO-2084, former Assistant Commissioner Tom Mitchinson reviewed information-sharing between government employees in the context of the application of this exemption:

> 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 word "advice" in section 13(1) [the provincial equivalent to section 7(1) of the municipal *Act*] is to consider the specific 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 [if disclosed] reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

In Order PO-2028, the former Assistant Commissioner also drew a distinction between advising on, or recommending, a course of action and simply drawing matters of potential relevance to the attention of a decision-maker.

In Order P-363[1], former Assistant Commissioner Mitchinson considered the issue of whether a direction given by a supervisor to an investigator constituted "advice or recommendations" for the purpose of section 13(1) which is, as noted, the provincial equivalent to section 7(1):

> [The record] consists of a … memo from the investigating human rights officer to her supervisor, together with the supervisor's reply. The [first] memo simply seeks direction regarding how the investigation should be handled which, in my view, places it outside the ambit of section 13(1). As for the [identified] response, it just outlines the supervisor's direction on how the investigation should proceed. It does not contain any information that can properly be characterized as "advice or recommendations" as these words are used in section 13(1). The supervisor does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; he simply provides direction to the officer under the terms of the Commission's governing legislation. In my view, the … response also does not qualify for exemption under section 13(1).

In Order PO-2400, Adjudicator John Swaigen found that a moderate degree of discussion, assessment, comparison or evaluation of options or alternatives does not necessarily constitute "advice" and he highlighted the distinction between description and prescription (see also Orders PO-2355 and MO-2433).

In my view, these principles are relevant in the context of this appeal. Accordingly, I have applied them in my determination of whether the records qualify for exemption under section 7(1) of the *Act*. Based on my review of the records, I find that they mostly contain views, opinions, cautions, instructions to staff, factual and evaluative information, which does not qualify as advice or recommendations for the purposes of section 7(1).

In nearly all of the records remaining at issue under this exemption, and taking into consideration that certain records were subject to inconsistent decisions, I find that there is no suggested course of action which may be either accepted or rejected in an ongoing deliberative process. In many instances, the records for which I will not be upholding the town's claim of section 7(1), the emails are directed at individuals who are not in a position to make a decision as this term is contemplated under the exemption. Rather, there are records originating with senior parks management staff to parks staff members that contain general or factual information and instructions about a process to be followed or next steps to be taken. In other records, information is being shared between employees of a similar level within the town structure, or the outside consultants, and it consists of details describing the position taken, or actions undertaken, by the town on the issues related to the appellant's contractual obligations. In my view, which is supported by a reading of Order P-363, these directions to staff or exchanges between similarly-placed staff do not qualify as "advice or recommendations" for the purpose of section 7(1).

In still other instances, the town has disclosed draft versions of certain records to the appellant, but not others, and it has failed to explain the basis for distinguishing between these drafts in its

[1] 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.).

representations. Moreover, and at least initially, the town appears to have reviewed the records for the appearance of the word "draft" as an initial basis for withholding the record and some records were disclosed with this word circled. This may have led to the appellant's argument that draft versions are not exempt under section 7(1). However, as I discussed in Order MO-2415, the draft nature of a record is not determinative of whether it qualifies for exemption under section 7(1):

> Past orders of this office have established that it is not the "type" of record, or it being in a draft or final state that determines its eligibility for exemption under the advice or recommendations exemption, but rather its content. In Order PO-1690, Adjudicator Holly Big Canoe considered whether a draft environmental report could be considered exempt under section 13(1), which is the provincial *Act*'s equivalent to section 7(1). She stated:
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> > A draft document is not, simply by its nature, advice or recommendations [Order P-434]. In order to qualify for exemption under section 13, the record 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. Although I am satisfied that the final version of this report is intended to be used during the deliberative process, it simply does not contain advice or recommendations, nor does it reveal advice or recommendations by inference. Accordingly, I find that section 13(1) does not apply.
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> I agree with Adjudicator Big Canoe's reasoning, and I find it applicable in the circumstances of the present appeal.
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> Put simply, the City has failed to provide sufficient evidence to persuade me that … section 7(1) of the *Act* applies to exempt the records in their entirety. On my review of the information in the records, I find that it mainly consists of background and factual material which does not relate to a suggested course of action in the sense contemplated by this exemption. Further, the records do not contain an element of advice or a recommendation that could be accepted or rejected as part of the deliberative process.

Similarly, in the present appeal, many of the draft versions of the records withheld by the town under section 7(1) were being shared between two parks employees who did not have decision-making capacity in any deliberative process. Further, the contents of these draft records are not suggestive of a recommended course of action. They merely represent different versions of a proposed response to communications from the appellant regarding ongoing issues with the contract. In any event, I find that the records do not provide advice in the sense of giving direction which might be accepted or rejected as part of a deliberative process. On this basis, I find that section 7(1) does not apply to many of the records for which it is claimed. Where the town has claimed only section 7(1) to deny access to the records, these records must be disclosed to the appellant.

However, I am satisfied that five pages of the records at issue contain information which, if disclosed, would reveal the advice or recommendations of town staff respecting a suggested course of action. I am further satisfied that disclosure of this information could reasonably be expected to hinder the provision of expert or professional assistance within the deliberative process for the town (Orders PO-2028 and 94). Accordingly, based on the town's representations and my review of the records, I am satisfied that disclosure of certain portions of pages 257, 274, 492, 495 and 513 (and their duplicates) would interfere with "the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making", or inhibit the free and frank exchange of views (Order 94). The portions of the records that qualify for exemption under section 7(1) will be marked on the copy of the records provided to the town with this order.

Sections 7(2) and 7(3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. In this appeal, however, neither the town nor the appellant has argued that any of the exceptions in sections 7(2) or 7(3) apply. In my view, section 7(3) has no possible application in the circumstances of this appeal. I have also considered whether the records subject to the exemption in section 7(1) qualify for any of the exceptions in section 7(2). In the circumstances of this appeal, I find that none of the exceptions apply to the material I have found exempt under section 7(1).

SOLICITOR-CLIENT PRIVILEGE

The town claims that the discretionary exemption in section 12 of the *Act* applies to exempt the remaining records under consideration in this order, which consist of approximately 114 pages.

Section 12 of the *Act* states:

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

Section 12 contains two branches: common law and statutory. The town relies on common law solicitor-client communication privilege to deny access to the records.

Common law solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice (*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)). The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

The privilege applies to "a continuum of communications" between a 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 (*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)).

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice (*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27). Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication (*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)).

Representations

In its brief representations, the town takes the position that the records withheld under section 12 all contain information sent to, or received from, the town's legal division. According to the town, these records relate to:

> … requesting or receiving a course of action or in preparation of legal documents as they pertain to solving issues related to the … construction project.

The town refers to additional submissions contained within the index of records. Most of these individual submissions suggest that the records (various chains of email correspondence) represent requests for "legal advice on the appropriate course of action and duties that would apply to the Town in the circumstances in dealing with the difficulties incurred with the contractor." The town also refers to the various communications involving legal counsel as being made in confidence speaking directly to the town's legal obligations and maintains that there has been no waiver of the privilege.

The appellant states that it accepts the town's position that communications between its staff and the legal department are exempt where legal advice is provided. However, the appellant expresses the view that some of the records over which the town claims solicitor-client privilege may merely have been forwarded or copied to the legal department and do not actually contain privileged content.

Analysis and findings

The town has denied access to approximately 114 pages of records on the grounds that they are subject to the solicitor-client privilege exemption in section 12. To begin, I find that in the present appeal, the individuals who authored or received the records were in a solicitor-client relationship: the solicitors were based in the town's legal division and the clients were various staff from the town's parks department.

The next determination involves consideration of whether or not each record can properly be construed as forming part of continuum of communications between solicitor and client for the purpose of seeking and/or providing legal advice. If so, the records are solicitor-client privileged

and therefore exempt under section 12. Based on the town's representations, and my own review of the records, I will uphold the town's section 12 exemption claim in part.

In my view, the scope of section 12 is not limited to a narrow construction of the term "legal advice" in view of cases such as *Balabel v. Air India* [*supra*] and previous orders of this office, which have provided exemption for a broader range of communications between client and counsel under the "continuum of communication" principle.

Based on my review of the records, I am satisfied that many of the withheld email communications between parks department staff and the legal department contain confidential legal advice that would be evident, or could be readily deduced, by disclosure. Alternately, several of the emails contain an express request for legal advice that sets out pertinent information for the solicitor's review. In my view, these emails form part of a confidential continuum of communications between the town's legal counsel and their clients in the parks department on the legal issues related to performance of the park facility contract. I find that these records are confidential solicitor-client communications directly related to the seeking or giving of legal advice and I find that they are subject to solicitor-client privilege.

In addition to the records which consist solely of email communications, there are various draft versions of correspondence under the solicitor's signature intended to be sent to the appellant. Some of these have a cover e-mail directed to, or from, a certain parks staff member. In my view, these draft letters also form part of the continuum of communications between solicitor and client for the purpose of revising the attached document with the advice of counsel. In the circumstances, I find that these records are solicitor-client privileged under section 12.

Accordingly, I find that the following records, or portions of them (and their duplicates), are subject to common law solicitor-client communication privilege and are therefore exempt under branch 1, subject to my review of the town's exercise of discretion, below: pages 271, 277-278, 279-280, 282-286, 373-374, 543-544, 551, 587, 589-590, 591, 593, 597-608, 613-615, 649-650, 656-682, 735, 738, 741-742, 745-747, 749-751, 759, 765, 766, and 770. It should be noted that many of these pages virtually duplicate others, but are in a slightly different form.

I have not reached the same conclusion regarding the other records for which the town claims exemption under section 12. Based on the contents of the records (emails), I am not satisfied that their disclosure would reveal confidential legal advice. I am also not satisfied that they otherwise form part of the continuum of communications on the legal issues related to the town's actions and obligations respecting the park facility and the performance of the contract for it. Some of these emails represent communications between parks staff that are primarily factual and informative in tone, or contain instructions to staff. Notwithstanding the fact that the town solicitor may have been "cc'd" on some of these communications, the mere fact of their review by the solicitor, without evidence of the seeking or provision of confidential legal advice, does not transform these emails into records that are subject to solicitor-client privilege (see Order P-1038). Based on my reading of these particular emails, I find that they do not qualify for exemption under section 12.

My findings with respect to the records I have found to be exempt under section 12 must be read in conjunction with the appendix I have prepared to identify duplicated records since the town appears to have disclosed certain emails over which it also asserted a claim of solicitor-client privilege by including those records on the CD-ROM in the "To be Disclosed" folder.

Certain records have been removed from the scope of the appeal because they contain the personal information of two individuals and the appellant does not seek access to personal information. However, I would note that with the exception of pages 582 and 584, I would have found that these records were exempt in any event on the basis of solicitor-client communication privilege under section 12.

EXERCISE OF DISCRETION

After deciding that a record or part thereof falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. An institution must exercise its discretion in this regard.

In this appeal, I have upheld the town's decision to withhold certain records, or portions of records, under the discretionary exemptions in sections 7(1) and 12. I must therefore review the town's exercise of discretion with respect to these exemptions because the town was permitted to disclose information, despite the fact that it could withhold it.

On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where: it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In such a case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution (section 43(2)).

Having considered the town's representations generally and the overall circumstances of this appeal, I find that the town has exercised its discretion within appropriate parameters and I am satisfied that it considered relevant factors in doing so. In considering the circumstances of this appeal, I also took into account the town's decision to disclose additional records to the appellant during the adjudication stage. As regards the remainder of the records it chose to withhold, I am satisfied that the town did not err in exercising its discretion not to disclose this information, and I will not interfere with it on appeal. I uphold the town's exercise of discretion with respect to these records.

ORDER:

1. I confirm that pages 274, 582, 584, 652, 663, 664, 681, 682 and 759 are removed from the scope of the appeal to the extent that they contain personal information for the purpose of the definition of that term in section 2(1) of the *Act*.

Where only parts of these pages are subject to my finding with respect to personal information, I have highlighted those parts to be removed in yellow highlighter on the copy of the records sent to the town with this order. The town should refer to the attached appendix in order to cross-reference the page numbers outlined above with their duplicates.

2. I uphold the town's decision to deny access to the following records, or portions of records:

   a. under section 7(1): pages 257, 274, 492, 495 and 513; and
   b. under section 12: pages 271, 277-278, 279-280, 282-286, 373-374, 543-544, 551, 587, 589-590, 591, 593, 597-608, 613-615, 649-650, 656-682, 735, 738, 741-742, 745-747, 749-751, 759, 765, 766, and 770.

   In cases where only a portion of the page is exempt, the exempt portion is highlighted in orange on the copy of the records sent to the town with this order. The town should refer to the attached appendix in order to cross-reference the page numbers outlined above with their duplicates.

3. I order the town to disclose the records or portions of records which I have found do not qualify for exemption to the appellant by **July 5, 2010** but not before **June 28, 2010**.

4. In order to verify compliance with this order, I reserve the right to require the town to provide me with a copy of the records disclosed to the appellant pursuant to order provision 3.

Original Signed By: May 27, 2010
Daphne Loukidelis
Adjudicator