

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2945-I

Appeal MA11-257

Town of Aurora

September 13, 2013

Summary: The requester sought access to a legal opinion and documents provided to the Town of Aurora's lawyer in preparation of the opinion. This decision finds that most of the records are exempt under section 12 (solicitor-client privilege). One record is exempt, in part, under section 6(1)(b) (closed meetings). The decision upholds the town's exercise of discretion in deciding to withhold access to the records to which sections 12 and 6(1)(b) apply. The adjudicator reserved her findings with respect to one remaining record, pending clarification and further submissions.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 6(2), 12.

Orders and Investigation Reports Considered: Order MO-1172

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

OVERVIEW:

[1] A law firm made a request to the Town of Aurora (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information relating to a legal opinion provided to the town:

1. Copies of all documents and other records that were provided or made available to [the named lawyer], prior to the release of his opinion; and
2. A copy of [the named lawyer]'s full opinion.

[2] In its request, the requester referred to an executive summary of the legal opinion that had been made public by the town. The requester indicated that, although it anticipated the town may seek to rely on the exemption at section 12 (solicitor-client privilege) of the *Act* to deny access to the legal opinion, the town had waived privilege in the opinion through the release of the executive summary.

[3] The town issued a decision granting access to some records and relying on sections 6(1)(b) (closed meetings), 7(1) (advice or recommendations), 8(1)(a), (b), (f) and (g) (law enforcement), 10(1)(a), (b) and (c) (third party information), 11(c) and (d) (economic and other interests), 12 and 15(a) (information available to the public) to deny access to the remainder. The town provided the requester with an Index of Records relating to the request, setting out a general description of each record. The Index of Records also indicated, for each record, whether access had been granted or denied and the section of the *Act* relied on where access was denied.

[4] The requester (now the appellant) appealed the town's decision to this office. In the normal course of processing the appeal, this office requested that the town provide the IPC with the records at issue in the appeal. In response, the town sent copies of some records, along with its Index of Records. It declined to provide copies of records for which the solicitor-client privilege was claimed.

[5] During the mediation stage of the appeal process, the town agreed to disclose to the appellant the records to which it had applied section 15(a). As no other mediation was possible, the file was moved to the adjudication stage of the appeal process for an inquiry.

[6] As part of the inquiry, our office issued a Notice of Inquiry (NOI) seeking representations from the town and from one affected party that may have an interest in one of the records at issue in the appeal (Record 20). The NOI indicated that more information regarding the records at issue under section 12 was necessary in order to adjudicate the question of whether they are exempt under the *Act*. It requested that the town's submissions include information about the nature and context of the communications for which the solicitor-client privilege was claimed, by way of affidavit.

[7] Our office received representations from the affected party as well as two sets of representations on behalf of the town: one set prepared by counsel employed by the town and one set prepared by external counsel for the town.

[8] After reviewing the representations received from the town, the adjudicator then assigned to the file wrote to the town to request further information regarding the records for which the town had claimed the exemption at section 12. In response to this request, the town made supplementary representations, which included an affidavit setting out additional information about the records to which section 12 had been applied.

[9] The adjudicator provided the appellant with a copy of the non-confidential portions of the affected party's representations, as well as complete copies of the representations of the town and the town's external counsel. The appellant provided its representations in response to the town's representations, not addressing the issues raised by the affected party.

[10] The file was recently transferred to me to complete the adjudication process. In this order, I uphold the town's decision to withhold access to the records to which it applied section 12. I partially uphold the town's decision to withhold Record 2 on the basis of section 6(1)(b), and I order disclosure of portions of Record 2 to the appellant.

[11] I deal with Record 20 separately, and request further submissions and clarification from the appellant.

[12] Because of my determinations below, it is unnecessary to consider the application of sections 7(1), 8(a) and 11 to any of the records.

BACKGROUND:

[13] Below, I set out some of the background to this appeal to give context to the records at issue. I have compiled this chronology of events from the non-confidential portions of the parties' submissions and from information in the public domain, including public versions of town Council meeting agendas and minutes, and the publicly-released executive summary of the legal opinion at issue.

[14] The legal opinion sought by the appellant (Record 29 in the Index of Records) concerns the town's liability for legal expenses in a defamation action brought by the town's former Mayor against third parties.

[15] The action related to an August 2010 blog post on a local website. The article was critical of the then-Mayor, and appeared during her campaign for a second term as mayor preceding municipal elections in October 2010. On the basis that the comments were defamatory of the then-Mayor and were published in connection to her reputation and office as an elected official of the town, town Council resolved, at a meeting held September 14, 2010, to have the town Solicitor retain external legal counsel to "take any and all actions to bring resolution" to the matter.

[16] Further to the town's decision to retain external counsel to pursue the defamation matter, the town retained the affected party (Law Firm 1).

[17] On October 8, 2010, the then-Mayor commenced the defamation action against the third parties. In the title of proceeding, the plaintiff is described as commencing the action in her capacity as Mayor of the town.

[18] She was subsequently defeated in the municipal elections held October 25, 2010.

[19] Following her defeat, Law Firm 1 issued a statement of claim on behalf of the soon-to-be former Mayor in which the plaintiff is shown simply by her name, and in which it indicates that the plaintiff would cease being Mayor on December 1, 2010.

[20] On November 22, 2010, the town Solicitor sent a letter to the soon-to-be former Mayor (Record 7). According to the executive summary, this letter was an attempt by the town to reach an agreement to limit the town's liability for legal expenses in the ongoing defamation action. In particular, the town sought to have the soon-to-be former Mayor agree to reimburse the town for its costs incurred out of any potential damages ultimately awarded to her in the action, and to reserve the right to reasonably limit the amount payable in respect of legal expenses incurred in representing her. The executive summary indicates that it does not appear that any agreement was reached.

[21] In December 2010, Council voted to reconsider its decision to retain external legal counsel to pursue the defamation matter. According to the executive summary, on December 14, 2010, town Council resolved to discontinue funding the litigation, effective that day, and notice was duly provided to Law Firm 1.

[22] Town Council then decided to retain the services of another law firm (Law Firm 2) to investigate and to provide a legal opinion regarding the town's liability for legal expenses in the action. That legal opinion, Record 29, was provided by a lawyer with Law Firm 2 (the named individual in the appellant's request) to the town Solicitor on February 24, 2011. A four-page executive summary of Record 29, dated March 8, 2011, was also provided by Law Firm 2 to the town.

[23] Record 29 was received by a committee of Council at a closed meeting held March 22, 2011. The committee's recommendations arising from its review of Record 29 at that meeting were considered and adopted by town Council in open session at a subsequent Council meeting. Among other things, Council decided to pay the legal accounts of Law Firm 1 and another firm for services up to specified dates, and not pay any legal expenses incurred after that. At that meeting Council also decided to make public the four-page executive summary of Record 29, and rejected a motion to waive solicitor-client privilege in Record 29 and release it to the public.

[24] The executive summary was released on March 30, 2011.

RECORDS:

[25] The records remaining at issue are described in the following Index of Records:

Record Number	General Description	Section(s) Applied
2	Town Council Closed Session Meeting Minutes of September 14, 2010	6(1)(b)
3	Email from [Town Solicitor] to [Law Firm 1] dated September 15, 2010	12, 7(1)
4	Confidential Legal Opinion from [Town Solicitor] to [Town Chief Administrative Officer] dated October 17, 2010	12, 7(1)
7	Letter from [Town Solicitor] to [former Mayor] dated November 22, 2010	12
8	Confidential Closed Session Memo from [Town Solicitor] to Mayor and Council dated December 14, 2010	12, 6(1)(b), 7(1)
9	Letter from [Town Solicitor] to [Law Firm 1] dated December 15, 2010	12
10	Email from [Town Solicitor] to [Town Chief Administrative Officer] dated December 16, 2010	12, 7(1)
15	Confidential Closed Session Memorandum from [Associate Solicitor] to Mayor and Council dated January 18, 2011	12, 6(1)(b), 7(1)
16	Confidential Closed Session Memorandum from [Associate Solicitor] to Mayor and Council dated January 25, 2011	12, 6(1)(b), 7(1)
20	Proposal for Town from [Law Firm 1] dated August 30, 2004	10(1), 11(c), 11(d)
22	Letter from [former Town Solicitor] to [Law Firm 1] regarding renewal of retainer by Town of Law Firm 1 for various legal matters, dated November 13, 2007	12
23	Letter from [Town Solicitor] to [Law Firm 1] regarding renewal of retainer by Town of Law Firm 1 for various legal matters, dated December 1, 2009	12
24	Letter from [Town Solicitor] to [Law Firm 1] regarding the renewal of retainer by Town of Law Firm 1 for various legal matters, dated March or May 3, 2010	12
25	Letter from [Associate Solicitor] to [the named individual at Law Firm 2], dated February 15, 2011	12
26	Email from [Associate Solicitor] to [the named individual at Law Firm 2], dated January 31, 2011	12
27	Retainer Agreement between Town and [Law Firm 1]	12, 11(c), 11(d)

	dated October 5, 2010	
29	Opinion letter from [the named individual at Law Firm 2]	6(1), 7(1), 8(1), 12

ISSUES:

- A. Can this office decide the issues in the appeal without a review of the records claimed to be subject to solicitor-client privilege?
- B. Does the discretionary exemption at section 12 apply to Records 3, 4, 7, 8, 9, 10, 15, 16, 22, 23, 24, 25, 26, 27 and 29?
- C. Does the discretionary exemption at section 6(1)(b) apply to Record 2?
- D. Did the town exercise its discretion under sections 12 and/or 6(1)(b)? If so, should this office uphold the exercise of discretion?
- E. Is Record 20 responsive to the request?

DISCUSSION:

A. Can this office decide the issues in the appeal without a review of the records claimed to be subject to solicitor-client privilege?

[26] This issue is raised in the appellant’s representations. The appellant states:

It is our submission that the Town has acted in bad faith but it is difficult for us to prove that contention as we are unable to review the Legal Opinion or the documents upon which it was based. Also, the IPC cannot accurately determine whether a document is truly solicitor-client privileged without actually reviewing that document. It is our submission that, depending on the nature of the communication and the information contained therein, a claim of privilege might be inappropriate.

Therefore, we hereby request that the IPC review all of the documents at issue and make a determination as to whether or not: 1) those documents are solicitor-client privileged; and, 2) the Town has acted in bad faith.

[27] The appellant refers to no law or statutory authority in support of its position that the IPC must review the records at issue in order to determine whether solicitor-client privilege applies to them.

[28] As noted above, the town declined to provide our office with the records to which it applied section 12, taking the position that it is not required to produce records for which solicitor-client privilege is claimed.

[29] As also indicated above, following receipt of the town's representations, the adjudicator previously assigned to this appeal addressed this issue in a letter to the town. The adjudicator made no determination about the merits of the town's claim that it was not obliged to provide the documents to the IPC, as he indicated that he was not directing production of the records but rather asking for a reasonable amount of information to enable him to make an informed decision about the application of section 12 to the records.

[30] In the letter, the adjudicator referred to section 41(4) of the *Act*, setting out the powers of the IPC during an inquiry, and the decision in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General)*, 2011 NLCA 69, reversing 2010 NLTD 31, which he stated strongly supports the Commissioner's authority to order the production of records claimed to be subject to solicitor-client privilege in order to verify the validity of the privilege claim.

[31] In response to this letter, the town provided additional particulars by way of affidavit as requested, which was shared with the appellant along with the rest of the town's representations.

[32] The Supreme Court of Canada has stated the following, with respect to actions by a public official that may impinge on a solicitor-client privilege:

When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that [solicitor-client] confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.¹

[33] The Supreme Court has also stated that "[e]ven courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue."²

[34] Based on the information provided by the town in its representations and in its supplementary affidavit, I am satisfied that it has provided sufficient information to enable me to adjudicate the question of whether the records are exempt under section 12 of the *Act*. The affidavit identifies, with respect to each record, the person creating the record, their position and/or the capacity in which the individual was acting in creating the record, the recipient of correspondence and that person's title/capacity, and the general subject-matter of the correspondence or document.

¹ *Descôteaux v. Mierzwinski*, [1982] 1 SCR 860 at 875; see also *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR 574 at para. 31 (*Blood Tribe*).

² *Blood Tribe*, above, at para. 17

[35] In the circumstances before me, when I have determined that I can fully adjudicate the question of whether the records are exempt from disclosure without a review of the records, I am satisfied that I need not exercise my authority to require production of those records.

[36] As discussed below, the appellant also suggests that I cannot make a determination on its submission that the town has acted in bad faith, which is relevant to whether it has properly exercised its discretion, unless I review the records. Here, again, I am satisfied that I can fully adjudicate the questions raised by the appellant without requiring production of the records to me. My conclusions are set out below in the section on exercise of discretion.

B. Does the discretionary exemption at section 12 apply to Records 3, 4, 7, 8, 9, 10, 15, 16, 22, 23, 24, 25, 26, 27 and 29?

[37] 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.

[38] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[39] In this appeal, the town relies on the common law privilege at branch 1 to exempt the legal opinion contained in Record 29, and on the branch 2 statutory privilege to exempt Records 3, 4, 7, 8, 9, 10, 15, 16, 22, 23, 24, 25, 26 and 27.

Branch 1: common law privilege

[40] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.³ As I find below that the solicitor-client communication privilege applies to Record 29, it is unnecessary to discuss the litigation privilege.

³ Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

Solicitor-client communication privilege

[41] 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.⁴

[42] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.⁵

[43] 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.⁶

[44] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.⁷

[45] 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.⁸

Loss of privilege

Waiver

[46] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[47] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege⁹

⁴ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁵ Orders PO-2441, MO-2166 and MO-1925.

⁶ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁷ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁸ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

⁹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.) (*S & K Processors*).

[48] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁰

[49] Waiver has been found to apply where, for example:

- the record is disclosed to another outside party¹¹
- the communication is made to an opposing party in litigation¹²
- the document records a communication made in open court¹³

Branch 2: statutory privileges

[50] Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. Again, it is unnecessary for me to discuss the litigation component of the branch 2 statutory privilege.

Statutory solicitor-client communication privilege

[51] Branch 2 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

Loss of Privilege

[52] The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the head of an institution,¹⁴ and
- the lack of a “zone of privacy” in connection with records prepared for use in or in contemplation of litigation¹⁵

Representations

[53] The town submits that the legal opinion comprising Record 29 is exempt under the first part of branch 1 of section 12 of the *Act*, as it meets the four factors attracting solicitor-client communication privilege – that is, Record 29 is a written communication

¹⁰ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

¹¹ Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹² Orders MO-1514 and MO-2396-F.

¹³ Orders P-1551 and MO-2006-F.

¹⁴ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

¹⁵ See above, at note 14.

of a confidential nature, made between a solicitor and client, that is directly related to seeking, formulating or giving legal advice.

[54] The town submits that the other outstanding records are exempt under the branch 2 statutory privilege for solicitor-client communication, as they are records provided by the town to external counsel (Law Firm 2) for the purpose of producing the legal opinion.

[55] The appellant did not take issue with the town's characterization of Record 29 as subject, at least in the first instance, to solicitor-client privilege. As described above, in its request letter to the town, the appellant anticipated the town's reliance on section 12 to exempt the legal opinion, but took the position that privilege in it had been waived.

[56] In its representations, the town addressed the waiver issue. The town submits that it has not evinced an intention to waive privilege over any of the requested records, and in fact has taken active steps to confirm its intention to maintain privilege in Record 29 at the Council meeting at which it rejected a motion to waive solicitor-client privilege over the legal opinion.

[57] The town submits that its release of an executive summary of the legal opinion contained in Record 29 does not constitute waiver of privilege. It states that disclosure of the executive summary was made in the interests of public transparency – that the very reason for creating the executive summary was to provide transparency while protecting the privilege attached to the opinion – and that public release of the executive summary cannot constitute waiver of privilege in a separate and independent document. In support of its position, the town relies on Order MO-1172 of this office, in which disclosure of the "bottom line" of legal advice was found not to constitute waiver of privilege.

[58] The town also submits that the facts of this appeal do not warrant a finding of implied waiver on other fairness grounds. The town and the appellant are not engaged in litigation. The town also notes that it is not involved in litigation with the former Mayor – although, as the legal opinion pertains to the town's rights and potential liabilities vis-à-vis the former Mayor, it also submits that requiring disclosure of the opinion may prejudice the town if its interests become adverse to the former Mayor.

[59] In its representations the appellant does not address the issue of waiver directly. It states it does not dispute most of the representations of the town "in relation to the legal principles." The appellant submits the town

...is not considering the appropriate question. The question that needs to be addressed is whether the Town has acted in bad faith, and if so,

whether that should affect the exercise of its discretion in relation to our request.

[60] The more detailed submissions on the exercise of discretion are described below, in the section on the exercise of discretion.

Analysis

[61] Based on the information before me, I accept that Record 29 is a legal opinion prepared by a law firm retained by the town for the purpose of giving confidential legal advice. I therefore find that Record 29 qualifies for solicitor-client communication privilege under the first part of branch 1 of section 12 of the *Act*.

[62] I also accept that the other records (Records 3, 4, 7, 8, 9, 10, 15, 16, 22, 23, 24, 25, 26 and 27) were provided by the town to Law Firm 2, to be used in the preparation of the legal opinion contained in Record 29. I find that these records are exempt under the branch 2 statutory privilege for solicitor-client communication.

[63] Although the appellant did not raise the issue of waiver in its representations, I will address its submission made initially during this appeal that the town waived privilege, in the legal opinion at least, by its release of an executive summary. As outlined above, the town maintains that there has been no waiver of privilege, either express or implied, by its release of the executive summary.

[64] On the facts of the present appeal, I am satisfied that the town did not voluntarily evince an intention to waive privilege in Record 29 by its release of a document summarizing its contents. By its resolutions made at the Council meeting of March 29, 2011, the town clearly evinced an intention to make public the four-page executive summary of Record 29, while at the same time maintaining privilege in the underlying document. Accordingly I do not find that there has been any express waiver of privilege.

[65] The question remains whether there has been a waiver of privilege other than by express intention. In *S & K Processors*, the decision setting out the common law test for waiver of privilege, the court recognized that "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require."¹⁶ The court referred to the proposition that "double elements are predicated in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived."¹⁷

¹⁶ *S & K Processors*, above, at para. 6

¹⁷ Set out in Wigmore on Evidence, cited in *S & K Processors* at para. 10

[66] Thus where there is no evidence of an express intention to waive, the question is whether "fairness and consistency" requires a finding of implied, or implicit, waiver.

[67] The town submits there is no basis for finding that its release of the executive summary, done in the interests of public transparency, amounts to an implied waiver of privilege in the legal opinion at issue. Among other things, it relies on Order MO-1172 of this office raising similar issues, where applying the common law test did not result in a finding of implied waiver.

[68] In Order MO-1172, this office upheld the City of Vaughan's decision to refuse access to a copy of a confidential memorandum from a deputy city manager and city solicitor to city council. The adjudicator rejected the argument that a public report's reference to a "small portion of the 'bottom line'" of the advice contained in that memorandum constituted waiver of privilege in the memorandum. The adjudicator noted that, in fact, public disclosure of such information may often be necessary in the interests of transparency:

In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication ...

This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.¹⁸

[69] In that order, the adjudicator found that there had been no express waiver of privilege, as she was satisfied that in making the relatively minimal disclosure the city did not intend to waive privilege. She was also satisfied that there had been no implicit waiver, as in the circumstances there was no basis for finding that fairness or consistency required disclosure. Among other factors, there was no evidence that the city provided access to the legal opinion to anyone other than city officials, and the city took active steps to preserve the confidentiality of the opinion.

¹⁸ At pages 5 and 6

[70] Subsequent orders of this office have applied similar reasoning to uphold privilege where public disclosure of some information gave rise to claims of implied waiver.¹⁹

[71] These cases involved actions and conduct of public bodies disclosing a "small portion of the bottom line" or a portion of a conclusion reached in a privileged legal opinion, in circumstances where such "relatively minimal disclosure" was found not to amount to implied waiver or to require full disclosure of the privileged material at issue in the interests of fairness or consistency.

[72] By its nature an executive summary is unlikely to disclose the entire contents of the document it is intended to summarize. I have reviewed the executive summary under discussion in this appeal. It is a four-page document that: explains the purpose of the legal opinion that it summarizes (namely, to provide an opinion on the town's liability for legal expenses relating to a defamation action); sets out a chronology of events giving rise to the action and the town's involvement in its funding; provides a summary of the findings on the basis of which two specific recommendations were made; and sets out those recommendations. According to the town, the executive summary was specifically created to provide public transparency while at the same time preserving confidentiality in the full 28-page legal opinion.

[73] I am satisfied that the disclosure of facts and key findings contained in the much longer legal opinion that is represented by the release of the executive summary can be described as "relatively minimal".

[74] I am also persuaded that the town's attempt to provide transparency in one aspect of its decision-making process, by soliciting the creation of and publicly disclosing the executive summary of the privileged opinion, has not resulted in any unfairness or inconsistency requiring a finding of implied waiver. In its submissions the town focuses on the fact that the defamation action at the heart of the facts in this appeal is a proceeding between the former Mayor and third parties, and that the town is not itself involved in litigation with the appellant or with the former Mayor. The town submits that implied waiver has no application in circumstances where the parties are not involved in litigation.

[75] Courts have considered the notion of fairness as between parties to litigation in considering whether implied waiver has been established. This office has considered this question in the context of access to information appeals and not only where the parties in an inquiry are also litigants in court proceedings. On the facts, however, I do not see how the release of the executive summary leads to a finding that fairness or consistency requires disclosure of the records at issue.

¹⁹ Orders MO-2500, MO-2573-I and MO-1233.

[76] As indicated, the appellant submits that the town solicited the creation of the executive summary "for the sole purpose of releasing it to the public in order to tarnish [the former Mayor's] good name." The appellant suggests that this is a kind of unfairness that can be remedied through disclosure of the full legal opinion. The appellant also submits that it requires access to the information on which the legal opinion was based in order to prove its suspicion that the town provided Law Firm 2 with "misleading or incomplete information to intentionally skew the legal opinion."

[77] I find that the appellant's objections to the executive summary do not raise the kind of unfairness that necessitates a finding of implied waiver, with its consequent puncturing of the solicitor-client privilege. The appellant's assertions as to the motivations of the town are speculative and provide an insubstantial basis for such a measure. As well, they are very different from the kinds of circumstances the courts have taken into account where implied waiver is found, such as litigants who wish to "cherry-pick" privileged communications to gain an advantage, or where a privileged communication has been put in issue in a proceeding.

[78] The circumstances before me are more analogous to those in the above-cited orders where the minimal release of information in a legal opinion, which results in a measure of transparency about a public body's activities, does not support a conclusion that the solicitor-client privilege no longer applies.

[79] I find therefore that there has been no implied waiver of privilege.

[80] As there has been no explicit or implicit waiver of privilege, I find that Record 29 is exempt under the first part of branch 1 of section 12, and that the remaining records considered here (Records 3, 4, 7, 8, 9, 10, 15, 16, 22, 23, 24, 25, 26 and 27) are exempt under branch 2 of section 12, subject to my review of the town's exercise of discretion.

B. Does the discretionary exemption at section 6(1)(b) apply to Record 2?

[81] Before I discuss the application of the section 6(1)(b) exemption, I note that the town chose not to claim solicitor-client privilege over this record. Based on the submissions and material before me, the wording of the request and the town's response, and the chronology of events, it appears likely that the town provided this record to Law Firm 2 for its use in preparing the legal opinion at Record 29.

[82] As such, there does not appear to be a distinction in principle between this record and the other records discussed above which were said to have been provided to counsel for use in providing the legal opinion, and which I have found therefore to be covered by solicitor-client privilege.

[83] The section 12 exemption is, however, discretionary, and the town may choose not to rely on it. The only issue before me with respect to Record 2, therefore, is whether it is exempt under section 6(1)(b) of the *Act*. That section reads:

A head may refuse to disclose a record ... 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.

[84] 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 meeting²⁰

[85] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;²¹ and
- "substance" generally means more than just the subject of the meeting²²

[86] 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.²³

[87] 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*.²⁴

[88] 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

²⁰ Orders M-64, M-102, MO-1248.

²¹ Order M-184.

²² Orders M-703, MO-1344.

²³ Order MO-1344.

²⁴ Order M-102.

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.²⁵ Further, the Divisional Court has held that, even if a record could be considered *in camera*, severance could be made, and portions disclosed, based on whether disclosing those portions would reveal the substance of the deliberations of the *in camera* meeting.²⁶

[89] 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,

(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

[90] In determining whether Record 2 qualifies for exemption under section 6(1)(b) of the *Act*, I will consider the three-part test set out above.

Parts 1 and 2 – was an in camera meeting of council, board, commission or other body, or a committee of one of them, held and was it authorized by statute?

[91] The record at issue under this heading consists of the minutes of a closed session held during a Regular Meeting of Council on September 14, 2010.

[92] The town submits that the closed session was held in accordance with section 239(2)(e) of the *Municipal Act, 2001* (which provision is mirrored in section 2.8(2)(e) of the town's Procedural By-law 4835-06.C, as amended), permitting a meeting or part of a meeting to be closed to the public if the subject matter being considered is litigation or potential litigation affecting the municipality. The town states that prior to going into closed session, Council passed a resolution in accordance with the requirements of section 239(4) of the *Municipal Act, 2001* and section 2.8(4) of the town's Procedural By-law. It provided a copy of the closed session resolution passed at that meeting and relevant extracts from the town's Procedural By-law.

[93] I have also reviewed the minutes of the open meeting of town Council on September 14, 2010, which indicate that Council moved into closed session to consider the following matters:

²⁵ Orders MO-1344, MO-2389 and MO-2499-I.

²⁶ *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346.

Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board:

Re:

1. Adena Meadows Limited et al. ("Magna")
Parkland Dedication/Cash-in-lieu
West side of Leslie Street, South of Wellington Street East
2. Potential defamation

[94] Only the second item of discussion in closed session is responsive to the appellant's request in this appeal.

[95] The public minutes indicate that following the closed session, Council reconvened into open session and to confirm a direction regarding the second item. Council passed a resolution in open session directing the town Solicitor to retain external counsel in relation to the potential defamation matter.

[96] Having reviewed the town's submissions, the closed session record at issue and the public materials referred to above, I am satisfied that the *in camera* session of Council at its Regular Meeting of September 14, 2010 was held in accordance with the requirements of the *Municipal Act, 2001* and the town's Procedural By-law. I accept that Council held a closed session on that date and that it was authorized to discuss the listed items in the absence of the public pursuant to the cited exception to the open meeting requirement. I am therefore satisfied that the first two parts of the section 6(1)(b) test have been met.

Part 3 – would disclosure of the records reveal the actual substance of the deliberations of the meeting?

[97] Under this part of the three-part test, the town must establish that disclosure of the record would reveal the actual substance of the deliberations of the closed meeting.

[98] The town submits simply that disclosure of Record 2 would reveal the actual substance of deliberations of the meeting.

[99] I have reviewed the responsive portion of the closed session minutes, being the record of discussion of item 2, the potential defamation matter. I find that only one portion of these minutes reveals the substance of the deliberations. This portion describes the discussion in a manner that reveals something about the nature of the views expressed and contents of the discussion. Further, although the result of the

discussion was reported and adopted in open session, this is not sufficient to bring this information under the exception in section 6(2).²⁷

[100] Other portions of the minutes pertaining to this issue do no more than identify the subject of the discussion, the attendees at the meeting and the result subsequently confirmed in open session. I find that the third requirement for the application of section 6(1)(b) has not been met for these portions and I will order their disclosure.

[101] I will now turn to the town's exercise of discretion in deciding to withhold records covered by the section 6(1)(b) and 12 exemptions.

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

[102] The sections 6(1)(b) and 12 exemption 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, this office may determine whether the institution failed to exercise its discretion.

[103] In addition, this office 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.

[104] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁸ This office may not, however, substitute its own discretion for that of the institution.²⁹

Relevant considerations

[105] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁰

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

²⁷ See Order MO-241.

²⁸ Order MO-1573.

²⁹ Section 43(2).

³⁰ Orders P-344, 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 affected person
- 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

[106] The town submits that it properly exercised its discretion to withhold the records at issue. It indicates that in arriving at its decision, the town considered such factors as:

- whether the information should be made public in the interests of transparency and accountability, weighed against the wording of the exemptions and the interests those exemptions seek to protect;
- whether the appellant was seeking its own information;
- the nature of the information and to what extent it is significant or sensitive to the town, appellant and any affected person;
- whether disclosure would prejudice the town's legal interests or negatively affect its legal rights; and
- whether the release of records would be contrary to the town's historic practice or to a validly passed town by-law.

[107] The town submits that in exercising its discretion it was mindful at all times that it must not act in bad faith, withhold information for an improper purpose or act in contravention of the *Act*.

[108] As indicated above, the appellant submits that the town acted in bad faith in exercising its discretion to withhold the legal opinion and the documents upon which it was based. I have set out some of its submissions on the bad faith allegation above, at paragraph 76.

[109] The appellant also reports that the release of the executive summary has resulted in the filing of an application against the former Mayor by a citizen alleging contravention of the *Municipal Conflict of Interest Act*. The appellant notes that in his affidavit in support of the application, the citizen indicates he only became aware of the matters giving rise to the application after reading the executive summary.

[110] The appellant concludes by stating that while it believes the town has acted in bad faith, it is difficult for it to prove its contention without having access to the legal opinion and the documents upon which it was based. It therefore requests, among other things, that this office make a finding that the town has acted in bad faith and require the town to re-exercise its discretion.

Analysis

[111] While the appellant has cited several bases for its allegations of bad faith on the part of the town, I find that these amount to no more than speculation.

[112] I have reviewed the executive summary, including a sentence to which the appellant took particular exception. On my review of its contents, and the other material before me, I see no basis for the appellant's allegation that the town's decision to solicit the creation of and release the executive summary to the public was made in bad faith. I find the town's explanation that the executive summary was created and disclosed in the interests of public transparency to be more persuasive.

[113] I am similarly unconvinced by the appellant's unsupported allegation that the town provided misleading or incomplete information to the author of the legal opinion in order to skew its outcome. While I appreciate the appellant's position that without access to the underlying records the appellant cannot prove the allegation to be true, there must be some basis for a finding of bad faith on behalf of an institution, which I find absent here.

[114] The fact that an application under municipal conflict of interest legislation was filed by a citizen against the former Mayor, and the appellant's belief that the application would not have been filed but for the release of the executive summary, do not support the assertions of bad faith. Whether or not the application has merit, its mere filing provides no basis for anything more than speculation as to the town's motivations in soliciting and releasing the executive summary.

[115] In light of all the above, I am satisfied that the town has not erred in the exercise of its discretion by acting in bad faith or for an improper purpose. I am also satisfied that the town did not take into account irrelevant considerations or fail to take into account relevant considerations.

[116] Accordingly, I am satisfied that the town properly exercised its discretion in applying the section 6(1)(b) and 12 exemptions, and I uphold its decision to withhold the records pursuant to this section.

Record 20

[117] I have decided to consider this record separately because, on review of the material before me, I arrive at the preliminary view that it is not covered by the scope of the request. Record 20 is a proposal made by Law Firm 1, dated August 30, 2004, for the provision of legal services. It was produced in response to the town's July 2004 RFP for external legal services.

[118] It is apparent from the request that the appellant seeks the material on which Law Firm 2 based its legal opinion of February 24, 2011, as well as the opinion itself. The legal opinion concerns the town's liability for legal expenses following the town's decision of September 14, 2010 to retain counsel to deal with a defamation matter. Record 20 does not contemplate the provision of legal services in relation to a specific matter, and in particular does not contemplate the provision of legal services in relation to the specific litigation which is the subject of the legal opinion in Record 29. Of particular relevance is the fact that another record listed in the Index of Records, Record 27, appears to be a retainer between the town and Law Firm 1 for the provision of legal services in relation to the specific litigation matter under discussion.

[119] The submissions before me are somewhat contradictory and unclear with respect to this record. The appellant does not address the record in any of its representations. The town listed it in the Index of Records, but relied on sections 10 and 11, and not section 12, to deny disclosure. However, in representations made by the town's external counsel in this appeal, it submits that, apart from the legal opinion at Record 29, "[a]ll...requested records relate to documents obtained by the external counsel from the town for the preparation of that legal opinion."³¹ Further, counsel submits that these records, "which were used by external counsel in preparing the opinion", are exempt under solicitor-client privilege, thus suggesting that the town *may* now take the position that section 12 also applies to this record.

[120] In any event, on my review of the material before me, including the submissions of all parties, I am not convinced that this record is covered by the request.

[121] As the responsiveness of this record was not raised as an issue previously, I will provide the appellant with an opportunity to provide submissions on whether this record is covered by the scope of its request, before making a final determination on access to this record. I will also ask the appellant to indicate whether it continues to seek access to this record.

³¹ At p.1 of the representations of the Town's external counsel.

ORDER:

1. I uphold the town's decision to deny access to Records 3, 4, 7, 8, 9, 10, 15, 16, 22, 23, 24, 25, 26, 27 and 29.
2. I order the town to disclose portions of Record 2 that I have found not covered by the section 6(1)(b) exemption. I have provided the town a copy of this record with this order, highlighting the portions to be disclosed. I uphold the town's decision to withhold the other portions of this record.
3. If the appellant continues to seek access to Record 20, it must provide submissions on the responsiveness of this record and confirm its interest in access to this record, by **October 11, 2013**.
4. Disclosure of the highlighted portions of Record 2 is to be made no later than **October 4, 2013**.

Original Signed By: _____
Sherry Liang
Senior Adjudicator

_____ September 13, 2013