

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3148

Appeal MA13-75

Town of South Bruce Peninsula

January 8, 2015

Summary: The appellant requested a copy of the minutes of certain closed meetings of the town which referred to him, as well as all documents that were discussed or presented at those meetings. The town granted access to one responsive record, but denied access to five other records on the basis of the discretionary exemption in 38(a) (discretion to deny requester's own information), in conjunction with sections 6(1)(b) (closed meetings) and 12 (solicitor-client privilege). This order upholds town's decision to deny access to the records and finds that the town properly exercised its discretion to deny access to them.

Statutes Considered: *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, sections 239(2)(e); *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 12 and 38(a).

Orders Considered: MO-2937 and MO-3085.

Cases Considered: *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div. Ct.).

OVERVIEW:

[1] The appellant made a request to the Town of South Bruce Peninsula (the town) under the *Municipal Freedom of Information and Protection of Privacy Act*, (the *Act*) for information from certain meetings. The request referred to certain solicitor-client or

litigation privileged agenda item descriptions and the dates of certain meetings, and then stated:

Regarding those items and related items, I would like all closed session minutes that refer to me directly or by innuendo, and also any documents that were discussed or presented in the closed meetings that refer to me directly or by innuendo.

[2] In response to the request, the town identified six responsive records. It granted access to one record (Record 5) and denied access to the other five records on the basis of a number of exemptions in the *Act*. The town also provided an index identifying the five withheld records and indicating the exemptions that applied to each of them.

[3] The appellant appealed the town's decision.

[4] During mediation, the possible application of the discretionary exemptions in sections 38(a) (discretion to deny requester's own information) and 38(b) (personal privacy) were raised, as the requested records appear to contain the personal information of the appellant. Also during mediation and later in the process, the town indicated that it was no longer relying on some of the identified exemptions. The town continued to rely on the exemptions in sections 6(1)(b) (closed meetings), 12 (solicitor-client privilege) and 14(1) (personal privacy) in addition to sections 38(a) and (b), to deny access to the records.

[5] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the town, initially. In response, I received representations with seven attachments. I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the town's representations and the seven attachments, to the appellant, who also provided representations to me.

[6] This order upholds the town's decision to deny access to the records on the basis of the discretionary exemption in 38(a) (discretion to deny requester's own information), in conjunction with sections 6(1)(b) (closed meetings) and 12 (solicitor-client privilege). This order also determines that the town properly exercised its discretion to deny access to the records.

RECORDS:

[7] The five records remaining at issue are the following:

Record Number	Description	Sections of the <i>Act</i> Applied
---------------	-------------	------------------------------------

1	November 20, 2012, Closed Session Minutes	6(1)(b), 12 and 38(a)
2	Solicitor Correspondence dated November 14, 2012	12 and 38(a)
3	Excerpts from Closed Session May 7, 2012	6(1)(b), 12 and 38(a)
4	December 4, 2012, Closed Session Minutes	6(1)(b) and 38(a)
6	December 12, 2012, Closed Session Minutes	6(1)(b), 12, 14(1), 38(a) and 38(b)

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Do Records 1, 3, 4 or 6 qualify for exemption under section 38(a) in conjunction with section 6(1)(b) of the *Act*?
- C. Does Record 2 qualify for exemption under section 38(a) in conjunction with section 12 of the *Act*?
- D. Did the town properly exercise its discretion in denying access to the information under sections 6(1)(b), 12 and/or 38(a) of the *Act*?

DISCUSSION:

Issue A. Do the records contain "personal information" as defined in section 2(1)?

[8] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1). That section reads:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to

financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if 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;

[9] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹

[10] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[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.² 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.³ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[12] The appellant is involved in a number of legal proceedings. In this appeal, the request is for records from closed meetings relating to litigation or other matters that “refer to [the appellant] directly or [indirectly].” Because of the wording of the request itself, any responsive records would contain information pertaining to the appellant, including the appellant’s name and the fact that he is involved in legal proceedings. As a result, I find that the records contain the personal information of the appellant within the meaning of paragraph (h) of section 2(1) of the *Act*.

[13] I also note that at least one of the records also contains the personal information of other identifiable individuals. However, as a result of my findings below, for the purposes of this appeal it is not necessary for me to identify precisely which information in the records relates to other individuals.

Issue B. Do Records 1, 3, 4 or 6 qualify for exemption under section 38(a) in conjunction with section 6(1)(b) of the *Act*?

[14] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[15] Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

[16] The town takes the position that Records 1, 3, 4 and 6 are exempt under section 6(1)(b). That section states:

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

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

one of them if a statute authorizes holding that meeting in the absence of the public.

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

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.⁵

[18] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;⁶ and
- “substance” generally means more than just the subject of the meeting.⁷

[19] 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.⁸

[20] 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*.⁹

[21] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, the question to ask is whether the purpose of the meeting was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.¹⁰

[22] 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

⁵ Orders M-64, M-102 and MO-1248.

⁶ Order M-184.

⁷ Orders M-703 and MO-1344.

⁸ Order MO-1344.

⁹ Order M-102.

¹⁰ *St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.).

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.¹¹

[23] I will review each part of this three-part test to determine whether the records qualify for exemption under this section.

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

[24] The town indicates that Records 1, 3, 4 and 6 are the minutes or excerpts of closed meetings held in 2012 on November 20, May 7, December 4 and December 12, respectively. The appellant does not dispute that these meetings were held. In the circumstances, I am satisfied that the meetings took place, and that Part 1 of the three-part test under section 6(1)(b) has been met.

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

The town's representations

[25] In support of its position that this part of the three-part test is established, the town states that the four meetings were closed to the public in accordance with the provisions of section 239(2) of the *Municipal Act, 2001*, which reads:

- (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
 - (a) the security of the property of the municipality or local board;
 - (b) personal matters about an identifiable individual, including municipal or local board employees;
 - (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
 - (d) labour relations or employee negotiations;

¹¹ Orders MO-1344, MO-2389 and MO-2499-I.

(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

(g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.

[26] The town provides specific evidence that the meetings of November 20, May 7 and December 12, 2012 (relating to Records 1, 3 and 6) were held in closed session by providing copies of each of the Council Resolutions authorizing the closed sessions. With respect to Record 4, the town provides evidence that this meeting was also held in closed session. The town also provides a copy of its procedural by-law authorizing the in-camera meetings, and states that it closed the meetings to the public on the basis of the authority set out in section 239(2)(e) of the *Municipal Act, 2001* (litigation or potential litigation).

[27] The town then refers to the various court actions which have been commenced by the appellant. It lists seven separate civil court actions initiated by the appellant and states that these actions "were initiated ... against the town." The town then refers specifically to Records 1, 3 and 6 and states that these documents were used "in order to obtain legal advice or to conduct or aid in the conduct of litigation." It states that the records relate to advice given to it by its solicitor and/or to litigation.

[28] The town also confirms that, as a result of a complaint made to the Ontario Ombudsman, the Ombudsman investigated whether the town properly held closed meetings in seven instances. Two of those meetings are meetings for which records are requested in this appeal (the November 20 and December 4, 2012 meetings, relating to Records 1 and 4). The Ombudsman's Report, which the town provided as an attachment to its representations, determined that all of the meetings which it investigated were properly held. The relevant portion of that report relating to the November 20, 2012 meeting (Record 1) reads:

The complaint alleged that Council's closed meeting [discussion] held on ... November 20, 2012 ... [was] improperly closed under exception 239(2)(e) - advice that is subject to solicitor-client privilege.

... In regard to the November 20, 2012 meeting, the Agenda and resolution indicate that Council held a closed meeting with respect to:

Advice that is subject to solicitor-client privilege, including communications necessary for the purpose AND litigation or

potential litigation, including matters before administrative tribunals affecting the municipality or local board (Litigation and Insurance Considerations)

The meeting record shows that Council discussed the Solicitor's legal opinion with respect to how to respond to a number of lawsuits filed against the Town and/or municipal officials or staff. ...

Council is permitted under the "solicitor-client privilege" exception to review or receive legal advice. It is not necessary that the advice pertain to litigation, although with respect to the November 20, 2012 meeting the advice received dealt with litigation matters. ...

The information provided also confirms that Council received advice from the solicitor during the November 20, 2012 ... [closed meeting] on municipal matters and the advice was intended to be confidential. As such, the subject matter discussed at [this meeting] qualifies for closed meeting consideration under the exception cited.

[29] The relevant portion of the Ombudsman's report relating to the December 4, 2012 meeting (Record 4) reads:

In regard to the ... December 4 [2012] closed [session], the complaint alleged that the litigation matter(s) scheduled for the closed meeting did not involve or affect the municipality and, therefore, the subject matter discussed did not qualify for closed meeting consideration under the cited exception of the [*Municipal Act* section 239(2)(f)] ...

The public meeting minutes for the above noted meetings showed that, in each case, Council passed a resolution to proceed in camera and the resolution provided the general nature of matters to be discussed, as required by the Act.

... The closed meeting records showed that, in all cases, the subject matter discussed in closed session focused on one or more active or potential lawsuits in which the Town and/or staff acting on behalf of the Town are named as respondents. The closed meeting discussions included status updates on pending litigation and discussion about next steps. ...

Given the above information, including the fact that all closed meeting discussions focused on information pertaining to ongoing or potential litigation, we concluded that the "litigation" exception was appropriately applied.

Further, we did not identify any procedural violations that needed to be addressed.

The appellant's representations

[30] The appellant takes issue with the town's position that the *Municipal Act, 2001* authorizes the identified meetings to be held in closed session. In support of his position, he relies on two main arguments: 1) that much of the litigation discussed in the closed meetings did not involve the town and therefore cannot be a proper basis to proceed in closed session, and 2) that the Ontario Ombudsman's findings are suspect and ought not to be relied on. I review these arguments in greater detail below.

[31] Regarding the application of section 6(1)(b), the appellant then states that:

The only reasons for going into closed sessions ... relevant to the meetings with requested records are client-solicitor and litigation privilege. So for the current request [the section 6(1)(b) exemption] is only available when either client-solicitor or litigation privilege is available.

Which means [section 6(1)(b)] is potentially available only for discussion of cases in which the town is the respondent ...

For discussion of all other cases, [section 6(1)(b)] is not available.

Analysis and findings

[32] Based on the representations of the town and the other materials provided in this appeal, I am satisfied that a statute, the *Municipal Act, 2001*, authorized the holding of the four meetings in the absence of the public, and that Part 2 of the test under section 6(1)(b) of the *Act* has been established.

[33] To begin, based on the evidence provided, including the affidavit evidence of the clerk of the town, I am satisfied that the subject-matter under consideration at the in-camera meetings of November 20, May 7 and December 12, 2012, relating to Records 1, 3 and 6, involved "litigation or potential litigation" within the meaning of section 239(2)(e) of the *Municipal Act, 2001*. The clerk has affirmed that Records 1, 3 and 6 relate to advice given to the town by its solicitor and/or to litigation and states that these documents were used "in order to obtain legal advice or to conduct or aid in the conduct of litigation." In addition, I am also satisfied that the subject-matter under consideration at the in-camera meeting of December 4, 2012 relating to Record 4 included "litigation or potential litigation" within the meaning of section 239(2)(e) of the *Municipal Act, 2001*. The town has also provided the supporting documents confirming the closing of all four of the meetings to the public and the grounds upon which these meetings were closed.

[34] I have considered the appellant's first argument - that much of the litigation discussed in the closed meetings did not involve the town and, therefore, the litigation cannot be a proper basis to proceed in closed session.

[35] The town lists seven legal proceedings which comprise the "litigation" discussed by council at these closed meetings, and confirms that only two of them include the town specifically as a named party. The other five proceedings do not name the town as a party, but involve other individuals including elected town officials, a former Chair of a town committee and members of a local board of the town. The appellant also reviews each of the legal proceedings in some detail and confirms that only some of them involve the town as a named party. He then states:

... in most legal proceedings, and in most or all records, the town is not a participant and is not a party. In most cases the litigations are private matters between [the appellant] other private parties. In most cases the town has no legal position.

[36] The appellant then states that he initiated three types of legal proceedings: 1) defamation lawsuits; 2) applications under the *Municipal Conflict of Interest Act (MCIA)*; and, 3) applications under the *Municipal Act, 2001* to quash by-laws and resolutions. He states that only the third type of action is "against the town."

[37] Regarding the defamation cases, the appellant states that his legal actions were initiated against certain members of council as private individuals and "have nothing to do with the town." He also states that because defamation is "never part of one's duty," the defendants cannot claim that the lawsuits arose from actions on their part which were part of their professional responsibilities. He also states that whether or not the town contributed to the defence of these actions does not make the town a party.

[38] Regarding the *MCIA* cases, the appellant states that he initiated the "enforcement and prosecution" of violations under the *MCIA* as a private citizen and elector, acting for the benefit of the town (the corporate body). He therefore argues that these applications cannot be against the town as this would make it "an application by a member of the corporate body acting for the benefit of the corporate body against the corporate body." He argues that this result would be absurd, and that *MCIA* applications are clearly against individuals, not the town.

[39] In Order MO-2937, Adjudicator Hale addressed a similar argument made by the appellant in the context of a claim by the town that a record qualified for exemption under the solicitor-client privilege in section 12. In that appeal, the appellant also argued that legal actions brought against council members for defamation and violations of the *MCIA* did not involve the town and that, therefore, any legal advice contained in the record at issue was not between a solicitor and his or her client about a legal matter involving the client. For this reason, he argued that the record could not

qualify for exemption as solicitor-client communication privileged information. Adjudicator Hale addressed this argument as follows:

In my view, it is clear that the town was involved in each of these proceedings, either as a named party or in a representative capacity on behalf of its staff and elected officials in the conduct of their official duties on behalf of the town. As a result, I specifically find that the town's involvement in any communications with counsel retained in each of these matters is that of a client of the law firm providing the advice. I conclude that, at the time the communication was made to the town staff and elected officials, there existed a solicitor-client relationship between them.

In addition, given the nature of the proceedings under way involving the town and the appellant, there was litigation underway between them. I further find that the communication which is the subject of this appeal was directly related to the giving of legal advice by the solicitor to the clients, in this case the town's staff and elected officials, about a legal matter pertaining directly to the conduct of the litigation.

[40] Adjudicator Hale also addressed this issue in Order MO-3085, where the appellant had argued that the findings in MO-2937 were incorrect. After reviewing the appellant's arguments, Adjudicator Hale stated:

The appellant's arguments misconstrue the purpose behind the provisions in the *Municipal Act* which enable municipalities to cover the costs of legal proceedings brought against their elected and appointed council and board members. These provisions protect individual members of council and boards from personal liability for legal expenses incurred when defending legal proceedings against them for the actions and decisions they make while serving as councillors or board members.

The appellant's legal proceedings are, in part, against individuals who were acting as councillors or board members at the time they took the action that the appellant complains of. The appellant's contention that he was defamed will ultimately be determined by the courts in which these actions were brought. In the meantime, the *Municipal Act* provides that the town may choose to cover the legal costs of these individuals in defending the actions. If the appellant's allegations are borne out, there may be some costs consequences against the defendants in these actions. The determination of fault lies with the court hearing the case and until that outcome is determined, the town has the right to cover the legal costs incurred by its staff and elected officials, contrary to what is argued by the appellant.

[41] I adopt the approach taken to this issue in Orders MO-2937 and MO-3085. I also note that the Ombudsman's Report refers to the legal proceedings discussed in the meetings reviewed by it as "active or potential lawsuits in which the Town and/or staff acting on behalf of the Town are named as respondents." In the circumstances, I am satisfied that the subject matter being considered in the closed meetings relating to Records 1, 3, 4 and 6 was litigation or potential litigation, and that the town was authorized to proceed in closed session under section 239(2)(e) of the *Municipal Act, 2001*.

[42] Lastly, I have considered the appellant's arguments that the Ontario Ombudsman's findings are "not reliable or relevant evidence." The appellant acknowledges that the Ombudsman did find that all of the closed session meetings which it investigated "were legal and met with the requirements of ... the *Municipal Act*," however, he argues that because of the way in which a municipality decides which body will investigate its actions (either the Ontario Ombudsman or another outside evaluator) there exists an inherent conflict of interest on the part of any body investigating the municipality's actions. As a result, the appellant argues that this "built in incentive for bias" to "favour the municipality" means that the Ontario Ombudsman's findings are "not reliable or relevant evidence." On my review of the appellant's arguments, I am not satisfied that this alleged conflict of interest exists, and I reject the appellant's arguments that the Ontario Ombudsman's findings are "not reliable or relevant evidence" in this appeal.

[43] As a result, I am satisfied that a statute authorized the holding of the meetings in the absence of the public, and that Part 2 of the three-part test under section 6(1)(b) has been met.

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

[44] The town takes the position that disclosure of the records would reveal the actual substance of the deliberations of the identified in-camera meetings.

[45] With respect to this aspect of the three part test, the town refers to the requirement found in Order M-98 which confirms that, in order to meet this part of the test, the records must contain more than merely the subject of the deliberations, but that disclosure "would reveal the substance of those deliberations."

[46] Regarding Records 1, 3 and 6, the town also provides affidavit evidence, sworn by the clerk of the town, in which the clerk affirms that the responsive records (the minutes of the closed meetings) contain the deliberations of those meetings, and not merely the subject of those deliberations. In the confidential portions of her affidavit, the clerk refers to the specific information in the records, and how this information describes the deliberations of the attendees at the closed meetings. Based on the

descriptions of the records and the affidavit evidence provided by the town, I am satisfied that disclosure of Records 1, 3 and 6 would reveal the substance of the deliberations of the closed meetings to which those records relate.

[47] With respect to Record 4, on my review of this record, this record clearly contains a description of the discussions and deliberations of the attendees at the closed meeting of December 4, 2012. Based on the evidence provided and the findings contained in the report of the Ontario Ombudsman referenced above, I have found that the town was authorized to proceed in camera under section 239(2)(e) of the *Municipal Act, 2001*, as portions of these minutes relate to litigation or potential litigation. I have also considered the decision of the Divisional Court in *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*¹² which determined that, if a portion of a record contains material which an institution is authorized to consider in-camera, the complete record can be considered at the in-camera meeting. That decision also confirmed that even if a full 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. I find that disclosure of any portion of Record 4 would reveal the substance of the deliberations of the closed meeting.¹³

[48] In the circumstances, I am satisfied that disclosure of the responsive records, identified as the minutes or excerpts of the closed meetings at issue, would reveal the substance of the deliberations of the closed meetings, and that part 3 of the test set out above has been established.

[49] As a result, I find that all three parts of the three-part test in section 6(1)(b) apply to Records 1, 3, 4 and 6. Accordingly, I find that these records qualify for exemption under section 38(a), in conjunction with section 6(1)(b) of the *Act*, subject to my review of the town's exercise of discretion, below.

Issue C. Does Record 2 qualify for exemption under section 38(a) in conjunction with section 12 of the *Act*?

[50] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[51] Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

¹² 2011 ONSC 2346 (Div.Ct.).

¹³ In making this determination, I note that section 239(2) authorizes the closing of a meeting for a number of reasons, including sections 239(2)(b) and (f). See also Order MO-2892.

[52] The town takes the position that Record 2 is exempt under section 38(a) in conjunction with section 12, which states:

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

[53] 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.

Branch 1: common law privilege

[54] 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.¹⁴

Solicitor-client communication privilege

[55] 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.¹⁵

[56] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.¹⁶

[57] 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.¹⁷

[58] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹⁸

¹⁴ 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).

¹⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁶ Orders PO-2441, MO-2166 and MO-1925.

¹⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

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

[59] 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.¹⁹

Litigation privilege

[60] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.²⁰

[61] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both. ...

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Analysis and findings

[62] The town indicates that Record 2 is subject to the solicitor-client privilege exemption in section 12 because it is a letter dated November 14, 2012 from the town's external solicitor to the town. In an affidavit previously provided to this office from the town, the town confirms that the named external solicitor provided the town with legal services. In its representations, the town tendered affidavit evidence that the named solicitor was retained by council to represent it in the various actions and proceedings brought by the appellant. The town also confirms that the solicitor's letter was

¹⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

²⁰ Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).

addressed to named representatives of the town and addressed as "strictly privileged and confidential."

[63] The appellant accepts that Record 2 is correspondence from a solicitor, but again argues that it can only be privileged if it only relates to the "by-law quashing cases" in which the town is a party or participant. The appellant takes the position that the town has not provided sufficient evidence to support a finding that the solicitor-client privilege applies to this record.

[64] I addressed the issue of whether or not the town is involved in the litigation involving the appellant under my discussion of section 6(1)(b) above. I noted that Adjudicator Hale addressed this issue directly in the context of a section 12 claim in Order MO-2937 where he stated:

... it is clear that the town was involved in each of these proceedings, either as a named party or in a representative capacity on behalf of its staff and elected officials in the conduct of their official duties on behalf of the town. As a result, I specifically find that the town's involvement in any communications with counsel retained in each of these matters is that of a client of the law firm providing the advice. I conclude that, at the time the communication was made to the town staff and elected officials, there existed a solicitor-client relationship between them.

In addition, given the nature of the proceedings under way involving the town and the appellant, there was litigation underway between them. I further find that the communication which is the subject of this appeal was directly related to the giving of legal advice by the solicitor to the clients, in this case the town's staff and elected officials, about a legal matter pertaining directly to the conduct of the litigation.

[65] On my review of the representations of the parties and the nature of the record, as well as the affidavit evidence of the town, I am satisfied that Record 2 consists of direct communications of a confidential nature between a solicitor and his client (the town) made for the purpose of giving professional legal advice, and that it qualifies for exemption under the solicitor-client communication privilege aspect of section 12.

[66] As a result, I find that Record 2 qualifies for exemption under section 38(a), in conjunction with section 12 of the *Act*, subject to my review of the town's exercise of discretion, below.

Issue D. Did the town properly exercise its discretion in denying access to the information under sections 6(1)(b), 12 and/or 38(a) of the *Act*?

[67] The section 6(1)(b), 12 and 38(a) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[68] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[69] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ This office may not, however, substitute its own discretion for that of the institution.²²

[70] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²³

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

²¹ Order MO-1573.

²² Section 43(2).

²³ Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[71] The town takes the position that it exercised its discretion to deny access to the records in good faith. It states that it considered whether the records could be released, and exercised its discretion not to release them. It refers to the fact that the litigation discussed in the records is litigation involving the appellant, and expresses its concern that the appellant is "requesting access to the documentation as a means to gain information with respect to [the town's] legal position." The town also refers to certain concerns that have been raised as a result of some of the appellant's activities. The town also provides confidential representations (particularly with respect to its decision to deny access to Record 4) in support of its position that it properly exercised its discretion. After reviewing the particulars of this appeal, it concludes by stating:

There is no bad faith in refusing to release the Closed Session documents nor are there any policy reasons which override the protection afforded to solicitor-client privilege in these circumstances.

[72] The appellant does not directly address this issue, but in his representations he refers to certain factors in support his view that he ought to have access to the records. These factors include the fact that the records contain his personal information and that certain litigation addressed in the records has been concluded.

[73] I have considered the issue of whether the town properly exercised its discretion to apply the exemptions in sections 38(a), 6(1)(b) and 12 to the records at issue. I have also considered the factors raised by the appellant. In the circumstances, I am satisfied that the town properly exercised its discretion to decline to provide the records to the appellant.

[74] With respect to the appellant's argument that the records contain his personal information, I note that the town has acknowledged that these records contain his personal information, and has taken this factor into account in deciding to deny access to the records. Regarding the appellant's reference to the fact that certain litigation is now concluded, I note that whether or not litigation is concluded does not directly impact the application of the exemptions claimed in this appeal. Furthermore, I have not found any of the records to be exempt under the litigation privilege exemption in section 12.²⁴

[75] In the circumstances, I find that the town properly exercised its discretion to apply sections 38(a), 6(1)(b) and 12 to the records, and did not take into account irrelevant considerations or fail to take into account relevant considerations in exercising its discretion. As a result, I uphold the town's decision.

ORDER:

I uphold the town's decision, and dismiss the appeal.

Original Signed By:
Frank DeVries
Adjudicator

January 8, 2015

²⁴ I also note that, although the conclusion of litigation would impact the application of the common law litigation privilege under branch 1 of section 12, it does not impact the application of the litigation privilege under branch 2 of that section. See *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952, which determined that, in contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.