Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3373

Appeal MA14-402-2

Toronto Police Services Board

November 3, 2016

Summary: The Toronto Police Services Board received a request under the *Act* for access to the legal opinions from three named lawyers relating to the Police and Community Engagement Review (PACER). The police denied access to the legal opinions on the basis of the exemption in section 12 (solicitor-client privilege). In this order the adjudicator finds that the legal opinions are covered by the solicitor-client communication privilege in section 12 of the *Act*, and that privilege was not waived in the circumstances of this appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12; *Police Services Act*, RSO 1990, c P15, sections 31 and 41.

Orders and Investigation Reports Considered: PO-3154, PO-3167, and MO-2945-I.

Cases Considered: *Pitney Bowes of Canada Ltd. v. Canada*, [2003] F.C.J. No. 311 (T.D.); *R v. Campbell* [1999] 1 SCR 565; *Solosky v. The Queen* [1980] 1 S.C.R, 821.

OVERVIEW:

[1] The Toronto Police Services Board (the "police" or the "board") received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the legal opinions from three named lawyers, as well as the letter from the police requesting the legal opinions. The request read:

> In the Police and Community Engagement Review (PACER) the Toronto Police Service reported that it had consulted with three eminent lawyers, all representing different legal scope and interests. …
>
> Please provide me with the letter sent by the Toronto Police Service to the three lawyers requesting the legal opinions and please provide me with copies of the three legal opinions.

[2] In response to the request, the police issued a decision denying access to the responsive records pursuant to section 12 (solicitor-client privilege) of the *Act*.

[3] The appellant appealed the police's decision to this office, and confirmed that he was taking the position that any privilege that may have existed in the records was waived as a result of the actions of the police.

[4] During mediation, the police confirmed that the three legal opinions were commissioned by counsel on behalf of the Chief of Police (the chief) and the Toronto Police Service in regards to the PACER project. The police confirm that the chief and the police claim solicitor-client privilege over the content of the three opinions. In addition, the police provided materials in support of their position, including email requests from police counsel to the three lawyers for the opinions, and legal accounts received from the three lawyers for the work done in preparing the opinions.

[5] Mediation did not resolve this appeal, and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry under the *Act*. I sought and received representations from the appellant and the police regarding the application of the solicitor-client privilege exemption in section 12 of the *Act*. These were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*.

[6] In their representations, the police assert that there is no "letter sent by the Toronto Police Service to the three lawyers requesting legal opinions", other than the emails provided to this office during mediation (and shared with the appellant during the inquiry stage of the appeal process). The appellant accepts the police's submissions on this point. As a result, the only records remaining at issue are the legal opinions prepared by the three named lawyers.

[7] In this order I find that the legal opinions are covered by the solicitor-client communication privilege exemption in section 12 of the *Act*, and that privilege was not waived in the circumstances of this appeal.

RECORDS:

[8] The records at issue in this appeal are three legal opinions prepared by three named lawyers. Each of the legal opinions was provided in two parts.

DISCUSSION:

Solicitor-client privilege

[9] The sole issue in this appeal is whether the discretionary solicitor-client privilege exemption at section 12 applies to the records.

[10] The police submit that section 12 of the *Act* applies to the records. Section 12 reads:

> 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.

[11] Section 12 contains two branches as described below. To rely on this exemption, the police must establish that one or the other (or both) branches apply.

[12] Branch 1 derives from the first part of section 12, which permits the police to refuse to disclose "a record that is subject to solicitor-client privilege". This branch applies to a record that is subject to common law "solicitor-client privilege."

[13] Branch 2 derives from the second part of section 12 and it is a statutory exemption that is available in the context of an institution's counsel giving legal advice or conducting litigation. The statutory exemption and common law privilege, although not necessarily identical, exist for similar reasons.

Branch 1: common law privilege

[14] Branch 1 encompasses two heads of common-law privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for Branch 1 of section 12 to apply, the police must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[1]

Solicitor-client communication privilege

[15] 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.[2]

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[1] 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).

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

[16] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[3]

[17] 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.[4]

[18] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[5]

[19] Confidentiality is an essential component of the privilege. Therefore, the police must demonstrate that the communication was made in confidence, either expressly or by implication.[6]

Loss of privilege

Waiver

[20] Solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[7]

[21] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[8]

[22] Generally, disclosure to outsiders of privileged information constitutes waiver of

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[3] Orders PO-2441, MO-2166 and MO-1925.

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

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

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

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

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

privilege.[9] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[10]

Branch 2: statutory privilege

[23] Branch 2 is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons.

Representations

The police's initial representations

[24] The police submit that the records are clearly protected under the solicitor-client communication privilege under both branches of section 12. The police state:

> The opinions were sought by the chief for the purpose of obtaining legal advice on questions of law from lawyers of diverse experience. Solicitor-client relationships were formed with each of the three lawyers in question, these lawyers produced legal opinions for the chief, invoices were rendered by the lawyers, and those lawyers were paid for legal services provided to the chief. … there is no question that the documents were created for the purpose of conveying legal advice.
>
> Indeed, [the appellant] seems to accept the correctness of this conclusion, given that he rests his arguments on the question of waiver, and not the idea that the opinions were not privileged *ab initio*.

[25] The police provided representations in support of their position that the chief is entitled to claim solicitor-client privilege, as is anyone else in a solicitor-client relationship. The police then reviewed the various responsibilities the chief has, and the reasons why the chief may, in certain circumstances, seek legal advice from various lawyers.

[26] The police then address the appellant's position, as set out in his initial request and his appeal letter, that any possible solicitor-client privilege that may have existed in the legal opinions was waived by the police as a result of their actions. The police refer the appellant's apparent argument that, because the chief and the deputy chief made reference to the opinions at a public meeting, any privilege over the opinions was

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[9] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

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

thereby waived. The police submit that this view is incorrect, and state:

> The impromptu comments of the Chief and the [Deputy Chief], revealing, at best, the "bottom line" of the opinions they received, could in no way amount to waiver, either express or implied, over opinions which the Chief and [the board] have treated as confidential since they were received.

[27] In support of their position, the police refer to two previous orders of this office. One is Order MO-2945-I, in which the Town of Aurora received a legal opinion and, for purposes of transparency, released a four-page executive summary of the opinion to the public. In that order, the adjudicator found that the town evidenced an intention to make the summary public while at the same time maintaining solicitor-client privilege, and that release of the summary was unlikely to disclose the entire contents of the legal opinion itself. On this basis, the adjudicator determined that release of the summary did not constitute waiver of privilege.

[28] The police also refer to Order MO-1172, where the adjudicator was satisfied that disclosing a small portion of the "bottom line" of legal advice is sometimes necessary or desirable for a public body to carry out its mandate and responsibilities, and does not constitute waiver of solicitor-client privilege.

[29] The police submit that the same reasoning applies in this case; that the legal opinions have always been treated as confidential and that comments revealing "at best" the bottom line of the legal opinions cannot amount to express or implied waiver of privilege.

The appellant's initial representations

[30] The appellant begins by stating that the legal opinions sought are directly related to "an extremely important public policy issue" regarding the practice of the police in "engaging in carding, also known as community contacts or community engagement." The appellant refers to the fact that these issues have been "extensively" dealt with by the police and examined by the media. The appellant's position is that, in the creation of public policy regarding police/citizen interactions, there should be "as much transparency as possible."

[31] With respect to the police's claim of solicitor-client privilege for the three opinions obtained on the legality of carding, the appellant asserts that such a broad claim of privilege may not apply, given that the chief made the opinions available to members of the Police Services Board for the purpose of creating public policy. The appellant submits that, by sharing the opinions with the board, the chief placed the opinions into the realm of public policy and, in effect, waived any claim to solicitor-client privilege.

[32] With respect to waiver, the appellant advances two main arguments. First, he submits that the chief waived privilege voluntarily. Second, he submits that the chief waived privilege by implication.

[33] In support of his first argument, the appellant refers to a passage on privilege from the *Law of Evidence in Canada,*[11] which states that a privilege-holder waives privilege voluntarily if they disclose or consent to disclose "any material part of a communication." The appellant submits that in offering the "bottom line" of the legal opinions in a public meeting, the chief voluntarily disclosed a "material part" of the privileged communications in question.

[34] In addition to voluntarily waiving privilege, the appellant submits that the principle of fairness allows for privilege to be waived by implication where a client's conduct reaches a certain point of disclosure. In support of his position, the appellant notes that a client can waive privilege by directly raising legal advice in a pleading or proceeding, thereby putting that legal advice in issue.[12] In particular, the appellant points to the Supreme Court of Canada's (SCC) decision in *R v Campbell*, where the RCMP relied on the advice of the Department of Justice in court to support its position that its actions were in good faith. In deciding that the RCMP had waived privilege by implication, Binnie J. wrote that the appellants were "entitled to have the bottom line of that evidence corroborated."[13] The appellant acknowledges that the litigation context in *Campbell* is different than the context in this appeal; however, he submits that it is a strong indicator that the chief waived privilege by implication by sharing the bottom line of the legal advice, especially because the police will ultimately rely on that advice as support for certain actions and policies.

[35] In addition to his two main arguments on waiver, the appellant also suggests that the two IPC Orders referred to in the police's submissions are not binding on me and that they should not be relied on as a basis for a decision on waiver in this case.

[36] The appellant provided an article with his submissions, which discusses *Ebrahim v Continental Precious Minerals*[14] where the Ontario Superior Court of Justice held that referring to the receipt of legal advice in an affidavit amounts to the waiver of privilege. Again, the appellant acknowledges that the context of this appeal differs from the litigation context but suggests that revealing the conclusions of a legal opinion in a public meeting concerning public policy amounts to waiver of solicitor-client privilege.

[37] The appellant also submits that confidentiality is an essential element of solicitor-client privilege. He refers to another passage on privilege in the *Canadian Encyclopedic Digest*,[15] which states, "… if the communication is intended to be revealed to a third

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[11] (4th ed, 2014) at para 14.138.

[12] [1999] 1 SCR 565 [*Campbell*]; *Law of Evidence in Canada* at para 14.146.

[13] *Campbell*, *ibid*, at para 47.

[14] *Ebrahim v Continental Precious Minerals*, 2012 ONSC 1123 (CanLii).

[15] "Barristers and Solicitors VIII.2" (Ontario) at para 171.

party, the element of confidentiality will be lacking ….” The appellant submits that the confidentiality criteria is lacking in this case, because the chief intended to reveal part of the privileged communications by sharing it in a public forum.

[38] Finally, the appellant submits that the police will likely have to divulge the contents of the legal opinions as soon as the first legal challenge to police actions carried out in accordance with those opinions finds its way into an Ontario court.

The police's reply representations

[39] The police maintain that the opinions are subject to solicitor-client privilege. They also submit that no argument based on public policy, such as that advanced by the appellant, can supplant that privilege. The police note that the appellant cites no authority for the position that "in the creation of public policy matters, such a broad claim [to solicitor-client privilege] may not apply."

[40] On the topic of waiver, the police maintain that the chief did not waive privilege with respect to the three opinions. In support of their position, the police discuss the "common interest" exception to waiver and bottom line disclosure.

[41] The police acknowledge that disclosure of legal advice to a third party can be evidence of an intention to waive privilege. However, the police take the position that sharing privileged information between parties with a common, though not necessarily identical, interest is not evidence of an intention to waive privilege.[16]

[42] The police refer to Order PO-3167, where a memorandum of law was prepared by counsel with the Ministry of the Attorney General, and provided to Ontario's Crown Attorneys and the Ministry of Safety and Correctional Services, who then shared it with the Commissioner of the Ontario Provincial Police and all Ontario Police Chiefs. The adjudicator found that the common interest exception to waiver applied because, while the interests and roles of the parties were not identical, they all "share[d] a common interest in having a uniform understanding of the state of the law on the particular point in issue, as well as a uniform approach to its administration…"[17]

[43] The police also point to provisions on the responsibilities of police services boards and police chiefs in the *Police Services Act*[18] as evidence of a common interest between the board and the chief. In particular, section 31 of the *Police Services Act* requires a board to direct the chief and monitor his/her performance, and to determine, in consultation with the chief, the objectives and priorities for police services in the

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[16] Order PO-3154.

[17] Order PO-3167 at para 43.

[18] RSO 1990, c P15.

municipality. In addition, section 41 requires a police chief to administer the police force and oversee its operation in accordance with the objectives, priorities and policies established by the board.

[44] The police submit that the opinions were provided by the chief to the board at the board's request with the understanding that there was a common interest in having a uniform understanding of the state of the law and an approach to its administration. As evidence of this understanding, the police provide a copy of internal correspondence from the board to the chief regarding disclosure of the legal opinions by the chief to the board. This document, which was signed by all board members, reads in part:

> It would be extremely helpful to the [Board Subcommittee] to be able to review those opinions and determine whether it requires any additional legal advice on the matter.
>
> The Board recognizes your concern that the three opinions you received remain privileged and confidential […] The City Solicitor has advised the Board that privilege can continue to apply to the opinions on the basis of the application of a common interest privilege between the Board and the Chief.

[45] In this same document, the board agrees that it will not voluntarily disclose the opinions and will assert a common interest privilege in response to any request for disclosure.

[46] The police therefore submit that, in light of the common interest shared between the chief and the board, sharing the legal opinions with the board did not constitute waiver of privilege.

[47] The police also confirm their position that sharing the crux of a legal opinion in a public meeting is not indicative of an intention to waive privilege over the opinion in its entirety. Rather, the police submit that in sharing the bottom line, the chief and deputy chief intended to strike an appropriate balance between transparency in public policy decision-making and ensuring that public officials have unfettered access to legal advice.

[48] The police disagree with the appellant's suggestion that previous orders of this office need not be relied upon in this case. The police submit that decision-makers in this office are entitled to rely on past decisions for guidance in assessing what will constitute waiver. The police refer to a number of orders where disclosure of the crux of legal advice was not found to constitute waiver,[19] and submit that the conduct of the

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[19] Namely, Orders MO-2222, MO-2929, and PO-2830. The police also refer to Orders MO-2945-I, MO-1233, MO-1172 and MO-1991, where disclosure beyond the crux of legal advice was found not to constitute waiver.

chief falls well below the conduct that the IPC has previously held to constitute waiver.

[49] The police assert that the appellant's reliance on the SCC's decision in *Campbell* is misplaced. They state that the police in *Campbell* were found to have engaged in illegal conduct and the accused argued there had been an abuse of process and sought to stay the proceedings. In resisting the requested remedy, the police testified that they had acted in good faith having relied on advice from Crown Counsel. The legal advice had been obtained specifically for the investigation at issue, and the police's reliance on that advice in asserting their good faith was explicit.

[50] In contrast, the police submit that the chief has never suggested that the legal opinions at issue constitute a justification for the police's community contacts policy. The police also submit that the disclosure of the bottom line advice provided to the chief cannot be taken to constitute reliance on that advice as a good faith basis for a policing policy adopted by the board on a controversial issue that that board sought out and received its own separate legal opinion on.

[51] Furthermore, the police state that the appellant's assertion that the chief will rely on the opinions as a good faith basis for his acts before Ontario courts sometime in the future is pure speculation and is not grounds to set aside the privilege at this time.

[52] The police also note that the appellant's representations focus on the high level of public interest in the subject matter covered by the opinions. The police submit that the significance of the issue giving rise to legal advice is irrelevant to the question of whether privilege attaches.

Appellant's sur-reply representations

[53] In his sur-reply representations, the appellant confirms that his four main arguments are:

1. Solicitor-client privilege should not apply to legal advice given with respect to the formulation and creation of public policy in areas of pressing public interest such as carding;

2. The chief voluntarily waived privilege when he provided the three legal opinions to a third party, the Toronto Police Services Board;

3. The police voluntarily waived privilege when they disclosed the existence of the opinions and their conclusions in public meetings and in the PACER Report;

4. There was waiver by implication when the police raised the legal advice it had received in defence of its position that the practice of carding as carried out by the police officers was legal and in support of its position as to the appropriate policy response to carding by the chief and the board.

[54] The appellant provides extensive sur-reply representations in support of these arguments. To the extent that they provide additional specific arguments, I review them below.

Analysis and Findings

Does the solicitor-client privilege exemption apply to the records at issue?

[55] The police submit that the opinions are subject to solicitor-client privilege as they were created in the context of a solicitor-client relationship for the purpose of conveying confidential legal advice. The appellant asserts that the section 12 exemption should not apply to legal advice given with respect to the formulation and creation of public policy in areas of pressing public interest such as carding. He states that any such privilege may not apply in these circumstances, given that the chief made the opinions available to members of the board for the purposes of creating public policy, thereby placing the opinions into the realm of public policy.

[56] The appellant's sur-reply representations argue that the courts have either limited the scope of the privilege or created exceptions to it based on public policy, albeit in very limited circumstances, and argues that this is one of those cases which ought to create an exception to the privilege. He states that considerations of public interest and public policy are important here, and that the scope of a class privilege like solicitor-client privilege is "shaped by the balance between the public interest in maintaining the privilege and the public interest in access to information, whether it be through the admission of relevant evidence in a court proceeding or through freedom of information requests."

[57] The appellant then refers to the decision in *R. v. National Post*[20] which considered whether a class privilege should be extended to journalists and their confidential sources, and which found that there is a public interest in the "free flow of accurate and pertinent information" and "[democratic] institutions and social justice will suffer without [it]."

[58] The appellant then states that common law solicitor-client privilege "has its origins in the administration of justice and the courts of law and the courts have not always been willing to extend the privilege far beyond its origins." He addresses the cases cited by the police in support of their position about the sweeping extent of the privilege, and argues that these cases are either distinguishable (as they arose in criminal or quasi-criminal contexts), or in the case of *Solosky v. The Queen*,[21] support his position in that:

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[20] [2010] 1 S.C.R, 477.

[21] [1980] 1 S.C.R, 821.

> [This case] is an example of how the courts are reluctant to extend the solicitor-client privilege much beyond its origins in the administration of justice and the courts of law. In that case, the court held that correspondence between an inmate and his solicitor was not privileged and could be opened in accordance with the applicable *Penitentiary Act* regulations, illustrating where public interest can limit the scope of the privilege. The court specifically rejected the notion that the privilege was akin to a "rule of property."

[59] The appellant argues that the current case is "distant from the origins of the privilege." He states:

> [The chief] solicited the opinions in order to formulate policy in the area of carding and to make the case for its policy to the Toronto Police Services Board and to the public at large. The courts have either limited the scope of the privilege (as in *Solosky* supra) or created exceptions to the privilege based on public policy, albeit in very limited circumstances. The appellant's position is that this is one of those cases to create an exception to the privilege.

[60] I have considered the representations of the parties and reviewed the records at issue in this appeal. I note that the records are clearly legal opinions provided by three lawyers to their client.

[61] Based on the information before me, I find that the records at issue consist of legal opinions prepared by three lawyers retained by the chief, for the purpose of communicating confidential legal advice on questions of law relating to the practice of "carding." I am satisfied that the records are exempt from disclosure pursuant to the solicitor-client communication exemption in section 12 of the *Act*, as they consist of direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.

[62] I have considered the appellant's representations, as well as the authorities he cites, in support of his position that the solicitor-client privilege cannot apply to legal advice given "with respect to the formulation and creation of public policy in areas of pressing public interest such as carding." I do not accept this position. The records at issue in this appeal are legal opinions sought from three lawyers on questions of law.

[63] Many decisions made by public bodies involve issues of public policy, and to suggest that legal advice sought and received in these areas cannot qualify for solicitor-client privilege is casting the net too broadly. I also note that the nature of the subject matter (carding) clearly involves public policy matters, but also clearly engages legal issues on which legal advice is reasonably sought, and which can be subject to solicitor-client privilege.

[64] As a result, I am satisfied that the records at issue are solicitor-client privileged, as they constitute legal opinions provided by three lawyers to their client for the purpose of providing legal advice.

[65] I will now review the various arguments regarding whether the solicitor-client privilege that existed was waived.

Was solicitor-client privilege waived?

[66] The appellant suggests two ways in which any solicitor-client privilege attaching to the records at issue may have been waived. Each is discussed in turn, below.

1) Was solicitor-client privilege waived by the chief when he shared the opinions with the board?

[67] After reviewing the circumstances and the representations of the parties, I find that the actions of the chief in sharing the three legal opinions with the board did not result in waiver of the privilege by the chief. I make this finding because I am satisfied that, in circumstances, the chief and the board shared a common interest.

[68] Previous orders of this office have addressed the common interest as it relates to possible waiver of privilege.

[69] In Order PO-3154, Adjudicator Steven Faughnan reviewed the case law pertaining to a determination of whether the common interest exception to waiver of privilege existed in that appeal.

[70] Adjudicator Faughnan articulated the following test:

> … the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:
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> > (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under Branch 1 of section 19(a)[22] of the *Act*, and
> >
> > (b) the parties who share that information must have a "common interest", but not necessarily [an] identical interest.[23]

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[22] Section 19 is the provincial counterpart to section 12 of the *Act*.

[23] See also *Barclays Bank PLC v. Metcalfe and Mansfield*, 2010 ONSC 5519, para 11.

[71] Furthermore, as noted in *Pitney Bowes of Canada Ltd v. Canada*, the determination of the existence of a common interest is highly fact-dependent.[24] In Order PO-3167, Adjudicator Donald Hale had to determine whether a legal memorandum prepared by the Assistant Deputy Attorney General for the Assistant Deputy Minister of the Ministry of Community Safety and Correctional Services and Ontario Crown Attorneys was exempt under section 19 of the provincial *Freedom of Information and Protection of Privacy Act,* despite the fact that the Assistant Deputy Minister had subsequently distributed it to "All Chiefs of Police". Adjudicator Hale first found that a solicitor-client relationship existed between the Assistant Deputy Attorney General and the Assistant Deputy Minister in connection with the memorandum. He then considered whether the common interest exception to waiver of privilege applied to the subsequent sharing of the memorandum with all Chiefs of Police. After reviewing the authorities, including *Pitney Bowes*, cited above, Adjudicator Hale concluded that the common interest exception to waiver of privilege applied:

> In my view, these general principles apply equally in the circumstances of this appeal. The interests of Crown Attorneys, the ministry, the OPP Commissioner and municipal chiefs of police are not identical, and they each play different roles in the administration of criminal justice as it pertains to the subject matter of the memorandum. However, they all share a common interest in having a uniform understanding of the state of the law on the particular point in issue, as well as a uniform approach to its administration as evidenced by the content of the memorandum itself. The words "privileged and confidential" appearing on the face of the memorandum indicate that it is to remain confidential as against others who are not its intended recipients or beneficiaries. The common interest shared by the recipients of the memorandum thus negates any waiver of the privilege that would otherwise have occurred by its disclosure to persons or entities outside the solicitor-client relationship.
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> In summary, I find that the memorandum had its origin as a privileged communication passing from the Assistant Deputy Attorney General on the one hand, to MAG Crown Attorneys and the ministry's Assistant Deputy Minister on the other. As such, it was a document which was subject to solicitor-client communication privilege for the purposes of section 19(a) from its inception.
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> Further, based on the context in which the document was provided to the Chiefs of Police by the ministry's Assistant Deputy Minister, there existed a common interest in the confidential subject matter of the memorandum. I find that they share a common interest in matters relating to law

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[24] [2003] F.C.J. No. 311 (T.D.), at para 18 [*Pitney Bowes*].

> enforcement and in the administration of justice generally. The memorandum at issue in this appeal describes a confidential opinion which was only shared with the Chiefs because of their common interest with MAG and the ministry in law enforcement concerns. I find further support for this finding in the fact that the memorandum itself states that it may be shared with the police, but is otherwise privileged and confidential, although this alone would not be determinative.
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> As a result of this finding of a common interest in the subject matter of the record, I find that its disclosure to the Chiefs did not constitute a waiver of the privilege that existed in the document. Accordingly, I conclude that it remains subject to solicitor-client communication privilege and is exempt from disclosure under section 19(a), on that basis.

[72] I agree with the two-step approach articulated in Order PO-3154 and applied in Order PO-3167, and will apply it to the legal opinion before me.

1) Are the legal opinions privileged under Branch 1?

[73] I found above that the legal opinions provided by the three lawyers to the chief are subject to solicitor-client communication privilege under Branch 1. The opinions are communications from three lawyers to their client made for the purpose of providing legal advice on a particular topic. I also find that the communications were confidential.[25]

2) Do the chief and the board share a common interest in the information contained in the opinions?

[74] As noted above, the police acknowledge that disclosure of legal advice to a third party can be evidence of an intention to waive privilege. However, the police take the position that sharing privileged information between parties with a common, though not necessarily identical, interest is not evidence of an intention to waive privilege.[26]

[75] The police refer to Order PO-3167, discussed above, and refer to the adjudicator's finding that the common interest exception to waiver applied because, while the interests and roles of the parties were not identical, they all "share[d] a common interest in having a uniform understanding of the state of the law on the particular point in issue, as well as a uniform approach to its administration…"[27] The

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[25] I address the issue of the sharing of the "bottom line" with others below; however, I reject the appellant's suggestion that the element of confidentiality was lacking in these circumstances because of the chief's public statements.

[26] Order PO-3154.

[27] Order PO-3167 at para 43.

police also point to provisions on the responsibilities of police services boards and police chiefs in the *Police Services Act*[28] as evidence of the common interest shared between the board and the chief in areas regarding policing.

[76] In his sur-reply representations, the appellant argues that the common interest exception does not apply in these circumstances, where the legal opinions were shared by the chief with the board. The appellant reviews certain authorities which discuss the common interest exception to waiver, and which he argues confirm that "it is more akin to litigation privilege by providing a functional extension of the privilege for a limited purpose and time in order to enable parties with a common goal to attempt to achieve a favourable result." He argues that extending the scope of the exception to the circumstances of this appeal will "do nothing to foster the solicitor-client relationship but will only serve here to deny access to information clearly relevant to matters of public interest and policy making." He then states:

> The [board] does not share a common interest with [the chief] that would permit reliance on the exception. While [the board] has a statutory responsibility for the provision of adequate and effective police services in Toronto, its role is very different from that of [the chief]. [The board] acts as a quasi-legislative body which sets objective and priorities, establishes policies and issues orders and directives to the Chief of Police. It is the primary mechanism under the *Police Services Act* for holding the police accountable to the communities it serves. As such it receives representations and reports from a wide range of persons [including community organizations, other interested parties, and the chief], all of whom share an interest in adequate and effective policing. The [chief's] specific goal in obtaining the opinions was to justify its past practices of carding and to support its own policy positions in that area. The [board] did not share that specific goal. The [board's] role is much broader, encompassing both the operational needs of [the chief] and the interests of the communities. The common interest exception does not apply to [the board] in this context because, as a statutory decision maker, it cannot be said to [share] an interest with the parties that make representations to it that would support the exception relied on by [the chief]

[77] I have considered the parties' representations and have reviewed the legal opinions. I accept the submissions of the police regarding the responsibilities of police services boards and police chiefs as set out in the *Police Services Act*. The board is responsible for establishing and modifying objectives, priorities and policies for the police. The chief is responsible for overseeing the police force's operation in accordance

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[28] RSO 1990, c P15.

with the objectives, priorities and policies established by the board. In respect of "carding", and given their respective roles and responsibilities, both the chief and the board share a common interest in having a uniform understanding of the state of the law in this area including what is and is not legal.

[78] I also do not accept the appellant's arguments regarding the reasons why the legal opinions were sought. In the circumstances, I find that the legal opinions (which I note were obtained from three different lawyers) were sought for the purpose of determining the applicable law as it applies to carding practices. I find further support for this decision in the copy of the correspondence from the board to the chief regarding disclosure of the legal opinions by the chief to the board. As noted above, this document, which was signed by all board members, confirms the understanding of the board and the chief with respect to the sharing of the legal opinions between them. The first two paragraphs read:

> As you are aware, the Board subcommittee on the issue of street checks is considering whether to seek legal advice on the legality of the conduct of street checks and their consistency with the requirements of the Canadian Charter of Rights and Freedoms and the Ontario Human Rights Code.
>
> The Board understands that you have obtained three legal opinions on this matter. It would be extremely helpful to the Subcommittee to be able to review those opinions and determine whether it requires and additional legal advice on the matter.

[79] The remainder of the document sets out the board's understanding of the common interest it shares with the chief, and the board's agreement that it will not voluntarily disclose these opinions to outside parties and will assert privilege in them. The document is signed by all of the members of the board. [29]

[80] In my view, this document supports the police's submission that the legal opinions were shared between the chief and board because of their common interest in having a uniform understanding of the state of the law in this area.

[81] As a result of this finding of a common interest in the subject matter of the record, I find that its disclosure to board did not constitute a waiver by the chief of the privilege that existed in the document.

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[29] See also the portions of this document set out in paragraph 44 of this order.

2) Was solicitor-client privilege waived by the police (either expressly or by implication) when they disclosed the existence of the opinions and their conclusions in public meetings and in the PACER Report?

[82] As noted, the appellant asserts that any possible solicitor-client privilege that may have existed in the legal opinions was waived by the police as a result of their actions. The appellant submits that in offering the "bottom line" of the legal opinions in a public meeting, the chief voluntarily disclosed a "material part" of the privileged communications in question. The appellant also refers to the references to the legal advice received from the lawyers as found in the PACER report in support of his position that the privilege has been waived.

[83] The appellant also takes the position that the police implicitly waived any privilege in the legal opinions when they raised the legal advice in defence of their position that the practice of carding was legal and in support of their position as to the appropriate policy response to carding by the chief and the board. He submits that the principle of fairness allows for privilege to be waived by implication where a client's conduct reaches a certain point of disclosure.

[84] As noted above, throughout this appeal the police dispute the appellant's position. They state:

> The impromptu comments of the Chief and the [Deputy Chief], revealing, at best, the "bottom line" of the opinions they received, could in no way amount to waiver, either express or implied, over opinions which the Chief and [the police] have treated as confidential since they were received.

[85] The police also assert that sharing the crux of a legal opinion in a public meeting is not indicative of an intention to waive privilege over the opinion in its entirety. Rather, the police submit that in sharing the bottom line, the chief and deputy chief intended to strike an appropriate balance between transparency in public policy decision-making and ensuring that public officials have unfettered access to legal advice. The police also refer to previous decisions of this office in support of their position that disclosure of the "bottom-line" legal advice does not constitute waiver.

[86] In his sur-reply representations the appellant expands on his position that fairness requires that the opinions be disclosed, and refers to the following reasons:

> (1) To maintain the integrity and transparency of the decision-making process by the board on the creation of policy in the area of carding.
>
> (2) Because the chief publicly stated that he relied on the legal opinions in formulating its own proposed policies on carding, thereby putting its own state of mind and bona fides in issue.

> The appellant states that this is analogous to the line of civil cases where a party attempts to justify its actions or explain its state of mind by reference to legal advice it received.
>
> (3) Because the chief voluntarily provided the opinions to the board and the board used the opinions to justify its stance on carding.
>
> The appellant argues that he and many other community members, organizations and agencies that made submissions and deputations to the board on this issue are entitled to a "level playing field where all information before the board for its consideration on this issue is made public." The appellant asserts that the chief has "in effect been allowed to submit the opinions in private in order to advance its position before the board without having to expose the opinions to public scrutiny and without giving the other interested parties an opportunity to respond to them." He states that this is analogous to the situation in *R. v. Campbell* where implied waiver was found where the Crown sought to rely on legal advice to establish good faith but refused disclosure on the basis of solicitor-client privilege.

[87] The appellant also states:

> The Appellant not only relies on the public statements of the Deputy Chief and the Chief as originally submitted but also the disclosure of the opinions set out in the excerpt of the PACER Report …. Both the public statements and the Executive Summary of the opinions contained in the PACER Report amount to a material disclosure of the contents of the opinions and go far beyond merely disclosing the existence of the opinions or the fact that [the chief] had sought legal advice on the matter. The Executive Summary in particular provided a detailed synopsis of the opinions. The IPC decisions relied on by [the chief] are distinguishable on that basis. [The chief's] position that disclosing "the crux of legal advice" was necessary "to maintain a policy of transparency regarding information relied upon it in the decision-making process" is ironic, given that the obvious lack of transparency created by the … refusal to disclose the information at stake in this appeal. It is also important to note that the ultimate decision-maker regarding carding policy was [the board] and not [the chief].

Analysis/findings

[88] I have reviewed the legal opinions at issue in this appeal, as well as the references to the "bottom-line" of the legal advice received, as set out both in specific statements made by the chief and the deputy chief (referenced by the appellant) and in the PACER Report. In the circumstances, I find that disclosing the "bottom-line" did not

constitute waiver of the three legal opinions by the police.

[89] To begin, I find that neither the chief nor the board intended to waive privilege in the three legal opinions by their actions in releasing certain "bottom-line" information from the opinions. The actions of the chief and the board, including the execution of the document referenced above and signed by all board members when receiving the opinions from the chief, evidence an intention to maintain privilege in the legal opinions themselves, notwithstanding the actions by the chief and the board to disclose a summary of the advice. Accordingly, I do not find that there has been any express waiver of privilege.

[90] With respect to whether there has been a waiver of privilege other than by express intention, *S & K Processors* is a decision setting out the common law test for waiver of privilege. Order MO-2945-I summarizes the court's position as follows:

> [In that decision], the court recognized that "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require."[30] 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."[31]
>
> 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.

[91] Order MO-2945-I went on to determine whether the disclosure of a four-page executive summary of a much longer legal opinion provided to the Town of Aurora meant that the privilege in the legal opinion was waived. The adjudicator found that it was not, and stated:

> 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

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

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

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.

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".

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.

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.

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."

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.
>
> 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.
>
> I find therefore that there has been no implied waiver of privilege.

[92] I agree with the approach taken to this issue found in Order MO-2945-I and apply it to the circumstances of this appeal.

[93] As set out above, the appellant takes the position that the police implicitly waived any privilege in the legal opinions when they raised the legal advice in defence of their position that the practice of carding was legal and in support of their position as to the appropriate policy response to carding by the chief and the board.

[94] I do not agree that the police implicitly waived privilege when they referred to the legal opinions in the public meetings and in the PACER report.

[95] To begin, I find that the police obtained the legal opinions to "seek legal advice on the legality of the conduct of street checks and their consistency with the requirements of the *Canadian Charter of Rights and Freedoms* and the *Ontario Human Rights Code*", as set out in the document provided by the board to the chief when the legal opinions were provided to the board. Although the police subsequently referenced the three legal opinions in the public meetings and in the PACER report, I note that the three legal opinions were sought by the police on questions of law. The legal opinions provide legal advice on questions of law from lawyers of diverse experience.

[96] Although I accept that the bottom-line legal advice contained in the three legal opinions are referenced in some detail, particularly in the excerpts from the PACER report, I also note that although the PACER report refers to the legal advice it received from the three lawyers, it summarizes this information in a general way in the relevant portion of the report. Furthermore, as noted by the police in their representations, the board sought out and received its own separate legal opinion. The representations read:

> The mere disclosure of the bottom line of legal advice provided to the chief cannot be taken to constitute reliance on that advice as a good faith basis for a policing policy adopted by the Board on an issue that has been the subject of scrutiny, debate, and public consultation for over three

> years, *and on which the Board sought out and received its own separate legal opinion*. [emphasis added]

[97] I also note that one of the contributing authors of the PACER report is in-house counsel for the police.

[98] Furthermore, I note that by its nature a summary is unlikely to disclose the entire contents of the document it is intended to summarize, let alone three separate opinions. I have reviewed the information contained in PACER report, for which the summary of the legal portion consists of six pages. These six pages include an identification of the legal issues, a background section and a brief summary. It then identifies five specific legal issues and provides a one or two-paragraph summary of the advice relating to each. The summary then provides a conclusion and, on the final page, catalogues three main categories of "measures to reduce risk of harm occasioned by data collection."

[99] In contrast, as noted above, the records at issue are three legal opinions prepared by three named lawyers of diverse experience. Each of the legal opinions was provided in two parts and, combined, the number of pages total approximately 38. In the circumstances, I find that the disclosure of the information found in the PACER report, which summarizes certain findings in the three legal opinions, can be described as "relatively minimal".[32]

[100] The police have also referenced Order MO-1172 in support of their position. In that order, in which the adjudicator rejected the argument that a public report's reference to a "small portion of the 'bottom line'" of the advice contained in a legal memorandum constituted waiver of privilege in the memorandum, the adjudicator noted that 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

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[32] See orders MO-2500, MO-2573-I and MO-1233.

> with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.[33]

[101] I agree with this statement regarding the public interest in disclosure of a summary of some "bottom-line" information in the interest of transparency.

[102] On my review of the "bottom-line" advice that has been publicly disclosed, as well as on my review of the legal opinions themselves, I conclude that the police's attempt to provide transparency in one aspect of its decision-making process, by publicly disclosing the summary of the legal opinions, has not resulted in any unfairness or inconsistency requiring a finding of implied waiver.

[103] Lastly, I have considered the appellant's position that the principle of fairness allows for privilege to be waived by implication where a client's conduct reaches a certain point of disclosure, and that I ought to find that the police implicitly waived any privilege in the legal opinions when they raised the legal advice in defence of their position that the practice of carding was legal and in support of their position as to the appropriate policy response to carding by the chief and the board. As noted above, the appellant refers to the *Campbell* case in support of his position, and the police take the position that the principles set out in *Campbell* do not apply.

[104] The appellant states that a client can waive privilege by directly raising legal advice in a pleading or proceeding, thereby putting that legal advice in issue.[34] He refers to *Campbell*, where the RCMP relied on the advice of the Department of Justice in court to support its position that its actions were in good faith, and where the court found that the RCMP had waived privilege by implication and that the appellants were "entitled to have the bottom line of that evidence corroborated."[35] The appellant acknowledges that the litigation context in *Campbell* is different than the context in this appeal; however, he submits that it is a strong indicator that the chief waived privilege by implication by sharing the bottom line of the legal advice, especially because the police will ultimately rely on that advice as support for certain actions and policies.[36]

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[33] At pages 5 and 6.

[34] [1999] 1 SCR 565 [*Campbell*]; *Law of Evidence in Canada* at para 14.146.

[35] *Campbell*, *ibid*, at para 47.

[36] As noted above, the appellant provided an article with his submissions, which discusses a case where the Ontario Superior Court of Justice held that referring to the receipt of legal advice in an affidavit amounts to the waiver of privilege. Again, the appellant acknowledges that the context of this appeal differs from the litigation context in *Ebrahim v Continental Precious Minerals*, but suggests that revealing the conclusions of a legal opinion in a public meeting concerning public policy amounts to waiver of solicitor-client privilege.

[105] As noted above, the police assert that the appellant's reliance on *Campbell* is misplaced. In *Campbell,* the RCMP were found to have engaged in illegal conduct, and the accused argued there had been an abuse of process and sought to stay the proceedings. In resisting the requested remedy, the RCMP claimed to have acted in good faith based upon advice from Crown Counsel. The legal advice had been obtained specifically for the investigation at issue, and the RCMP's reliance on that advice in asserting their good faith was explicit.

[106] In contrast, the police submit that the chief has never suggested that the legal opinions at issue constitute a "justification" for the police's community contacts policy. The police also submit that the disclosure of the bottom line of advice provided to the chief cannot be taken to constitute reliance on that advice as a good faith basis for a policing policy adopted by the board on a controversial issue that that board sought out and received its own separate legal opinion on.

[107] In his sur-reply representations, the appellant states that:

> The case of *Campbell* … is an example of the application of the doctrine of implied waiver of solicitor-client privilege where waiver will be implied when required by fairness.

[108] I have reviewed the *Campbell* decision and the representations of the parties on the possible impact of that decision to the issues before me. I find that the circumstances giving rise to the disclosure of the legal advice in *Campbell* are quite distinct from the ones at issue in this appeal, and do not apply in the circumstances this appeal, where a public institution references legal advice sought and received in the context of making decisions on matters of public policy. The legal opinions (as well as other legal advice provided to the board) were one component of the process undertaken by the board to make the decisions it did. In addition, on my review of the statements made by the chief and the deputy chief in the public meetings referenced by the appellant, I conclude that the references to the "bottom-line" advice by these individuals is insufficient to support a finding of implied waiver of solicitor-client privilege as found in *Campbell*. As a result, I find that the principle of fairness does not result in a finding that privilege in the legal opinions was waived by implication.

Exercise of Discretion

General principles

[109] The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

[111] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[37] This office may not, however, substitute its own discretion for that of the institution.[38]

Relevant considerations

[112] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[39]

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

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[37] Order MO-1573.

[38] Section 43(2).

[39] Orders P-344 and MO-1573.

- 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 and findings

[113] The police submit that the chief considered whether to exercise his discretion to waive the privilege he claims over the opinions, and the extent to which some of the material could be released to the public. The police confirm that the chief remains of the view that privilege should not be waived, and that this position is "in his unfettered discretion" to take. The police also submit that, to the extent that information contained in the records can be severed and made public, that information has been made public as it was included in the PACER report.

[114] The police also submit that the exercise of discretion was made in good faith, was respectful of the need for the disclosure of information on a matter of public debate, yet sensitive to the need of the chief to be able to seek and receive legal advice in confidence.

[115] The appellant states that he is not surprised that the police claim to have exercised its discretion in determining not to waive privilege. While the police claim to have obtained beneficial intelligence through the carding process, the appellant does not believe that the police have ever publicly substantiated those claims.

[116] On my review of the representations of the parties, I see no basis upon which to interfere with the police's exercise of discretion. The police took into account relevant considerations and there is no evidence that it acted in bad faith or for an improper purpose. The police confirm that they considered the fact that certain information had been released to the public and that the solicitor-client privilege applies to the records. In the circumstances, I see no error in the police's exercise of discretion to apply the section 12 exemption to the records, and I uphold their exercise of discretion.

ORDER:

I uphold the decision of the police that the records qualify for exemption under section 12 of the *Act*, and dismiss this appeal.

Original Signed by: November 3, 2016

Frank DeVries
Senior Adjudicator