Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3630

Appeal MA13-436

Town of Ajax

June 29, 2018

Summary: The appellant filed a request to the town for access to various records relating to a retaining wall built in the mid 1980's. The town granted the appellant partial access but claimed a number of exemptions to withhold access to a study and correspondence exchanged between the town and third parties. None of the third parties provided submissions during the inquiry process. The adjudicator finds that, but for a small portion of one record containing the personal information of complainants, the records do not qualify for exemption under sections 6(1)(b), 7(1), 10(1), 12 or 14(1) and orders the town to disclose these records to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) definition of "personal information", 6(1)(b), 7(1), 10(1), 12, and 14(1).

Cases Considered: *RSJ Holdings Inc v The Corporation of the City of London*, 2005 Can LII 43895 (ON CA) at para 19; *London (City) v RSJ Holdings Inc*, 2007 SCC 29.

OVERVIEW:

[1] The appellant filed a ten-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of Ajax (the town) for access to various records relating to a retaining wall built in a subdivision in the 1980's. Prior to receiving the appellant's request, the town obtained an order requiring the appellant to pay for the repair of a retaining wall on his property.

[2] The town granted the appellant partial access to the responsive records claiming that the exemptions under sections 6(1)(b) (closed meeting), 7(1) (advice or

recommendations), 10(1)(a) or (b) (third party information) and 14(1) (personal privacy) applied to the withheld portions. The town provided an index of records with its decision letter.

[3] The appellant appealed the town's decision to this office and a mediator was assigned to the appeal.

[4] During the mediation stage of the appeal, the appellant advised that he is only seeking access to the responsive records identified as "file 12" in the index of records, which comprise of 13 withheld documents. Mediation did not result in a settlement and the appeal was moved to the adjudication stage of the appeal process for an inquiry.

[5] During the inquiry, a Notice of Inquiry was sent to the town and five companies involved the consultation process or construction of the retaining wall. The town provided brief representations in response but none of the companies (affected parties) responded.[1] The town was provided an opportunity to make supplemental representations, which it did. The town's representations were shared with the appellant, who made representations in response. The town and the appellant also were given an opportunity to make additional representations on the town's late raising of the solicitor-client privilege exemption under section 12.[2]

[6] The appeal file was subsequently transferred to me to continue the adjudication of this appeal. In this order, I find that the vast majority of the records withheld by the town do not qualify for exemption and order the town to disclose these records to the appellant. However, I uphold the town's decision to withhold the names and address information of complainants identified in record 11.

RECORDS:

[7] The records at issue are the following:

Description of record	**Number of Pages**	**Access**	**Exemption Claimed**
Record 1: Letter from design/site engineers to town, dated July 29, 1998	6	withheld	6(1)(b) 7

[1] The materials sent to two of the affected parties was sent back to this office unopened. It appears that the two companies are no longer in business.

[2] At this time, the parties were also given an opportunity to provide representations in support of their positions on whether the town's solicitor-client privilege claim under section 12 should be allowed given that it was raised after the prescribed amount of time set out in section 11 of the *IPC Code of Procedure*. However, neither party made representations on this issue and I am satisfied that the appellant is not prejudiced and the integrity of the appeals process is not compromised as the town's late section 12 claim was made in its representations in response to the first Notice of Inquiry this office sent. Therefore, the late raising of this exemption did not result in any delay in the adjudication process.

			10(1)(a) & (b) 12
Record 3: Letter to testing company, dated May 26, 1998. Letter to town's engineering consultant, dated May 25, 1998 Letter to design/site engineers from town, dated May 25, 1998. Letter from testing company to town about retaining walls, dated June 16, 1998 Letter from testing laboratory about clarification of Wall Study, dated June 16, 1998	1 2 2 1 7	withheld	6(1)(b) 7 10(1)(a) & (b) 12
Record 4: 1998 Retaining Wall Study for named subdivision by testing company, dated April 1998	32	withheld	6(1)(b) 7 12
Record 5: Fax from developer to town about installation, payment information and an agreement, dated June 22, 1994	10	withheld	10(1)(a) & (b) 12
Record 6: Letter from town to developer about the retaining wall, dated June 16, 1994 **Attached:** Letter from manufacturer, dated June 14, 1994	1 1	withheld	10(1)(a) & (b) 12
Record 7: Letter from town to manufacturer about the wall's warranty, dated June 7, 1994	1	withheld	7 12 14(1)
Record 8: Letter from manufacturer to town, dated May 27, 1994	1	withheld	10(1)(a) & (b) 12
Record 9: Letter from town to manufacturer, dated February 18, 1994 **Attached:** Letter from town to	1 2	withheld	7 12

manufacturer, dated October 25, 1993			
Record 10: Letter from the design/site engineers to the town, dated August 19, 1993 **Attached:** Letter from developer to town, dated July 30, 1993	2 1	withheld	10(1)(a) & (b) 12
Record 11: Letter from town to design/site engineers, dated August 4, 1993 **Attached:** Letter from town to developer, dated July 13, 1988	1 1	disclosed partially withheld	N/A 12 14(1)
Record 13: Letter from developer to design/site engineers, dated July 20, 1988	1	withheld	10(1)(a) & (b) 12
Record 14: Letter from manufacturer to developer, dated June 17, 1988	2	withheld	10(1)(a) & (b) 12 14(1)
Record 15: Letter from the developer to a construction company, dated May 13, 1988 **Attached:** Letter to developer (author unknown), dated May 19, 1988	2 1	withheld	10(1)(a) & (b) 12

ISSUES:

A. Do records 7, 11 and 14 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate? Does the mandatory exemption under section 14(1) apply to the personal information in these records?

B. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records?

C. Does the mandatory third party information exemption at section 10(1) apply to records 1, 3, 5, 6, 8, 10, 13, 14 and 15?

D. Does the discretionary closed meeting exemption at section 6(1)(b) apply to records 1, 3 and 4? Does the exception at section 6(2)(c) apply?

E. Does the discretionary advice or recommendations exemption at section 7(1) apply to records 1, 3, 4, 7, 9? Do any of the exceptions at section 7(2) apply?

DISCUSSION:

A. Do records 7, 11 and 14 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate? Does the mandatory exemption under section 14(1) apply to the personal information in these records?

[8] The town withheld portions of records 7, 11 and 14[3] claiming that the personal privacy provisions under section 14(1) apply. In order to determine whether section 14(1) applies, it is necessary to decide whether records 7, 11 and 14 contain personal information. In support of its position, the town states that the records "…contain personal comments/observations made by the writer that would be inappropriate for release due to the nature of the comments and the potential litigation issues."

[9] 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.[4]

[10] 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.[5]

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

[12] Records 7, 11 and 14 consist of letters exchanged between the town and the manufacturer, the town and its engineering consultant and between the manufacturer and developer. I have reviewed the letters and note that one portion of the letter attached to record 11 identifies the names and addresses of individuals who made complaints to the town about the retaining walls in the subdivision. Accordingly, I find that this information constitutes their personal information as defined in paragraphs (d) and (h) of section 2(1) (address along with an individual's name). I also find that disclosure of this information to the appellant would engage the privacy provisions under section 14(1) taking into consideration the factor favouring privacy protection at section 14(2)(h) (supplied in confidence).[7] This office has consistently held that there is

---

[3] The index of records provided by the town did not identify record 14 as a record exempt under section 14(1). However, in its representations the town takes the position that the personal privacy exemption under section 14(1) applies to record 14 along with records 7 and 11.
[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[7] Section 14(2)(h) states: A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether the personal information has been supplied by the individual to whom the information relates in confidence.

a reasonable expectation of confidentiality when an individual's personal information is collected while filing a complaint.[8] Given that none of the exceptions in section 14(1) or situations in section 14(4) apply in the circumstances of this appeal and the appellant has not raised any listed or unlisted factors favouring disclosure under section 14(2) with regard to the complainants' information, I find that disclosure of this information to the appellant would constitute an unjustified invasion of personal privacy under section 14(1) and uphold the town's decision to withhold this information.

[13] However, I find that the remaining information contained in records 7, 11 and 14 do not constitute the personal information of any identifiable individual. I am satisfied that the letters were exchanged between individuals acting in their professional, official or business capacities. My review of the records does not support the town's assertion that the records "contain personal comments/observations" of these individuals. Instead, the records appear to capture the professional communications of various individuals regarding issues relating to the retaining walls. Accordingly, I reject the town's argument that disclosure of the records would reveal something of a personal nature about the writers. In addition, I find that the portions of the records which identify lot numbers or property addresses not linked to a named complainant does not constitute "personal information" as defined in section 2(1).

[14] Accordingly, the personal privacy provisions under the *Act* cannot apply to records 7, 11 and 14 but for the complainants' information in record 11 that I found exempt under section 14(1). I will go on to determine whether any of the other exemptions claimed by the town apply to these records.

B. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records?

[15] Section 12 states as follows:

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

[16] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[17] Based on my review of the town's representations, it appears that the town takes the position that the litigation privilege at branch 1 and 2 apply to the withheld records. The town's submissions do not claim that the statutory or common law solicitor-client communication privilege apply in the circumstances of this appeal.

---

[8] See for examples Orders MO-2859 and MO-3426.

Branch 1: common law privilege

Litigation privilege

[18] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[9] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[10] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[11] For branch 1 of the litigation privilege to apply in this appeal, the litigation must be ongoing or reasonably contemplated.[12]

Statutory litigation privilege

[19] This privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[13]

[20] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[14]

[21] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[15]

Representations of the parties

[22] In its representations, the town states:

> The documentation in question relates to retaining walls built in a subdivision in the mid 1980's. The retaining walls were built to code at the time of construction, and were signed off by the appropriate officials at the time of inspection. The opinion of the municipality has been, and remains, that it is the owner of the property(s) which bears the responsibility of maintaining and repairing any and all retaining walls on

---

[9] *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).

[10] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

[11] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

[12] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

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

[14] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

[15] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

> private property. Where a retaining wall has been located on municipal property, the Town has absorbed any costs for repairs and maintenance.
>
> The Town submits that the documents in regard to this issue had been collected, prepared and/or used by counsel in contemplation of litigation and as such the litigation privilege pertains to these papers and materials created or obtained especially for the litigations, whether existing or contemplated.
>
> There was a litigation filed against the Town in the late 1990's which facilitated the initial Retaining Wall Study dated April 1998 (Record 4).

[23] The town goes on to state that the records:

> …were created for the dominant purpose of reasonable contemplated litigation in the late 1990's. The state of the retaining walls in this area has been an ongoing matter between the Town and homeowners, part of the issue being many of the contractors involved with the initial construction are no longer in business or reachable. The fact that there is an ongoing litigation on the retaining walls on [appellant's street address] at this time substantiates that this matter has not been resolved.

[24] The appellant takes the position that the town has "supplied very little evidence" in support of its reliance on section 12 and questions the town's assertion that the wall study was created in response to actual or contemplated litigation. In support of its position, the appellant states:

> The Town claims that the report and the letters are subject to litigation privilege. No evidence has been provided that the dominant purpose for the report's creation was for litigation. The Town has never mentioned who commissioned the report. We believe it was commissioned by a Town employee and not by the City Solicitor for the dominant purpose of litigation. If after the report was prepared it was given to the City Solicitor for use in any potential litigation the dominant purpose test is not met. The Town cannot use its solicitor as a vehicle for hiding information, which in this case it is attempting to do.
>
> The Town also suggests that the letters were prepared in contemplation of litigation. This cannot be the case. The letters were written in order to determine whether the retaining wall was under warranty and who should fix it. The dominant purpose of writing the letters was not for use by the City Solicitor in any litigation. The fact that the letters may have later been given to the City Solicitor do not bring them within the litigation privilege.
>
> Furthermore, even if litigation privilege at one time attached to the File 12 documents, the privilege ends once the litigation ends. There is no indication that the Town's efforts to force [the appellant] to replace the

> wall is in any way related to the as of yet undisclosed contemplated litigation. The fact that almost 20 years have passed since the undisclosed contemplated litigation is evidence that is not related.

Decision and Analysis

[25] Both the common law and statutory litigation privileges require that the litigation be reasonably contemplated or ongoing at the time the records were created for the privilege to apply. As stated above, litigation privilege protects records created for the dominant purpose of litigation to ensure that counsel preparing a case for trial has a "zone of privacy".

[26] Though I accept the town's evidence that the retaining walls in the subdivision in question had "been an ongoing matter between the Town and homeowners", I find there is insufficient evidence to demonstrate that the records before me were prepared for the dominant purpose of ongoing or reasonably contemplated litigation.

[27] In making my decision, I note that the only specific ongoing or contemplated litigation identified by the town is the litigation matter with the appellant. However, it appears that the records at issue were created approximately 20 years before the legal matter between the town and the appellant was contemplated.

[28] The town submits that the records were created in response to other reasonably contemplated litigation in the late 1990's. The town also submits that the study was commissioned in response to a litigation matter filed against it. However, the town's representations did not provide specifics of the contemplated litigation or identify any adverse parties. Based on my review of the records, it appears that years before the wall study was commissioned, the town made inquiries about the warranty and had received resident complaints. The town subsequently retained a consultant to prepare the wall study.

[29] In my view, evidence that the town commenced to make inquiries about the warranty and obtained a wall study fails to demonstrate that litigation was contemplated when it gathered this information. It is a well established principle that the "dominant purpose test" requires more than a vague or general apprehension of litigation.[16] The town is obligated to investigate and resolve property standards issues and there is no evidence before me suggesting that the town's creation of the records or request for a study was anything more than it discharging its duties. In addition, the fact that the town received complaints from residents before it commissioned the study does not persuade me that litigation was ongoing or contemplated at the time the records were created. Again, I was not presented with evidence demonstrating that litigation was ongoing or was being contemplated in response to issues the town began

---

[16] See *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, Butterworth's: Toronto, 1993, pages 93-94 quoting *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co. v Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003) Toronto Doc. 570/02 (Ont. Div. Ct.)).

to investigate in the mid 1980's and continued to investigate into the 1990's.

[30] Finally, I reviewed the records themselves and note that the wall study identifies the writer of the report along with the individuals employed by the town who authorized and coordinated the work to complete the study. There is no evidence that the town's legal department had any involvement in commissioning the wall study. Though it appears that the town copied the town's solicitor on its correspondence to its engineers enclosing copies of the study there is nothing in the content of that letter or the other letters forming the records at issue which suggest that litigation was ongoing or contemplated.[17]

[31] Having regard to the above, I conclude that the records at issue were not prepared for the dominant purpose of ongoing or reasonably contemplated litigation as is required for a finding of litigation privilege under either branch. Accordingly, I find that the records at issue do not constitute information falling within the ambit of the statutory or common law litigation privileges under section 12.

[32] As a result of my decision, I will order the town to disclose the portions of record 11 which I have found do not contain "personal information" as defined in section 2(1) as I have found that the remaining portions of that record also do not qualify for exemption under section 12.

[33] I will go on to determine whether the remaining records qualify for exemption under sections 6(1)(b), 7(1) and/or 10(1).

C. Does the mandatory third party information exemption at section 10(1) apply to records 1, 3, 5, 6, 8, 10, 13, 14 and 15?

[34] The town claims that the above-referenced records qualify for exemption under sections 10(1)(a) and (b), which state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

[35] Section 10(1) is designed to protect the confidential "informational assets" of

[17] As noted above, the town did not claim that the solicitor-client communication privilege under branch 1 or 2 apply to the records.

businesses or other organizations that provide information to government institutions.[18] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[19]

[36] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Representations of the parties

[37] In its representations, the town states:

> Records [1, 3][20], 5, 8, 10, 13, 14 and 15 contain technical or commercial information related to the initial design or remedial work done to the retaining walls in this subdivision. The issue is sensitive for a variety of reasons. Several parties were involved with the initial project and remedial work either in the actual construction or in a consulting capacity, none of which were willing or able to identify where a fault in construction may have occurred. Much of the documentation relating to this matter addresses why they would not or could not be responsible for the failure of the structures. The town maintains that release of this information could prejudice significantly the competitive position, or interfere significantly, with the contractual or other negotiations of the organizations involved. There is also a reasonable expectation that the release of this information could result in undue loss to parties involved as a result of the current litigation of the retaining wall failure.

[38] As previously mentioned, the five companies involved in the consultation process or construction of the retaining wall were given an opportunity to provide representations but did not.

---

[18] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[19] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[20] Though the town's representations did not reference records 1 and 3 with its section 10(1) claim, I note that the index of records it provided with its access decision included these records.

Part 1: type of information

[39] Based on my review of the records, I am satisfied that they contain technical information.[21] I am also satisfied that record 5, which contains payment information and invoices, contains financial information[22]. Accordingly, I find that the first part of the three part test in section 10(1) has been met.

Part 2: supplied in confidence

[40] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[23]

[41] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[24]

[42] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[25]

[43] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access

---

[21] *Technical information* has been defined in previous orders as is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. (See Order PO-2010)
[22] *Financial information* has been defined in previous orders as referring to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs. (See also PO-2010).
[23] Order MO-1706.
[24] Orders PO-2020 and PO-2043.
[25] Order PO-2020.

- prepared for a purpose that would not entail disclosure[26]

[44] The town's representations do not specifically address this issue. The records consists of correspondence exchanged between the town and the third parties for a ten year period from 1988 to 1998. Records 1, 8 and 10 are letters the third parties provided the town which respond to questions raised by the town in their correspondence to the third parties. Record 3 comprises letters the town sent to the third parties and one of the third party's response. Record 5 consists of a fax cover page, cheque image and purchase order the developer sent to the town. Finally, records 13, 14 and 15 are correspondence exchanged between the third parties, which in two instances were copied to the town.

[45] Though it appears that many of the withheld letters were directly supplied to the town by a third party, this cannot be said for all of the records as some of the letters were exchanged between third parties (although ultimately included in the town's record holdings).

[46] In any event, for the second part of the test in section 10(1) to apply, the party resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit. In this case, the third parties did not provide representations upon being notified of the appeal and the town's representations do not address the confidentiality issue. I have reviewed the withheld records and am satisfied that the content of the records do not contain any language which would suggest that the information was being communicated to the town on the basis that it was confidential and that it was to be kept confidential. In fact, the numerous individuals copied on many of the letters suggest the opposite. In the absence of evidence from the third parties, I find that there is insufficient evidence to support a finding that the records were treated consistently by the town and the third parties in manner that indicates a concern for confidentiality.

[47] Having regard to the above, I find that the town has failed to establish a reasonable basis to conclude that the records at issue were supplied to it in confidence. Accordingly, part 2 of the three-part test in section 10(1) has not been met.

[48] Since all three parts of the section 10(1) test must be met in order for section 10(1) to apply, the exemption cannot apply in the circumstances of this appeal and it is not necessary that I also consider the harms in part 3 of the test.

[49] As none of the exemptions claimed for records 5, 6, 8, 10, 13, 14 and 15 have been found to apply, I will order the town to disclose these records to the appellant. I will go on to determine whether the exemptions under sections 6(1)(b) or 7(1) apply to the remaining records.

---

[26] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

D. Does the discretionary closed meeting exemption at section 6(1)(b) apply to records 1, 3 and 4? Does the exception at section 6(2)(c) apply?

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

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

[51] 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[27]

[52] 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.[28]

Parts 1 and 2 – council held a meeting authorized by statute to be held in the absence of the public

[53] 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*.[29]

[54] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?[30]

[55] The town takes the position that Records 1, 3 and 4 qualify for exemption under section 6(1)(b). The town submits that the wall study (Record 4) was "presented and discussed in an in-camera session of Council" which occurred on June 4, 1998. The town also submits that the "threat of potential litigation definitely made this item

---

[27] Orders M-64, M-102 and MO-1248.
[28] Order MO-1344.
[29] Order M-102.
[30] *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

worthy of in-camera discussion". The town provided a copy of the minutes of the "in-camera" portion of the June 4, 1998 meeting. The meeting minutes were not shared with the appellant for confidentiality reasons.

[56] The appellant submissions question whether the meeting in question was properly constituted by a committee and authorized to be held in-camera. The appellant submits that the "subject matter does not fall within the very very limited scope of matters which do not require a public hearing". The appellant cites the provisions of the *Municipal Act*, 1990 which would have been in force at the time the meeting in question was convened and argues that discussion of the study in a closed session would have not been authorized.

[57] I agree with the appellant's position that the *Municipal Act,* 1990 and its present version contain identical provisions which authorizes closed sessions to discuss litigation matters. Section 239(2)(e) states that:

> a meeting or part of a meeting may be closed to the public if the subject matter being considered is litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board".[31]

[58] In support of its position that the meeting was not authorized to be held in-camera, the appellant refers to a Court of Appeal[32] decision which found that a report which recommended that a land use study be undertaken, "cannot be said to be litigation or potential litigation simply because it was introduced by the city's solicitor at the closed meetings". The Court of Appeal found that the report was not prepared for the purpose of litigation but rather to support the recommendation.

[59] Having regard to the representations of the parties, I am not satisfied that the town's June 4, 1998 meeting was authorized by statute to be held in the absence of the public. In my view, the town has failed to adduce sufficient evidence to demonstrate that the subject matter being considered at the meeting related to an actual or potential litigation matter. The matters discussed related to the study was presented to council by an employee in the city's Property Maintenance office, who provided a verbal update. In my view, the circumstances in this appeal are similar to those in the Court of Appeal case referred to above. Based on my review of the confidential meeting minutes, it appears that the matters relating to the study was discussed at the meeting in question not the topic of contemplated litigation.

[60] Though I am satisfied that a council meeting took place, thus meeting part 1 of the test, I find that the meeting was not authorized by statute to be held in the absence of the public. Accordingly, I find that part 2 of the test has not been met.

---

[31] *Municipal Act*, 2001.

[32] *RSJ Holdings Inc v The Corporation of the City of London,* 2005 Can LII 43895 (ON CA) at para 19, upheld by the Supreme Court of Canada in *London (City) v RSJ Holdings Inc,* 2007 SCC 29.

[61] Since all three parts of the section 6(1)(b) test must be met for the exemption to apply, it cannot apply in the circumstances of this appeal. However, for the sake of completeness, I will go on to make a finding about part 3 of the test.

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

[62] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[33]

[63] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;[34] and
- "substance" generally means more than just the subject of the meeting.[35]

[64] The town's submissions assert that the study "was never discussed in an open session of counsel, nor was it released to the public at any time". The town takes the position that disclosure of Records 1, 3 and 4 would reveal the actual substance of deliberations which took place at its June 4, 1998 meeting. In support of its position, the town states:

> The Retaining Wall Study (Record 4) was prepared by a consultant by the Town, and contains advice or recommendations on remedial work to be done on the retaining walls.
>
> …
>
> The Town of Ajax did not have an Engineering division at the time the walls were constructed. Instead, it had an engineering firm on retainer to handle this aspect of development in the Town. The remaining correspondence in this file with the various companies involved in this project relates to, or references, this study. Release of this correspondence would reveal the substance of deliberations of the closed meeting in which the report was discussed.
>
> Records 1 and 3 specifically address the issues, concerns and recommendations noted in Record 4, and it is our belief that release of

---

[33] Orders MO-1344, MO-2389 and MO-2499-I.
[34] Order M-184.
[35] Orders M-703 and MO-1344.

> these records would reveal information contained in Record 4 and would therefore also be exempt from release under section 6 of *MFIPPA*.

[65] The appellant submits that the town has not established that the third part of the test in section 6(1)(b) has been met. In support of this position, the appellant states:

> For each letter and the report, [t]he Town must prove that its disclosure would reveal the Town's decision making process at the closed meeting. The Town claims that the various letters in File 12 reference or relate to the study. [Previous decisions have found that] references are not enough to rely on the Section 6 exemption. We also believe that nothing contained in the report would disclose deliberation conducted at the supposed meeting.

[66] I have reviewed the parties submissions along with the confidential meeting minutes provided by the town and am not satisfied that disclosure of Records 1, 3 or 4 would reveal the substance of council's deliberations on June 4, 1998. In my view, the records do not contain any information which would reveal the actual considerations, debates or decisions that were deliberated by council. In fact, based on the information provided by the town there is insufficient evidence that any deliberations took place at the meeting in question.

[67] Accordingly, I find that part 3 of the three-part test has not been met and the exemption under section 6(1)(b) cannot apply to records 1, 3, or 4. In any event, even if I found that the closed meeting exemption applied to these records, it would appear that the exception in section 6(2)(c) applies to most of the records.

[68] Section 6(2) of the *Act* sets out exceptions to sections 6(1)(a) and/or (b). It reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> (c) the record is more than twenty years old.

[69] My review of the records suggests that all of the records, but for one letter, are more than twenty years old as of the date of this order.

[70] I will now consider whether the town's final exemption claim applies to the records for which it is claimed.

E. Does the discretionary advice or recommendations exemption at section 7(1) apply to records 1, 3, 4, 7, 9?

[71] Section 7(1) states:

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

[72] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[36]

[73] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[74] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [37]

[75] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[76] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[38]

[77] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[39]

Representations of the parties

[78] The town submits that Records 1, 3, 4, 7 and 9 qualify for exemption under section 7(1). The crux of the town's argument is that the study (Record 4) prepared by its consultant contains advice or recommendations regarding remediation issues and

---

[36] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[37] See above at paras. 26 and 47.
[38] Order P-1054.
[39] *John Doe v. Ontario (Finance)*, cited above, at para. 51.

that the release of study and correspondence which reference the study in Records 1, 3, 7 and 9 would reveal advice or recommendations provided to the town.

[79] The appellant responded:

> We believe the report contains solely factual material addressing the problems with the retaining wall.

[80] The appellant's submissions raise a question as to whether the exception at section 7(2)(a) applies. This section states:

> Despite [section 7(1)], a head shall not refuse under subsection (1) to disclose a record that contains factual material

[81] The appellant also questions whether the consultant preparing the report was in fact a consultant or just one of the third parties involved in the design and construction of the retaining wall.

[82] I have reviewed the study at Record 4 and am satisfied that it was prepared by a consultant independent of the work completed by the engineers and construction companies hired to design and construct the retaining walls. It appears that the consultant was retained to verify the dimensions of the retaining walls and test the drainage system. In doing so, the consultant conducted site visits, reviewed the grading plans in the town's office and interviewed the town's engineer and the manufacturer of the wall. In my view, the study does not contain advice or recommendations which suggest a course of action that will ultimately be accepted or rejected. I note that page 12 contains a brief statement capturing the authour's conclusion. However, I find that the authour's statement is too general and cannot be described as identifying policy options or specific courses of action for a decision-maker to follow or not. In addition, I am also satisfied that the author's clarification set out in Record 3 is too general to constitute advice or recommendations for the purposes of section 7(1). Finally, I find that the references to the study contained in remaining correspondence found in Records 1, 3, 4, 7 and 9 also do not qualify for exemption under section 7(1) for the same reasons.

[83] In my view, the study appears to contain mostly of factual information[40] which would engage the exception at section 7(2)(a).[41] I note that most of the report contains information the consultant gathered from its site visits, inspections and interviews. A large portion of the study also reviewed principles from the Canadian Geotechnical Society and contain diagrams and maps.

[84] I find that the study appears to contain field research results which would

---

[40] Previous decisions have found that "factual material" refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record. See for example Order 24.

[41] Section 7(2)(a) states: Despite subsection 7(1), a head shall not refuse under subsection (1) to disclose a record that contains factual material.

engage the exception at section 7(2)(g).[42] "Field research" is a systematic investigation, conducted away from the laboratory and in the natural environment, for the purpose of establishing facts and reaching new conclusions.[43] Based on my review of the study, I am satisfied that most, if not all, of the study at Record 4 contains the results of field research undertaken before the town formulated a plan on how and if it would remediate the wall.

Summary

[85] I find that Records 1, 3, 4, 7 and 9 do not qualify for exemption under section 7(1) as they do not identify policy options or identify a course of action to be accepted or rejected in relation to a decision the town is to make. In any event, even if I found that the records contain "advice or recommendations", it would appear that the exceptions at sections 7(2)(a) and (g) apply to most, if not, all of the records.

[86] As no other exemptions have been claimed by the town, I will order it to disclose Records 1, 3, 4, 7 and 9 to the appellant.

ORDER:

1. I do not uphold the town's exemption claims under sections 6(1)(b), 7(1), 10(1)(a)/(b) and 12.

2. I uphold the town's section 14(1) exemption claim, in part.

3. I order the town to disclose Records 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 15 to the appellant by **August 8, 2018** but not before **August 3, 2018**. For the sake of clarity, in the copy of Record 11 enclosed with the order to be sent to the town, I have highlighted the portions of the record which **are not** be disclosed to the appellant.

4. In order to verify compliance with order provision 3, I reserve the right to require a copy of the records to be disclosed by the town to be sent to me.

Original Signed By June 29, 2018

Jennifer James
Adjudicator

[42] Section 7(2)(g) states: Despite subsection 7(1), a head shall not refuse under subsection (1) to disclose a record that contains a report containing the results of field research undertaken before the formulation of a policy proposal.

[43] Order P-763.