

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3813

Appeal MA17-606

Niagara Peninsula Conservation Authority

August 6, 2019

**Summary:** The Niagara Peninsula Conservation Authority (the NPCA) received a request for access to records relating to its investigation of a former board member's actions in relation to the hiring of an auditor. The NPCA denied access to one record, a report from its legal counsel, on the grounds that it is a solicitor-client privileged communication and therefore exempt under section 12 (solicitor-client privilege). In this order, the adjudicator upholds the NPCA's application of section 38(a) (discretion to refuse requester's own information), together with section 12, to the record and finds that the NPCA did not waive privilege over it. The adjudicator also upholds the NPCA's exercise of discretion and dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.M.56, as amended, sections 2(1) (definition of personal information), 12 and 38(a).

**Orders Considered:** Orders M-11, MO-1172, MO-1233, MO-2945-I, MO-3497, and P-1551

**Cases Considered:** *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.); *Stevens v. Canada (Prime Minister)* (1988), 161 D.L.R. (4<sup>th</sup>) 85.

### OVERVIEW:

[1] In 2017, the Niagara Peninsula Conservation Authority (the NPCA) voted to publicly censure a member of its board of directors for what it concluded were alleged

improprieties involving the bidding process associated with the hiring of an auditor.<sup>1</sup> After resigning from the NPCA, the former member made a request to the NPCA under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

All documents created and gathered in the preparation of the Niagara Peninsula Conservation Authority's investigation into the actions of [the former member] pertaining to the Request for Proposal and the hiring of an auditor, an Interim, Draft and/or Final Report into any complaint of [a named individual] regarding [the former member]. In particular and in addition to the foregoing, the requester seeks access to all copies of:

1. All investigation notes used in the preparation and findings of [a named individual] and/or [a named law firm];
2. All interview notes made in the course of interviewing the witnesses, all statements, emails, testimony made by the witnesses and given to the investigator(s); and
3. All internal communication between representatives of the NPCA pertaining to the investigation and its findings.

[2] The NPCA issued a decision granting access to what it wrote were all records responsive to the request "without redaction or exemption."

[3] The requester, now the appellant, appealed the decision, asking that the NPCA provide an index of the responsive records, including whether or not it had withheld any records, and if so, pursuant to which section of the *Act*. In his appeal, the appellant further asked the NPCA to advise him whether or not there existed any responsive records pertaining to the request for "any interim, draft and/or final report into any complaint of a named individual regarding [the appellant]", and whether these were withheld.

[4] The NPCA issued a revised decision with an index of records to accompany its original decision.

[5] The NPCA's revised decision also advised the appellant that the NPCA had located a record that was not on its servers, emails, or in its files at the time of its initial search for records in response to the appellant's request. The NPCA did not disclose this record, however, claiming that it is a privileged communication between a solicitor and client and therefore exempt from disclosure in accordance with section 12 (solicitor-

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<sup>1</sup> This information is contained in news media articles provided by the appellant and available in the public domain, as well as in the non-confidential portions of the parties' submissions.

client privilege) of the *Act*.

[6] The appellant seeks access to this record.

[7] For the reasons that follow, I uphold the NPCA's decision to deny access to the record. I find that it is a direct communication of a confidential nature between the NPCA and its legal counsel, prepared for the purpose of giving professional legal advice, and that it is therefore subject to solicitor-client privilege and exempt from disclosure pursuant to section 38(a) (discretion to refuse access to requester's own personal information), with section 12, of the *Act*. I also find that the NPCA did not waive its claim of privilege over the record in the circumstances of this appeal and that it properly exercised its discretion in its decision to withhold it.

## **RECORD:**

The record is a legal opinion prepared by legal counsel for the NPCA.

## **ISSUES:**

- A. Does the record contain personal information, and if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) (discretion to refuse requester's own personal information) in conjunction with section 12 (solicitor-client privilege) apply to the record?
- C. Did the NPCA properly exercise its discretion in withholding the record?

## **DISCUSSION:**

### **Issue A: Does the record contain personal information, and if so, to whom does it relate?**

[8] In its representations in response to the Notice of Inquiry, the NPCA added as an issue the question of whether the record contains personal information as that term is defined in section 2(1) of the *Act*. Both parties made full submissions on this issue.<sup>2</sup>

[9] The NPCA submits that the information in the record contains the personal information of an individual other than the appellant.

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<sup>2</sup> In addition to the application of section 12 of the *Act*, which was the section on which the NPCA relied in its decision to deny access to the record and on which the parties made representations.

[10] Although the NPCA has not specifically claimed a personal privacy exemption (found at section 14 or 38(b)) for the record, I have nonetheless considered whether the record contains another individual's personal information, because that finding is relevant to my finding on the NPCA's exercise of discretion, discussed below under Issue C. I must also determine whether the record contains the appellant's personal information, because a requester's entitlement to information differs depending on whether the record contains his or her personal information.

[11] I will address first whether the record contains the appellant's personal information. I find that the record contains the appellant's personal information according to paragraph (g) of the definition of personal information in section 2(1), which defines personal information to include the views or opinions of another individual about the individual.

[12] With respect to whether the record contains the personal information of any individuals other than the appellant, the NPCA submits that the information in the record consists of the personal information of another individual. The appellant does not dispute that the record contains personal information about an identifiable individual as defined in section 2(1). He submits, however, that this individual's identity has already been disclosed by the NPCA so that this should not be considered a basis for withholding the record.

[13] I have reviewed the record and I find that this information falls under paragraph (h) of the definition of personal information in section 2(1): it consists of the other individual's name and other personal information about him, namely that he spoke about the appellant in the context of an investigation, which I find to be this individual's personal information.

[14] As discussed in greater detail below, however, the parties agree that the record was prepared by the NPCA's legal counsel for the purpose of providing legal advice and that it is properly subject to a claim of solicitor-client privilege pursuant to section 12 of the *Act*. The NPCA denied access to the entire on the grounds that it is "protected under solicitor-client privilege"<sup>3</sup> and therefore exempt pursuant to section 12. The NPCA claims that the entire record is exempt because it is a privileged communication between solicitor and client. The appellant, meanwhile, argues that the record should be disclosed because the NPCA waived privilege.

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<sup>3</sup> According to the NPCA's revised decision denying access to the record.

**Issue B: Does the discretionary exemption at section 38(a) (discretion to refuse requester's own personal information) in conjunction with section 12 apply to the record?**

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

[16] Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information. **[emphasis added]**

[17] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.<sup>4</sup>

[18] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. The NPCA's exercise of discretion is discussed below under Issue C. I have considered the fact that the record contains the personal information of the appellant and another identifiable individual in my review of the NPCA's exercise of its discretion to deny access to the record, below.

***Section 12***

[19] Section 38(a) of the *Act* gives an institution the discretion to refuse to disclose to the individual to whom the information relates personal information if section 12 would apply to the disclosure of that personal information.

[20] Section 12 allows an institution to refuse to disclose a record that is subject to solicitor-client privilege. More specifically, section 12 allows an institution to 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." The exemption is discretionary, meaning that the institution that has custody and control of the record can disclose it at its discretion.

[21] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege")

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<sup>4</sup> Order M-352.

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.

[22] At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation 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.

[24] Litigation privilege does not apply to the facts of this appeal. The NPCA has not claimed litigation privilege and neither party referred to any reasonably contemplated litigation.

#### *Solicitor-client communication privilege*

[25] For the reasons that follow, I find that the record is a communication between solicitor and client that is subject to solicitor-client privilege under Branch 1. As described further in this decision, the NPCA submits that the head retained legal counsel for the purpose of providing the legal opinion contained in the record and that, in accordance with Branch 2, only the head can waive privilege. Although I am satisfied that there is sufficient evidence before me to support a finding that the head, that is, the chair of the NPCA, did not waive privilege over the entire record, I have conducted my analysis under Branch 1. As noted, the institution must establish only that one or the other applies.

[26] 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.<sup>5</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>6</sup> The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.<sup>7</sup>

[27] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating, or giving legal advice.<sup>8</sup>

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<sup>5</sup> *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)

<sup>6</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>7</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

<sup>8</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

[28] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>9</sup>

[29] Solicitor-client communication has an important public interest in ensuring that a client may confide in his or her lawyer on a legal matter without reservation.<sup>10</sup> The Supreme Court of Canada has described solicitor-client privilege as a “fundamental civil and legal right” which should not be lightly abrogated, stating that:

Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person’s right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of confidentiality.<sup>11</sup>

#### *Loss of privilege: waiver*

[30] Solicitor-client privilege may be waived under common law. Waiver may be express or implied.

[31] An express waiver of privilege will occur where the holder of the privilege knows the existence of the privilege and voluntarily demonstrates an intention to waive the privilege.<sup>12</sup>

[32] 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.<sup>13</sup>

[33] Although disclosure to outsiders of privileged information generally constitutes waiver of privilege,<sup>14</sup> waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.<sup>15</sup>

### ***Representations***

#### *NPCA’s representations*

[34] The NPCA says that the record is exempt from disclosure pursuant to section 12

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<sup>9</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>10</sup> Order P-1551, at page 5.

<sup>11</sup> *Descoteaux v. Mierzwinski*, [1982] 1 SCR 860, at 875.

<sup>12</sup> *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)

<sup>13</sup> *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

<sup>14</sup> 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.).

<sup>15</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

of the *Act* because it is privileged internal correspondence between the NPCA's chair and its legal counsel.

[35] The NPCA describes itself in its representations as a provincial planning authority that manages the impact of human activities, urban growth and rural activities on the Niagara Peninsula Watershed. The NPCA's chair is responsible for overseeing its governance, including the conduct of its board members, in accordance with the NPCA's regulations.

[36] The NPCA submits that it received information that raised concerns about alleged impropriety involving a former member that undermined a bidding process associated with the hiring of an auditor. As a result, it sought an opinion from its legal counsel, who prepared the record at issue. Based on its own concerns and its counsel's legal opinion the NPCA moved a vote to publicly censure the former member, who ultimately resigned.

[37] The NPCA maintains that the record consists of legal advice that it sought, and that was formulated and provided by its legal counsel. It says that the record is direct communication of a confidential nature passed between the NPCA and its counsel, created for the purpose of giving professional legal advice. It argues that the release of the record would reveal the basis and substance of this legal advice. The NPCA submits that solicitor-client privilege is permanent in duration,<sup>16</sup> so that the fact that a matter that is the subject of the communication may be concluded does not put an end to the solicitor-client privilege that attaches to the record.

[38] The NPCA denies that it ever waived privilege over the record. It submits that the limited information about the record that it did disclose publicly – the "bottom line" legal advice it received in response to media inquiries and in an executive summary to local municipal councils – was disclosed as part of its efforts to remain transparent in the discharge of its duties. It submits that none of this limited voluntary disclosure should be interpreted as waiver of solicitor-client privilege in the record. Finally, it submits that, as the letter was solicited by and is addressed to the chair, only the chair could authorize a waiver of privilege. The chair, it says, controlled the level of public disclosure associated with the record, ensuring that the interests of transparency were served but that record was not released, nor privilege waived.

[39] Finally, the NPCA denies that it impliedly waived privilege over the record when a redacted copy of it was "leaked" to a local newspaper outside the NPCA's knowledge or authorization.

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<sup>16</sup> Unlike common-law litigation privilege, which ends with the completion of litigation.

*The appellant's representations*

[40] The appellant does not dispute that the record was prepared by the NPCA's legal counsel for the purpose of providing legal advice, or that it is properly subject to a claim of solicitor-client communication privilege. He concedes that the record falls within the discretionary exemption outlined in section 12.

[41] However, the appellant argues that the NPCA waived privilege over the record, either expressly or impliedly, as a result of publicly disclosing the subject matter of the record, its attachments, and the legal recommendations contained in it. By commenting publicly about the record, its contents and/or recommendations, the appellant argues that the NPCA lost any claim of privilege and that the chair of the NPCA waived privilege over all or part of the record when he publicly cited the record's recommendations and findings as the basis for the appellant's public censure. In allowing certain information to be made public about the record, the appellant submits that the NPCA has, "in at least a limited extent," allowed the record's subject matter and recommendations to be identified.

[42] In addition, or in the alternative, the appellant submits that the NPCA lost any claim for privilege through an inadvertent disclosure that saw a redacted copy of the letter "leaked" to a local newspaper.<sup>17</sup> The appellant says that, by failing to act in any way to recover the record following this disclosure, the NPCA impliedly waived privilege over it. The appellant also argues that a representative of the NPCA confirmed that the record would be made available to the public.

[43] Finally, the appellant submits that fairness supports disclosure of the record because this situation has irreparably tarnished and left a very public stain on his long-term political career.

***Analysis and findings***

[44] There is no dispute that the record is a privileged communication between the NPCA and its lawyer. The record, which contains the NPCA's lawyer's legal opinion, fits within the following test set out in Orders M-11 and P-1551:

- there was written communication
- the communication was of a confidential nature
- the communication was between a client and a legal advisor; and,

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<sup>17</sup> According to an article submitted by the appellant with his representations, and discussed later in this order, a redacted version of the record was "leaked" to a local newspaper by an unidentified, and possibly unknown, source.

- the communication was directly related to seeking, formulating or giving legal advice.

[45] I therefore find that the record is a privileged communication prepared by legal counsel retained by the NPCA for the purpose of giving confidential legal advice and that it qualifies for solicitor-client privilege under section 12 of the *Act*.

[46] The question to be determined is whether, as the appellant argues, there has been a waiver of privilege, either express or implied. I find that there has not been.

[47] With respect to loss of privilege, the appellant argues that because NPCA representatives publicly referred to the record and some of its contents, including the advice sought and received, this amounts to an implied or express waiver. As outlined above, the NPCA submits that any public disclosure of the record was deliberately limited to the "bottom line" legal advice it received, in an effort to keep the record confidential while being transparent about its activities in responding to media inquiries and inquiries from the surrounding municipalities regarding the events associated with and following the audit process. I find that the publications submitted by the appellant with his representations support this conclusion.

[48] Previous orders have held that institution did not waive solicitor-client privilege by disclosing "bottom line" legal advice in the discharge of their functions. I adopt their reasoning in this order.

[49] In Order MO-1233, Assistant Commissioner David Goodis held that disclosure by an institution of the bottom line of legal advice it received did not constitute a waiver of solicitor-client privilege.<sup>18</sup>

[50] The Federal Court addressed the issue of waiver in *Stevens v. Canada (Prime Minister)*.<sup>19</sup> In *Stevens*, pursuant to an access request under the federal *Access to Information Act*, a federal institution provided partial access to legal accounts, severing out the narrative portion of the accounts while providing access to the dollar amounts. In dealing with the issue of waiver in the freedom of information context, the court held that, in making the relatively minimal disclosure of a small portion of the "bottom line" legal advice it received, the institution did not intend to waive privilege with respect to the record itself. The court wrote that, although the institution did provide a small portion of the "bottom line" legal advice it received, "fairness and consistency" did not require a finding that the privilege ceased and held that the institution had not, by disclosing bottom line advice, implicitly waived privilege.

[51] In Order MO-2945-I, Assistant Commissioner Sherry Liang dealt with a town's

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<sup>18</sup> See also Orders M-1165 and MO-1172.

<sup>19</sup> (1998), 161 D.L.R. (4<sup>th</sup>) 85.

submission that the release of an executive summary of a legal opinion was done in the interests of public transparency and did not amount to a waiver of privilege. In finding that the disclosure by the town of an executive summary of a legal opinion did not amount to waiver, she considered a number of cases where this office upheld privilege where public disclosure of some information gave rise to claims of implied waiver. As in this appeal, those cases involved instances where public bodies disclosed a portion of a conclusion reached in a privileged legal opinion and found that such relatively minimal disclosure did not amount to an implied waiver that would warrant disclosure of the privileged material under the *Act*.

[52] More recently, in Order MO-3497, Adjudicator Alec Fadel dealt with the issue of the release of "bottom line" legal advice by an institution, where a town publicly released (to an open meeting of council and the media) part of one paragraph of a lawyer's memorandum that Adjudicator Fadel found was privileged. He held that, in releasing bottom line information as opposed to the entire document, the town did not intend to waive privilege over the record but provided a minimal degree of disclosure to carry out its mandate and responsibilities.

[53] It is clear from the various media articles submitted by the appellant that the anticipated audit of the NPCA, as well as the appellant's resignation associated with the bidding process, attracted significant local media interest, including the interest of the surrounding municipalities. These publications make clear that the NPCA, in disclosing certain contents of the record, including the bottom line legal advice received, consistently maintained that the record itself was confidential and could not be released.

[54] When the NPCA wrote to the councils of surrounding affected municipalities regarding its activities associated with the audit and censure, it provided a summary of the contents of the record, including the bottom line legal opinion, but notably did not include a copy of the record itself.

[55] In similar circumstances, this office has found that where public organizations have released certain portions of information protected by solicitor-client privilege, this does not amount to waiver of privilege. In Order MO-1172, Adjudicator Cropley upheld the City of Vaughan's decision to withhold access to a copy of a confidential memorandum prepared by the city solicitor to city council after a public report had been released that referenced portions of the confidential memo. Adjudicator Cropley expressly stated that public bodies can release information relevant to their decisions and still maintain privilege, writing:

... 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.

[56] She went on to say that:

A decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision making process.

[57] I find that this reasoning applies to this appeal and that any decision by a public body like the NPCA must consider the careful balance that public organizations must strike between public transparency and maintaining privilege. In my view, responding to media inquiries about the NPCA's activities, as well as preparing a summary of its actions to local municipalities affected by the NPCA's activities are in line with the NPCA's need to be transparent about its decision-making process and to ensure proper discharge and oversight of its functions.

[58] I do not agree that the media articles provided by the appellant disclose voluntary conduct on the part of the NPCA that would support a finding that privilege had been waived. On the contrary, the articles repeat the position taken by the NPCA that the record was confidential. For example, in the article referring to the letter sent by the NPCA's chair to local municipal councils, the author notes that the record was not included with the letter. The article goes on to say that the record has not been made public and that the NPCA chair has refused to disclose the details of the allegations he made against the appellant.

[59] In an article by another publication, the author writes that the publication made its own access request for the record which was ultimately denied on the grounds that the record is confidential and cannot be released.<sup>20</sup>

[60] From my review of these articles, it is clear that the NPCA treated the report itself confidentially and did not share it publicly, apart from statements made to media setting out the reasons for seeking a legal opinion and the bottom line advice provided.

[61] I conclude, therefore, that the NPCA's disclosure of the limited information about the legal opinion does not amount to waiver of privilege over the entire record.

*Inadvertent disclosure does not amount to waiver*

[62] In a twist to the facts of this appeal, a redacted version of the record was "leaked" to one media outlet by an unidentified source. According to the NPCA, it does not know the identity of the person responsible, although it submits that the leak went

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<sup>20</sup> In this article, the author writes that an NPCA representative initially said that the record would be published, but that the request was ultimately denied on the grounds that the record is confidential and cannot be released.

against the chair's express intention to withhold the report as protected by solicitor-client privilege.

[63] In *S. & K. Processors*, the decision setting out the common law test for waiver of privilege, the court recognized that "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require."<sup>21</sup> 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."<sup>22</sup> 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.

[64] The NPCA submits that it did not learn of the leak until after the media had already published information from the redacted report. With respect to the appellant's argument that the NPCA lost privilege because it failed to take any action to recover the leaked redacted report, the NPCA says that by then, there was no reasonable or even realistic way for it to ensure its return. I agree and find that, once references to the contents of the redacted report were published, there was little that the NPCA could meaningfully do to retrieve or recover the report.

[65] In these circumstances, I find no basis on which to conclude that the NPCA or its representatives engaged in voluntary conduct that would evince a desire to waive privilege over the record or that would support a finding that waiver was implied. The media publications provided by the appellant show that the NPCA consistently referred to the record as confidential while disclosing limited information about the record's contents in an effort to remain transparent.

[66] Even the publication to which the record was leaked described it as a confidential legal opinion that had not been made public.

[67] For these reasons, I find that the NPCA did not waive privilege over the record, either expressly or impliedly. Subject to my review of the NPCA's exercise of discretion, below, I find that the record is exempt under section 12 of the *Act*.

**Issue C: Did the NPCA properly exercise its discretion in withholding the record?**

[68] The section 12 and 38(a) exemptions are discretionary and permit an institution to disclose information despite the fact that it could withhold it. An institution must

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<sup>21</sup> *S & K Processors*, above, at para. 6

<sup>22</sup> Set out in Wigmore on Evidence, cited in *S & K Processors* at para. 10

exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[69] 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.

[70] While this office may send the matter back to the institution for an exercise of discretion based on proper considerations,<sup>23</sup> it may not substitute its own discretion for that of the institution.<sup>24</sup>

### ***Relevant considerations***

[71] Relevant considerations may include, but are not limited to, those listed below:<sup>25</sup>

- the purposes of the *Act*, including the principles that information should be available to the public
- exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

[72] I find that, in denying access to the record, the board properly exercised its discretion under section 38(a), in conjunction with section 12, took into account relevant considerations, and did not consider irrelevant ones.

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<sup>23</sup> Order MO-1573.

<sup>24</sup> Section 43(2).

<sup>25</sup> Orders P-344 and MO-1573.

*The NPCA's representations*

[73] The NPCA submits that, in exercising its discretion to deny access to the record, it considered the above factors, and concluded that:

- the record is not in the public domain and that releasing it will not add to the public interest in transparency but will cause prejudice to the NPCA
- the importance of preserving solicitor-client privilege is fundamental, the legal advice sought by the NPCA is privileged, and that at no point did the NPCA waive privilege
- the record sought to be protected falls squarely within the scope of the section 12 exemption
- there is no public interest in receiving a privileged solicitor-client communication
- the appellant has no sympathetic or compelling need for the information, which consists entirely of the seeking, formulating or giving of legal advice between the NPCA and its legal counsel
- disclosure of the record would have no effect on the public confidence in the operation of the NPCA
- the information is highly sensitive to the NPCA in that it relates to its constitutionally-protected right to solicitor-client privilege. The NPCA considered that the information may be significant to the appellant but concluded that this does not outweigh a claim of solicitor-client privilege.

*Appellant's representations*

[74] The appellant submits that the NPCA did not properly exercise its discretion under section 12. He says that it erred in exercising its discretion, and did so for an improper purpose or in bad faith. The appellant says that the considerations outlined by the NPCA are improper, misstatements, and/or disingenuous. He says that:

- the record is in the public domain, in part and in some form, as referenced in the articles he submitted. The contents have been cited and referenced and relied on by the NPCA and that this fractured disclosure and these public references to support the appellant's public censure support disclosure of the entire report
- the NPCA has waived the protection of solicitor-client privilege through both its partial and the inadvertent disclosure of the record
- information pertaining to an individual's conduct, or alleged conduct, is considered that individual's personal information. Given that the appellant was

publicly censured as a result of the report which alleged impropriety, discretion should result in access to the appellant to the record

- there is a compelling need in the present case to ensure transparency given that the appellant was publicly censured as a result of the contents of the record and his political career irreparably tarnished as a result of the NPCA's reliance on the contents of the record
- public confidence in the NPCA requires that the report be disclosed so that the public is wholly informed about the actions of an elected representative on the NPCA's board that the appellant argues were egregious
- the significance of the information to the appellant cannot be understated and must weigh in favour of disclosure of the report because it resulted in the appellant's public censure, resignation from the NPCA, and a very public stain on his political career.

### ***Analysis and Findings***

[75] As I have noted above, this office is entitled only to consider whether the NPCA did, in fact, properly undertake an exercise of its discretion, but cannot substitute its own discretion for that of the NPCA. Section 43(2) of the *Act* states:

(2) If the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

[76] In this case, I do not find that the NPCA took into account improper considerations in the exercise of its discretion. The audit process and the associated censure and resignation of a board member were matters of interest to the local community. In disclosing certain information, while withholding the report itself, the NPCA shared what I find was limited "bottom line" legal advice in an effort to keep the community informed on a topic of importance to it, while preserving the integrity of the solicitor-client relationship. I find that the board considered the need to be transparent, the right of the community to a transparent process, the nature of the information contained in the report, including that it contained personal information that was significant to the appellant, and balanced these considerations with its own right to confide in its lawyer without reservation.<sup>26</sup> I find that these were relevant considerations and that they were not considered for an improper purpose. I therefore uphold the board's exercise of discretion to withhold the record under section 38(a), in conjunction with section 12 of the *Act*.

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<sup>26</sup> Order P-1551.

**ORDER:**

I uphold the NPCA's decision and dismiss this appeal.

Original signed by \_\_\_\_\_  
Jessica Kowalski  
Adjudicator

\_\_\_\_\_ August 6, 2019