

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3919-I

Appeal MA18-478

Town of South Bruce Peninsula

April 20, 2020

**Summary:** The appellant seeks access to records from the town about its maintenance activities and an endangered bird habitat on Sauble Beach. The town is the subject of a prosecution under the *Endangered Species Act* for its activities in relation to the bird habitat. The town denied access based on a variety of exemptions, including section 12 (solicitor-client communications). This office raised the issue of the possible application of the prosecution exclusion in section 52(2.1) of the *Act* to the records. In this interim order the adjudicator: finds that the prosecution exclusion does not apply to the records; upholds the town's decision in part to withhold some of the records on the basis of section 12; and, defers consideration of the exemptions claimed in relation to the balance of the records.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(2.1) (ongoing prosecution), section 12(1) (solicitor-client privilege).

**Orders and Investigation Reports Considered:** Orders MO-3094 and MO-3253-I.

**Cases Considered:** *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991, *General Accident Assurance Co. v. Chrusz*, (1999) 45 O.R. (3d) 321 (C.A.).

### OVERVIEW:

[1] This interim order deals with an access request for records about the maintenance activities and piping plover habitat located on Sauble Beach. The request was made to the municipality responsible for maintaining Sauble Beach, the Town of South Bruce Peninsula (the town).

[2] Some context is required. As explained in the parties' representations, a piping plover is a bird that is recognized as an endangered species under the *Endangered Species Act, 2007*, S.O. 2007, c. 6 (the ESA). On May 21 and July 25, 2018, the Ministry of Natural Resources and Forestry (the ministry) laid charges against the town under the *ESA* for allegedly damaging piping plover habitat on Sauble Beach in April, August and September 2017. In March, May, June and October 2018, the ministry also issued "stop orders" to the town to limit the nature of the town's maintenance activities on Sauble Beach.

[3] In October 2019, the town was convicted of both charges and ordered to pay \$100,000 to a bird conservation organization to support piping plover recovery efforts. The town has appealed the convictions. The stop orders are no longer in place, having expired on December 31, 2018. I will now turn to the access request.

[4] On April 20, 2018, the requester (now appellant) made a request under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (the *Act*) for copies of the following records for the time period of February 1 to November 1, 2018:

- All emails between the mayor and the town staff and/or contractors regarding tilling, grading, grooming and maintenance on Sauble Beach.
- All draft press releases related to piping plover habitat on Sauble Beach, and emails from the mayor related to edits to those press releases.
- All emails, correspondence, meeting notes (excluding publicly available council meeting minutes and notes) in relation to meetings or discussions between the town and the ministry about beach tilling, grading, grooming and maintenance in or near piping plover habitat.

[5] After some clarifications, the town issued a decision indicating that it had searched and identified 76 responsive records. The town denied access in full relying on a variety of mandatory and discretionary exemptions under the *Act*.<sup>1</sup>

[6] At the time of its decision, the town asserted that the following discretionary exemptions applied to all of the records: the solicitor-client privilege exemption (section 12), the closed meeting exemption (section 6(1)(b)), the law enforcement and fair trial exemptions (sections 8(1)(a)(b) and (f)), and certain of the discretionary economic and other interests exemptions (sections 11(c)(d) and (e)). The town also asserted that the discretionary advice or recommendations exemption (section 7(1)) applied to some of the records and that the mandatory relations with other governments exemption (s. 9)

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<sup>1</sup> I have no information before me about whether the town carried out searches for responsive records after July 7, 2018.

applied to other records. Finally, the town asserted that the mandatory personal privacy exemption (section 14) applied to some of the records.

[7] The town charged a fee in the amount of \$457.50 for the search undertaken.

[8] The appellant appealed the town's decisions to withhold access and to charge a fee. At mediation, the town decided to waive the fee and the appellant withdrew the fee waiver appeal. The appellant also clarified that she did not seek personal information. Mediation did not resolve the appeal and the file was transferred to the adjudication stage.

[9] After providing representations about the above-described exemptions claimed, the town was invited to make submissions about the possible application of the prosecution exclusion in section 52(2.1) of the *Act*. The ministry was also notified and invited to make submissions. The appellant was provided with the non-confidential portions<sup>2</sup> of the representations made by the town and made submissions on all of the issues in the appeal, including section 52(2.1).

[10] This is an interim order addressing section 52(2.1) and the town's claim of privilege over the records. I find that section 52(2.1) does not apply and I uphold the town's decision to withhold some of the records on the basis of the discretionary solicitor-client privilege exemption in section 12. Without sufficient information to determine the remaining issues, I defer my consideration of the application of the exemptions claimed in relation to the balance of the records.

## **RECORDS:**

[11] The town refused to provide this office with copies of any of the records in reliance on *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 ("*Blood Tribe*"), claiming that the records are subject to solicitor-client, litigation and other privilege because the records relate to the charges faced by the town under the *ESA*. Instead, the town provided an affidavit and information about the nature of the records.

[12] The responsive records are enumerated in an index of records that was provided to the appellant by the town when it made its initial decision. The records include emails, notes, reports and minutes from town council meetings. I have grouped these records into categories based on the town's submissions, as follows:

Category	Number
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<sup>2</sup> Some portions of the town's representations were withheld from the appellant as they met the confidentiality criteria set out in Practice Direction 7, Sharing of Representations.

	<b>of records</b>
<b>Category 1</b> - Emails between town staff and/or mayor <i>and</i> the town's solicitor before and after the March 21, 2018 charge.	30 records
<b>Category 2</b> - Emails between town staff and/or mayor <i>and</i> the town's solicitor <i>and</i> a third party organization (referred to as "organization A") after the March 21, 2018 charge.	6 records
<b>Category 3</b> - Email between town staff, mayor and deputy mayor <i>and</i> the town's solicitor <i>and</i> a third party (distinct from the third party in category 2) (referred to as "consultant A") after the March 21, 2018 charge.	1 records
<b>Category 4</b> - Emails between town staff and/or mayor <i>and</i> the town's solicitor <i>and</i> the ministry before and after the March 21, 2018 charge.	2 records
<b>Category 5</b> - Emails between town staff and mayor <i>and</i> the ministry before and after the March 21, 2018 charge and one undated email.	7 records
<b>Category 6</b> - Minutes of closed session of town council and a report or excerpts of a report tabled during closed session before and after the March 21, 2018 charge.	8 records
<b>Category 7</b> – Print-out of an electronic calendar of a conference call and notes made by an unidentified person dated March 13, 2018.	1 records
<b>Category 8</b> - Email between town staff and mayor that was cc'd to the town solicitor and others before the March 21, 2018 charge.	1 records
<b>Category 9</b> - Emails between City staff and/or mayor, deputy mayor or councillors about prior advice of solicitor or drafts prepared by the town solicitor before the March 21, 2018 charge.	4 records
<b>Category 10</b> – Emails between City staff and/or mayor, deputy mayor or councillors that reveal actions undertaken at direction of or on advice of solicitor after the March 21, 2018 charge.	2 records
<b>Category 11</b> - Emails between City staff and/or mayor, deputy mayor or councillors regarding contacts or planned contact with the minister, some undated and some dated after March 21, 2018 charge.	6 records
<b>Category 12</b> - Emails between City staff and/or mayor, deputy mayor or councillors before the March 21, 2018 charge.	2 records
<b>Category 13</b> - Emails between City staff and/or mayor, deputy mayor	3 records

or councillors after the March 21, 2018 charge.	
<b>Category 14</b> - Emails between City staff and/or mayor, deputy mayor or councillors regarding a particular topic dated prior to the March 21, 2018 charge.	3 records

## ISSUES:

- A. Does section 52(2.1) of the *Act* apply to exclude the records from the application of the *Act*?
- B. Does the discretionary exemption in section 12 apply to any of the records and if so, did the town properly exercise its discretion to withhold those records?

## DISCUSSION:

### **Issue A: Does section 52(2.1) of the *Act* apply to exclude the records from the application of the *Act*?**

[13] Section 52(2.1) states:

The *Act* does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[14] In order for the exclusion in section 52(2.1) to apply, the party relying on section 52(2.1) must establish that: there is a prosecution; there is "some connection" between the record and a prosecution; and, all of the proceedings with respect to the prosecution have not been completed.<sup>3</sup> Because the records which would otherwise be accessible under the *Act* are not accessible because of the exclusion, the onus of proof to establish that it applies falls to the party making the claim.<sup>4</sup>

[15] The term "prosecution" in section 52(2.1) of the *Act* can include proceedings in respect of quasi-criminal charges or regulatory offences laid under an enactment of Ontario or Canada that carry "true penal consequences" such as imprisonment or a significant fine.<sup>5</sup> There is no disagreement between the parties that the charges under the *ESA* constitute a prosecution; however, the appellant disagrees with the town's position that the stop orders constitute a prosecution. As will be seen, I do not need to

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<sup>3</sup> Orders PO-3260 and MO-3670.

<sup>4</sup> Order MO-3670 at para 11.

<sup>5</sup> Order PO-2703.

decide this issue in this case.

[16] The exclusion in section 52(2.1) is most commonly claimed by investigating or prosecuting authorities (i.e. the police or the Crown) to protect the records and information necessary to support an ongoing prosecution, furthering the purposes of the exclusion, which include maintaining the integrity of the criminal justice system, protecting solicitor-client privilege and controlling the dissemination and publication of records relating to an ongoing prosecution, among other purposes.<sup>6</sup> The Court in *Toronto Star* endorsed the view that the exclusion has the following purposes relating to the protection of prosecution materials:

- “protecting prosecutors from having to address access-to- information requests for records that are part of their prosecution file where the matter is ongoing”;<sup>7</sup>
- ensuring that “the accused, the Crown and the public’s right to a fair trial is not jeopardized by the premature production of prosecution materials to third parties”<sup>8</sup>
- ensuring “that the protection of solicitor-client and litigation privilege is not unduly jeopardized by the production of prosecution materials.”<sup>9</sup>

[17] The prosecution exclusion has been deemed to apply to records outside of the Crown or prosecution brief.<sup>10</sup> In *Toronto Star*, for example, the Court found that ministerial briefing notes and political correspondence concerning the progress of particular charges through the justice system were covered by the prosecution exclusion.

[18] Similarly, in Order MO-3670, the adjudicator upheld the Peel Regional Police Service Board’s (the police) decision that the prosecution exclusion applied to exclude maintenance records for two breath-testing machines for specified time periods because it was reasonable to expect that those records would become relevant to a specific ongoing prosecution. In the appeal leading to Order MO-3670, the police provided compelling evidence that the requested records pertained to a particular prosecution involving the appellant, including that the appellant had attempted to obtain the same records, unsuccessfully, through the responsible Crown counsel.<sup>11</sup>

[19] This office has also determined that the section 52(2.1) exclusion applies to

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<sup>6</sup> *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (“*Toronto Star*”).

<sup>7</sup> *Toronto Star* at para 49.

<sup>8</sup> *Toronto Star* at para 50.

<sup>9</sup> *Toronto Star* at para 50.

<sup>10</sup> MO-3670

<sup>11</sup> MO-3670 at para 14

records outside of the control of a prosecuting or investigating authority when the record was likely to be used in a prosecution by a prosecuting authority. This was the case in Order MO-3094 dealing with an access request made to the Toronto Transit Commission (the "TTC") for a surveillance video from a streetcar (the "TTC Order"). In the TTC Order, the adjudicator determined that the video was excluded from the *Act* because of the prosecution exclusion. Unlike the present appeal, the relevant prosecuting authority (the Ministry of the Attorney General) made representations attesting to the likelihood that the video would be used in an ongoing prosecution against an individual and the adjudicator accordingly determined that the prosecution exclusion applied.

[20] In each of these examples, the records at issue related in some way to the conduct of a prosecution by the prosecuting authority, and not the defence of a prosecution. The question raised in this appeal is whether the exclusion at section 52(2.1) can apply to records relating to the town's own defence against the charges.

### ***Representations***

[21] The town made general submissions about the application of section 52(2.1) pertaining to all of the records collectively. It asserts that disclosure of the records would interfere with the ongoing prosecution and the town's defence. The town says that all of the records were created as a result of the prosecution.

[22] The town makes further submissions in reference to *Toronto Star* but in substance, these submissions mirror its representations about solicitor-client privilege. The town relies completely on its more detailed submissions pertaining to solicitor-client privilege in support of its argument that the prosecution exclusion should apply. The town does not address the "some connection" test nor does it discuss how this test should be applied in the context of a defence case, rather than prosecution materials. The town stated (in reply to the appellant's representations on the point) that although it made submissions that the exclusion applied when invited to do so, its first position was that it relied on section 12 and the other exemptions claimed.

[23] The ministry, which is responsible for the prosecution in this case, was invited to make submissions but was unable to do so in a substantive way because the town refused to provide it with access to the records. The town was understandably opposed to sharing those records with the ministry at that time or any time because the ministry is in the middle of prosecuting – and now defending an appeal of – charges against the town.

[24] In addition to its submissions that the stop orders are not a prosecution (referred to above), the appellant argued that the prosecution exclusion does not apply to records held by the town in relation to a prosecution against it. The appellant acknowledges that prior orders of this office that the exclusion can apply to records outside of the Crown Brief. But the appellant says that in this case, neither the appellant nor the ministry provided sufficient (or any) evidence to demonstrate that the

exclusion applies.

### ***Analysis and Finding***

[25] The burden of proof rests on the institution claiming that the exclusion applies. For the reasons that follow, I find that the town has not met this burden and that the prosecution exclusion does not apply to the records in this case.

[26] The predominant application of section 52(2.1) in the orders of this office is at the urging of prosecuting or investigating authorities. The prosecution exclusion has not been limited to the Crown or prosecution brief and has been found to include records in the control of investigating authorities and third parties. When assessing whether the exclusion applies, the main issue before adjudicators of this office is whether there is "some connection" between the records and the case to be made *by the prosecuting authority*.

[27] I am not aware of any previous orders of this office where the exclusion has been found to apply to records in the control of an institution that is the subject of a prosecution – this would be a novel application of the prosecution exclusion.

[28] The Concise Oxford Dictionary<sup>12</sup> defines the words "prosecution," "prosecute" and "prosecutor" in the following terms:

**prosecution** ... n. **1 a** the institution and carrying on of a criminal charge in a court. **b** the carrying on of legal proceedings against a person. **c** the prosecuting party in a court case...

**prosecute** ... v.tr. **1 ... a** institute legal proceedings against (a person). **b** institute a prosecution with reference to (a claim, crime, etc.)...

**prosecutor** ... n. ... a person who prosecutes, esp. in a criminal court.

[29] I conclude that the plain an ordinary meaning of the word "prosecution" referred to in section 52(2.1) means the actions of a prosecutor in initiating a charge or claim and conducting legal proceedings against another party, and not the actions of another party in defending against or resisting the charge or claim, even though the actions of both relate to the same proceedings.

[30] On its face, the exclusion does not apply to records relating to "proceedings" in respect of a prosecution. It applies to records relating to the "prosecution" itself. Accordingly, even if it could be shown that the records have some connection with the defence advanced by a party to the proceedings, they would not qualify under section

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<sup>12</sup> *Concise Oxford Dictionary*, 8th Ed., Clarendon Press, Oxford, 1990, p. 959.



52(2.1) unless it could also be shown that they have some connection with the prosecutor's actions in conducting the prosecution or "carrying on" the charges or legal proceedings.

[31] In my view, this interpretation is consistent with *Toronto Star*, where the Court identified the purposes of section 52(2.1) as "protecting prosecutors" from addressing access-to-information requests when the matter is ongoing<sup>13</sup> and ensuring that premature production of prosecution materials does not jeopardize the right to a fair trial or solicitor-client and litigation privilege.<sup>14</sup>

[32] Although the town made several broad and general claims about the prejudice it will face if the records are disclosed, for the reasons stated above it is my view that the section 52(2.1) exclusion is not available to the town to exclude records relating to its defence of a charge.

[33] It was also possible that the ministry would make submissions to demonstrate that some of the records in the possession of the town were to be used by the ministry in the prosecution and that disclosure would prejudice its right to a fair trial or cause other harms protected by the exclusion but it did not do so. Although the town understandably refused to provide the records to the ministry, I am satisfied that if the town possessed a record that was part of the prosecution brief, the ministry would have known.

[34] In summary, I find that neither the town nor the ministry has provided evidence to support the application of section 52(2.1) to any of the records. Accordingly, as I have found that the exclusion does not apply, the *Act* applies to the records at issue, and I will consider the possible application of the section 12 exemption (solicitor-client privilege).

**Issue B: Does the discretionary exemption in section 12 apply to any of the records and if so, did the town properly exercise its discretion to withhold those records?**

[35] Section 12 states that:

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

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<sup>13</sup> *Toronto Star* at para 49.

<sup>14</sup> I note that a number of orders of British Columbia's commissioner under the equivalent exclusion state that its purpose is to allow prosecutions to proceed without interference by insulating Crown counsel from access requests until the prosecutions are complete: Order F15-26 (2015 BCIPC 28 (CanLII)); Order No. 20-1994 (1994 CanLII 606 (BCI IPC)); Order No. 256-1998 (1998 CanLII 2682 (BC IPC)).

an institution for use in giving legal advice or in contemplation of or for use in litigation.

[36] As noted above, in reliance on the common law protection over solicitor-client privileged information, the town has refused to provide copies of the records to this office and instead provided an affidavit and submissions about the nature and content of the records. It also asserts that the discretionary exemption in section 12 of the *Act* pertaining to solicitor-client privilege justifies its decision to withhold all of the records.

[37] The appellant submits that because the town has refused to produce the records to this office, there is not enough information before me to adjudicate the issue.

[38] Section 42 of the *Act* specifies that the town bears the burden of proof to demonstrate that claimed exemptions apply.

[39] Where an adjudicator is unable to review the records on the basis of a claim of solicitor-client privilege, a preliminary issue arises: has the institution provided sufficient information to enable the adjudicator to the question about whether the records are exempt under section 12. An adjudicator may have sufficient information when the institution provides affidavit evidence and other information about the records. The town has made efforts to provide detailed information about the records, while also working to protect its position that those records are privileged and that it does not intend to waive that privilege.

[40] As is further described below, I have determined that I have sufficient information to fully adjudicate whether some of the records are exempt on the basis of section 12 and I uphold the town's decision in relation to these records. I have also determined that the section 12 exemption does not apply to certain of the records and I defer my consideration of the town's alternative exemption claims and request that the town provide this office with copies of those records in accordance with *Practice Direction Number 1, Providing records to the IPC during an appeal*.

[41] With respect to the balance of the records, I have determined that I do not have sufficient information to decide whether the section 12 exemption applies and I defer my consideration of the town's exemption claim respecting those records. The town should review its section 12 claims in relation to these remaining records. For the records for which it continues to rely on the section 12 exemption, the town must provide this office with additional information about the records so that I can conclude my adjudication of the matter. If there are records for which it no longer relies on section 12, I request that the town provide this office with copies of those records so that the alternative discretionary exemption claims can be adjudicated.

***Representations of the parties regarding the discretionary solicitor-client privilege exemption in section 12 of the Act***

*The town's representations*

[42] To recap, the town has been charged with two offences under the *ESA* for incidents that occurred in April 2017. The town states, and it stands to reason, that the investigation began prior to February 1, 2018 (the beginning of the time period for the requested records). Charges against the town were laid on March 21 and July 25, 2018. After a trial in October 2019, the town was found guilty of both charges. The town has appealed the convictions. In addition to the charges, the ministry issued two stop orders (i.e. orders under the *ESA* restricting the town's beach maintenance activities) against the town; both stop orders lapsed on December 31, 2018.

[43] The town submits that all of the records relate to the charges or the stop orders, that it has sought and obtained legal advice throughout and that all of the records are protected by solicitor-client privilege. The town has provided evidence that identifies its solicitors, an external law firm, and states that it has been "under the advisement" of those solicitors regarding "all actions regarding beach maintenance since the investigation into the Town by the [ministry] began...."

[44] In its original decision withholding access, the town provided the appellant with high level information about each of the records, including the type of record, number of pages and when applicable "re: line" content. In its submissions to this office, the town has provided additional information about each of the 76 records in lieu of providing the records themselves; only some of this information was shared with the appellant. I have considered the town's confidential representations about the content of the records to group the records into categories, which are set out in the Records section, above.

*The appellant's representations*

[45] The appellant submits that the town has failed to meet its burden to prove that the solicitor-client exemption applies. It submits that not all communications between a solicitor and client are privileged, citing Supreme Court authority, including *Solosky v. The Queen*<sup>15</sup> and an order of this office.<sup>16</sup> The appellant also points out inconsistencies within the town's submissions that she says call into question the town's contention that *all* of the records contain solicitor-client information.

[46] To be fair to both the town and the appellant, the town has provided more information to this office than it has been willing to share with the appellant, including

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<sup>15</sup> [1980] 1 S.C.R. 821 at p. 835

<sup>16</sup> Order P-1363.

an important type of information: the specific parties to the emails. I have carefully considered the appellant's observations about the apparent inconsistencies.

*The town's reply*

[47] The town re-asserts that it is subject to the charges and the stop order. The town relies on prior orders of this office that referenced *Waugh v. British Railways Board*<sup>17</sup> for the proposition that documents that are "produced or brought into existence either with the dominant purpose of its author ... of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection." The town asserts generally that "all documentation was created to support the litigation and for no other purpose...", and that both types of common law privilege (described more fully below) apply.

[48] I will review each of the categories of records in consideration of the specific representations of the parties about the particular records and in consideration of the well-established jurisprudence of this office regarding section 12, which I will now summarize.

***Requirements of section 12***

[49] Section 12 states:

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

[50] To rely on section 12, the town must establish that either or both common law privilege (called "Branch 1") or statutory privilege (called "Branch 2") applies to the records.

*Branch 1: common law privilege*

[51] The town may refuse to disclose a record that is subject to "solicitor-client privilege," which includes two types of claims: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[52] The first type, solicitor-client communication privilege, protects direct communications of a confidential nature between a solicitor and client, or their agents

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<sup>17</sup> (1979) 2 All E.R. 1169

or employees, made for the purpose of obtaining or giving professional legal advice.<sup>18</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>19</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>20</sup>

[53] 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>21</sup> The privilege does not cover communications between a solicitor and a party on the other side of a transaction.<sup>22</sup>

[54] The second type, 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.<sup>23</sup> Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.<sup>24</sup> 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.<sup>25</sup> The litigation must be ongoing or reasonably contemplated.<sup>26</sup> Common law litigation privilege generally comes to an end with the termination of litigation.<sup>27</sup>

### *Branch 2: statutory privilege*

[55] The town may refuse to disclose a record 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." This is referred to as the second branch, "statutory privilege", and it 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

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<sup>18</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>19</sup> Orders PO-2441 at p. 2, MO-2166 at p. 4 and MO-1925 at p. 4.

<sup>20</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

<sup>21</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) ("*Chrusz*"); Order MO-2936 at para 18.

<sup>22</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

<sup>23</sup> *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39) ("*Blank*").

<sup>24</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) ("*Ontario (AG)*").

<sup>25</sup> *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC) ("*Goodis*").

<sup>26</sup> Order MO-1337-I and *Chrusz*, cited above; see also *Blank*, cited above.

<sup>27</sup> *Blank*, cited above.

litigation privilege, such as communications between opposing counsel.<sup>28</sup>

[56] The statutory litigation privilege in section 12 also protects records prepared for use in the mediation or settlement of litigation.<sup>29</sup> In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.<sup>30</sup>

#### *Loss of privilege - waiver*

[57] Branch 1 and Branch 2 solicitor-client privilege may be waived. There are no submissions before me that the town has waived such privilege.

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

[58] The following undisputed facts are relevant to the analysis that follows: for many months prior to February 1, 2018 (the beginning of the time period for which records were requested) the town was aware of a ministry investigation into the town's beach maintenance activities; the town was charged with offences under the *ESA* on March 21 and July 25, 2018; the town retained external legal counsel to assist with the investigation and charges; and, after a conviction, the town appealed the matter. These facts are relevant to the analysis because they demonstrate that the town had a need to, and in fact did, seek and obtain legal advice about the investigation and charge.

#### *Category 1 Records*

[59] All of the records in category 1 are emails sent or received from town officials (members of council or town staff) to the town's solicitors from February 5 to April 28, 2018. The town asserts generally that these emails contain legal advice, deal with settlement discussions or are about the town's defence to the charge.<sup>31</sup> In consideration of information provided by the town about the content of the records, together with the above-noted facts about the investigation and date of the first charge, I have sufficient information to determine this issue and am satisfied that the emails in category 1 constitute solicitor-client communications, meaning that they are subject to the first type of solicitor-client privilege in Branch 1 of section 12.

[60] As a starting point, I easily accept that the emails in this category that post-date the March 21, 2018 charge are logically solicitor-client communications that were made

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<sup>28</sup> See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) ("*Big Canoe*"); *Goodis*, cited above.

<sup>29</sup> *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

<sup>30</sup> *Ontario (AG)*, cited above.

<sup>31</sup> Although there were eventually two charges, the records at issue in this appeal pre-date the second charge.

for the purpose of seeking and obtaining legal advice about the first charge. The "re: lines" of these records are consistent with communications that would be sent or received confidentially for the purpose of obtaining legal advice about the ministry's investigation or eventual charges.

[61] Regarding the emails that pre-date the charge, I accept they were also sent or received for the purpose of seeking and obtaining legal advice based on the "re: lines" and the fact that the investigation (of which the town was aware) pre-dated the charges. For example, some of the "re: lines" of the emails sent or received prior to the charge state "MNR meeting" which is consistent with the town's knowledge of the investigation; and, these emails are between town staff, the mayor *and the town solicitors*. As a further example, the week before the charge date, emails between town representatives and its solicitors contained the re: line "draft letter to MNR."

[62] In summary, I find that all of the records in category 1 are solicitor-client communications and therefore eligible for exemption under Branch 1 (common law) of the solicitor-client privilege exemption in section 12 of the *Act*. However, I must also consider whether the town exercised its discretion in accordance with the *Act*, which I will do after I have considered all of the categories of records.

#### *Category 2 Records*

[63] The records in category 2 contain emails between town staff or member of Council, the town's solicitor *and* organization A. The records in this category post-date the March 21, 2018 charge.

[64] In consideration of the context (dates, charges, parties), the town's position that these records are subject to solicitor-client privilege is persuasive at first glance; however, the parties and "re: lines" of the emails in category 2 raise questions about whether these records were created for the purpose of obtaining legal advice or were sent confidentially. As submitted by the appellant, mere inclusion of a solicitor on a communication is not sufficient to bring that communication within the scope of solicitor-client communication privilege.

[65] Organization A is not the town's solicitor and in consideration of the other information before me, some of the records may have been created for a purpose other than legal advice. For instance, the re: line for two of the records are "Draft Press Release" and "Today's Press Release", respectively. The town explains:

Documentation relates to advice from the solicitor regarding the charge. Seeking third party assistance regarding the charge settlement and proper public perception. [emphasis added]

[66] Three of the records concern the stop order and the town submits that these records relate to “legal advice and strategy” but it has not explained the role of the third party in relation to its claim that solicitor-client privilege applies.<sup>32</sup> Regarding communications that involve third parties, the adjudicator in Order MO-3253-I has summarized the issue as follows:

With respect to communication between a client and a third party or between a solicitor and a third party, in *General Accident Assurance Co. v. Chrusz*, [...] Doherty J., writing for the majority on this point, observed that the authorities establish two principles:

1. not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege; and
2. where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as they meet the criteria for the existence of the privilege.

[67] I do not have sufficient evidence before me to apply the relevant principles and tests pertaining to solicitor-client communications involving third parties. Therefore, I am unable to assess the town’s claim that the category 2 emails involving Organization A are solicitor-client communications. However, this does not end the matter.

[68] The town has also asserted that litigation privilege applies, which is captured within both branches of the section 12 solicitor-client exemption. For Branch 1 litigation privilege to apply, I must be satisfied that the records were created for the dominant purpose of litigation within a zone of privacy to investigate and prepare a case for trial. Based on the information before me, it is not inherently obvious, nor does it follow logically, how press releases could be related to preparation for trial. I also do not have sufficient evidence before me to conclude that the records were created within the zone of privacy necessary for litigation. Regarding the emails pertaining to the stop order, any claim of litigation privilege is no longer available because the stop order has lapsed and there is no hearing pending. In sum, I do not have sufficient information to conclude that litigation privilege in Branch 1 applies or does not apply to any of the records in category 2.

[69] I will now turn to Branch 2, which is substantially similar to Branch 1 litigation

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<sup>32</sup> *Chrusz*, cited above, canvasses how claims of solicitor-client privilege communications can be impacted when third parties are involved; see Order MO-3253-I for a discussion of *Chrusz*.



privilege; however, it is a greater protection because once it applies it does not cease to apply with the conclusion of the underlying litigation. As with the town's claim that Branch 1 litigation privilege applies, I do not have sufficient evidence before me to conclude that the records at issue were created within the zone of privacy *necessary for litigation*.

[70] To summarize, I do not have sufficient information to determine whether the records in category 2 are subject to the section 12 exemption or not.<sup>33</sup>

#### *Category 3 record*

[71] The category 3 record consists of one record which post-dates the charge and is an email between city staff and the town solicitors, as well as another third party, consultant A (distinct from the third party in category 2). I have not been provided with any information about the nature of consultant A's expertise, who initiated the communication, or for what purpose it was sent or specifically how it relates to legal advice sought or obtained. I do not have sufficient information to determine whether or not this record is protected by any of the privileges in section 12 of the *Act*.<sup>34</sup>

#### *Category 4 records*

[72] The category 4 records consist of emails between town staff or members of council, the *town solicitors* and *the ministry*. The town states that these records were sent on the advice of its solicitors. In consideration of the parties to the emails, these are not records relating to the seeking or obtaining legal advice so they are not solicitor-client privileged communications nor were they made within the zone of privacy necessary to support a claim of litigation privilege. Rather, these emails are communications to the adverse party (the ministry) and such communications are not exempt by section 12 and I therefore determine that the section 12 exemption does not apply to these records.<sup>35</sup>

#### *Category 5 records*

[73] The category 5 records consist of emails between town staff, members of council *and ministry officials*. These emails were not sent to or received from the town solicitor. They are communications between the ministry and the town about maintenance of the beach. On their face, these records are not solicitor-client privileged communications,

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<sup>33</sup> The town has also asserted, in the alternative to section 12, that the following exemptions apply to these records: 6(1)(b), 8(1)(a)(b)(f), 11(c)(d)(e).

<sup>34</sup> The town has also asserted, in the alternative to section 12, that the following exemptions apply to this record: sections 6(1)(b), 7(1), 8(1)(a)(b)(f), 11(c)(d)(e) and 14(1).

<sup>35</sup> The town has also asserted that the following exemptions apply to the category 4 records: sections 6(1)(b), 8(1)(a)(b)(f), 9(1)(d) and 11(c)(d)(e).

nor is there any information before me to suggest how the records were created in the zone of privacy protected by the common law or statutory litigation privileges. I find that the section 12 discretionary exemption does not apply to the records in category 5.<sup>36</sup>

#### *Category 6 records*

[74] The category 6 records are copies of minutes of, and reports or excerpts of reports tabled at, closed sessions of the town council. Other than the report or excerpts of the report, the records are not on their face solicitor-client privileged communications; they are minutes of meetings. It is possible, as the town asserts, that these minutes reveal privileged information, but I have insufficient information before me to assess this claim.<sup>37</sup>

#### *Category 7 record*

[75] The category 7 record is a calendar printout and handwritten notes of an unidentified person. The town submits that the notes are of a call with the town solicitors that happened about a week before the charge were laid. Without information about the author of these notes or who was present at the meeting, I am not able to determine whether the section 12 exemption applies or not.<sup>38</sup>

#### *Category 8 record*

[76] The category 8 record is an email between town staff that is cc'd to the town solicitor and others. The re line is "proposed beach maintenance outline." I have insufficient information before me to determine that the communication captured in the record was for the purpose of the town seeking or obtaining legal advice or part of the continuum of communications relating to that advice. Depending on the content of the communication, which I have no information about at this time, it may also be that the record is protected by litigation privilege in either Branch 1 or 2; however, I do not have sufficient information to determine this issue.<sup>39</sup>

#### *Category 9 records*

[77] The category 9 records contain emails between town staff or members of council about prior advice provided by the town solicitor, including draft documents prepared by the solicitor. After a review of the "re: lines" and the broader context, and with the

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<sup>36</sup> The town has also asserted that the following mandatory and discretionary exemptions apply to the category 5 records: section 6(1)(b), 8(1)(a)(b)(f), 9(1)(d), 11(c)(d)(e), section 14(1).

<sup>37</sup> The town relies on several alternative exemptions: sections 6(1)(b), 8(1)(a)(b)(f), 11(c)(d)(e)

<sup>38</sup> The town relies on several alternative exemptions: sections 6(1)(b), 8(1)(a)(b)(f), 11(c)(d)(e).

<sup>39</sup> The town relies on several alternative exemptions: sections 6(1)(b), 8(1)(a)(b)(f), 11(c)(d)(e).

benefit of the information about the record's content, I am able to conclude that disclosing these records would disclose solicitor-client privileged communications and I accept the town's position that they are subject to the discretionary section 12 exemption. Subject to my review of the town's discretion, I will uphold this aspect of the town's decision.

*Category 10 records*

[78] The category 10 records contain emails between town staff and members of council that, according to the town, are actions flowing from the solicitor's advice. The town solicitors are not party to these communications nor do I have sufficient information to assess whether the solicitor's opinions or advice are contained in these records.<sup>40</sup>

*Category 11 records*

[79] The category 11 records consist of emails between town staff and members of council regarding contacts or planned contact with the minister of the ministry at the time. The town asserts that this action is connected to advice given by the town solicitor. The town solicitors are not party to these communications nor do I have sufficient information to assess whether the solicitor's opinions or advice are contained in these records. As a result, I do not have sufficient information to determine whether the records in category 11 are subject to the section 12 exemption or not.<sup>41</sup>

*Category 12 records*

[80] The category 12 records consist of emails between town staff and members of council. The town states that these are "emails about Sauble Beach" with the general assertion that the emails are "regarding advice from the town solicitor." I have insufficient information to assess this claim and it does not logically flow from the re line or the other information available to me. It is apparent that the town is responsible for maintenance of Sauble Beach regardless of the fact that it faced charges under the ESA. To summarize, I do not have sufficient information to determine whether or not the records in category 12 are subject to the section 12 exemption.<sup>42</sup>

*Category 13 records*

[81] The category 13 records consist of emails between town staff and the mayor. The town has provided an explanation about why it claims these records are solicitor-client privileged that I will not reproduce due to confidentiality concerns. These emails

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<sup>40</sup> The town relies on several alternative exemptions: sections 6(1)(b), 8(1)(a)(b)(f), 11(c)(d)(e).

<sup>41</sup> The town relies on several alternative exemptions: sections 6(1)(b), 8(1)(a)(b)(f), 11(c)(d)(e).

<sup>42</sup> The town relies on several alternative exemptions: sections 6(1)(b), 8(1)(a)(b)(f), 9(1)(b), 11(c)(d)(e).

occur in the days following the charge and the town's explanation about how these records are subject to either common law or statutory litigation privilege stands to reason. I accept the town's explanation and, subject to my consideration of the town's exercise of discretion, uphold its decision that these records are subject to the either common law or statutory litigation privilege.

#### *Category 14 records*

[82] The category 14 records consist of emails between town staff and members of town council regarding a particular topic in the days before the March 21, 2018 charge. The emails are internal, not with the town solicitors or any third party. Because the town was aware of the investigation, it stands to reason that these emails may contain solicitor- client communication privileged information relating to the seeking of legal advice, but I do not have sufficient information to make such a determination.<sup>43</sup>

#### ***Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?***

[83] I have determined that some of the records are eligible to be withheld on the basis of the discretionary exemption in section 12: categories 1 and 9 and 13 (a total of 37 records). The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it.

[84] An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so and may send the matter back to the institution for a proper exercise of discretion. 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, or it fails to take into account relevant considerations.

#### *Representations*

[85] The appellant submits that the town has failed in its exercise of discretion because it has exercised it in an overbroad manner, citing the fact that the town claimed several and identical exemptions in relation to all 76 records. The town stands by its exercise of discretion, citing the highly sensitive nature of the legal proceedings it faced and that it acted in a way that was motivated by protecting the town's legal interests.

#### *Findings*

[86] I have considered the town's representations on the factors that it took into

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<sup>43</sup> The town relies on several alternative exemptions: sections 6(1)(b), 8(1)(a)(b)(f), 11(c)(d)(e).

account in exercising its discretion not to disclose the records that I have found to be exempt under section 12. In exercising its discretion, the town placed significant weight on the risks and perils it faced because of the *ESA* charges. The interests advanced and protected by the town are relevant and appropriate considerations in response to the access request. I find that the town has acted in good faith in its exercise of discretion to apply the section 12 exemption and in the instances where I determined that the exemption applies, I uphold its exercise of discretion.

[87] With the benefit of the findings in this interim order, I expect the town to review the exemptions claimed in relation to the remaining records at issue and in a way that is mindful of the purposes of the *Act*, which include: information should be available to the public and that exemptions from the right of access should be limited and specific.

**ORDER:**

1. I uphold the town's decision to deny access to the records in categories 1, 9, and 13 on the basis of section 12 of the *Act*.
2. I do not uphold the town's decision to deny access to the records in categories 4 and 5 on the basis of section 12 of the *Act* and defer my findings on the application of the other exemptions claimed by the town.
3. I defer my findings on the application of section 12 or any of the other exemptions claimed by the town in relation to records in categories: 2, 3, 6, 7, 8, 10, 11, 12, and 14.
4. I will be writing to the town to request additional information necessary to conclude the inquiry.
5. I remain seized of this appeal in order to dispose of the remaining issues.

Original signed by \_\_\_\_\_  
Valerie Jepson  
Adjudicator

\_\_\_\_\_ April 20, 2020