

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3979

Appeal MA19-00062

Rideau Valley Conservation Authority

December 2, 2020

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Rideau Valley Conservation Authority (the RVCA) for access to correspondence and related records referring to a particular property, named school or centre.

The RVCA granted partial access to the appellant, withholding portions on the basis of the discretionary exemptions in sections 7(1) (advice or recommendations), 8(1)(b) (law enforcement investigation) and 12 (solicitor-client privilege) of the *Act*.

In this order, the adjudicator upholds the RVCA's decision to withhold some of the records on the basis of the advice and recommendations exemption in section 7(1). She also upholds the RVCA's decision to withhold some of the records on the basis of the solicitor-client privilege exemption in section 12. The adjudicator does not uphold all of the RVCA's exemption claims, including those under section 8(1)(b) and accordingly orders it to disclose some of the withheld information.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O., Ch. M.56, sections 48(a), 7(1), 8(1)(b), 12.

Orders Considered: Orders MO-1678, MO-3154, MO-3253-I, PO-3167 and PO-4065.

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36, *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*, 2002 BCSC 1344.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Rideau Valley Conservation Authority (the RVCA) for access to correspondence and related records referring to a particular property (the property), named school or centre.

[2] The request and this appeal is best understood with some context, provided for in the parties' representations in this matter. The RVCA has authority under the *Conservation Authorities Act* to regulate and issue permits for development on certain lands. In exercising its authority under the *Conservation Authorities Act*, the RVCA works closely with municipalities.

[3] The property is located in Tay Valley Township (the township) and is owned by the appellant's spouse. The township issued a building permit for a structure located on the property.

[4] After construction began, staff from the township and the RVCA attended the property. The township determined that construction was not proceeding in accordance with the permit and it issued a Stop Work Order under the *Building Code Act*. In addition, the RVCA determined that because of the location of the structure, another permit was required under its permitting authority in the *Conservation Authorities Act*. There is a dispute about the property, its use and these events involving the appellant, his spouse, the RVCA and the township.

[5] After locating responsive records, the RVCA notified the township and the township submitted representations on the disclosure of certain records. As is also noted (or acknowledged) in the parties' representations, this appeal involves some of the same records at issue in another appeal where the township is the respondent and the appellant's spouse is the requester, Appeal MA18-395.

[6] The RVCA then issued an access decision granting the appellant partial access to the records. The RVCA advised the appellant that it withheld portions of the records under the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 8(1)(b) (law enforcement investigation) and 12 (solicitor-client privilege) of the *Act*.

[7] The appellant appealed the RVCA's decision. During mediation, the appellant confirmed his interest in pursuing access to the records in their entirety. The RVCA maintained its access decision.

[8] Mediation did not resolve the issues and the appeal transferred to the adjudication stage of the appeal process where an adjudicator commenced an inquiry by inviting representations from the appellant, the RVCA and the township. The representations were shared in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[9] During the inquiry, the RVCA indicated that it no longer relied on section 6(1)(b) and it is therefore no longer at issue in this appeal.

[10] The inquiry was transferred to me to conclude the appeal. I invited representations from the RVCA and the appellant about the possible application of section 38(a) (discretion to refuse requester's own information) to the records.

[11] In this order, I uphold the RVCA's decision to withhold some of the records because sections 7(1) and 12 apply. I accordingly order the RVCA to disclose the information for which I have not upheld its exemption claims.

RECORDS:

There are twelve records at issue in this appeal, identified as records 3, 5, 6, 7, 9, 11, 14, 15, 16, 20, 21 and 21 in the RVCA's Index of Records. Each record consists of a bundle of related email correspondence and their attachments, hand-written notes (in some cases) and other miscellaneous documents.

ISSUES:

- A. Do the records contain the "personal information," as defined in section 2(1), of the appellant?
- B. Does the discretionary exemption for advice and recommendations at section 7(1) apply to the information at issue?
- C. Does the discretionary exemption for solicitor-client privilege at section 12 apply to the information at issue?
- D. Does the discretionary exemption for law enforcement investigation at section 8(1)(b) apply to the information at issue?
- E. Did the RVCA exercise its discretion under sections 7(1) or 12, as the case may be? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain the "personal information," as defined in section 2(1), of the appellant?

[12] Whether the appellant's personal information is contained in the records is necessary to determine whether the exemption claims made by the RVCA ought to be considered under section 38(a), which is the section of the *Act* that sets out the exemptions from the right of access to one's own personal information.

[13] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual," including information such as: an individual's age or marital status (paragraph (a)), information relating to financial transactions in which the individual has been involved (paragraph (b)), the address or telephone number of the individual (paragraph (d)), correspondence sent to the institution of a private and confidential nature (paragraph (f)) or the views or opinions of another individual about the individual (paragraph (g)). The list of examples of personal information under section 2(1) is not exhaustive, meaning that other types of information may qualify.

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

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

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

[15] As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual. However, if information associated with an individual in a professional capacity reveals something of a personal nature about the individual, it may qualify as personal information.¹

Representations

[16] The RVCA submits that the records do not contain the appellant's personal information. It says that the information relates to land owned by the appellant's spouse and to development permits that were sought by the appellant's spouse. It states that the appellant is not the author of any of the records at issue.

[17] The appellant, without having the ability to review the records, submits that it is likely that the records contain his personal information. The appellant acknowledges that information relating to the property or the centre does not necessarily constitute his personal information but he submits that because he had been actively involved in the centre's interests, including interactions with the RVCA, it is foreseeable that the information may contain the views and opinions about him, and accordingly constitute his personal information. The appellant submits further that even if he is not identified

¹ Orders P-1409, R-980015, PO-2225 and MO-2344.

in the records, views about him may still be contained in the records.

Findings and analysis

[18] Based on my review of the records remaining at issue, they do not include the appellant's personal information and I will therefore not consider section 38(a) further. The records at issue relate to approvals sought, or that may be sought, by the appellant's spouse for the property and the construction of the centre. Information about the centre and its operation is not personal information.

Issue B: Does the discretionary exemption for advice and recommendations at section 7(1) apply to the information at issue?

[19] The RVCA applied section 7(1) to parts or all of records 3, 6, 7, 9, 11, 14, 15, 16 and 20. It also states that it erroneously withheld portions of records 3 and 6 and will disclose those portions. Subject to this office's review, the appellant accepts that section 7(1) applies to the records except for Record 7.

[20] Section 7(1) states:

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

[21] In *John Doe v. Ontario (Finance)*,² the Supreme Court of Canada held that the purpose of the equivalent section in the *Act* is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.

[22] There does not appear to be any dispute between the parties about the meaning and purpose of section 7(1); the focus of the appeal is whether the RVCA has properly applied the exemption. I will first review the relevant considerations that come to bear when applying section 7(1) and then I will turn to the parties' representations.

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

[24] "Advice" has a broader meaning than "recommendations." "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which

² 2014 SCC 36 (*John Doe*), at para. 43.

option to take.³

[25] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.⁴

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

- the information itself consists of advice or recommendations, or,
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁵

[27] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.⁶

[28] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).⁷

[29] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7(1). Only section 7(2)(a) may be relevant to this appeal and it stipulates that an institution shall not refuse to disclose a record under section 7(1) that contains factual material.

[30] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.⁸ Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) may not apply.⁹

³ *John Doe*, above, at paras. 26 and 47.

⁴ Order PO-3315.

⁵ Order P-1054

⁶ *John Doe*, cited above, at para. 51.

⁷ *John Doe*, cited above, at paras. 50-51.

⁸ Order 24.

⁹ Order PO-2097.

Discussion and findings

[31] I will first outline the parties' general position regarding section 7(1). I will then describe each record at issue, the parties' specific representations about the record and my findings.

General representations

[32] The RVCA says that it relies on section 7(1) to withhold records or parts of records that contain advice and recommendations from employees "of an institution under the *Act* and/or consultants retained by an institution." It seeks to apply section 7(1) to advice and recommendations provided by employees of the RVCA and employees of and consultants to the township. The RVCA submits that its application of section 7(1) is to "preserve the ability of employees and consultants to provide frank and unfiltered advice within a deliberative process of decision making as the RVCA and the township worked to fulfill their respective mandates in regulating building and development."

[33] In response and as noted above, the appellant accepts the RVCA's section 7(1) claims, subject to this office's review, for all records except Record 7. I have given the appellant's section 7(1) concessions little weight because the burden is on the RVCA to establish the exemptions claimed.

[34] The township adopts and supports the RVCA's position in this appeal and also makes other representations about how Appeal MA18-395, referred to above, should impact this appeal. In Appeal MA18-395, the township objects to disclosure of some of the same records at issue in this appeal, also on the basis of section 7(1).

Record 3

[35] The RVCA relies on section 7(1) to withhold pages 1-5 and 42-54 of Record 3.¹⁰ It says that disclosing this information would reveal advice and recommendations, either directly or by inference, of the RVCA's Environmental Planner and of the planning staff of the township regarding a structure under construction, statutory requirements, the approval process and recommended actions. It says that disclosure of this information would prejudice the ability of the RVCA and the township to receive confidential advice and recommendations.

[36] The withheld portions of Record 3 are emails among RVCA staff and between the RVCA and township staff, including duplicate emails appearing in email chains.

[37] Based on my review, I find that section 7(1) applies only to portions of Record 3.

¹⁰ The RVCA says that it will disclose the other pages in Record 3.

These portions include advice of the public servants of both the RVCA and the township, describing options for next steps and they contain an evaluative quality.¹¹ There is factual information contained within these portions but it is my view that these parts of the emails are so inextricably intertwined with the other content that it is not reasonable to sever them because to do so would reveal either meaningless snippets of information or risk revealing the exempt information.

[38] However, some portions of Record 3 contain discrete email exchanges that may reasonably be severed from the advice and recommendations. I will therefore consider the RVCA's alternative claim that section 8(1)(a) applies to those portions of Record 3.

Record 6 (pages 1-2)

[39] The RVCA relies on section 7(1) to withhold pages 1 and 2 of Record 6 and states that it will disclose the remaining pages. Regarding pages 1 and 2, it says that the information consists of advice and recommendations of its Environmental Planner and qualifies for exemption for the same reasons stated in relation to Record 3.

[40] Based on my review of pages 1-2 of Record 6, I agree with the RVCA's characterization of the information. It is an email that contains its Environmental Planner's opinion, is evaluative in nature and in my view constitutes advice within the meaning of section 7(1). While there are portions of it that contain factual information, these fragments are intertwined with the advice and not capable of being severed. I find that section 7(1) applies to pages 1 and 2 of Record 6.

[41] As noted, the RVCA has withdrawn its exemption claims relating to the remaining pages in Record 6 and they will therefore also be disclosed.

Record 7

[42] Record 7 is a bundle of documents, most of which have been disclosed. The RVCA relies on section 7(1) to withhold pages 6 and 21-24. It submits that disclosure of page 6 in Record 7 would reveal advice from a consultant retained by the township. It acknowledges that the consultant was not retained by the RVCA but states that part of the consultant's function was to provide advice to the township that "impacted the RVCA's regulatory role." Regarding other withheld portions of Record 7 (pages 21-24), the RVCA states that this information constitutes advice from the same consultant (retained by the township) to matters addressed at a meeting with the appellant.

[43] In response, the appellant states that the withheld information on page 6 was a communication that occurred at a time when there was an "open dialogue" between the

¹¹ Both the RVCA and the township are institutions under the *Act*, and the township objects to the disclosure of this information on the basis of section 7(1).

appellant, the township and the RVCA and that it cannot be advice or recommendations or if it is, the information has "come to light" in other contexts and it should be released. Regarding the withheld information on pages 21-24, the appellant states that because the notes were prepared for a meeting that he was at, discussions about how that meeting – that already occurred – was to be conducted "are not worthy of protection" under the *Act*.

[44] The township adopts the RVCA's representations and opposes disclosure. It submits that whether the appellant attended the meeting is not a relevant consideration to the application of section 7(1). Further, the township submits that the appellant's assertion that withholding the information in record 7 fails to consider the purpose of the section. It says, "The mere fact that the appellant may have some insight into the advice and recommendations received by the township by virtue of his presence at the [meeting] in question does not entitle him to access the entirety of that advice."

[45] In sur-reply to the appellant's reply, the RVCA provided further information about the withheld portions of Record 7. It emphasizes that the appellant was not a party to the particular email at issue and that it "is distinct and separate from the dialogue involving the appellant."

[46] Based on my review of the information on the withheld pages, I find that section 7(1) applies to all of the withheld information in Record 7. Pages 21-24 consist of an analysis that contains advice within the meaning of section 7(1); it is evaluative and contains opinion of the consultant.¹² These pages also contain some factual material but it is my view that it is inextricably intertwined with the advice. Page 6 of Record 7 is related to the record contained on pages 21-24. Considered together with the information on pages 21-24, I am satisfied that page 6 also consists of advice within the meaning of section 7(1).

Record 9

[47] Record 9 is an email exchange. The RVCA submits that it was prepared by the township's consultant and that, as noted above regarding Record 7, the consultant was providing advice to both the township, also an institution, and the RVCA. In addition, the RVCA submits that if this record was disclosed in its hands, it would result in the township being reluctant to share this type of information with the RVCA. The township adopts the RVCA's representations in support of withholding this record. As noted, the appellant made no specific representations on this record.

[48] In my view, the information in Record 9 falls within the section 7(1) exemption.

¹² Both the RVCA and the township are institutions under the *Act*, and the township objects to the disclosure of this information on the basis of section 7(1).

Without disclosing the nature of the information due to confidentiality concerns, I am satisfied that disclosure would reveal advice of the township's consultant. It is evaluative in nature. I accordingly find that section 7(1) applies.

Record 11

[49] Record 11 consists of two emails. The RVCA disclosed all but the first two pages, in reliance on sections 7(1) and 8(1)(b). It submits that page 1 and 2 are a draft of a communication prepared by one of its employees. It argues that drafts are within the scope of the section 7(1) exemption as they are advice with respect to form and content to be included in a particular document. Neither the appellant nor the township made specific representations on this record.

[50] Based on my review, the RVCA has accurately described the record and in consideration of its content and author, I agree that it is eligible for the section 7(1) exemption because disclosure of it would reveal advice of an RVCA employee.

Record 14

[51] Record 14 contains different versions and tangents of a short email exchange between RVCA employees; all pages have been withheld pursuant to sections 7(1), 8(1) and 12. The RVCA submits that the information consists of advice and recommendations shared between two RVCA employees and asserts that it should be withheld. The appellant did not make specific representations about this record.

[52] In my view, most of Record 14 qualifies as advice within the meaning of section 7(1). With the exception of the last email in the exchange, which may reasonably be severed, I agree with the RVCA's characterization and find that part of Record 14 qualifies for the section 7(1) exemption. I will review the RVCA's alternative exemption claim for the remainder of the record under Issue D.

Record 15

[53] Record 15 includes copies of various emails in an email exchange as well as hand-written notes. The RVCA withheld pages 6 and 7 of Record 15 on the basis of sections 7(1), 8(1) and 12. The RVCA submits that the withheld portions of Record 15 contain advice and recommendations "as to the recommended course of action." The withheld portions are hand-written notes taken by an RVCA employee from a meeting involving RVCA and township staff, as well as legal counsel for the township. The RVCA appears to rely primarily on its claim that disclosure of this document reveals solicitor-client privileged information but also asserts that disclosure would reveal advice and recommendations under section 7(1).

[54] Based on my review of the notes, I agree that they contain information that qualifies for the section 7(1) exemption. The information contained in the notes summarizes a discussion that included opinions, and analysis of an evaluative nature.

Record 16

[55] Record 16 is a two page email. In reliance on sections 7(1), 8(1) and 12, the RVCA withheld one bullet within a bulleted list on the basis that it is "information advice" provided to the RVCA by its employees and because it describes a meeting in which legal advice was sought and received.

[56] Based on my review, I agree that section 7(1) applies to the withheld information. The withheld information contains an evaluative component and I am satisfied that it is advice within the meaning of section 7(1).

Record 20

[57] Record 20 contains an email and attachments from the township's solicitor to the RVCA. The RVCA's main argument is that the information is solicitor-client privileged but it also asserts that it contains advice within the meaning of section 7(1).

[58] In my view, Record 20 does not qualify for a section 7(1) exemption because there is no evaluative information from any staff or consultants. I considered whether the type of records attached to the email qualified under section 7(1) but have insufficient information before, including on the face of the document, to accurately characterize them for this purpose. I do not uphold the RVCA's application of section 7(1) to any of Record 20 and will consider its alternative claim under section 12 at Issue C, below.

Summary

[59] I find that the section 7(1) exemption applies to all of the withheld information in records 6, 7, 9, 11, 15, and 16 and most of the withheld information in records 3 and 14. I will consider whether the RVCA exercised its discretion properly in applying this exemption at Issue E.

[60] I will first consider the RVCA's alternative claims for the remaining parts of records 3 and 14 and the entirety of Record 20 at Issues C and D, below.

Issue C: Does the discretionary exemption for solicitor-client privilege at section 12 apply to the information at issue?

[61] The RVCA applied section 12 to withhold all or part of the following records remaining at issue: 5, 14 (part), 20, 21 and 22. The solicitor-client relationship at issue is between the township and its solicitor, and the RVCA submits that it had a common interest with the township regarding the matters for which legal advice was sought.

[62] As will be seen, the parties agree about the principles underpinning section 12. I will therefore review those principles and considerations and then turn to the parties' representations.

[63] Section 12 states as follows:

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

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

[65] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Although litigation privilege is referred to by the township, its section 12 claim rests on solicitor-client communication privilege.

[66] 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.¹³ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹⁴ 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.¹⁵

[67] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.¹⁶

[68] 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.¹⁷ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹⁸

[69] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege voluntarily demonstrates an intention to waive the privilege.¹⁹ An implied

¹³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁴ Orders PO-2441, MO-1925 and MO-2166.

¹⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) ("*Chrusz*"); Order MO-2936.

¹⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

¹⁹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

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.²⁰

[70] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.²¹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.²²

[71] 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. Like the common law solicitor-client communication privilege, statutory communication privilege covers records prepared for use in giving legal advice.

Representations

[72] The RVCA submits that solicitor-client privilege is broad and covers not only the document containing advice, but also information passed between solicitor and client aimed at keeping both parties informed so that advice can be sought and given.

[73] As noted, the basis for the RVCA’s section 12 claim is the solicitor-client relationship between *the township* and *the township’s* solicitor. The RVCA submits that it had a common interest with the township in the matters about which the township sought and received legal advice and that therefore the township’s sharing of information with the RVCA did not constitute waiver. The RVCA points to its shared responsibility with the township to regulate development and construction on the property, including “a shared responsibility to consider, approve, or deny building permits and development applications.”

[74] The RVCA acknowledges that disclosure of privileged information constitutes waiver of privilege, but that waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. It submits that in the present case the township has not waived privilege, “given the common interest between the parties” and that it is in the public interest that the township and the RVCA continue to be able to share legal advice on matters in which they have a common interest.

[75] The appellant accepts that the township’s sharing of solicitor-client privileged

²⁰ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

²¹ 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.).

²² *Chrusz*, cited above; Orders MO-1678 and PO-3167.

information with the RVCA does not constitute waiver, subject to this office's review.

[76] However, the appellant asks this office to specifically consider whether the withheld communications are for the "legitimate *purpose* of seeking and providing legal advice" or for the purpose of "mere commentary." Regarding records 14, 20 and 22, the appellant requests that additional information about the records be provided to him. (It should be noted that the RVCA has provided this office with complete copies of all of the records in dispute.)

[77] The township's representations focus on the importance of solicitor-client privilege at common law and how the Supreme Court of Canada has recognized the special nature of solicitor-client privileged information, even in the context of access to information legislation. It asserts that the section 12 exemption is broad and includes solicitor-client communication and litigation privilege. It submits that section 12 protects all communications forming part of the "continuum of communications" between client and lawyer for purposes of seeking and providing legal advice (MO-2945-I) and that it permits an institution to withhold documents relating to investigations by or on behalf of legal counsel to assist with providing legal advice, citing Order MO-2781.

[78] The township notes that the RVCA submitted, and the appellant accepted, that the township had not waived privilege by sharing communications with the RVCA. It disputes that additional information about these communications should be disclosed, as urged by the appellant, arguing that this would reveal information about the legal advice.

Analysis and findings

[79] For the reasons that follow, I find that some of the withheld information qualifies as solicitor-client privileged information of the township and that although it was disclosed to the RVCA, this disclosure did not constitute waiver because of the common interest exception to waiver.

[80] In *Chrusz*²³, the Ontario Court of Appeal examined the common interest exception to waiver in the context of solicitor-client litigation privilege claims. IPC adjudicators have examined and established that the common interest exception to waiver also applies to solicitor-client communication privilege claims under certain circumstances.²⁴

[81] Drawing on the analysis of the adjudicator in Orders MO-1678 and with regard to *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*,²⁵ the adjudicator

²³ Cited above.

²⁴ See for example, Orders MO-1678, MO-3253-I, PO-3154, PO-3167 and PO-4065.

²⁵ 2002 BCSC 1344.

in Order PO-3154 articulated the following two part test to determine the existence of a common interest to resist waiver of solicitor-client privilege:

- a. the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor- client privilege under [the *Act*]; and,
- b. the parties who share that information must have a “common interest,” but not necessarily identical interest.

[82] Adjudicators in Orders PO-3167, PO-4065 and MO-3253-I followed this approach, noting also that the determination of the existence of a common interest is highly fact-dependent.²⁶ In Orders PO-3167, PO-4065 and MO-3253-I, the adjudicators found a common interest to exist in relation to solicitor-client communication privileged information. Having reviewed the extensive discussions in these orders of the underlying case law and its application to section 12 or its equivalent in the provincial *Act*, I agree with the approach taken and find it applicable to the present appeal.

[83] In consideration of the related jurisdictions of the RVCA and the township over the property and the degree of cooperation and collaboration between them as evidenced in the substance of the records, I am satisfied that the RVCA had a common interest in the legal advice sought and received by the township. Although the two institutions did not have identical interests to each other, I conclude that it was common. For instance, in my view it would have been reasonably possible for the township’s counsel to represent the interests of the RVCA in the matter should it have been necessary.²⁷

[84] I therefore find that any disclosure of the township’s privileged information at issue in this appeal to the RVCA does not constitute waiver and that therefore the second part the test set out above is met. I will now review on a record by record basis, the first part of the test – whether the information is inherently privileged.

Record 5

[85] The RVCA withheld the hand-written notes on page 40 of Record 5. Based on my review, the notes do not record any communication with the township solicitor, nor do they describe any legal advice. However, they contain one line that qualifies as solicitor-client privileged communication information as it contains information that would reveal the seeking or receipt of legal advice. In my view, this information may reasonably be severed from the remainder of the notes. I therefore find that section 12 applies to one

²⁶ *Pitney Bowes of Canada Ltd. v. Canada*, [2003] F.C.J. No. 311 (T.D.).

²⁷ See *Canadian Pacific Ltd. v. CNADA (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.), as referred to in Orders MO-1678, MO-3253-I and PO-3154, for example.

line of the hand-written notes only. I will accordingly review the RVCA's alternative claim that section 8(1)(b) applies to the remainder of the notes.

Record 14

[86] Regarding Record 14, I have already determined that all but one discrete email qualifies for the advice and recommendations exemption in section 7(1) and so subject to my review of the RVCA's exercise of discretion, I will uphold the RVCA's decision to withhold most of the information. Considering only the discrete email that remains at issue, noting that it is a communication between RVCA staff and that none of its content reveals any solicitor-client communication privileged information, I find that section 12 does not apply to this email. I will therefore consider the RVCA's alternative section 8(1)(b) claim.

Record 20

[87] Record 20 includes email correspondence that includes communication between the township and its solicitor. Based on my review, the entirety of Record 20 qualifies as solicitor-client communication privilege under section 12.

Record 21

[88] Record 21 consists of two emails, one of which has been withheld. The withheld email does not contain communication between the township (or the RVCA) and a solicitor. However, one portion of the email would reveal solicitor-client communication privileged information that qualifies for section 12. I also find that this portion may reasonably be severed from the remainder of the email and I will therefore consider the RVCA's alternative section 8(1) claim regarding the remaining information.

Record 22

[89] Record 22 consists of an email and hand-written notes. The email (on page 1 of Record 22) qualifies as solicitor-client communication privilege information, revealing direct communications with the township solicitor. However, the hand-written notes (on page 2 of Record 22) do not contain any information that reveals such communications or the content of legal advice sought or obtained. I therefore find that only page 1 of Record 22 qualifies for section 12.

Summary

[90] I find that section 12 applies to part of Record 5, the entirety of Record 20, one sentence of Record 21 and page 1 of Record 22. I will review the RVCA's exercise of discretion to withhold this information below at Issue E.

[91] I will first review the RVCA's alternative claim that section 8(1)(b) applies to part of the remaining withheld information in records 5, 14 and 21.

[92] The RVCA has not made any alternative claims regarding page 2 of Record 22 and I will therefore order it disclosed.

Issue D: Does the discretionary exemption for law enforcement investigation at section 8(1)(b) apply to the information at issue?

[93] The RVCA relies on section 8(1)(b) on the basis of its understanding of the actions of the township's enforcement of its by-laws in relation to the property. The only information remaining at issue for which the RVCA claimed the section 8(1)(b) exemption is parts of records 3, 5, 14 and 21.

[94] Section 8(1)(b) is a harms-based exemption. It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.²⁸ The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²⁹

[95] The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations.³⁰ The investigation in question must be ongoing or in existence.³¹

[96] The institution holding the records need not be the institution conducting the law enforcement investigation for the exemption to apply.³²

Representations

[97] The RVCA asserts that section 8(1)(b) applies on the basis that the township was conducting an investigation under its by-laws. The RVCA states that it was advised about the investigation by the township.

[98] The appellant states that he "understands that where issues overlap it is not uncommon for a conservation authority and a municipality to jointly consider" matters related to zoning by-law compliance, although, as noted, the RVCA does not have

²⁸ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

²⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

³⁰ Order PO-2085.

³¹ Order PO-2657.

³² Order PO-2085.

jurisdiction to enforce these. However, the appellant is prepared to accept, subject to this office's review, the RVCA's application of section 8(1)(b) to records 3 and 21. However, he makes specific representations about Record 5.

[99] Regarding Record 5, the appellant submits that based on the date of the record, it was created at a time when the township's by-law did not contain any requirements pertaining to structures built on the floodplain. As I understand the argument, the RVCA's jurisdiction is limited to regulation of structures on the floodplain only.

[100] The RVCA in reply states that it has exercised its discretion to protect the township's investigation and it rejects the notion that this office ought to consider the limits of the RVCA's own jurisdiction.

[101] The township states that section 8(1)(b) permits an institution to withhold records where disclosure "could reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement proceeding of from which a law enforcement proceeding is likely to result." It submits that law enforcement includes investigations into possible violations of municipal by-law.³³ Further, the township states that it is involved in an ongoing investigation into the appellant's breach of the zoning by-law and that the RVCA is involved in this investigation. It says that there is a risk of harm and that the township need not provide evidence of actual harm, or intent to harm.

[102] In response to the appellant's representations, the township says that section 8(1)(b) does not stipulate that an institution can only rely on section 8(1)(b) where disclosure would affect an investigation performed by the institution claiming the exemption. Regarding the timing issue, the township states that at the time, the township was "in the process of assessing the validity of the appellant's wife's [...] permit and a possible breach of the zoning by-law at that time and that the redacted portion of Record 5 relates to that investigation."

[103] In reply to the township's arguments, the appellant states that the township has "evidently chosen not to pursue prosecution of the appellant or his spouse for a by-law infraction" and it therefore submits that the records created at that time are no longer caught by section 8(1)(b).

Analysis and findings

[104] In my view, the evidence before me does not establish how disclosure of the withheld information could reasonably be expected to harm or interfere with any investigation and it accordingly does not meet the test required by section 8(1)(b). The

³³ Order M-16.

following analysis is brief, in part, because I have upheld exemption claims relating to the main substance of the records remaining at issue.

[105] Based on my review of the records and the context, I am unable to conclude that the remaining withheld information in records 3 and 21 is related in any way to any investigation and I find that section 8(1)(b) does not apply.

[106] The remaining withheld information in Record 5 relates to other events or actions, not any investigation or investigation steps on the part of the township and I find that it is not eligible for section 8(1)(b).

[107] The RVCA has made no further alternative exemption claims for these records and I will therefore order these portions to be disclosed.

Issue E: Did the RVCA exercise its discretion under sections 7(1) or 12, as the case may be? If so, should this office uphold the exercise of discretion?

[108] The sections 7(1) and 12 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[109] In addition, this office 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.

[110] This office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁴ This office may not, however, substitute its own discretion for that of the institution.³⁵

[111] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁶

- the purposes of the *Act*, including the principles that:

³⁴ Order MO-1573.

³⁵ Section 43(2).

³⁶ Orders P-344 and MO-1573.

- information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
 - whether the requester has a sympathetic or compelling need to receive the information
 - whether the requester is an individual or an organization
 - the relationship between the requester and any affected persons
 - whether disclosure will increase public confidence in the operation of the institution
 - the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person.

Representations

[112] The RVCA submits that it properly exercised its discretion, taking into account the purpose of the *Act*, the wording of the exemptions and the interests they seek to protect. It asserts that it did not take into account any irrelevant considerations.

[113] The appellant submits that the RVCA did not exercise its discretion with due care and that it was improperly influenced by the township's input into the proper application of the *Act*. The appellant also refers to the RVCA's admission that it mistakenly withheld certain parts of records as further evidence of its failure to exercise its discretion.

[114] In reply (and throughout its representations), the RVCA acknowledges that it considered the interests of the township but it affirms that it exercised its discretion with due care and without improper influence from the township.³⁷

Analysis and Findings

[115] I uphold the RVCA's exercise of discretion to withhold the information eligible for exemption under sections 7(1) and 12.

³⁷ The township made representations about the RVCA's exercise of discretion but I do not find it necessary to consider them.

[116] To reach this conclusion, I considered the totality of the records before me, the approach taken by the RVCA as evidenced by the records as well as the RVCA and the appellant's representations. There is no evidence before me that the RVCA acted in bad faith or for an improper purpose or that it took into account irrelevant considerations.

[117] The RVCA's consultation with the township was appropriate and I find, based on the approach taken by the RVCA as evidenced by the information disclosed, that it exercised its discretion in consideration of its own interests and its good faith consideration of the interests of the township. There is nothing improper about the approach taken by the RVCA.

[118] Regarding some of the appellant's other claims about the errors made or the merits of the exemption claims in general, I observe that focus of the review of discretion is whether the institution has engaged in its "residual discretion" to consider all relevant matters and possibly disclose information that it may otherwise be entitled to withhold under a discretionary exemption. It is not a second review of the merits of the exemption claims made.

[119] I am satisfied that the RVCA exercised its discretion in a proper manner and I uphold it.

ORDER:

1. I uphold the RVCA's decision to deny access to the withheld information in records 3 (part), 6, 7, 9, 11, 14 (part), and 16 on the basis of section 7(1).
2. I uphold the RVCA's decision to deny access to the withheld information in records 5 (part), 20, 21 (part), and 22 (page 1) on the basis of section 12.
3. I order the RVCA to disclose records 3 (part), 5 (part), 21 (part), and 22 (page 2) and the pages for which it abandoned its exemption claims in this inquiry to the requester by **January 11, 2021** but not before **January 5, 2021**.
4. For certainty, the information highlighted in the copy of records 3, 5, and 21 provided to the RVCA with this order should be disclosed.
5. In order to verify compliance with order provision 3, I reserve the right to require the RVCA to provide a copy of the access decision and the records sent to the appellant.
6. The timelines in this order may be extended if the RVCA is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.

Original signed by:
Valerie Jepson

December 2, 2020

Adjudicator