Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER MO-4015-F

Appeal MA17-526

County of Norfolk

February 24, 2021

Summary: This final order upholds the County of Norfolk's decision, in part, to apply the Branch 1 common law litigation privilege of section 12 (solicitor-client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act* to various records, including email correspondence, meeting notes and a report. The adjudicator orders the County of Norfolk to disclose four records to the appellants that she finds are not subject to the solicitor-client privilege exemption in section 12.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12.

OVERVIEW:

[1] This appeal arises from a request for information made by two individuals to the County of Norfolk (the county) for records related to a property that they own in the county, as well as county records related to drainage and culverts. The requesters had previously complained to the county in 2015 about water drainage problems on their property. Both the requesters and the county had engineering reports prepared to assess the drainage issues on the property but the parties were unable to determine who was responsible for the damage the requesters say occurred. In 2017, the requesters commenced a civil lawsuit against the county regarding the drainage issues and the damage they say was caused to their property. The litigation is ongoing.

[2] After commencing their lawsuit, the requesters submitted a request for information under the *Municipal Freedom of Information and Protection of Privacy Act*

(the *Act*) to the county for access to the following information related to their property:

1. All records pertaining to the [the property];

2. All records pertaining to the portion of municipal land, including [a specified road], adjacent to [the property] (the "Municipal Lands") including, but not limited to, any municipal work completed on the Municipal Lands;

3. All records pertaining to all drainage and culverts currently, or historically, present on the Municipal lands;

4. All records pertaining to [a named individual]'s involvement with [the property] and/or the Municipal Lands; and

5. All records pertaining to any communications among Town staff regarding the [the property] and/or the Municipal Lands.

[3] The county identified records that were responsive to the request and granted the requesters partial access. It withheld some information pursuant to the mandatory exemption in section 14(1) (personal privacy) of the *Act* and the discretionary exemption for solicitor-client privilege in section 12 of the *Act*.

[4] The requesters (now the appellants) appealed the county's decision to grant them partial access to the records it identified in its initial search to this office. The appellants also asserted that additional responsive records should exist. As a result, the issue of reasonable search was added to their appeal.

[5] Mediation did not resolve the issues and the matters were moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*. An adjudicator was assigned to this appeal and she sent a Notice of Inquiry to the parties, who provided representations in response.

[6] The appellants indicated in their initial representations that they were no longer challenging the county's application of the mandatory exemption at section 14(1) of the *Act*. As a result, the information that the county withheld pursuant to section 14(1) is no longer at issue.

[7] This matter was then transferred to me to continue the inquiry. After reviewing the parties' representations and the records at issue, I determined that there was a reasonable basis to conclude that additional responsive records should exist. As a result, I issued Interim Order MO-3895-I, where I ordered the county to conduct a further search for responsive records. I remained seized of the appeal to determine the outstanding issues, including whether the discretionary exemption at section 12 applied to the information the county withheld.

[8] Following Interim Order MO-3895-I, the county conducted a further search and issued a decision regarding 114 additional records.[1] The county granted partial access to the records and applied sections 7(1) (advice and recommendations), section 12 (solicitor-client privilege), section 14(1) (personal privacy), section 15(a) (information soon to be published) and section 52(3) (labour relations exclusion) to portions of the newly identified records. It also said that a portion of one record was not responsive to the request.

[9] The appellants notified this office that they were satisfied with the county's subsequent search for responsive records. However, they advised that they were appealing the county's application of sections 7(1) and 12 to the newly identified records. The appellants confirmed that they were not appealing any other exclusions or exemptions applied by the county and advised that they did not wish to participate in mediation in regards to the newly identified records.

[10] As a result, I decided to continue my inquiry into the information at issue in the original responsive records (the Group A records) and to add the newly identified responsive records (the Group B records). I invited the parties to make representations on whether sections 7(1) and/or 12 applied to the Group B records only. The county provided representations in response but the appellants did not. The appellants advised this office that they intended to rely on the representations they made for the Group A records for the Group B records.

[11] In this final order, I uphold the county's decision to withhold all of the information at issue in the Group A and B records pursuant to common law litigation privilege exemption in section 12 of the *Act*, with the exception of Group B records 104, 105, 111 and 114. I conclude that section 12 of the *Act* does not apply to these records and because the county did not apply any other exemptions to them, I will order the county to disclose them to the appellants. As a result of my findings regarding section 12, it was not necessary for me to also consider whether section 7(1) applied to any of the records at issue.[2]

RECORDS:

[12] There are 93 records at issue in Group A that the county withheld in full or in part pursuant to section 12 of the *Act*.[3] These are the records identified by the county during its original search. They are comprised of email correspondence and attachments. The county provided an index with its representations that provides a description of each record, specifies the exemption claimed and includes an explanation

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[1] Based on a decision letter sent to the appellant and copied to this office.
[2] The only record at issue that the county applied section 7(1) of the *Act* to is Group B Record 72.
[3] The Group A records at issue are listed in the county's index as records 3-7, 12, 14-20, 22, 24, 28-31, 33, 35, 37-38, 40, 42-55, 57-76, 81-82, 87-88, 90-102, 104-108, and 112-124.

outlining why the exemption was claimed.

[13] There are 40 records at issue in Group B. They are comprised of emails and attachments, meeting notes and logs, a report, maps, and photographs. These are the records that the county identified during its supplemental search pursuant to Interim Order MO-3895-I. The Group B records have been withheld in full. They are listed in the index provided by the county as records 70, 72 to 98, 100, 103 to 112, and 114. The county's index includes a description of each record, the exemption applied and comments about why the exemption was claimed.

[14] The county provided this office with copies of both Group A and B records with no redactions. I have reviewed them in coming to my findings.

DISCUSSION:

[15] The county says that section 12 of the *Act* applies to all of the information at issue in the Group A and B records. 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 an institution for use in giving legal advice or in contemplation of or for use in litigation.

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

[17] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Here, the county relies on the common law litigation privilege.

[18] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[4] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[5] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as

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

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

communications between opposing counsel.[6] The litigation must be ongoing or reasonably contemplated.[7]

Termination of litigation

[19] Common law litigation privilege generally comes to an end with the termination of litigation.[8]

Branch 2: statutory privilege

[20] 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. Here, the county relies on the statutory litigation privilege.

[21] The statutory litigation privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[9]

[22] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[10] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[11]

Loss of privilege

[23] 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, and
- voluntarily demonstrates an intention to waive the privilege.[12]

[24] An implied waiver of solicitor-client privilege may also occur where fairness

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[6] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[7] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[8] *Blank v. Canada (Minister of Justice)*, cited above.
[9] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[10] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[11] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[12] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

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.[13]

[25] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[14] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[15]

The parties' representations

[26] The parties both made extensive representations regarding the Group A records, including initial and reply representations. Although I have carefully reviewed all of the representations submitted, I will refer only to the most salient portions in this decision.

[27] I also confirm that I considered the appellants' initial representations and sur-reply representations for the Group A records when determining whether section 12 applies to the Group B records.

The county's initial representations for the Group A records

[28] The county submits that both the common law and statutory litigation privilege apply to the portions of the Group A records it has withheld pursuant to section 12 of the *Act*. Specifically, it says that these records were created in contemplation of litigation, in order to investigate the claims made by the appellants and prepare the case for trial. As I noted above, these records are emails and attachments.

[29] The county submits that litigation privilege exists partly so that parties to litigation, whether represented or not, are "left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure." The county adds that "litigation privilege arises and operates *even in the absence of a solicitor-client relationship*, and it applies indiscriminately to all litigants."[16]

[30] The county submits that in 2015 the appellants contacted it and complained about alleged damage to their property due to water drainage problems. The county says that it notified its insurer of a potential claim on March 30, 2016 and opened a "risk management file" in contemplation of litigation. The county asserts that the records contained in the risk management file were assembled and/or created in contemplation, and for the dominant purpose, of litigation.

[31] The county provided copies of the Notice of Action it received from the

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[13] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[14] 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.).
[15] *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.
[16] The county refers me to paragraphs 27 to 32 of *Blank v. Canada (Minister of Justice)*, cited above. Emphasis in original.

appellants in 2017 and the Statement of Claim the appellants filed with the Ontario Superior Court of Justice regarding the alleged damage to their property.

[32] In support of its representations, the county provided an affidavit from a supervisor in its Risk and Realty department, which was formerly known as the Legal Risk and Property Management department (the Supervisor). The Supervisor confirmed that she has worked for the county in that role since January 2015 and she says that as a result, she has knowledge of the matters attested to in her affidavit.

[33] The Supervisor attests that the county notified its insurer of a potential claim against it involving the appellants and their property in March 2016 and opened a risk management file in contemplation of litigation to assist the legal services department in preparing a defence against the expected claim. The Supervisor states that the records contained in the risk management file, were, or are being, assembled, created, and/or generated for the dominant purpose of preparing the county for the litigation of the claim commenced by the appellants.

[34] The Supervisor also attests that it is her belief that one of the records at issue, a specific engineering report sought by the appellants dated May 5, 2016 (the Report) was created at the request of the county's insurance adjuster in contemplation of, and for the dominant purpose of, litigation.

The appellants' representations

[35] The appellants say that the county has not provided sufficient information to support its claim that all of the records are subject to the solicitor-client privilege exemption in section 12 of the *Act*. The appellants assert that a record does not qualify for an exemption simply because it has been reviewed by a lawyer or because legal counsel has suggested that several parts of the record should be revised in a certain manner. It says that the county's approach to exempting everything found in their "risk management file" fails to engage in the proper analysis of the actual content of each record.

[36] The appellants also say that the county has attempted to spread an "unprincipled umbrella" of privilege over all of the contents of their risk management file, without any attempt to sever non-privileged material.

[37] Specifically with regard to the county's claim that litigation privilege applies to the records at issue, the appellants say that privilege only applies if the document was made or obtained with an intention that it be confidential in the course of litigation. The appellants say that at common law, notes of statements made during a proceeding in the presence of the parties cannot be deemed to have intended to be confidential, and

therefore no privilege attaches to those records.[17]

[38] The appellants also submit that it should have been possible for the county to sever some of the information at issue and provide it in response to the request. They say that it is difficult for them to present representations due to the lack of information provided about the records by the county in its index.

[39] The appellants made specific representations about the Report.[18] They submit that the Report was the result of an attendance by the county and the engineering company it hired at their property to investigate issues with respect to drainage and culverts. The appellants say that they allowed the engineering company onto their property to review the water damage and produce the Report. The appellants say that in return, the county assured them that they would be provided with a copy of the Report.

[40] The appellants also assert that in the alternative to disclosing the Report in full, it should have been possible for the county to sever and disclose portions of the Report. In support of this assertion they point out that the county released copies of both the appellants' engineering report and a prior report from 1986 without any redactions. The appellants say that these reports may have even provided content for the Report since they discuss similar issues and the same property. As such, the appellants submit that the Report should be released, either in part, or as a whole.

[41] The appellants say that litigation privilege does not apply to the Report because a record does not qualify for exemption simply because it has been reviewed by a lawyer or because legal counsel has suggested that several parts of the record should be revised in a certain manner.

[42] The appellants submit that litigation privilege only applies if a document was made or obtained with an intention that it be confidential in the course of litigation. The appellants say that the county's agents told them that they would provide them with a copy of the Report in exchange for access to the property and a copy of their own report. The appellants submit that even if the county later decided they did not want to give the appellants a copy of the report, this "after-the-fact" decision does not create the prior intention needed to engage the protection of litigation privilege.

[43] Furthermore, the appellants say that in order for the Report to be protected by litigation privilege, it must have been created for the dominant purpose of contemplated litigation. They submit that this determination requires a factual inquiry into the purpose for which the Report was created. The appellants submit that where a record appears to serve one or more purposes, each of which at the time of creation, would

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[17] The appellants rely on Order P-1551 to support this assertion.
[18] This is the engineering report also referred to by the county at paragraph 38.

have been as important as preparing for possible litigation (or more so), the dominant purpose test will not have been met.[19] They say that whether or not litigation subsequently arose is not relevant to the assessment of the record's dominant purpose.

[44] In summary, the appellants submit that just because the county would like to now use the Report for the purpose of litigation, does not mean it is protected by litigation privilege.

[45] Finally, the appellants assert that it is unclear that the dominant purpose of the Report was for litigation. They say that the county did not claim litigation privilege over the engineering report they provided the county and chose to release it in full, despite the fact that it was drafted in response to the same series of events at their property. The appellants submit that the county has taken an inconsistent and improper approach to their exemption of the Report, which needs to be remedied.

The county's reply regarding the Group A records

[46] The county reiterates its original representations that since March 30, 2016, it kept a risk management file, which is comprised of documents that were created and/or assembled for the dominant purpose of litigation. In particular, the county says this file was created to investigate and defend the anticipated claim from the appellants. The county also asserts that its risk management file was created and maintained as a brief to provide to its lawyer for use in defending the claim.

[47] Finally, in response to the appellant's claims that the county, or an agent of the county, agreed to provide them with a copy of the Report in exchange for access to their property, the county says that this is a "bald assertion" that has been made without any evidence. The county asserts that the disclosure of records pursuant to a request under the *Act* is governed by the *Act*, regardless of whether a contract existed between the parties about the production of a particular record and that the existence of any contract is outside the purview of the Information and Privacy Commissioner.

[48] The county reiterates its claim that the Report was prepared in contemplation of litigation for its confidential use in defending the appellants' claim and it is subject to litigation privilege.

The appellant's sur-reply

[49] The appellants submit that section 12 of the *Act* covers a number of types of privilege, and that each type requires a factual inquiry into the intentions of the parties. They say that based on the county's affidavit, it first became aware of the appellants' complaint regarding drainage issues in or about June 2015. They say that according to the affidavit, nearly a year later the county notified its insurer of a potential claim and

[19] The appellants rely on Order M-685.

opened a risk management file. However, the appellant says that the county did not have any internal legal counsel involved and did not appear to seek external legal counsel until approximately July or August 2017.

[50] The appellants say that the fact that the county used the same explanation for every document it says is exempt pursuant to section 12 of the *Act* in its index is further evidence that the county took an unprincipled approach to its application of the exemption. The appellants submit that the lack of specificity prevents them from having any understanding of why the exemption is appropriate or how it relates to the subject matter of any of the documents for which the exemption is claimed.

[51] The appellants also submit that the county's selection of March 30, 2016 as the date it anticipated litigation and opened a risk management file does not make sense, given that their affiant states that the county became aware of the appellants' complaint regarding drainage issues in or about June 2015, almost a year before the risk management file was allegedly opened. They also point out that the county did not receive a Notice of Action until February 2017, and that it does not appear that the county had retained a lawyer to "utilize the risk management file," until more than a year after it was opened.

[52] Finally, the appellants submit that the county's agents' promise to provide the Report is evidence of the context and intention of the county when it, or its agents, commissioned the Report. The appellants say that county has not offered any details in support of its claim that the Report was prepared in contemplation of litigation. They deny that either of the county's affiants would have had personal knowledge of the interaction between themselves and the county regarding the Report.

The county's representations regarding the Group B records

[53] The county submits that the Group B records are subject to common law litigation privilege.[20] As noted above, the Group B records are the records identified by the county further to the additional search I ordered in Interim Order MO-3895-I.[21] They are comprised of emails and attachments, meeting notes and logs, maps, and photographs. The Report is Record 90 in the Group B records.

[54] The county says that each of these was created for its risk management file, in

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[20] I note that at paragraph 21 of its representations for the Group B records, the county states that "Any applications of statutory privilege exercised in the applied severances in accordance with section 12 has not been waived." There are no other references to the Branch 2 statutory solicitor-client privilege exemptions in the county's representations for the Group B records. As a result, I have only considered whether the Branch 1 common law litigation privilege applies to the Group B records.

[21] As noted above, the county identified 114 new records (the Group B records) and it withheld 40 of those records in full pursuant to section 12 of the *Act*. They are numbered as records 70, 72 to 98, 100, 103-112 and 114 in the county's index.

contemplation of potential litigation. It submits that the county's risk management staff are notified when litigation is reasonably contemplated to occur as a result of a potential legal issue or conflict.

[55] The county made specific representations about the remaining records at issue. First, it says that Record 70 is evidence that the Risk Management Supervisor (referred to above as the Supervisor) was first notified of the issue related to the appellants' property by the Senior Drainage Superintendent, on February 19, 2016. The county says that this record would only have been created for the purpose of litigation.

[56] The county submits that page 1 of Record 72 is an email that includes the Supervisor and was made in contemplation that litigation was likely to occur. It says that pages 3 to 4 of Record 72 are communications that involve the Risk Management department that were made "for the purposes of contemplating the potential of litigation."

[57] With regard to records 73 to 85, page 1 of Record 86, and records 89, 91 to 93, 98, 100, 103, and 106 to 108, the county says that these records are subject to common law litigation privilege because they include Risk Management department staff communications, which were created for the purpose of litigation, or potential litigation. The county asserts that the attachments to the communications are "exclusively records that would only have been created in contemplation of litigation" and that the "zone of privacy" was maintained, as communications were kept internal, or were with parties that have a common interest with the county.

[58] Specifically, the county provided the following reasons for its assertions that the records specified are subject to the Branch 1 common law litigation privilege:

- pages 19 to 22 of Record 86 are attached to an e-mail that was created by county staff for the dominant purpose of litigation;
- records 87, 94, 96, 110, and 112 were created by the county for the dominant purpose of litigation;
- Record 88 is comprised of Risk Management department staff communications that were created for the purpose of litigation, or potential litigation;
- the attachments to the email in Record 88 are legal work product that was compiled for the dominant purpose of litigation;
- Record 90 (the Report) was commissioned from a private, third party engineer, by the county's insurance adjuster for use in the litigation or its resolution through settlement and is part of the "zone of privacy" under which the county investigated and prepared a case for trial;
- Record 91 is part of the "zone of privacy" for the purpose of potential future litigation; and that

- records 95, 97, 104, 105, 109, 111, 114 were located in the risk management file and were only obtained or generated in the context of the actual or apprehended litigation and for the purpose of dealing with the litigation or its resolution through settlement.

[59] The county denies that it has waived privilege over any of the records at issue.

[60] As noted above, the appellants were offered the opportunity to respond to the county's representations about the Group B records. The appellants declined to make any further representations, but asked that their original representations and sur-reply be considered for the Group B records. I confirm that I considered all of the appellants' representations in coming to my determinations on both the Group A and Group B records.

Findings and analysis

[61] For the reasons that follow, I find that the Branch 1 common law litigation privilege applies to all of the information at issue in the Group A records and all of the records at issue in the Group B records, with the exception of records 104, 105, 111 and 114.

[62] As set out above at paragraph 21, Branch 1 litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.[22] The purpose of the privilege is "to create a 'zone of privacy' in relation to pending or apprehended litigation", so that litigants can prepare their respective cases in private, without adversarial interference and the risk of premature disclosure.[23]

[63] Previous orders of this office have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, 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.[24]

[64] To meet the "dominant purpose" test, there must be more than a vague or

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[22] Orders MO-2933-I, MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[23] *Blank*, (cited above).
[24] See, for example, Orders PO-3448 and MO-3120 and *Solicitor-Client Privilege in Canadian Law*, Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94.

general apprehension of litigation.[25] Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief.[26]

[65] The basic chronology of events relating to the appellants' claim against the county is generally agreed upon by the parties. The appellants are the owners of a property within the county. Sometime before June 2015, the appellants contacted the county to advise that they were experiencing drainage issues on their property. County staff examined the property with the appellants in 2015, both the county and the appellants had engineering reports prepared, and the appellants filed a Statement of Claim against the county in 2017.[27]

[66] The issues the parties do not agree on are:

- When the litigation would reasonably have been contemplated by the county? and
- Were the records at issue were created for the dominant purpose of that litigation?

[67] I will address each of these issues below.

When was litigation reasonably contemplated by the county?

[68] In its representations regarding the Group A records, the county says that in contemplation of litigation involving the appellant, it opened a risk management file on March 30, 2016. The county expands on this explanation in the representations it submitted in support of its decision with respect to the Group B records. It states that its practice is to notify the Risk Management staff when litigation is reasonably contemplated to occur due to a potential legal issue or conflict. It specifies that the Risk Management Supervisor was notified by the Senior Drainage Superintendent on February 19, 2016.

[69] The appellants assert that the selection of the March 30, 2016 date is "nonsensical" given that the county became aware of their complaint regarding the drainage issues in 2015, almost a year before the risk management file was opened. The appellants also note that the county did not receive the appellants' Notice of Action until 2017, and that it did not appear that a lawyer had been retained to "utilize the risk

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[25] Order MO-1337-I.
[26] Order MO-1337-I; *General Accident Assurance Co.*, cited above; and *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.).
[27] These facts are taken from the parties' representations as well as the Statement of Claim, which was included as an appendix to the county's representations.

management file" until more than a year after that file was opened.

[70] I accept the county's representations that the Risk Management Supervisor was notified of potential litigation regarding the drainage issues on February 19, 2016, and I find that litigation was reasonably contemplated at that time. I base this finding on my review of the copy of the records at issue that the county provided this office. While I cannot reveal the content of the information at issue, in my view, the email communications in records 70 and 72 of the Group B records offer clear evidence in support of the county's representations that litigation was reasonably contemplated by this date.

[71] As outlined above, litigation privilege may apply regardless of whether a party has retained a lawyer. As such, I do not accept the appellants' submissions that litigation privilege does not apply because the county had not yet retained a lawyer to use the risk management file.

Was the information at issue in the Group A and the B records created for the dominant purpose of litigation?

[72] Based on my review of the parties' representations and evidence, and in particular, my review of the Group A and B records, I find that all of the information at issue in the Group A records and most of the records at issue in the Group B records were created or brought into existence, to aid in the conduct of litigation, that at the time of their production, was a reasonable prospect.[28] Below I will address the Group A and B records separately. As the parties have both made extensive representations regarding the Report, I will address it first.

The Report

[73] The Report, dated May 5, 2016, is listed as Record 90 in the index for the Group B records. The county describes it as a report "prepared for claims adjuster." I have reviewed the entire record and can confirm that the contents support the attestation of the Risk Management Supervisor that the Report was created at the request of the county's insurance adjuster in contemplation and for the dominant purpose of litigation.

[74] In support this finding, I note that previous orders of this office have concluded that similar types of reports fell within the scope of litigation privilege. In Order MO-1571, Adjudicator Morrow summarized these orders as follows:

> In Order M-285, Adjudicator Holly Big Canoe found that reports prepared by an insurance adjuster for the City of Kitchener in response to damage

[28] To be clear, each of the records that I find is subject to the Branch 1 common law litigation privilege exemption in section 12 of the *Act* was created or brought into existence after February 19, 2016 (the date which I determined the county reasonably contemplated the litigation in paragraph 68).

> claims for flooded homes by homeowners met the dominant purpose test and fit within the scope of litigation privilege. Adjudicator Big Canoe found that the dominant purpose for the preparation of the reports in that case was to prepare for anticipated litigation between the City and the homeowners. In Order M-502, Adjudicator Donald Hale found that a report prepared by the City of Timmins' Public Works Department following two incidents in which the appellant's home was damaged by a sewer back-up, met the dominant purpose test. In that case, Adjudicator Hale found that the report was intended to inform the adjuster retained by the City's insurer of the occurrence and the possible cause of the problems with the sewer on the appellant's street. As the City had been put on notice by the appellant that a claim was being made, Adjudicator Hale found that there was a reasonable prospect of litigation at the time the report was prepared. Accordingly, Adjudicator Hale concluded that litigation privilege applied.
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> Consistent with Orders M-285 and M-502, I am satisfied that the consultant's report was prepared on behalf of the Municipality for the dominant purpose of using it in reasonably contemplated litigation against the City. It is clear that the Municipality's insurer sought the report to assess the Municipality's liability, in possible future litigation, for damages caused by the storm. In fact, some of the contemplated litigation has already come to fruition, and the Municipality has established that there is a reasonable prospect of further claims.[29]

[75] Similar to the orders outlined above, I find that the Report at issue in this inquiry was obtained by the adjuster for the dominant purpose of using it to assist with the litigation that was reasonably foreseeable against the county. As a result, I find that the Report is subject to the Branch 1 common law litigation privilege, as claimed by the county.

[76] I also note that Record 68 in the Group A records specifically relates to the Report. The county describes Record 68 in its index as an "email with attachments." I have reviewed Records 68 and confirm that it contains additional information about the Report. While I cannot reveal the contents of the email or attachments, the email chain is comprised of communications between the insurance examiner, the claims adjuster and the county's legal risk department. The attachment is a report from the adjuster that is explicitly marked confidential. The confidential report refers to the circumstances under which the Report was obtained. I confirm that Record 68 was created for the dominant purpose of litigation, and that it also supports my finding that the Report at Record 90 in the Group B records is subject to Branch 1 common law litigation privilege.

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[29] Order MO-1571; Also see Interim Order MO-2933-I.

[77] In making these findings, I have considered the appellants' representations regarding the agreement they say they made with the county, whereby they were to receive a copy of the Report in exchange for providing the county with a copy of their own engineering report and providing the county's expert access to their property. I accept that, if there was further evidence with regard to these assertions, this sort of agreement could provide insight into the county's reason for obtaining the Report. However, as I stated earlier, it clear from the actual records at issue in this inquiry that the county's insurance adjuster requested that this report be prepared in contemplation and for the dominant purpose of litigation.

[78] Finally, I also note the appellants' representations that the county has acted inconsistently by deciding to release two prior reports, but withholding the Report. They say that in circumstances where the previous reports may have provided content for the Report, the county should have released at least some portions of the Report. In my view, because the three reports are separate records, the county's decision to release the two previous reports, which it was aware that the appellants already possessed copies of, has no bearing on its decision to withhold the Report, which I have found is subject to the Branch 1 common law litigation privilege.

The Group A records

[79] As noted by the appellants, the county's assertions regarding its application of the Branch 1 common law litigation privilege are largely similar for the majority of the Group A records. In general, the county says that the records at issue were assembled, created, and/or generated for the dominant purpose of preparing the county for the litigation of the claim commenced by the appellants.

[80] I have reviewed all of the Group A records and I confirm that they are comprised of email communications and attachments, all of which relate to the matters set out in the appellants' Statement of Claim and the specific issues that the Risk Management Supervisor was notified of by email on February 19, 2016 regarding the potential litigation related to the drainage issues.[30]

[81] The parties to the email communications at issue in the Group A records are all either county employees that I accept were involved with the preparation for the potential litigation, the county's insurance claims examiner or its insurance adjuster and their staff, and/or the county's legal counsel. Based on my review of the records, the county's representations, and the Supervisor's affidavit, I accept that the county involved the insurance examiner and the adjuster to assess its liability in the reasonably contemplated litigation by the appellants over the drainage issues.

[82] Based on my review of the records in Group A, I find that the information at

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[30] See my findings at paragraph 74 regarding Group B records 70 and 72.

issue relates to efforts by the county staff, the insurance examiner and the adjuster to evaluate the county's liability for the damages alleged by the appellants, and to prepare the county for the potential litigation of the issues raised by the appellants.

[83] Although I cannot reveal the content the records, I confirm that all of the emails and attachments were either provided to, or originated with, the county, the claims examiner or the adjuster and were created and/or generated for the dominant purpose of preparing the county for the litigation which was reasonably contemplated, and ultimately commenced by the appellants.

[84] For all of the reasons set out above, I find that the Branch 1 common law litigation privilege applies to all of the information at issue in the Group A records because litigation was reasonably foreseeable by the county when the records were created and the dominant purpose of the severed portions of the records was to assist with that litigation. I find, further, that all of the communications took place within the requisite zone of privacy.

[85] Finally, there is no dispute between the parties that the litigation is ongoing and I find, based on the evidence before me, that it is. Therefore, the litigation privilege over these records has not ended.

[86] The information at issue in the records in Group A is therefore subject to the litigation privilege component of Branch 1 of section 12. I will review the county's exercise of discretion after I address the Group B records.

The Group B records

[87] For the reasons that follow, I find that Group B records 70, 72 to 82 to 98, 100, 103, 106 to 109 and 112 are subject to the Branch 1 common law litigation privilege. However, I find that Branch 1 common law litigation privilege does not apply to Group B records 104, 105, 111 or 114 and I will order the county to disclose those records to the appellants.

[88] The county submits that records 70, 72 to 98, 100, 103 to 112, and 114 are subject to common law litigation privilege. It states that each of these records was created for its "risk management file," in contemplation of potential litigation. The county says that the "zone of privacy" is maintained, as communications are kept internal or with parties that have a common interest with the county.

[89] As with the Group A records, the county provided this office with full, un-redacted copies of the Group B records as evidence in support of its position that section 12 of the *Act* applies. I have reviewed all of the records and confirm that each corresponds with the description in the index the county provided for the Group B records.

[90] Records 70, 72 to 82, 84 to 89, 91 to 93, 98, 100, 103, and 106 to 109 are email communications. Based on my review of these records, and all of the evidence before

me in this inquiry, it is clear to me that each of these communications was created after litigation was reasonably contemplated by the county, and for the dominant purpose of assisting it with that litigation.

[91] As with the email communications in the Group A records, the parties to the communications include only county staff involved in the preparation for the litigation, the county's insurance examiner and the adjuster. I accept that these communications were made within the zone of privacy to assist the county with the litigation it anticipated the appellants would commence regarding the drainage issues. Specifically, I note that the emails provide insight into the steps the county was taking to investigate, research and gather evidence about the potential litigation. It is clear from the records at issue that each participant in the email communications was involved in the preparation for the potential litigation.

[92] Records 94 to 97 are not email communications, though the information in these records is referred to in the email communications referred to in paragraph 91. These records are comprised of maps and other information from the county's Land Registry Office which I accept, based on the county's representations and the content of the records, were gathered by the county for its use in preparing for the litigation. I accept that they have been kept within the zone of privacy and find that the Branch 1 common law litigation privilege applies.

[93] Records 83, 110, and 112 are notes from meetings between the county, and its insurance examiner and/or the adjuster, and in some cases, the appellants. Based on my review of the meeting notes, it is clear to me that they were prepared for the purpose of assisting the county to prepare for the anticipated litigation with the appellants. In addition to recounting discussions or observations, the notes also include analysis regarding the potential litigation and steps the county intended to take regarding it preparation for that litigation. I accept that the county kept this information confidential between its own employees, the insurance examiner and the adjuster. As a result, I find that the Branch 1 common law litigation privilege exemption in section 12 of the *Act* applies to records 83, 110, and 112.

[94] In making this finding, I confirm that I considered the appellants' reliance on Order P-1551, which states that notes of statements made during a proceeding in the presence of the both parties to a litigation matter cannot be deemed to have been intended to be confidential, and therefore no privilege attaches to those records. In my view, that principle does not apply in this case. The records to which the adjudicator in Order P-1551 applied this principle were entitled "Summary of Evidence Heard on Voir Dire" and were notes of evidence given during a trial. The notes at issue in this inquiry were not taken during a "proceeding." As a result, Order P-1551 is not relevant to the information at issue in this inquiry. In any event, it appears that the records before me are distinguishable on the basis that they are not solely an objective account of the statements made at the meetings. As I noted above, they include the county's analysis regarding the potential litigation.

[95] I find however, that the remaining records in Group B, records 104, 105, 111

and 114, are not subject to the Branch 1 common law litigation privilege exemption in section 12 of the *Act*. Based on my review of the records themselves and the county's index, I find that the appellants provided each of these records to the county, or its insurance examiner. The records are comprised of photographs with notes from the appellants, a "problem log" created by the appellants, and a one-page letter from the appellants' legal counsel to the insurance examiner.

[96] In its representations, the county states the following about these records:

> These documents were only obtained or generated in the context of the actual or apprehended litigation and for the purpose of dealing with the litigation or its resolution through settlement. Section 12 of the *Act* is applied on this record to protect identifying the legal work product compiled for the dominant purpose of litigation.

[97] I do not accept these representations. While I accept that these records were obtained by the county "in the context of" litigation and for the purpose of dealing with that litigation, I am not satisfied that they are part of the "zone of privacy" necessary to support a claim of litigation privilege, nor do they identify any "legal work product."[31] I also note that there is nothing on the face of these records that indicates they relate to settlement negotiations and the county has provided no further explanation or evidence to support its assertions in that regard. In the absence of any evidence about how the county came to possess these records, and where it did not create the records itself, I find that it would be unreasonable to conclude that they were within the county's "zone of privacy" or that they form part of the county's work product for the purpose of preparing for trial or settlement.

[98] I specifically reject the county's assertion that these records are its legal work product, or would "identify" the county's legal work product. As outlined by the Ontario Superior Court of Justice in *Fresco v. CIBC*, the "work product test" focuses on the need to protect legal counsel's observations, thoughts and opinions, or his/her theories and strategies.[32] In my view, it is clear that records 104, 105, 111 and 114 do not contain this sort of information nor would their disclosure identify this sort of information. As a result, I find that the Branch 1 common law litigation privilege exemption does not apply to records 104, 105, 111 or 114 and, since the county has not claimed any other exemptions to those records, I will order that it disclose them to the appellants.

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[31] See, for example, paragraph 44 of *Ontario (Correctional Services) v. Goodis*, cited above, where the Court confirmed that communications between opposing parties are not considered privileged, nor are those records part of counsel's work product, prepared for it or by it for third parties.

[32] *Fresco v Canadian Imperial Bank of Commerce*, [2019] OJ No 2979, 2019 ONSC 3309 at paras. 37 to 42.

Summary of findings for the Group A and B records

[99] For all of the reasons set out above, I find that the Branch 1 common law litigation privilege exemption applies to all of the portions of the Group A records that the county has withheld pursuant to section 12 of the *Act* and to Group B records 70, 72 to 82 to 98, 100, 103, 106 to 109 and 112.[33] Section 12 does not apply to Group B records 104, 105, 111 and 114.

[100] I will now review whether the county properly exercised its discretion in deciding to withhold the exempt information.

Exercise of Discretion

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

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

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

[103] In either case, 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]

The parties' representations

[104] The county says that it considered the purpose of the *Act* and the principle that the use of exemptions should be limited and specific when it exercised its discretion to apply section 12 to the information at issue in this inquiry. The county submits that all Public Works, Building Department, and other operational records were released without use of the section 12 exemption and that only those records which were located within the Risk Management file because of the actual or contemplated litigation were withheld.

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[33] The county also applied section 7(1) (advice and recommendations) to Record 72 of the Group B records. Given my finding regarding section 12, it is not necessary for me to consider whether section 7(1) also applies to Record 72.
[34] Order MO-1573.
[35] Section 43(2).

[105] The county denies that it exercised its discretion in bad faith. It says that it released as much information as it could without jeopardizing the integrity of the ongoing litigation. The county says that it consulted with its legal counsel regarding the discretion to waive privilege, where possible, and it denies that any irrelevant factors were taken in consideration. It submits that litigation privilege exists to allow a litigant to prepare its defence free from adversarial interference or premature disclosure. It says that the county's claim of litigation privilege over the information at issue must be upheld to enable it to properly engage in the ongoing litigation process with the appellants.

[106] The appellants submit that the county did not apply the section 12 exemption properly. It says that the county's "blanket approach" to the risk management file suggests that it did not consider the specific application of the section 12 exemption to any of the records at issue. It argues that even if there are records that would be validly exempt in part, the county could have redacted or severed the records to disclose additional information.

Findings and analysis

[107] Having regard to the circumstances of this appeal, I am satisfied that the county considered a number of relevant factors when exercising its discretion under section 12. Furthermore, I see no evidence that it took into account irrelevant considerations or failed to take into account relevant considerations.

[108] I accept the county's representations that it considered the purpose of the *Act* and released as much information as it could without affecting the integrity of the ongoing litigation. I note that based on the indexes provided for the Group A and B records, and the copies of severed records provided to this office, many records (or portions of records) were released to the appellants. In my view, it is apparent that the county turned its mind to what information could be disclosed, and what information it believed was necessary to withhold on the basis of the common law litigation privilege in order to prepare for the ongoing litigation with the appellants.[36]

[109] Based on my review of all the records and the parties' representations, I see no evidence that the exercised its discretion in bad faith or for any improper purpose. I find that the county considered whether further information could be released to the appellants and took relevant considerations into account when it decided to withhold the information at issue.

[110] As a result, I uphold the county's exercise of discretion pursuant to section 12 of the *Act* for all of the information that I have found to be exempt under section 12.

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[36] For these reasons, I also do not accept the appellants' assertions that the county failed to disclose as much of the responsive records as could reasonably severed without disclosing material which is exempt, pursuant to section 4(2) of the *Act*.

ORDER:

1. I order the county to disclose Group B records 104, 105, 111 and 114 to the appellants by March 31, 2021.

2. I uphold the county's decision to withhold all of the remaining information at issue under section 12 of the *Act*.

3. In order to verify compliance with this order, I reserve the right to require the county to provide me with a copy of its correspondence to the appellants, disclosing the records in accordance with order provision 1.

4. The timeline noted in order provision 1 may be extended if the county is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such extension requests.

Original signed by: February 24, 2021

Meganne Cameron
Adjudicator