

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4048-I

Appeal MA18-478

Town of South Bruce Peninsula

May 11, 2021

Summary: The appellant seeks access to records from the town about its maintenance activities and an endangered bird on Sauble Beach. The town was investigated and is now the subject of a prosecution under the *Endangered Species Act* for its activities in relation to the endangered bird. The town denied access based on a variety of exemptions. Some of the issues in this appeal were resolved in Interim Order MO-3919-I.

In this order the adjudicator partially upholds the town's decision to withhold some of the records on the basis of the discretionary solicitor-client privilege exemption in section 12. For the remaining records, the adjudicator rejects the town's alternative claims under sections 6(1)(b), 8(1), 11, and 9 and orders certain records to be disclosed to the appellant.

Three of the records may contain the personal information of an affected party and the adjudicator has therefore deferred consideration of whether disclosure of these records would constitute an unjustified invasion of personal privacy pending notification of the affected party.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 8(1)(a), 8(1)(b), 8(1)(f), 11(c), 11(d), 11(e), 9, and 12(1).

Orders and Investigation Reports Considered: Orders MO-3919-I, MO-3094, PO-2490 and MO-3253-I.

OVERVIEW:

[1] This order deals with most of the remaining issues in dispute arising from an

access request for records about the Town of South Bruce Peninsula's (the town) maintenance activities on Sauble Beach and its impacts on piping plovers. A piping plover is a bird that is recognized as an endangered species under the *Endangered Species Act, 2007*, S.O. 2007, c. 6 (the *ESA*).

[2] The request is best understood with some additional context. On May 21 and July 25, 2018, the Ministry of Natural Resources and Forestry (the ministry) laid charges against the town under the *ESA* for allegedly damaging piping plover habitat on Sauble Beach in 2017. Following the initial charges, in March, May, June and October 2018, the ministry also issued "stop orders" to the town to limit the nature of the town's maintenance activities on Sauble Beach.

[3] The stop orders are no longer in place, having expired on December 31, 2018. In 2019, the town was convicted and ordered to pay \$100,000 to a bird conservation organization to support piping plover recovery efforts. The town appealed the convictions and in March 2021, the appeal was dismissed.¹ The town has now applied for leave to appeal the dismissal to the Ontario Court of Appeal.

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

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

[5] After some clarifications, the town issued a decision on July 7, 2018 indicating that it had searched and identified 76 responsive records. The town denied access in full relying on a variety of mandatory and discretionary exemptions under the *Act*.²

[6] At the time of its decision, the town asserted that the following discretionary exemptions applied to all of the records: solicitor-client privilege (section 12), closed

¹ Decision of Justice J.A. Morneau of the Ontario Court of Justice released March 8, 2021.

² I have no information before me about whether the town carried out searches for responsive records after July 7, 2018 up to November 1, 2018.

meetings (section 6(1)(b)), law enforcement and fair trial (sections 8(1)(a)(b) and (f)), and economic and other interests (sections 11(c)(d) and (e)). The town also asserted that the discretionary advice or recommendations exemption (section 7(1)) applied to some of the records and that the mandatory relations with other governments exemption (section 9) applied to other records. Finally, the town asserted that the mandatory personal privacy exemption (section 14) applied to some of the records.

[7] The appellant appealed the town's decisions to withhold access and to charge a fee. At mediation, the fee issue was resolved. The appellant³ also clarified that it did not seek access to certain personal information.

[8] The file was transferred to the adjudication stage and a written inquiry occurred. During the inquiry, the IPC raised the possible application of the prosecution exclusion in section 52(2.1) of the *Act*.

[9] The ministry was added as an affected party. The town, the appellant and the ministry were invited to make representations on all of the issues. The non-confidential representations of the town were shared with the appellant and vice versa. The ministry advised that it was unable to make representations because the town refused to provide it with access to, or information about, the records at issue.

[10] On April 20, 2020, I issued Interim Order MO-3919-I resolving some of the issues in the appeal. First, I found that the prosecution exclusion (section 52(2.1)) does not apply to the records. Second, I upheld the town's decision to withhold some of the records on the basis of the discretionary solicitor-client privilege exemption in section 12.⁴ Third, I found that the town was not permitted to rely on the section 12 exemption for some of the records.⁵ I was not able to make a final decision about the application of section 12 for the remaining records because there was insufficient evidence for me to do so and so I deferred that decision along with consideration of the town's alternative claims.

[11] Following Interim Order MO-3919-I, I requested that the town provide me with additional evidence regarding the remaining records and copies of the records for which I did not uphold its section 12 claim. The town complied with this request.

[12] Upon my further request, the town then agreed to provide me with copies of the

³ The appellant is an organization. References to "her" in Interim Order MO-3919-I were to the appellant's representative.

⁴ Records in categories 1, 9 and 13.

⁵ Records in categories 4 and 5.

records remaining at issue.⁶ I also sought and obtained an update from the town about the status of the prosecution, which is reflected in the summary above.

[13] In this order I partially uphold the town's decision to withhold some of the records remaining at issue on the basis of the discretionary solicitor-client privilege exemption in section 12.

[14] Regarding the remaining information for which I do not uphold the town's decision under section 12,⁷ I find that the town has not established any of its alternative claims under sections 6(1)(b), 8(1), 11, and 9 and I order the town to disclose records to the appellant.⁸

[15] In order to provide notice to an affected party, I defer consideration of whether the mandatory personal privacy exemption applies to four records.⁹

RECORDS:

[16] The records remaining at issue are set out in the chart below, using the same categories that I used in Interim Order MO-3919-I.¹⁰ Because I have now been able to review the records themselves, I have made some modifications to the descriptions and re-categorized one record.

Category	Number of records
Category 2 - Emails between town staff and/or mayor <i>and</i> the town's solicitor <i>and</i> a third party organization (referred to as "organization A") after the March 21, 2018 charge.	six
Category 3 - Email between town staff, mayor and deputy mayor <i>and</i> the town's solicitor <i>and</i> a third party (distinct from the third party in category 2) (referred to as "consultant A") after the March 21, 2018 charge.	one

⁶ The town did so while expressly stating that it reserves its claim that all of the records are subject to solicitor-client privilege at common law, citing *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574.

⁷ Records 6, 15 (part), 16 (part), 18, 22, 26, 36, 48, 52, 54, 55, 57 and 68.

⁸ Records 6, 22, 26, 36, 52, 54, 55, 57 and 58.

⁹ Records 15 (part), 16 (part), 18, and 48.

¹⁰ Because I upheld the town's decision to withhold the records in categories 1, 9 and 13 they are not discussed in this order.

Category 4 - Emails between town staff and/or mayor <i>and</i> the town's solicitor <i>and</i> the ministry before and after the March 21, 2018 charge.	two
Category 5 - Emails between town staff and mayor <i>and</i> the ministry before and after the March 21, 2018 charge and one undated email.	seven
Category 6 - Minutes of closed session of town council and a report or excerpts of a report tabled during closed session before and after the March 21, 2018 charge.	eight
Category 7 – Print-out of an electronic calendar of a conference call and notes made by an unidentified person dated March 13, 2018.	one
Category 8 - Email between town staff and mayor that was cc'd to the town solicitor and others before the March 21, 2018 charge.	one
Category 10 – Emails between City staff and/or mayor, deputy mayor or councillors that reveal actions undertaken at direction of or on advice of solicitor after the March 21, 2018 charge.	two
Category 11 - Emails between City staff and/or mayor, deputy mayor or councillors regarding possible third party assistance, dated after the March 21, 2018 charge.	five
Category 12 - Emails between City staff and/or mayor, deputy mayor or councillors before the March 21, 2018 charge.	three
Category 14 - Emails between City staff and/or mayor, deputy mayor or councillors regarding a particular topic dated prior to the March 21, 2018 charge.	three

ISSUES:

- A. Does the discretionary solicitor-client privilege exemption at section 12 apply to records in categories 2, 3, 6, 7, 8, 10, 11, 12, and 14?
- B. Do the discretionary law enforcement exemptions at sections 8(1)(a), (b) or (f) apply to the information remaining at issue?
- C. Does the discretionary closed meetings exemption at section 6(1)(b) apply to the information remaining at issue?
- D. Do the discretionary economic and other interests exemptions at sections 11(c), (d) or (e) apply to the information remaining at issue?

- E. Does the mandatory exemption for relations with other governments at section 9 apply to the information remaining at issue?
- F. Did the town exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?
- G. Do records 15, 16, 18 and 48 contain another individual's personal information?

DISCUSSION:

Issue A: Does the discretionary solicitor-client privilege exemption at section 12 apply to the records in categories 2, 3, 6, 7, 8, 10, 11, 12, and 14?

[17] The town asserts that the records remaining at issue consist of information that is protected by solicitor-client communication privilege or litigation privilege and it relies on section 12 to withhold them.

[18] Section 12 of the *Act* states:

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

[19] It is well established that 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.¹¹ The town has not specified whether the privileges it claims are under Branch 1 or 2; however, I understand it to assert the broadest solicitor-client privilege claims possible.

Communication privilege (Branch 1 and 2)

[20] Solicitor-client communication privilege at common law and as set out in section 12¹² 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

¹¹ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) ("*Ontario (AG)*").

¹² "... that was prepared by or for counsel employed or retained by an institution for use in giving legal advice..."

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

¹⁴ Orders PO-2441 at p. 2, MO-2166 at p. 4 and MO-1925 at p. 4.

document containing the legal advice, or the request for advice, but also includes information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹⁵

[21] Confidentiality is an essential component of the privilege. Therefore, the town must demonstrate that the communication was made in confidence, either expressly or by implication.¹⁶ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹⁷

Litigation privilege (Branch 1 and 2)

[22] At common law (Branch 1), 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.¹⁸ Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.¹⁹ 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.²⁰ The litigation must be ongoing or reasonably contemplated.²¹ Common law litigation privilege generally comes to an end with the termination of litigation.²²

[23] The statutory litigation privilege (Branch 2) applies to records “prepared by or for counsel employed or retained by an institution for use 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.²³ The statutory litigation privilege in section 12 also protects records prepared for use in the mediation or settlement of litigation.²⁴ In contrast to the common law litigation privilege, termination of litigation does not end the statutory litigation privilege in section 12.²⁵

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

¹⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) (“*Chrusz*”); Order MO-2936 at para 18.

¹⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

¹⁸ *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) (“*Blank*”).

¹⁹ *Ontario (AG)*, cited above.

²⁰ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC) (“*Goodis*”).

²¹ Order MO-1337-I and *Chrusz*, cited above; see also *Blank*, cited above.

²² *Blank*, cited above.

²³ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Goodis*, cited above.

²⁴ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

²⁵ *Ontario (AG)*, cited above.

Loss of privilege - waiver

[24] Branch 1 and Branch 2 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 it.²⁶

[25] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.²⁷ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.²⁸

[26] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.²⁹

The town's representations

[27] As described above, the town explains that it has been charged with two offences under the *ESA* for incidents that occurred in April 2017. The town states and it stands to reason that the investigation began prior to February 1, 2018 (the beginning of the time period for the requested records). Charges against the town were laid on March 21 and July 25, 2018. In addition to the charges, the ministry issued two stop orders (i.e. orders under the *ESA* restricting the town's beach maintenance activities) against the town. Both stop orders lapsed on December 31, 2018. The town continues to defend itself against the charges and is seeking leave to appeal the most recent decision of the Ontario Court of Justice that upheld the original convictions.

[28] The town submits that all of the records relate to the charges or the stop orders and that all of the records are protected by both communication privilege and litigation privilege. The town explains that it retained a law firm to assist with the charges and stop orders and that it has been "under the advisement" of this law firm regarding "all actions regarding beach maintenance since the investigation into the Town by the [ministry] began...." The town says that some of the communications relate to possible settlement.

[29] In addition to providing this office with copies of the records remaining at issue, the town made specific confidential representations regarding the individual records which I will address below.

²⁶ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983)*, 45 B.C.L.R. 218 (S.C.).

²⁷ 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.).

²⁸ *Chrusz*, cited above; Orders MO-1678, PO-3154 and PO-3167.

²⁹ *R. v. Youvarajah*, 2011 ONCA 654 and Order MO-2945-I.

The appellant's representations

[30] The appellant submits that the town has failed to meet its burden to prove that the solicitor-client exemption applies. It submits that not all communications between a solicitor and client are privileged, citing *Solosky v. The Queen* and other Supreme Court of Canada authorities.³⁰ The appellant also submits that when possible, records may be redacted to omit solicitor-client privileged information, citing Order P-1363.

[31] The appellant also points out inconsistencies within the town's submissions that it says call into question the town's contention that *all* of the records contain solicitor-client information.

[32] Generally, the appellant submits that the town has not provided sufficient evidence to support its claim that section 12 applies. (Although the appellant was provided with some information about the records, it did not receive the town's confidential representations that included more detailed descriptions of the records, including the identity of the parties to the communications.)

The town's reply

[33] The town re-asserts that it is subject to the charges and the stop orders and that it has obtained legal advice to respond and defend itself. The town reiterates its claim that litigation privilege applies to the records and refers to prior orders³¹ of this office that referenced *Waugh v. British Railways Board*³² for the proposition that documents that are "produced or brought into existence either with the dominant purpose of its author ... of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection." The town asserts generally that "all documentation was created to support the litigation and for no other purpose...."

Analysis and Findings

[34] Based on the context provided in the representations of the parties and on my review of the records themselves, I accept that the town retained lawyers to assist it to respond to the investigation and eventually to defend it against the *ESA* charges. The town has been charged and continues to defend itself against those charges.

[35] I will consider and make findings about each category of record below. As will be seen, I find that most of the records at issue consist of either solicitor-client

³⁰ [1980] 1 S.C.R. 821 at p. 835, *Foster Wheeler Power Co. v. SIGED*, 2004 SCC 18 and *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31.

³¹ Orders MO-3148 and MO-1337-I.

³² (1979) 2 All E.R. 1169

communication privileged information or litigation privileged information.

[36] For those records for which I find the town has established that section 12 applies, I will consider the town's exercise of discretion at Issue F below. For the others, I will address the town's alternative exemption claims at Issues B through E below.

Categories 2 and 3 (seven records in total)

[37] The records in categories 2 and 3 post-date the March 21, 2018 charge and are between town officials (staff or members of council) and the town's solicitor and organization A, in some cases, and consultant A, in others. In its confidential representations the town explains organization A's role in relation to the litigation, including the circumstances of its retainer. I ascertained consultant A's role based on my review of the records themselves. The town asserts that these emails are both communication and litigation privileged.

[38] Based on my review of the records, I find that the emails consist of solicitor-client communication privileged information (Branch 1 or 2). They are communications that were intended to be confidential between the town and its lawyer for the purpose of seeking and receiving legal advice. Although I considered it, the inclusion of Organization A or Consultant A did not give rise to any concerns about waiver based on their roles in relation to the subject of the advice being sought and received.

[39] In any event, I also find that they are captured by Branch 1 litigation privilege and Branch 2 statutory litigation privilege as they were plainly prepared for counsel for use in litigation, specifically the town's defence against the charges, and the communications took place within the requisite zone of privacy.

[40] In summary, I find that the category 2 and 3 records are eligible for exemption under section 12.

Category 6 (eight records)

[41] The category 6 records are copies of minutes of, and reports or excerpts of reports tabled at, closed sessions of the town council on March 20 and April 3, 2018. They contain advice from the town's lawyers relating to the investigation and eventual charges. They also contain the town's instructions to its lawyers regarding the town's defence of the charges.³³ Some of the records in this category are signed and unsigned versions of the same records.

³³ There is one portion of the records that does not relate to the charges or the maintenance of Sauble Beach and it is in my view not responsive to the request (Record 11, and duplicate information in Record 13).

[42] Based on my review of them, I find that disclosure of the category six records would reveal information that is protected by solicitor-client communication privilege (Branch 1 or 2) and they are therefore eligible for exemption under section 12.

Category 7 (one record)

[43] The category 7 record is a calendar printout and handwritten notes of a town employee that pre-date the initial charge. The town explains that the notes were made during a telephone call with the town's lawyers regarding the eventual charges.

[44] Based on my review of this record, I find that it consists of solicitor-client communication privileged information (Branch 1 or 2) because it is a record of legal advice sought by, and provided to, the town by its lawyer. The category seven record is eligible for exemption under section 12.

Category 8 (one record)

[45] The category 8 record is an email between town staff and members of council that is copied to the town solicitor. The email pre-dates the charge and the re line is "proposed beach maintenance outline."

[46] Based on my review of the email, it contains a request for legal advice and is therefore communication privileged information (Branch 1 or 2) and I find that it is eligible for the section 12 exemption.

Category 10 (two records, numbered 5 and 6)

[47] The category 10 records consist of emails between town staff and members of council that, according to the town, are actions flowing from the solicitor's advice. The town lawyers are not party to these communications.³⁴

[48] One record (record 5) is an email that occurred just prior to the charge. Based on my review, disclosure of this record would reveal solicitor-client communication privileged information (seeking or receiving legal advice).

[49] The second record (record 6) is an email that was sent just after the charge but before the stop orders were issued. It is not reveal, nor does it contain, solicitor-client communication privileged information. The town says that it relates to the investigation and its defence. Based on my review of the content of the email and the other events

³⁴ There are two records in this category and each consist of an email forwarded by a member of Council to the town's freedom of information coordinator on April 28, 2018. They appear to have been forwarded to respond to the access request. However, the records that were forwarded are dated shortly both before and after the charge.

that were ongoing at the time, I am unable to conclude that this email was created for the dominant purpose of the litigation (either the charges or the stop orders) but rather it relates generally to another topic, albeit a related topic.

[50] In summary, I find that the section 12 exemption applies to record 5 but not to record 6. I will consider the town's alternative exemption claims regarding record 6 below.

Category 11 (five records³⁵)

[51] The category 11 records consist of emails between town staff and members of council regarding possible third party assistance with the charge and/or settlement. The town asserts that this action is connected to advice given by the town solicitor. The re: lines include: "Subject: Fwd: The Minister," "Subject: Letter to Minister," and, "Subject: Minister's Letter."

[52] These records are internal emails among town staff and/or elected officials; the town's lawyers are not party to these communications. They are dated after the initial charges.

[53] Based on my review of the records in category 11 and considering the underlying context including some of the information contained in the privileged information contained in the other records, I find that the category 11 records were created for the dominant purpose of the town's response to the charges. As I noted above, the litigation is ongoing. I find that these records consist of litigation privileged information (Branch 1) and that therefore the section 12 exemption applies to them.

Category 12 records (three records – numbered 15, 16, 18)

[54] The records in category 12 are email chains, all of which pre-date the charge. The town says that these records relate to the investigation being undertaken by the ministry or relate to its efforts to obtain assistance from a third party. Generally, the town asserts that the records are "regarding advice from the town solicitor." The town provided some additional context in its confidential representations.

[55] Two of the three records (records 15 and 16) in category 12 are email chains with overlapping content. These email chains begin with an external inquiry to the town, which is responded to by town staff and the Mayor. The email chains then branch off into an exchange among town staff and the mayor.

[56] In my view, parts of these email chains consist of communication privileged

³⁵ Having now reviewed the records at issue, I have determined that one of the records originally included in Category 11 should be included in Category 12.

information because I find that disclosure of those parts would reveal advice provided by the town's lawyer. Section 12 therefore applies to those parts. I am unable to reach the same conclusion for the remaining, duplicate parts of records 15 and 16.

[57] I considered whether the remaining parts of records 15 and 16 consist of litigation privileged information but I have determined that they do not. In my view, the dominant purpose of these records was to respond to an external inquiry that was related generally to beach maintenance and the investigation, but not the dominant purpose of the town's defence of the charge. Furthermore, the emails involve a third party and I am unable to conclude in the circumstances and given the identity of the third party that they occurred within a necessary zone of privacy to establish litigation privilege.

[58] Turning to record 18, based on my review, I am unable to conclude that it contains communication or litigation privileged information. Like records 15 and 16, the email chain originates with an external inquiry and includes communications between town staff and a member of the town's council. The email communications do not contain legal advice nor am I able to conclude that they were sent and received with the dominant purpose of the town's defence of the charges. While the email exchanges relate to beach maintenance, the purpose of them is not related to the town's defence of the charge but rather to respond to the actions of a third party.

[59] I will consider the town's alternative arguments about record 18 and the remaining parts of records 15 and 16 below.

Category 14 (three records)

[60] The category 14 records consist of emails between town staff and members of town council regarding a particular topic in the days before the March 21, 2018 charge. The emails are internal, not with the town solicitors or any third party. The town submits, and it is clear from my review of them, that the objective of these emails was related to the investigation and to avoid the charges that were in fact laid in the days that followed. I am satisfied that the emails were created for the dominant purpose of responding to the investigation, and with a view to avoiding reasonably anticipated litigation. I am also satisfied that they occurred within a requisite zone of privacy necessary to establish litigation privilege (Branch 1).

Summary

[61] I find that the town has established the application of the section 12 exemption for all of the records in categories 2, 3, 6, 7, 8, 11, 12, 14, record 5 and part of the information in records 15 and 16. I will review the town's exercise of discretion in relation to this information below.

[62] I find that the town has not established the section 12 exemption for records 6, 18 and part of the information in records 15 and 16.

[63] In Interim Order MO-3919-I, I determined that the town had not established the section 12 exemption for records in categories 4 and 5. I will consider the town's alternative exemption claims for this information below at Issues B to E. The following chart summarizes the records remaining at issue and the alternative claims made by the town, which will be addressed below as necessary.

Record	6(1)(b)	8(1)(a)(b)(f)	9(1)(b)	11(c)(d)(e)
6	X	X		X
15	X	X	X	X
16	X	X	X	X
18	X	X		X
22	X	X		X
26	X	X		X
36	X	X	X	X
48	X	X	X	X
52	X	X		X
54	X	X	X	X
55	X	X	X	X
57	X	X	X	X
68	X	X		X

[64] The town also asserts that record 48 contains personal information of an individual and that therefore the mandatory personal privacy exemption at section 14(1) applies to that record. The town's claims will be addressed at Issue G, below.

Issue B: Do the discretionary law enforcement exemptions at sections 8(1)(a), (b) or (f) apply to the information remaining at issue?

[65] The town makes the alternative claim that sections 8(1)(a), (b) and (f) apply to the records remaining at issue, which are listed in the chart above. Sections 8(1)(a), (b) and (f) state:

- (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- ...
- (f) deprive a person of the right to a fair trial or impartial adjudication;

[66] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) of the *Act*. There is no dispute between the parties that the ministry's investigation and eventual decision to charge the town under the *ESA* constitutes a law enforcement proceeding or matter. The parties disagree about whether the stop work order proceedings constitute a law enforcement matter or proceeding.

[67] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[68] The IPC has stated that "law enforcement" does not apply to the following situations:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.³⁶
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.³⁷

[69] Generally, the law enforcement exemption must be approached in a sensitive

³⁶ Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

³⁷ Order P-1117.

manner, recognizing the difficulty of predicting future events in a law enforcement context.³⁸

[70] For an institution to rely on section 8, it must provide detailed evidence about the potential for the harms stated in section 8. 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.³⁹ The institution 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.⁴⁰

[71] For section 8(1)(a) to apply, the matter in question must be ongoing or in existence.⁴¹ The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters.⁴² "Matter" may extend beyond a specific investigation or proceeding.⁴³

[72] For section 8(1)(b) to apply, 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.⁴⁴ The investigation in question must be ongoing or in existence.⁴⁵

[73] In either case, the institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply.⁴⁶

[74] For section 8(1)(f) to apply, the institution must show that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. The exemption is not available as a protection against remote and speculative

³⁸ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) ("*Fineberg*").

³⁹ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

⁴⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) ("*Ontario Community Safety*") at paras. 52-4.

⁴¹ Order PO-2657.

⁴² Orders PO-2085 and MO-1578.

⁴³ *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

⁴⁴ Order PO-2085.

⁴⁵ Order PO-2657.

⁴⁶ Order PO-2085.

dangers.⁴⁷

Representations

[75] The town submits that all of the records were “created and could reasonably be expected to interfere with” the ministry’s investigation under the *ESA* that led to the charges. Further, it states that disclosure of the records “would deprive the town of a right to fair trial.” The town states that it wishes only to disclose its position in relation to the charges through the trial process.

[76] The appellant submits that the town has failed to meet its burden to demonstrate that section 8 applies. Referring to *Ontario Community Safety*,⁴⁸ it submits that the town must provide “detailed and convincing evidence.” It characterizes the town’s evidence as “brief and general evidence” that ought to be found to be insufficient. The appellant submits that the town cannot simply assert that the harms are self-evident and that the mere fact that it is party to a legal proceeding is insufficient.

[77] The appellant observes that the town claims that section 8(1) applies to all 72 records originally at issue and that it has failed to specify how disclosure of the records would cause the harms stated. In support the appellant refers to Order MO-3085, an order dismissing the town’s section 8(1)(f) claims made in another matter for lack of sufficient evidence.

[78] As indicated above, the appellant concedes that the prosecution leading to the charges is a law enforcement matter or proceeding. However, it argues that any proceedings, such as an appeal, of the stop work order does not constitute a law enforcement matter or proceeding.⁴⁹ In response, the town submits that the stop work orders were related to the charges and that in any event, they carried the risk of penalty if breached. In support, the town provided a copy of one of the stop orders. The stop orders were filed after the charges.

[79] Finally, the appellant submits that if any of the information at issue is exempt under section 8(1), the town should sever and disclose the remaining information.

[80] The town briefly replies that the stop work orders were issued under the same

⁴⁷ Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); and Order PO- 2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.).

⁴⁸ Cited above.

⁴⁹ The parties’ arguments about this issue are drawn in part from their submissions about the application of the prosecution exclusion at section 52(2.1) of the *Act*, which was addressed in Interim Order MO-3919- I.

legislation as the charges, the *ESA*, and are connected to and related to each other. It also submits that disclosure of the records could possibly harm other individuals (i.e. staff or contractors to the town) who may become subject to related proceedings.

Analysis and finding

[81] To begin, I agree with the parties that the prosecution under the *ESA* constitutes a law enforcement matter or investigation. I also find that the stop orders constitute a law enforcement matter or investigation. In my view, in the circumstances of this appeal the stop orders are connected and related to the charges. Failure to comply with the order carries penalties and when viewed together with the charges, are part of the overall enforcement activities of the ministry.

[82] However, I find that the town has failed to provide sufficient evidence about how disclosure of the records would interfere with a law enforcement matter (8(1)(a)), interfere with the investigation (8(1)(b)), or deprive it of a right to a fair trial (8(1)(f)). Although the town is not required to establish that disclosure will in fact cause the harms stated in section 8(1), it must provide detailed evidence that demonstrates the risk of harm is well beyond the merely possible or speculative.

[83] The town has provided little information about how sections 8(1)(a) and (b) could or would apply to the circumstances at hand. It suggests that disclosure could interfere with *the ministry's* investigation or prosecution of the town. The ministry was notified as an affected party; however, the town refused to provide or discuss the records with the ministry. Although the ministry was unable to make representations, I am satisfied that if there was any possible concern that disclosure of the town's own records could impact the ministry's prosecution it would have so advised. I find that neither sections 8(1)(a) or (b) apply to the records at issue.

[84] Section 8(1)(f) requires more detailed consideration. Under section 8(1)(f), a head may refuse to disclose a record if the disclosure could reasonably be expected to "deprive a person of the right to a fair trial or impartial adjudication." Unlike its other section 8(1) claims, the town says that its own right to a fair trial is at risk if the records are disclosed. Although the town's trial has concluded, it is still possible that its appeal will be successful and it is not therefore possible to dismiss this part of the town's claim on the basis that the trial is at an end.

[85] Most commonly, the section 8(1) exemption is claimed by the investigation or law enforcement authority pursuing the enforcement, not the subject. Although it is not common, subjects of possible law enforcement investigations have attempted to rely on

section 8(1)(f).⁵⁰ In Order PO-2490, an affected party who was a possible subject of a legal proceeding, argued that the equivalent section under the provincial act⁵¹ applied even though the institution decided not to make that claim. In Order PO-2490, the adjudicator discussed the principles of section 8(1)(f) even though he determined that the affected party could not raise the discretionary exemption not claimed by the institution.

[86] Of relevance to this appeal, the adjudicator in Order PO-2490 referred to Order 48 in which Commissioner Sidney Linden observed that the mere existence of procedures to obtain documents in other contexts such a discovery procedures does not “necessarily imply” that obtaining documents under the *Act* is unfair in the context of section 8(1)(f). Because there is no automatic presumption or assumption, it is therefore up to the party claiming the harm to provide evidence of the unfairness.⁵²

[87] The essence of the town’s arguments about section 8(1)(f) is that because there is an ongoing prosecution, all records that touch on it would prejudice its right to fair trial. It has not offered any evidence about how the particular type of information could cause the harms required to establish section 8(1)(f). I agree with the principles set out above that although section 8(1)(f) deals with an important principle – one’s right to a fair trial – parties who claim that it applies are nevertheless required to demonstrate with evidence beyond mere conjecture that unfairness could reasonably be expected to occur. In my view, the town has failed to provide sufficiently detailed evidence to demonstrate that disclosure of the records could deprive it of a fair right to trial. The town has failed to establish that section 8(1)(f) applies.

[88] I find that the law enforcement exemptions at section 8(1) claimed by the town do not apply to the records remaining at issue.

Issue C: Does the discretionary closed meetings exemption at section 6(1)(b) apply to the records remaining at issue?

[89] Section 6(1)(b) is an exemption for records related to closed sessions of a municipal council.

[90] The town appears to claim that section 6(1)(b) applies to all of the records originally at issue. However and as I will explain further below, based on the representations made in this inquiry and my review of the records themselves, I have concluded that the town only claims that section 6(1)(b) applies to those records that pertain to closed sessions of its council and not to all of the records at issue.

⁵⁰ See for example Orders MO-2178 and PO-2490 in which the subject of the law enforcement matter argued that section 8(1)(f) (or the equivalent in the provincial legislation).

⁵¹ Section 14(1)(f) in the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

⁵² See also the adjudicator’s discussion of Order PO-1688.

[91] I have already concluded that the records that pertain to closed sessions of its council – those in category 6 – are exempt under section 12 and it is therefore not necessary for me to consider this issue further.

[92] To explain why I have concluded that the town does not claim the section 6(1)(b) exemption for records other than those in category 6, I will briefly summarize the representations made on this issue in this inquiry.

[93] The town's representations in support of section 6(1)(b) focus on sections 239(2)(e) or (f) of the *Municipal Act, 2001*⁵³ that authorize it to convene closed sessions of its council to discuss "litigation or potential litigation..." or "advice that is subject to solicitor-client privilege...." The town says that it has procedural bylaws that make provision for closed meetings in accordance with the *Municipal Act* and that it complied with all relevant requirements.

[94] Initially, the town argued that releasing any documentation would disclose the substance of the deliberations which provided direction to staff about the "ongoing litigation, the investigation and the solicitor's advice in defence of the case."

[95] Briefly stated, the appellant submitted that the town has failed to demonstrate that the section 6(1)(b) applies to the records and that the town had not specified how or why section 6(1)(b) applies to each of the records at issue (originally a total of 72).

[96] In reply, the town did not offer any express clarification or specificity about which records in particular it argued are exempt under section 6(1)(b). However, it submits that the protections in the *Municipal Act* that enable its council to deliberate in closed session permit it to deliberate in absence of the public and that the *Act* is not meant to "circumvent" those protections. Importantly, the town refers to and relies on Order MO- 3148, an order that upheld the town's section 6(1)(b) claims involving minutes from closed sessions of council.

[97] The town states,

The town asserts that it has discussed its litigation only in closed session and that closed session documents which are responsive reveal the substance of advice given and received with regard to the litigation.

[98] Taking the town's reply representations into consideration and within the context of the records at issue, I am satisfied that that the town intends only to apply the section 6(1)(b) exemption to records that involve an actual meeting of the town council which is limited to the category 6 records for which I have already determined that section 12 applies.

⁵³ S.O., 2001, c.25 ("*Municipal Act*").

[99] Furthermore, after reviewing the records or information that remains at issue, I am unable to discern any reasonable basis to argue that section 6(1)(b) could apply to those records.

Issue D: Do the discretionary economic and other interests exemptions at sections 11(c), (d) or (e) apply to the information at issue?

[100] The town makes the alternative claim that sections 11(c), (d) and (e) apply to the records remaining at issue, which are listed in the chart above.

[101] Section 11 states:

A head may refuse to disclose a record that contains,

...

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

[102] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.⁵⁴

Representations

[103] The town states that it will suffer two harms if the records are disclosed. First, it submits that if it is not successful in defending itself against the charges, it will face monetary penalties – i.e. fines. The town does not elaborate further on this harm as I understand it to claim that it is a self-evident economic harm.

[104] Second, the town submits that if it is not successful in its defence of the charges, it will lose its ability to maintain the beach at Sauble Beach. The town says the beach at

⁵⁴ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

Sauble Beach brings tourists to the area, which is a benefit to the town. The town says that if it is unable to maintain the beach, it and small businesses in the town will suffer economic loss. It says, "This is not mere speculation. The previous condition of the beach did not lend itself to any beach activity."

[105] The town made other confidential representations on this issue that are relevant to its claim that relate to its ability to continue to maintain the beach area at Sauble Beach and, read broadly, in support of its claim that section 11(e) applies. As I understand it, the town relies on section 11(e) to the extent that some of the records relate to its beach maintenance plans.

[106] The appellant submits that the town's claim that it could face monetary penalties or suffer because of reduced tourism are irrelevant to section 11(c), which is intended to protect the ability of institutions to earn money in the marketplace.

[107] Regarding section 11(d), the appellant says that the town must provide more evidence in support of its claim that disclosure could be injurious to the financial interests of the town.

[108] Lastly, regarding section 11(e) the appellant submits that the town has failed to address any element of the test referred to above.

Analysis and finding

[109] In my view, the town has not established that section 11 applies to the information remaining at issue. The town's arguments raise concerns that are either too speculative or are not relevant to the interests protected by section 11.

[110] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁵⁵

[111] The purpose of section 11(d) is to permit withholding of information or records if disclosure could be injurious to the town.

[112] For either sections 11 (c) or (d) to apply, 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

⁵⁵ Orders P-1190 and MO-2233.

depend on the type of issue and seriousness of the consequences.⁵⁶ The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances.⁵⁷

[113] The possibility that the town may face a monetary penalty as a result of being convicted of a provincial offence is not the type of interest protected by either sections 11(c) or (d). The town faces this risk because of its alleged conduct and the ministry's decision to bring charges, not because of possible disclosure of the records. Even if I were to conclude that the risk faced by the town was in the nature of the harms protected by section 11, it is my view that the possibility that disclosure could prejudice the town's ability to defend itself, resulting in harm to it, is too contingent and speculative to establish the applicability of either sections 11(c) or (d).

[114] Although the town asserts that the charges in general will impact its ability to maintain the beach at Sauble Beach, it is not clear to me how disclosure could impact the town's maintenance activities. Again, it appears that the town urges me to conclude that disclosure could prejudice its ability to defend itself against the charges and that if it is unsuccessful in successfully defending itself, it will suffer losses because it cannot maintain the beach the way that it would like to. In my view, these concerns are too contingent and speculative to meet the burden of proof that the town must meet for sections 11(c) or (d) to apply.

[115] The town also relies on section 11(e), which pertains to specific types of records. For section 11(e) to apply, the institution must show that:

1. The record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution.⁵⁸

[116] Section 11(e) applies to financial, commercial, labour, international or similar negotiations.⁵⁹

⁵⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁵⁷ Order MO-2363.

⁵⁸ Order PO-2064.

⁵⁹ Orders PO-2064 and PO-2536.

[117] Having reviewed the records at issue, I am unable to conclude that they consist of positions, plans, procedures, criteria or instructions within the meaning of section 11(e). I acknowledge that the town may be asserting that the records relate to its negotiations with the ministry for a beach maintenance plan. Considering the records remaining at issue and those that involve the ministry, all but two of them are copies of communications between the town and the ministry and so no harm to the town's negotiations with the ministry could come from disclosure. Having said that, the town has not persuaded me in any event that the subject matter of those negotiations is the type of negotiations that section 11(e) is intended to cover.

[118] I find that section 11(e) does not apply to the records remaining at issue.

Issue E: Does the mandatory exemption for relations with other governments at section 9 apply to the information remaining at issue?

[119] The town asserts that the mandatory exemption for relations with other governments at section 9 applies because the records involve communications with the ministry or its local MPP. The town appears only to assert that section 9 applies to some of the records that meet this description: records 15, 16, 36, 48, 54, 55 and 57. Because section 9 is a mandatory exemption, I have considered whether it applies to any of the records remaining at issue, as set out in the chart above.

[120] The ministry is an affected party in this appeal and was notified and invited to make representations, but did not do so. The town refused to provide the ministry with copies of or information about the records at issue when it was notified. I understand this position because the town was and continues to be subject to a prosecution by the ministry. However, given the nature of the information this section seeks to protect – information provided by the ministry to the town – I am satisfied that the ministry would know what information it provided to the town and was in a position to make representations on this exemption if it wished to do so.

[121] Relevant parts of section 9 state:

(1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

(a) ...

(b) the Government of Ontario or the government of a province or territory in Canada;

(2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

[122] The purpose of this exemption is to ensure that governments under the jurisdiction of the *Act* continue to obtain records which other governments might otherwise be unwilling to supply without having this protection from disclosure."⁶⁰

[123] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.⁶¹

[124] For a record to qualify for this exemption, the institution must establish that:

1. disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section; and
2. the information was received by the institution in confidence.⁶²

[125] The focus of this exemption is to protect the interests of the supplier of information, and not the recipient. Generally, if the supplier indicates that it has no concerns about disclosure, this can be a significant consideration in determining whether the information was received in confidence.⁶³

Representations

[126] The town explains that many of the records contain correspondence between the town and the ministry and between the town and its local MPP. It says that in both cases, there was an expectation that these communications would be confidential. In relation to many of these records, the town also submitted that they were protected by solicitor- client privilege, which has been addressed in Interim Order MO-3919-I and above.

[127] The appellant submits that the town has failed to demonstrate that the records at issue were provided in confidence. It submits, "the appellant's need for the information to be kept confidential is not a basis for the exemption," citing Order M-844.

Analysis and findings

[128] To begin, I find that the correspondence involving the MPP is not eligible for the section 9 exemption. An MPP is not the same thing as government of Ontario.

⁶⁰ Order M-912.

⁶¹ Order P-1552.

⁶² Orders MO-1581, MO-1896 and MO-2314.

⁶³ Orders M-844 and MO-2032-F.

Accordingly, I find that the remaining information in records 15 and 16 are not subject to section 9.

[129] Turning to the records that involve the ministry, they may be grouped into two categories: instances where the town provided the ministry with information; and, instances where the ministry provided the town with information. Only the information that is in the latter category could possibly be captured by section 9. Of the remaining records, this leaves records 57 and 26, which contain duplicate information.

[130] Having closely reviewed records 57 and 26, there is in my view no reasonable basis to suggest that the information provided by the ministry was supplied to the town in confidence. It is accurate that the communications from the ministry relate to beach maintenance and that they are not public statements; however, they contain administrative, logistical information only.

[131] I find that section 9 does not apply to the records or information remaining at issue.

Issue F: Did the town exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[132] I have determined that some of the records are eligible to be withheld on the basis of the discretionary exemption in section 12. The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it.

[133] The IPC's jurisdiction to review an institution's exercise of discretion emphasizes that even if a record is eligible for a discretionary exemption, the institution may nevertheless decide to disclose it. Review of the institution's exercise of discretion is separate from the IPC's jurisdiction to review whether a record is eligible for the exemption.

[134] An institution must exercise its discretion. This means that in addition to determining whether a discretionary exemption applies, it must also ask whether the record should nevertheless be disclosed.

[135] Also, an institution must not err when exercising its discretion. An institution may be found to have erred where, for example,

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

[136] If an institution fails to exercise its discretion or it does so improperly, the IPC may send the matter back to the institution for an exercise of discretion based on

proper considerations.⁶⁴ The IPC may not, however, substitute its own discretion for that of the institution.⁶⁵

[137] Relevant to the present appeal, the IPC has found in previous orders that following considerations are relevant:⁶⁶

- the purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited and specific;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- whether disclosure will increase public confidence in the operation of the institution;
- the relationship between the requester and any affected persons;
- 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

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

Findings

[139] I have considered the town's representations on the factors that it took into account in exercising its discretion not to disclose the records that I have found to be

⁶⁴ Order MO-1573.

⁶⁵ Section 54(2).

⁶⁶ Not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant: Orders P-344 and MO-1573.

exempt under section 12. In exercising its discretion, the town placed significant weight on the risks and perils it faced because of the *ESA* charges. The interests advanced and protected by the town are relevant and appropriate considerations in response to the access request. I find that the town has acted in good faith in its exercise of discretion to apply the section 12 exemption and in the instances where I determined that the exemption applies, I uphold its exercise of discretion.

Issue G: Do records 15, 16, 18 and 48 contain another individual's personal information?

[140] The town claimed that several records contained the personal information of a number of different individuals. As a result of my findings above, almost all of these claims are not necessary to consider because I have upheld the town's decision not to disclose for other reasons.

[141] However, the town expressly claims that record 48 contains the personal information of an individual. Although not expressly referenced by the town, records 15, 16 and 18 also refer to the same individual. It is therefore necessary to consider whether the records contain personal information, because if they do, I must consider the potential application of the mandatory personal privacy exemption at section 14(1).

[142] The individual named in these records has not been notified of this appeal and I will therefore defer my consideration of this issue pending notification.

ORDER:

1. Except for those records referred to in order provisions 2 and 3, I uphold the town's decision to deny access to the records on the basis of section 12 of the *Act*.
2. I order the town to disclose the following records to the appellant by **June 16, 2021** but not before **June 11, 2021**: 6, 22, 26, 36, 52, 54, 55, 57 and 68.
3. I defer consideration of whether section 14(1) applies to following information: part of record 15, part of record 16, record 18 and record 48. I will indicate which parts of records 15 and 16 that I have upheld the town's section 12 claims in the copy of the records sent to the town with this order.
4. In order to verify compliance with order provision 2, I reserve the right to require the town to provide the IPC with a copy the records sent to the appellant.

Original Signed by: _____

Valerie Jepson
Adjudicator

_____ May 11, 2021