Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4173

Appeal MA19-00805

Windsor-Detroit Tunnel Corporation

March 2, 2022

Summary: The Windsor Detroit Tunnel Corporation (the WDTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to the delays in finishing the ceiling replacement project in the Detroit-Windsor tunnel border crossing, the predicted finish date, and the expected cost of the project. In response to the request, the WDTC issued an access decision, granting partial access to the responsive records. Access to some information was withheld under the discretionary exemptions at sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege). After two revised access decisions were issued and further disclosure was granted to the appellant, seven records remain at issue. In this order, the adjudicator upholds the WDTC's decision to withhold a record under section 6(1)(b), and partially upholds the WDTC's decision to withhold the remaining records under section 12. She orders the disclosure of two records (with the exception of a small portion of one, which she finds also exempt under section 12).

Statutes Considered: *The Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 6(2), 12, and 16.

Orders Considered: Orders PO-3627 and PO-3804-I.

Cases Considered: *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997) 102 O.A.C. 71; *Rogacki v. Belz*, [2003] O.J. No. 3809, 232 D.L.R. (4th) 523, 41 C.P.C. (5th) 78, 125 A.C.W.S. (3d) 806 (C.A.); *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

OVERVIEW:

[1] The Windsor Detroit Tunnel Corporation (the WDTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*)[1] for the following information:

> All documents and correspondence, including but not limited to e-mails, letters and meeting notes, discussing reasons for the delays in finishing the ceiling replacement project in the Detroit-Windsor tunnel border crossing. I also request any documents addressing what the predicted finish date will be, and how much the project is expected to cost.

[2] After the requester narrowed the scope of the request to records concerning two specific individuals, the WDTC conducted a search and issued an access decision.[2] The WDTC granted access to the records in part, and relied on sections 6(1)(b) (closed meeting), and 12 (solicitor-client privilege) of the *Act* to withhold access to some of the requested records.

[3] The requester, now the appellant, appealed the WDTC's access decision to the Information and Privacy Commissioner of Ontario (the IPC). The IPC appointed a mediator to explore resolution.

[4] During mediation, the mediator held discussions with the appellant and with the WDTC. The WDTC subsequently issued a revised decision to the appellant, disclosing additional records and denying access to the remaining records under sections 6(1)(b), 11(e) and 11(g) (economic or other interests of the institution), and 12 of the *Act*.[3] With its revised access decision, the WDTC enclosed the records it was releasing in full, and a revised index.[4]

[5] The appellant advised the mediator that he continues to seek access to the records that were denied to him under sections 6(1)(b), 11(e) and (g) and 12 of the *Act*, but the WDTC maintained its position that those exemptions apply to the records at issue.

[6] Since no further mediation was possible, the appellant confirmed that he wished

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[1] Under under the transfer of request provision in section 18(3) of the *Act*.

[2] At first, the WDTC issued an interim fee decision, which the requester appealed to the Office of the Information and Privacy Commissioner of Ontario. The IPC appointed a mediator to explore resolution. The fee decision was resolved at mediation and that appeal was closed. During the mediation of that appeal, the requester narrowed the scope of their request and the WDTC conducted a search for the records that are the subject of this appeal.

[3] Although the WDTC raised the additional discretionary exemptions at sections 11(e) and 11(g) to one of the records at issue after the deadline specified in the Notice of Mediation, the appellant confirmed with the mediator that he is not taking issue in this regard. Accordingly, late raising of a discretionary exemption is not at issue in this appeal.

[4] The WDTC waived any fees associated with this revised decision.

to proceed with the appeal at the adjudication stage, where an adjudicator may conduct a written inquiry.[5]

[7] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the WDTC. I sought and received written representations from the WDTC in response.

[8] After receiving the Notice of Inquiry, the WDTC issued a revised access decision and disclosed additional records to the appellant. After considering the further disclosure, the appellant confirmed to the IPC that he would like to pursue access to seven specified records. As a result, the records over which the exemptions at sections 11(e) and 11(g) were claimed are no longer at issue in this appeal.

[9] I then sought and received written representations from the appellant in response to an amended Notice of Inquiry and the non-confidential portions of the WDTC's representations. I withheld some of WDTC's representations for confidentiality reasons, under *Practice Direction 7 of the Code of Procedure* of the IPC. The parties then exchanged further representations, and then I closed the inquiry.

[10] For the reasons that follow, I uphold the access decision of the WDTC, in part. I find one record is exempt under section 6(1)(b). Of the remaining six records, I find that four of them (in whole or in part, as claimed) are exempt under section 12, and that a small portion of a fifth record is exempt under section 12. However, I find that section 12 does not apply to the remaining portion of that fifth record, or to the sixth record, and I order the WDTC to disclose those records to the appellant.

RECORDS:

[11] The records remaining at issue are records 12, 13, 24, 26, 27, 43, and 44. The records are emails (some with attachments), as described in an index of records that was shared with the appellant.[6]

ISSUES:

A. Does the discretionary exemption at section 6(1)(b) relating to closed meetings apply to record 24?

B. Does the discretionary solicitor-client privilege exemption at section 12 of the Act apply to records 12, 13, 26, 27, 43 and 44?

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[5] After the Mediator's Report was issued, the WDTC confirmed that record 38 was denied under section 6(1)(b) and, as such, was added as one of the records remaining at issue. Record 38 is no longer at issue, because the WDTC decided to disclose it through the revised access decision that it issued after receiving the Notice of Inquiry.

[6] Dated February 10, 2020.

C. Did the institution exercise its discretion under sections 6(1)(b) and 12? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Background information

[12] It is useful to begin by setting out some background information, which the WDTC provided in its representations.

[13] The request relates to the delay in the renovations to the Detroit-Windsor Tunnel (the tunnel). The WDTC states that at the time the records were created, each side of the tunnel was owned by a different corporation: the WDTC owned the Windsor side of the tunnel,[7] and the Detroit-Windsor Tunnel Corp (the DWT) owned the Detroit side. Originally, the tunnel was managed under a joint operating agreement between the DWT and the WDTC. That joint agreement was terminated at the end of 2017, and the DWT and WDBL entered into a shared services agreement.[8]

[14] The WDTC states that the tunnel requires collaboration with the DWT, to ensure the safety of the persons crossing the international land border between Canada and the United States.

[15] According to the WDTC, in or around 2017, the DWT entered into an agreement with a certain construction company to extensively renovate the tunnel. The WDTC was not a party to that agreement.

[16] There were numerous delays in the completion of the tunnel renovation project, and the appellant's request is for records related to such delays.

[17] The WDTC says that during the tunnel renovation project, it held numerous closed meetings between senior officials, board members and, at times, legal counsel, to discuss matters such as possible and threatened litigation and litigation/settlement strategy.

[18] This order addresses the remaining seven records at issue, after the WDTC granted the appellant access to additional responsive records since he first filed his request. The WDTC relies on section 6(1)(b) (closed meetings) to withhold one record at issue, and on section 12 (solicitor-client privilege) to withhold the remaining six records at issue.

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[7] The WDTC says that the institution is the WDTC with the Windsor Detroit BorderLink Limited (WDBL), which was the WDTC's operating arm for the day-to-day management and maintenance of the Canadian side of the tunnel. For ease of reference I will simply refer to the WDTC or "the institution" in this order.
[8] The shared services agreement involved the WDBL taking over the day-to-day operations of the tunnel.

Issue A: Does the discretionary exemption at section 6(1)(b) relating to closed meetings apply to record 24?

[19] Section 6 protects certain records relating to a municipal institution's legislative function or closed meetings of a council, board, commission or other body.

[20] Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[21] For the exemption at section 6(1)(b) to apply, the WDTC must show that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting,
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.[9]

Parts one and two: Held a meeting in camera

[22] The institution must show that it held a meeting, and that it was authorized by law to hold the meeting *in camera*.[10] For the meeting to be authorized to be held *in camera*, its purpose must have been to deal with a matter for which a closed meeting is authorized by statute.[11]

[23] The WDTC states that it held a closed meeting on December 19, 2018, under the authority of section 239(2)(e) of the *Municipal Act*, 2001, which authorizes holding closed meetings when potential litigation will be discussed. Section 239(2)(e) of the *Municipal Act, 2001* says:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.

[24] The WDTC also states that its practice is to create an open session and closed session package for board meetings that have both closed and open sessions, and that

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[9] Orders M-64, M-102 and MO-1248.
[10] Order M-102.
[11] *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

it follows guidelines from the City of Windsor about when meetings can be held in the absence of the public.

[25] However, the WDTC states that there was no open session for this particular board meeting that occurred on December 19, 2018.

[26] The WDTC also provided the minutes of the meeting, showing that it was closed and that its administrative report regarding the bent slab sections of the tunnel was presented at the board meeting. The WDTC states that this report, which in all material aspects is the same report contained in record 24, was discussed at length and formed the basis of legal discussions.

[27] The appellant does not dispute that a closed meeting took place, but argues that just because information was discussed in the absence of the public, it does not necessarily mean that the information should never be disclosed. He also submits that the delays, cost overruns and safety concerns created by issues such as the bent slabs have been the crux of this information request, and that these are issues that officials on both sides of the border repeatedly chose to keep from the public. He argues that the records should be disclosed in the public interest.

[28] With respect to this argument that record 24 should be disclosed in the public interest, I note that section 16 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under only certain sections of the *Act*.

[29] Section 16 says:

> An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[30] Since section 6 is not one of the sections appearing in the above list of exemptions, section 16 cannot apply where a record is exempt under section 6(1)(b) of the *Act*.

[31] Regardless of the types of considerations referenced by the appellant, if an institution establishes that the three-part test set, out above, has been met, then section 6(1)(b) applies. An institution may, however, consider the types of public interest factors raised by the appellant in the exercise of its discretion to disclose or withhold records that would otherwise be subject to section 6(1)(b), as a discretionary exemption; however that is separate from the issue of whether section 6(1)(b) applies to the record. I address the WDTC's exercise of discretion below under Issue C.

[32] Based on my review of the parties' representations, I find that the WDTC held a meeting in on December 19, 2018, satisfying part one of test.

[33] Based on my review of the WDTC's representations and the record itself, I find that the WDTC discussed the bent slab report, and the potential litigation related to it, at the meeting on December 19, 2018. Since the subject matter of the closed meeting included potential litigation, I find that the WDTC was authorized to hold the meeting in the absence of the public, under the authority of a statute (specifically, section 239(2)(e) of the *Municipal Act, 2001*), meeting part two of the test.

Part three: Substance of deliberations

[34] For section 6(1)(b) to apply, it must be established that disclosure of the record would reveal the actual substance of deliberations that took place at the *in camera* meeting, and not just the subject of the meeting or the deliberations.[12] *Deliberations* refer to discussions conducted with a view towards making a decision.[13]

[35] Section 6(1)(b) does not protect records merely because they refer to matters discussed at a closed meeting, and it does not protect the names of individuals attending meetings, and the dates, times and locations of meetings.[14]

[36] The WDTC states that, per the minutes of the closed meeting session, its administrative report regarding the bent slab sections of tunnel (the bent slab report) was presented to its board. The WDTC explains that the bent slab report is, in all material respects, the same report contained in record 24. Since the meeting was a closed meeting and the draft bent slab report attached to record 24 was discussed in depth and formed the basis of the aforementioned legal discussions, the WDTC submits that record 24 contains more than merely the subject of the deliberations at the closed meeting. In addition, the WDTC explains that the email contained in record 24 summarizes the bent slab report. Therefore, the WDTC submits that all of record 24 should be exempt from disclosure under section 6(1)(b) of the *Act*.

[37] The appellant submits that the report should not be withheld just because legal matters were discussed at the meeting, arguing that that would lead to a "slippery slope" of the public not having a right to see reports about publicly funded projects because the reports were later given to legal counsel or were the basis for later legal decisions. The appellant submits that the bent slab report could be provided "without the ensuing legal discussions."

[38] In response to the appellant's representations, the WDTC reiterates that the substance of the closed meeting discussions involved record 24. Furthermore, the WDTC states that it is not refusing to disclose record 24 because that record was later provided to legal counsel, or that it was the basis for later legal discussions, or that legal matters were discussed at the same meeting. Rather, the WDTC states that it is refusing to disclose record 24 because it would reveal the actual substance of the

[12] Orders MO-703, MO-1344, MO-2389 and MO-2499-I.
[13] Order M-184.
[14] Order MO-1344.

deliberations of the closed meeting. As a result, the WDTC maintains its position that record 24 in its entirety should be exempt from disclosure under section 6(1)(b) of the *Act*.

[39] In response to the WDTC, the appellant submits, in part, the information can be released in the overriding public interest, and emphasizes that the legal advice received by the institution is not being sought. He also "re-assert[s] that contemplation of litigation is not the same as litigation, and that all information is not necessarily off limits simply because it was discussed at a closed meeting." While acknowledging that some details discussed during a closed meeting might be subject to client-solicitor privilege, the appellant submits that there must be other details that can be disclosed without violating that privilege. In addition, the appellant makes a number of comments about the process of attempting to receive access to information thus far, and makes arguments regarding the need for disclosure for reasons of public safety, institutional accountability, and oversight of how taxpayers' money is used or managed.

[40] Having reviewed record 24 and the representations of the parties, I am persuaded that the WDTC has established the third part of the test for section 6(1)(b) applies to record 24. Based on the evidence before me, I find that the email included in record 24 summarizes the bent slab report attached to the email, and that record 24 is essentially the bent slab report. I accept the board's evidence that the draft bent slab report was discussed in depth at the closed meeting and formed the basis of legal decisions. Therefore, I am satisfied that disclosure of record 24 would reveal the substance of the deliberations of the WDTC at the closed meeting in question. As a result, subject to my review of the WDTC's discretion, below under Issue C, I find that record 24 is exempt under section 6(1)(b) of the *Act*.

Section 6(2): exceptions to the exemption

[41] Section 6(2) of the *Act* sets out exceptions to section 6(1)(b). It says, in part:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
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> . . .
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> (b) in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public; or
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> (c) the record is more than twenty years old.

Section 6(2)(b): open meeting

[42] The WDTC states that there was no open portion of the closed meeting in question. The evidence before me does not establish that the subject-matter of the

deliberations in question has been considered in a meeting that was open to the public. Therefore, the exception at section 6(2)(b) does not apply in the circumstances.

Section 6(2)(c): record more than twenty years old

[43] Given the dates clearly marked on record 24 (in 2018), the record is not more than twenty years old, and the exception at section 6(2)(c) does not apply.

Issue B: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to records 12, 13, 26, 27, 43 and 44?

[44] The remaining six records at issue in this appeal were withheld under the discretionary exemption at section 12 (solicitor-client privilege). As I will explain below, I uphold the WDTC's decision to withhold the information at issue in records 12, 13, 26, 27, and a small portion of record 43. However, I do not uphold the WDTC's determination that the remaining portion of record 43, or any of record 44, is exempt under section 12 of the *Act*, and as a result, I will order the disclosure of these records.

[45] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It 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.

[46] Section 12 contains two different exemptions, referred to in previous IPC decisions as "branches." The first branch ("subject to solicitor-client privilege") is based on common law. The second branch ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies.

Branch 1: common law privilege

[47] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

Common law solicitor-client communication privilege

[48] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[15] This privilege

[15] Orders PO-2441, MO-2166 and MO-1925.

protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[16] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[17]

[49] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[18]

[50] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[19] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[20]

Common law litigation privilege

[51] Common law litigation privilege is based on the need to protect the adversarial process by ensuring that legal counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[21] The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.[22]

[52] This privilege protects records created for the dominant purpose of litigation. It protects a lawyer's work product and covers material going beyond communications between lawyer and client.[23]

[53] Litigation privilege 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.[24]

Common law loss of privilege

Waiver

[54] Under the common law, a client may waive solicitor-client privilege. An express

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[16] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[17] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada* (*Ministry of Public Safety and Emergency Preparedness*) *v. Canada* (*Information Commissioner*), 2013 FCA 104.
[18] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[19] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[20] *Kitchener* (*City*) *v. Ontario* (*Information and Privacy Commissioner*), 2012 ONSC 3496 (Div. Ct.)
[21] *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).
[22] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada* (*Minister of Justice*), cited above.
[23] *Ontario* (*Attorney General*) *v. Ontario* (*Information and Privacy Commission, Inquiry Officer*) (2002), 62 O.R. (3d) 167 (C.A.).
[24] *Ontario* (*Ministry of Correctional Service*) *v. Goodis*, 2008 CanLII 2603 (ON SCDC).

waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.[25]

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

[56] Generally, disclosure to outsiders of privileged information is a 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]

Termination of litigation

[57] Common law litigation privilege generally comes to an end with the termination of litigation.[29]

Branch 2: statutory privilege

[58] The branch 2 exemption 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.

Statutory solicitor-client communication privilege

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

Statutory litigation privilege

[60] This 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.[30]

[61] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[31]

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[25] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd*. (1983), 45 B.C.L.R. 218 (S.C.).
[26] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[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] *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.
[29] *Blank v. Canada* (*Minister of Justice*), cited above.
[30] See *Ontario* (*Attorney General*) *v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario* (*Ministry of Correctional Service*) *v. Goodis*, cited above.
[31] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

[62] In contrast to the common law privilege, termination of litigation does *not* end the statutory litigation privilege in section 12.[32]

Loss of statutory privilege – waiver

The statutory privilege in section 12 may be been lost through waiver.[33]

Representations and analysis/findings

[63] The WDTC submits that all the remaining records (or portions of records) at issue "originated in privilege and that privilege was maintained." It provided further details about each of the six records, which I will discuss below.

Records 12 and 13

[64] In its index of records and representations, the WDTC describes records 12 and 13 as emails, and identifies the senders and recipients, none of whom are legal counsel.

[65] Record 12 is an email from a certain board member to the rest of the board, relating to the sender's communications with the WDTC's legal counsel.

[66] Record 13 is an email from a board member to the mayor of the City of Windsor, containing information about confidential communication with the WDTC's legal counsel.

[67] The WDTC submits that the exemption at section 12 applies to the redacted portions of record 12 because it contains a discussion between two named board members, and other board members, regarding the communications of one of the named board members with legal counsel. The WDTC submits that disclosure of this record would disclose information given to a solicitor retained by the institution to provide legal advice, and should be protected by the common law and statutory solicitor-client communication privilege.

[68] Regarding record 13, the WDTC submits that section 12 should apply to the redacted portions of that record because they contain correspondence between two named board members regarding confidential communication with legal counsel. The WDTC submits that disclosing this record would disclose the subject matter of the opinion referenced in the record that is protected by the common law and statutory solicitor-client communication privilege.

[69] In response, the appellant states that, without knowing the exact content of the redacted information in the records, the information could be disclosed in overriding

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[32] *Ontario* (*Attorney General*) *v. Ontario* (*Information and Privacy Commission, Inquiry Officer*), cited above.

[33] See discussion above under Branch 1, "Loss of Privilege." Also, see Order PO-3627 and *Ontario* (*Attorney General*) *v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

public interest, and notes that the WDTC "previously claimed similar privileges in withholding information that it was ultimately compelled to release."

[70] I appreciate that the appellant appears to be frustrated that records that were previously withheld were later disclosed. However, what I must decide is whether the section 12 applies to the information withheld in the records before me that remain at issue. In doing so, I must consider the actual content of the records and the institution's explanation for why an exemption applies to it, in light of the wording of the exemption and any applicable jurisprudence. It is also worth mentioning that the section 12 exemption is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption.

[71] Based on my review of the redacted portions of records 12 and 13, and the parties' representations, I am satisfied that section 12 applies to the information withheld in records 12 and 13. Although the legal counsel was neither sender nor recipient of these emails, disclosure of record 12 would disclose the nature of confidential communication between the WDTC and its solicitor; similarly, disclosure of the withheld portion of record 13 would disclose the subject matter of a legal opinion given by counsel for the WDTC to the WDTC. As this type of information would have been protected by solicitor-client privilege if it would have been in direct communication between counsel and client under the common law solicitor-client communications privilege, the privilege extends to the disclosure of this information in internal emails within the client (here, the board). As a result, I find that the portions of records 12 and 13 at issue are exempt under section 12, subject to my examination of the WDTC's exercise of discretion.

[72] With respect to the public interest override at section 16, as it was the case for section 6(1)(b), section 12 is not one of the exemptions listed under section 16, so the public interest override cannot apply to records that are exempt under section 12. As I also stated above, an institution should nonetheless take into account any public interest in disclosure in exercising their discretion with respect to records that are exempt under section 12.

Record 26

[73] The WDTC submits that record 26 contains correspondence between two named board members, where one summarizes issues with the completion of the tunnel project that were then used as the basis of requesting legal advice from the institution's solicitor. As a result, the WDTC submits that the common law and statutory solicitor-client communication privileges covered by section 12 apply to record 26 because disclosure would indirectly disclose information provided to the institution's solicitor for the purpose of providing legal advice.

[74] In response, the appellant draws attention to the WDTC's description that the correspondence summarizes issues with completion of the tunnel project. The appellant

states that record 26 "presumably does not contain correspondence with a lawyer, results of any correspondence with legal counsel or legal advice," and states that he does not seek any potential legal advice that followed. The appellant argues that a record should not be denied simply because information in it was later sent to a lawyer. He argues that such reasoning is a "manipulation" of the exemptions cited and "goes against the spirit of [the *Act*]," and would remove the public's right to know by creating a "loophole" for institutions to just send any information that they do not want to publicize to their legal counsel.

[75] In reply to the appellant, the WDTC maintains its position, and cites Interim Order PO-3804-I, which stated solicitor-client privilege protects "not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given."

[76] Based on my review of record 26 and the parties' representations, I am satisfied that record 26 qualifies for the common law solicitor-client communications privilege under section 12. I find that disclosure of record 26 would reveal information passed from the WDTC to its solicitor aimed at keeping both informed so that legal advice can be sought and given, and is therefore exempt under section 12, subject to my examination of the WDTC's exercise of discretion. Since I have found that record 26 is exempt under the common law solicitor-client communication privilege, it is not necessary to determine whether the other privileges claimed would also apply.

Record 27

[77] The WDTC describes record 27 as an email thread between the institution's board members, whereby they discuss the unilateral changes to the construction schedule by DWT. The WDTC also states that record 27 indicates that the information contained in the thread should be added to the list for the WDTC's solicitor. As a result, the WDTC submits that disclosure of record 27 would indirectly disclose information provided to a solicitor retained by the institution for the purpose of giving legal advice.

[78] In addition, the WDTC explains that a specified section of the email thread in record 27 between two named board members summarizes a draft memorandum from the institution's solicitor prepared in contemplation of litigation.

[79] For these reasons, the WDT submits that record 27 is exempt from disclosure, in full, because of the common law and statutory solicitor-client communication privileges, and the common law and statutory litigation privileges.

[80] In response, the appellant submits that discussions about changes to the tunnel construction schedule, which have not been shared with the public, form the basis of the access to information request. The appellant submits that this can be disclosed, even if it was later given to a solicitor. In addition, the appellant argues that a

suggestion within the record that it "should" be sent to legal counsel is not grounds to withhold it. He submits that either the record was provided to counsel, or it was not, and that the WDTC does not clearly state whether it was or not. The appellant submits that if record 27 was later provided to counsel, that "does not make that exemption any more legitimate," arguing that this is a distorted use of an exemption in the *Ac*t to keep information secret that should be shared with the public. The appellant submits that information about changes to the construction schedule can and should be provided, and the summary of the memorandum from the institution's solicitor can be redacted.

[81] In response to the appellant, the WDTC maintains its position that record 27 is exempt under section 12, in full, because it contains information relating to the tunnel construction schedule changes exchanged between its board members, which was provided to the WDTC's solicitor to form the basis of a legal opinion. The WDTC states that that legal opinion is in record 27, and that the substance of that legal opinion indicates there was reasonably contemplated litigation.

[82] Based on my review of record 27 and the parties' representations, I find that record 27 is exempt under the statutory solicitor-client communication privilege, subject to my review of the WDTC's exercise of discretion. That is because I find that disclosure of record 27 would reveal information prepared by WDTC for its solicitor in to form the basis of a legal opinion. As a result, there is no need to consider whether other privileges claimed may also apply.

[83] Regarding the appellant's view that the summary of the memorandum from the institution's solicitor can be redacted, I note that the Ontario Divisional Court has stated that "[o]nce it is established that a record constitutes a communication to legal counsel for advice, . . . the communication *in its entirety* is subject to privilege"[34] and that the privilege "protects the entire communication and not merely those specific items which involve actual advice."[35] Past IPC orders have also recognized that records containing direct solicitor-client communications relating to the seeking or receiving of legal advice are subject to a "class-based privilege," and therefore, are not subject to severance.[36] Given the nature of record 27, as I have described above, I apply that principle in this case. However, I note that this principle does not prevent an institution from exercising its discretion to disclose information that is subject to this privilege, but that is a separate question (Issue C, in this order).

Records 43 and 44

[84] The WDTC submits that records 43 and 44 are related. I agree with that, but I do not agree that either of these records are exempt under section 12, for the reasons set out below.

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[34] *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997) 102 O.A.C. 71, 46 Admin L.R. (2d) 115, [1997] O.J. No. 1465 (Div. Ct.).
[35] *Ibid.*
[36] See, for example, Orders MO-3409 and MO-2486.

[85] Each of these records is a demand letter between opposing counsel with a cover email or email chain, involving a WDTC board member sharing the demand letter with others on the WDTC side. The email chain in record 43 also includes an email from an opposing party to the WDTC.

[86] The WDTC states that record 43 contains a demand letter that sets out DWT's position in response to a letter sent by the WDTC regarding issues that the WDTC was experiencing with DWT regarding the delays of the tunnel project. The WDTC submits that record 43 is, therefore, covered by the common law and statutory solicitor-client communication privileges, and the statutory litigation privilege under section 12.

[87] In addition, the WDTC submits that record 43 "attempted to settle/mediate reasonably contemplated litigation, as evidenced by reference in the letter to the parties' intention to work jointly and cooperatively to complete the Tunnel renovation project." Therefore, the WDTC submits that record 43 "is an attempt to mediate between the parties, so it should be subject to the statutory litigation privilege and not disclosed." In support of its position, the WDTC states that the email in record 43 shows that the parties are using the demand letter as a basis for continuing negotiations between the parties. As a result, the WDTC submits that the email should also be exempt under the statutory litigation privilege.

[88] In the alternative, the WDTC submits that record 43 should be exempt under the common law and statutory solicitor-client communication privileges, as it contains information shared between the institution's board members which was passed onto its solicitor to keep both parties informed, so that advice can be given and a response can be prepared to the demand letter.

[89] Regarding record 44, the WDTC describes it as a demand letter, in response to the demand letter contained in record 43. The WDTC states that record 44 reiterates its proposal to settle the issues between the parties, and containing language regarding resolving the matter on agreeable terms. As a result, the WDTC submits that that is a continued attempt to mediate the issues between the parties to resolve reasonably contemplated litigation, under section 12.

[90] Furthermore, the WDTC states that the demand letters contained in records 43 and 44 came after numerous legal opinions and unsuccessful attempts to resolve the issues between the parties themselves without involving legal counsel. Therefore, the WDTC submits that litigation was reasonably contemplated at the time of their exchange, and these demand letters contain conversations between the parties to prevent litigation from being commenced.

[91] In response to the WDTC, the appellant states that the WDTC acknowledges that "the litigation used to deny this document is only 'contemplated.' He also argues that discussions about working cooperatively together are not evidence that a lawsuit has been filed or is contemplated, and that without actual litigation, the record should not

be subject to privilege. He states that correspondence discussing reasons for delays and cost overruns on a public project may be legal documents but do not amount to litigation, and states that without a statement of claim, there is no lawsuit. Regarding the WDTC's alternative argument, the appellant also repeats arguments he made about other records about the passage of information to lawyers not necessarily meaning a record is exempt.

[92] In response to the appellant, the WDTC submits that records 43 and 44 evidence the parties' efforts to settle, mediate, or alternatively resolve their disputes before beginning litigation and, therefore, should be exempt from disclosure under section 12.

[93] The WDTC also states that section 12 does not require that litigation be commenced for the exemption to apply, only that it was reasonably contemplated.

[94] Furthermore, the WDTC submits that records 43 and 44 contain threats of litigation if certain actions are not taken, with options to avoid potential litigation, which shows reasonably contemplated litigation protected by section 12 and the statutory litigation privilege. In addition, the WDTC explains that the email contained in record 43 indicates that the letter contained therein was used as a basis for continuing to discuss contemplated litigation, and that the email was provided to the WDTC's solicitor in order to obtain legal advice regarding the letter. For these reasons the WDTC submits that section 12 applies to both records 43 and 44 by way of the solicitor-client privilege and litigation privilege (without specifying which branch of section 12 was meant).

[95] Based on my review of records 43 and 44 and the parties' representations, I am not satisfied that section 12 applies.

[96] The email exchange that forms part of record 43 does not involve counsel as a sender or recipient. The email in record 44 is simply a cover email from a WDTC board member to others (non-counsel), attaching their counsel's demand letter. Given the nature of these emails, I find that they are not privileged communications between a solicitor and client, and would not reveal such communications, with one limited exception. In my view, only the third line of the email on the first page of record 43 may be considered privileged under the common law solicitor-client privilege communications privilege because its disclosure would reveal information relating to direct communications between the WDTC and its counsel.

[97] Turning to the demand letters themselves, as described by the WDTC, the demand letters in records 43 and 44 are related to each other. These demand letters are written by counsel of opposing parties, the WDTC and DWT. This is clear to me from my review of the WDTC's representations and the records themselves. This is an important point because, as mentioned, neither the common law litigation privilege nor the statutory litigation privilege applies to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications

between opposing counsel.[37] The demand letter in record 43 is not a communication between the WDTC and its solicitor, or a record that can reasonably be described as prepared for its solicitor by the WDTC. For the same reasons, the demand letter written by the WDTC's counsel to opposing counsel (the main part of record 44) is not covered by any privilege in section 12.

[98] Furthermore, while I appreciate that litigation is referenced in the demand letters, that is not sufficient to find that either of the litigation privileges applies because the demand letters are correspondence between parties that had opposing interests, and therefore did not take place within the requisite zone of privacy for litigation privilege to apply.

[99] While the statutory litigation privilege also protects records prepared for use in the mediation or settlement of litigation,[38] there is insufficient evidence before me to conclude that either the cover emails or the demand letters in records 43 and 44 are covered by settlement privilege. In *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (*Magnotta*),[39] the Ontario Court of Appeal held that records prepared for use in the mediation or settlement of litigation are exempt under the statutory litigation privilege in (the provincial equivalent of) section 12 of the *Act*. The Court explained its rationale, in part, as follows:

> Alternative dispute resolution now forms an integral part of the civil litigation process in Ontario. Various alternative dispute resolution methods have been incorporated into the litigation process as can be seen by reference to the Rules of Civil Procedure, which regulate and help define the parameters of the litigation process. The Disputed Records were delivered as part of a mediation. In *Rogacki v. Belz*,[40] . . ., this court observed that mandatory mediation is a part of the litigation process. There is no principled reason to treat mandatory and consensual mediations differently when considering whether they are part of the litigation process. Furthermore, interpreting the word "litigation" in the second branch to encompass mediation and settlement discussions is consonant with public interest considerations because the public interest in transparency is trumped by the more compelling public interest in encouraging the settlement of litigation[.]

[100] Orders issued by the IPC since *Magnotta* have applied it in finding that records prepared for use in the settlement of contemplated litigation are exempt under the statutory litigation privilege. In Order PO-3627, for example, the records at issue were minutes of settlement between an institution and two former employees. In finding that

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[37] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[38] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[39] 2010 ONCA 681.
[40] *Rogacki v. Belz*, [2003] O.J. No. 3809, 232 D.L.R. (4th) 523, 41 C.P.C. (5th) 78, 125 A.C.W.S . (3d) 806 (C.A.).

the records are exempt under statutory litigation privilege, Adjudicator John Higgins stated as follows:

> The records at issue in this case are two sets of Minutes of Settlement, and two other documents that were part of the settlement relating to one former employee. In *Magnotta*, the records at issue were precisely analogous, as they consisted of Minutes of Settlement and documents relating to the implementation of the settlement. In this case, the evidence, including the records themselves, makes it clear that they are records prepared by or for counsel employed by a hospital for use in the settlement of contemplated litigation.

[101] Based on my review of the emails in records 43 and 44, and the WDTC's representations, I am not satisfied that there is sufficient evidence before me to accept that the emails (or the demand letters attached for that matter, which have I discussed above) constitute evidence of attempting to settle or mediate, a dispute between the WDTC and DTW, such that settlement privilege may apply. There is insufficient evidence before me that these records form part of mandatory or consensual mediation or settlement efforts, per *Magnotta*. The fact that efforts to resolve the dispute without lawyers were unsuccessful before getting to the stage of these demand letters being written, in my view, undermines the notion that these demand letters were prepared to settle or mediate the dispute.

[102] Since no other exemptions were claimed over records 43 and 44, I will order the WDTC to disclose them to the appellant (except for the small portion of record 43 which I have found to be exempt, above).

Issue C: Did the institution exercise its discretion under sections 6(1)(b) and 12? If so, should the IPC uphold the exercise of discretion?

[103] The sections 6(1)(b) and 12 exemptions are discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

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

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

[105] In either case, the IPC may send the matter back to the institution for an

exercise of discretion based on proper considerations.[41] The IPC cannot, however, substitute its own discretion for that of the institution.[42]

What considerations are relevant to the exercise of discretion?

[106] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:[43]

- the purposes of the *Act*, including the principles that: information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their 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,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

The parties' representations

[107] The WDTC submits that in exercising its discretion under sections 6(1)(b) and 12 of the *Act*, it provided full and partial access to the majority of the responsive records.

[108] It describes the considerations it made in deciding whether to partially or fully withhold any records, as follows:

- the appellant was not seeking any of his personal information,

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[41] Order MO-1573.
[42] Section 43(2).
[43] Orders P-344 and MO-1573.

- the sensitive nature of the records,
- the fact that the tunnel project and relationship between DWT and the institution are ongoing and crucial to the safety of the passengers crossing an international land border,
- the wording of the exemptions claimed, and
- the purpose of *MFIPPA* (that information should be available to the public, with the exemptions limited and specific).

[109] In response to the WDTC, the appellant states that many of the records disclosed were "incomplete or irrelevant to the request, and that they tried to charge exorbitant fees to even look for the information in the first place." The appellant also states that the disclosure was only made after a prolonged appeal and mediation process, and that in many cases, the information eventually disclosed was initially withheld using the same arguments and exempts claimed over the seven records that remain at issue in this appeal.

[110] Furthermore, the appellant argues that the fact that he is not seeking personal information is not an argument to withhold the information at issue. He submits that every member of the public has a right to information about the workings of public agencies and how tax dollars are spent. In this appeal, the appellant argues that issues of public safety are also a serious consideration. He submits that these rights "do not disappear because an agency does not want the information released or fears it might be embarrassing."

[111] Similarly, the appellant submits that suggesting the records are of a "sensitive nature" should not be an argument to withhold information from the public. He argues that the term "sensitive" is relative and ambiguous, and could simply mean it is considered sensitive because it might put the institution in a bad light.

[112] With respect to the relationship between the DTW and the WDTC, he submits that it is irrelevant to this request. He submits that the nature of that relationship, or the potential effect on that relationship, has no bearing on whether the information at issue here should be disclosed.

[113] In addition, the appellant submits that the suggestion that revealing what should already be publicly available information could affect safety of the tunnel is disingenuous. He submits that, if anything, disclosure of the records at issue could improve safety and accountability by shedding light on issues that have not been publicly addressed to date.

Analysis/findings

[114] The parties disagree about whether, in exercising its discretion under section

6(1)(b) and 12, the WDTC took into account relevant (or irrelevant) considerations. It is worth noting that, as mentioned, the IPC cannot substitute its own discretion for that of the institution.

[115] What I am considering here is the WDTC's exercise of discretion in connection with records 12, 13, 24, 26, 27, and one portion of 43, which I have found exempt under sections 6(1)(b) and 12, respectively. With respect to these records (whether withheld in full or in part), in the circumstances, I find that the considerations that the WDTC says that it took into account were relevant, and not irrelevant, considerations. I see nothing improper in considering whether the appellant was seeking his own personal information, the wording of the exemptions claimed, the purpose of the *Act*, and the institution's views about the nature and sensitivity of the records and any relationships with affected parties tied to the records. These considerations have long been accepted by the IPC as relevant considerations, and in the circumstances of this appeal, I find that to be so.

[116] The *Act* allows institutions to withhold from disclosure information that is subject to discretionary exemptions.

[117] I appreciate the appellant's concern about the time taken to receive the disclosure that he did, but I do not find this to be sufficient evidence that the institution did not exercise its discretion in good faith.

[118] Similarly, the institution is bound by the Act itself to charge fees for the processing of requests, in accordance with the type of information sought, the length of time required to search, and other factors. Therefore, I do not find the fees charged to be evidence of bad faith either.

[119] With respect to the relevance or completeness of the disclosure of other records, I find that to be irrelevant in the circumstances to the question of whether the WDTC properly exercised its discretion to claim sections 6(1)(b) and 12 over records 12, 13, 24, 26, 27, and a portion of record 43, respectively.

[120] For these reasons, I uphold the WDTC's exercise of discretion in relation to the exempt information in records 12, 13, 24, 26, 27, and 43. As a result, that information will remain withheld.

ORDER:

1. I uphold the WDTC's decision, in part.

2. I uphold the WDTC's decision to withhold record 24 under section 6(1)(b) of the *Act*.

3. I uphold the WDTC's decision to withhold the information at issue in records 12, 13, 26, 27, and the portion of record 43 described in this order, under section 12 of the *Act*.

4. I do not uphold the WDTC's decision to withhold the remaining portion of record 43, and record 44 in its entirety, under section 12 of the *Act*. I order the WDTC to disclose the remaining portion of record 43, and record 44 in its entirety, to the appellant by **April 6, 2022**, but not before **April 1, 2022**.

5. In order to verify compliance with this order, I reserve the right to require the WDTC to provide me with a copy of the records disclosed, pursuant to provision 4 of this order.

Original signed by: March 2, 2022

Marian Sami
Adjudicator