

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4362

Appeal MA21-00412

Township of Clearview

March 31, 2023

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records pertaining to revenues and expenses related to the proposal to close a county road and upgrade a side road in the jurisdiction of the Township of Clearview (the township). The township identified 99 invoices from a third party engineering consultant as responsive to the request and decided to grant partial access to the invoices, withholding portions pursuant to the solicitor-client privilege exemption in section 12 of the *Act*. The appellant appealed the township's decision and, during mediation, the township raised the advice or recommendations exemption in section 7(1) of the *Act* as an alternative basis for withholding portions of the invoices. The appellant raised the public interest override in section 16.

In this order, the adjudicator finds that the section 12 solicitor-client exemption applies to information withheld from 42 of the invoices and that neither of the section 7(1) or section 12 exemptions applies to the remaining 57 invoices. As a result of her findings, she orders the township to disclose to the appellant, in full, the 57 invoices to which neither exemption applies.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1) and 12.

Orders Considered: Order PO-2483.

Cases Considered: *Maranda v. Richer* [2003] 3 S.C.R. 193 and *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941 (C.A.).

OVERVIEW:

[1] By way of background, the Township of Clearview (the township) is the owner and public road authority for 26/27 Side Road (the side road) located in the Niagara Escarpment. The township was a party to a joint board hearing by the former Ontario Municipal Board and Environmental Review Tribunal of an application to expand operations at a quarry in the vicinity of the side road. A joint board order approved minutes of settlement reached by the parties that included a direction that the township upgrade the side road.

[2] The township sought a development permit from the Niagara Escarpment Commission (NEC) for the proposed works to upgrade the side road. The NEC denied the township's application for a development permit and, at the end of 2015, the township appealed the NEC's decision to the Niagara Escarpment Hearing Office (NEHO).¹

[3] In February 2018, the township made an application to amend the Niagara Escarpment Plan to add policy exceptions that would permit infrastructure improvements to the sideroad.² This application has been met with opposition and has been referred to the NEHO. The township's appeal and the referred application are both continuing before the NEHO and have been adjourned without a date as a result of an intervention by the Director of the Environmental Assessment Branch of the Ministry of Environment, Conservation and Parks.

[4] This appeal arises from an access to information request made to the township pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester seeks access to information in invoices pertaining to engineering services provided by a third party consultant to the township in relation to the side road upgrade.

[5] The access request reads as follows:

All revenues and expenses (including all original sourced invoices) related to the proposal to close County Road 91 and upgrade [the side road]. This includes legal and consulting fees and includes the years of 2010 – November 10, 2020.

[6] The township identified 99 responsive records, which are invoices from a third party engineering company for services provided from 2012 to 2020. The township decided to grant partial access to the records, withholding some information from each of the 99 invoices pursuant to the discretionary solicitor-client privilege exemption in

¹ NEHO Case No 15-176 commenced under sections 25(5.1) and 25(8) of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2.

² NEHO Case No 20-036 commenced under section 10(3) of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2, as amended.

section 12 of the *Act*.³

[7] The requester, now the appellant, appealed the township's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore possible resolution.

[8] During mediation, the township provided written submissions to the mediator stating that in each of the 99 invoices, it had withheld the summary of the services provided to the township by the third party engineering consultants. The withheld information consists of a sentence or a short paragraph on each invoice.

[9] In its submissions, the township maintained its reliance on the application of the solicitor-client privilege exemption in section 12 to the withheld information. In addition, the township raised the discretionary advice or recommendations exemption in section 7(1) of the *Act* as an alternative basis for withholding the information from the invoices.

[10] The mediator provided the appellant with the township's submissions. The appellant advised that they did not accept that the exemptions relied upon by the township applied to the information withheld from the invoices. The appellant challenged the township's raising of section 7(1) as an additional discretionary exemption and raised the public interest override in relation to the section 7(1) claim.⁴

[11] As a mediated resolution was not achieved, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry.

[12] I decided to conduct an inquiry and invited and received representations from the parties. The parties' representations were shared in accordance with section 7 of the IPC's *Code of Procedure* (the *Code*) and *Practice Direction 7*.

[13] In this order, I find that the solicitor-client privilege exemption in section 12 applies to the information withheld from 42 of the 99 invoices. I find that neither the solicitor-client privilege exemption in section 12 nor the advice or recommendations exemption in section 7(1) applies to the information withheld from the remaining 57 invoices. Accordingly, I order the township to disclose the 57 invoices in full to the appellant. The 57 invoices to be disclosed are listed in the schedule to this order.

RECORDS:

[14] The information at issue in this appeal is the descriptive summary of services rendered to the township by the engineering consultant that has been severed from

³ According to the township, the legal invoices have already been provided to the appellant and they are not at issue in this appeal.

⁴ The public interest override, which is found in section 16 of the *Act*, cannot apply to information that is exempt under section 12.

each of the 99 invoices.

ISSUES:

- A. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the information at issue in the 99 invoices?
- B. Should the IPC permit the township to claim a new discretionary exemption, under section 7(1) of the *Act*, outside of the 35-day window for doing so?
- C. Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to the information at issue?
- D. Did the township properly exercise its discretion under section 12? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the information at issue in the 99 invoices?

[15] The township maintains that the information withheld from each of the 99 invoices is exempt under the solicitor-client privilege exemption in section 12 of the *Act*. Section 12 states:

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

[16] 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*. An institution that relies upon the exemption in section 12 must establish that at least one branch applies.

Branch 1: common law privilege

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

Common law solicitor-client communication privilege

[18] 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.⁵ This privilege 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.⁶ 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.⁷

[19] Confidentiality is an essential component of solicitor-client privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁸

Common law litigation privilege

[20] Common law litigation privilege is based on the need to protect the adversarial process by ensuring that parties have a “zone of privacy” in which to investigate and prepare a case for trial.⁹ The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.¹⁰

[21] 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.¹¹

[22] 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.¹²

Common law loss of privilege

Waiver

[23] Under the common law, a client may waive solicitor-client privilege. An express waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.¹³

⁵ Orders PO-2441, MO-2166 and MO-1925.

⁶ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁷ *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.

⁸ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁹ *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).

¹⁰ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

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

¹² *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹³ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

[24] 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.¹⁴

[25] Generally, disclosure to outsiders of privileged information is a waiver of privilege.¹⁵ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹⁶

Termination of litigation

[26] Common law litigation privilege generally comes to an end with the termination of litigation.¹⁷

Common law treatment of legal fees and billing information

[27] Under the common law, there is a presumption that legal billing information is privileged unless the information is “neutral” and does not directly or indirectly reveal privileged communications.¹⁸ The township’s position is that the common law treatment of legal fees and billing information is relevant to this appeal and I address this further in my analysis below.

Branch 2: statutory privilege

[28] 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

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

Statutory litigation privilege

[30] 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 the “zone of privacy” intended to be protected by the litigation

¹⁴ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹⁵ 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.).

¹⁶ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

¹⁷ *Blank v. Canada (Minister of Justice)*, cited above.

¹⁸ *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769, 2007 CanLII 65615 (ONSCDC); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

privilege, such as communications between opposing counsel.¹⁹

[31] Statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.²⁰ In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.²¹

Representations

Township's representations

[32] I have considered the township's representations and I have also reviewed the public statement made in March 2021 by the township's mayor regarding the side road upgrade. The township provided a copy of the mayor's statement with its submissions during mediation for general context of its development application to the NEC and the referral to the NEHO of the application to amend the NEP.

[33] The township submits that the common law treatment of legal billing information applies to the invoices. The township cites Order PO-2483 (which addressed legal billings) and submits that the engineering invoices are presumed to be privileged and the presumption is not rebutted, because the information in them is not neutral. In response to the two questions that are considered in the common law treatment of legal billing information, the township submits that an "assiduous inquirer", aware of background information, could use the information redacted from the invoices to deduce privileged communications.

[34] The township submits that the works completed by the engineers and summarised in the redacted portions of the invoices are directly related to the preparation for the township's ongoing litigation to obtain a development permit for the side road upgrade. The township adds that the engineers are key witnesses in the pending litigation.

[35] The township cites the decision of the Ontario Court of Appeal in *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*²² and submits that the summary details in the invoices are within the "zone of privacy" afforded for the purposes of litigation privilege in order to facilitate adversarial preparation and to foster a fair trial.

[36] The township also relies on the branch 2 exemption, statutory litigation privilege. In its representations, the township explains its position as follows:

¹⁹ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

²⁰ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

²¹ *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, cited above.

²² 62 OR (3d) 167.

The township submits that the synopsis of the services rendered by [the engineering consultant] within these invoices were prepared and the action outlined within them used by counsel retained by the township for giving legal advice or in contemplation of, or for use in, litigation. The township is the appellant to a hearing currently before the [NEHO] regarding proposed road improvements and upgrades to the [side road] and the NEC's decision to deny issuance of a development permit to upgrade the road. Both the township's legal counsel and [the engineering consultant] have been involved in providing representations on behalf of the township regarding this application to the [NEC] and subsequent appeal of the decision ... Services provided by [the engineering consultant] have been used by the township's legal counsel to provide legal advice and opinions on moving forward through the NEC application and subsequent hearing process.

[37] The township submits that the redacted portions of the invoices are therefore subject to statutory litigation privilege. It is the township's position that the township and their legal counsel continue to use the engineering information provided by the third party engineering consultants to assist the lawyers in providing legal advice and navigating the NEC application and NEHO hearing process.

[38] The township cites Orders PO-2967 and PO-4097 (both cases where the statutory litigation privilege was found to apply) and submits that the information withheld from the invoices meets the "dominant purpose" test as each invoice concerns work undertaken for the dominant purpose of aiding in litigation.

Appellant's representations

[39] The appellant's position is that the exemption in section 12 of the *Act* does not apply to the information redacted from each of the 99 invoices as neither of the two branches of privilege is established.

[40] The appellant distinguishes the orders cited by the township and submits that in those appeals the test of "assiduous inquirer" was met in respect of invoices for legal fees.

[41] The appellant submits that the statutory litigation privilege does not apply to the information withheld by the township. The appellant's position is that the invoices were not prepared for use in giving legal advice nor are they litigation documents but invoices created for the purpose of compensation. The appellant states that the invoices were generated for work done by the consultants as part of the assessment of the environmental impacts of the upgrade of the side road. As such, the appellant submits that the work is a matter of public record.

Analysis and findings

[42] Although it is not entirely clear, I understand the township's position to be that all of the privileges under section 12 apply to the information withheld from the invoices:

- a. Common law solicitor-client communication privilege. Although the township states that it is not relying on this privilege, the township relies upon the common law treatment of legal fees and billing information, which is an aspect of solicitor-client communication privilege;
- b. Statutory communication privilege (prepared by or for the township's counsel for use in giving legal advice);
- c. Common law litigation privilege. Although the township states that it is not relying upon this privilege, the township submits that the work and communications summarised in the invoices were undertaken for the dominant purpose of litigation and are within the "zone of privacy"; and
- d. Statutory litigation privilege (prepared by or for the township's counsel in contemplation of or for use in litigation).

[43] For the reasons that follow, I am not satisfied that the invoices are to be treated in the same way as legal fees and billing information which, under the common law, is subject to a rebuttable presumption of solicitor-client communication privilege. I am also not satisfied that statutory solicitor-client communication privilege applies to the information at issue.

[44] I find, however, that the information withheld from 42 of the 99 invoices is subject to common law litigation privilege and is therefore exempt under section 12 of the *Act*. The information withheld from the remaining 57 invoices is not subject to either the common law or statutory litigation privileges. It must, therefore, be disclosed.

[45] Before setting out my analysis of each of the privileges under section 12, I will explain the findings of fact that I have reached from my review of the parties' representations and the 99 invoices.

[46] I have considered the township's representations concerning the proceedings in which it has been involved in relation to the side road upgrade. The IPC has previously held that proceedings before administrative tribunals qualify as "litigation" for the purpose of the section 12 exemption²³ and I am satisfied that the permit proceedings before the NEHO qualify as litigation for these purposes. I accept the township's evidence that the hearing before the Joint Board was contested and concluded by minutes of settlement to which the township was a party and that the township's

²³ See Orders M-162 and M-625.

subsequent application to the NEC for a development permit and the ongoing appeal before the NEHO are adversarial in nature. Further, I accept that these proceedings have not been concluded.

[47] I find, from my review of the non-disclosed portions of the invoices, that they include descriptions of engineering consultants' work undertaken in relation to the side road upgrade, which is the subject of the NEC application and the subsequent hearing before the NEHO.

[48] From my review of the invoices, I find that they were created by the engineering consultants on a monthly basis to recover fees for consulting services. The invoices are addressed to the township and there is no evidence before me that the township's counsel or legal representatives were privy to the agreement for services between the township and the third party engineers. Similarly, there is no reasonable basis for me to find that the third party engineers were retained by township counsel to do the work to which the invoices relate. I am also not persuaded that, on the face of them, the invoices were intended to be confidential in their entirety.²⁴

[49] From my review of the invoices, which cover a period of 8 years, I am satisfied that the township retained the engineers during a time when it was engaged in the litigation that I have summarised above. In addition, and based upon the appellant's representations, my review of the descriptive summary of work in the invoices and the township mayor's public statement, I find that the work carried out by the engineers included an environmental impact study for the side road upgrade. The fact that this work was carried out by the engineers is information in the public domain. I will now turn to my section 12 analysis and first address solicitor-client communication privilege then litigation privilege, under the two branches.

Branch 1 – common law solicitor-client communication privilege

[50] The township relies upon the common law treatment of legal fees and billing information, which is an aspect of the common law solicitor-client communication privilege.

[51] As I have explained above, the invoices at issue were created by the third party engineering consultant and are addressed directly to the township. I have not been provided with any information regarding the relationship between the engineering consultant and the township's legal advisor.

[52] I agree with the appellant's submission and find that the engineering invoices were created by the engineering consultants for the purpose of collecting fees for services rendered to the township.

²⁴ However, as I explain in my analysis below, I am satisfied that portions of the invoices relate to communications that took place within a zone of privacy for the purposes of litigation privilege.

[53] The township's position is that the information redacted from the responsive records is not "neutral" and that an assiduous inquirer would be able to deduce privileged communications if the invoices are released in full. The township submits that the descriptive summary of the work in each of the 99 invoices is presumed to be privileged and should be treated in the same way as legal fees and billing information.

[54] I do not agree with the township's submission and am not satisfied that the approach to legal billings applies to the information withheld from the 99 engineering invoices. The invoices at issue in this appeal do not pertain to legal fees and billing information and there is no reasonable basis for treating them as such.

[55] A number of court decisions and IPC orders have addressed the common law treatment of legal fees and billing information.

[56] In *Maranda v. Richer*,²⁵ the Supreme Court of Canada held that legal billing information is presumptively privileged unless the information is "neutral" so that it neither directly nor indirectly reveals privileged communications. Subsequent orders of the IPC have held that the principles established in *Maranda*, which was a criminal case, apply in the civil law context and to legal billing information in records to which access is pursued through the *Act*.²⁶

[57] The township seeks to follow this approach with regard to the engineering invoices at issue and cites the "assiduous inquirer" test set out by the Court of Appeal in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*²⁷ as it was explained in the adjudicator's review of the common law treatment of legal billing information in Order PO-2483. The township's submission is that "if the information reveals or permits solicitor-client communications to be deduced, then the privilege remains." The township submits that the redacted portions of the invoices permit the deduction of privileged communications.

[58] I have considered the township's submissions and, in my view, they provide no reasonable basis for extending the presumptive privilege in the common law treatment of legal fees and billing information to the engineering invoices. In *Maranda*, the Supreme Court held that the presumption of privilege that attaches to a lawyer's bill of account is "consistent with the aim of keeping impairments of solicitor-client privilege to a minimum."²⁸ As these invoices reflect work done by engineers, not solicitors, I find that there is no basis for applying a presumption of privilege in respect of the consultant's billing information.

[59] Accordingly, I find that the presumptive privilege analysis from the common law

²⁵ 2003 SCC 67 (CanLII), [2003] 3 SCR 193.

²⁶ See Orders PO-2484 and PO-2548, both upheld by the Divisional Court in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No 2769 (Div. Ct.).

²⁷ [2005] O.J. No. 941 (C.A.)

²⁸ [2003] 3 SCR 193 at para 33.

treatment of legal fees and billing information does not apply to the information withheld from the engineering invoices. The township does not otherwise rely on common law communication privilege.

Branch 2 – statutory communication privilege

[60] The township states that services provided by the engineering consultant have been used by the township's legal counsel to provide legal advice and opinions on moving forward through the NEC application and subsequent hearing process. This argument implies that the township may be relying on the statutory communication privilege. However, for that privilege to apply, the information must have been prepared *by or for* township counsel. As I have noted above, the invoices are addressed to the township, not its counsel, and there is no information before me from which to conclude that the invoices formed part of any communication with township counsel. Furthermore, to the extent that the withheld information refers to work conducted by the engineers, I have found above that that work was conducted for the township, not for the township's counsel.

[61] Accordingly, I find that the statutory communication privilege does not apply.

Branch 1 – common law litigation privilege

[62] The township submits that the descriptive summaries of work done by the consultants that appear in the invoices include conclusions reached as a result of the consultants' work for the purposes of advancing the township's position in the litigation. The township also states that the consultants are key witnesses in the pending litigation.

[63] For common law litigation privilege to apply, a record must have been created for the dominant purpose of reasonably contemplated litigation. As I have already explained, I agree with the appellant's submission that the invoices are records that were prepared for the collection of fees for work undertaken for the township. The collection of fees for work undertaken is ancillary to the work itself. There is no evidence before me that the invoices, including the summaries of the engineers' work, were created for the purpose of the litigation or have become part of the township solicitor's work product so that they are records subject to litigation privilege. Accordingly, I find that the invoices themselves were not prepared for the dominant purpose of litigation.

[64] This finding does not end the matter, because the withheld information refers to communications that may or may not be litigation privileged; I must now address that matter. The township has not identified specific information in the descriptive summaries of the work undertaken by the engineers that it claims was used for the purpose of advancing the township's position in the litigation. The township asserts a blanket privilege applies to the summaries in all the 99 invoices. I have found that the

invoices are not presumptively privileged communications and are not themselves records created for the dominant purpose of litigation and I therefore disagree with the township's submission that a blanket privilege applies to exempt from disclosure all the summaries of work in the invoices.

[65] While I reject the township's submission of a blanket privilege, I have considered the descriptive summary in each invoice to determine whether, if disclosed, it would reveal or permit to be revealed the content of communications made for the dominant purpose of litigation or reasonably apprehended litigation.

[66] As I have noted above, common law litigation privilege is based on the need to protect the adversarial process by ensuring that counsel has a "zone of privacy" in which to investigate and prepare a case for trial. I have found that the township is involved in proceedings that qualify as "litigation" for the purpose of section 12 of the *Act*. Accordingly, I have considered whether any of the descriptive summaries of the engineers' work, if disclosed, would reveal communications taking place within a zone of privacy for the dominant purpose of litigation.

[67] From my review of the records, I am satisfied that the descriptive summaries in 42 of the invoices, if disclosed, would reveal or permit to be revealed communications made in the requisite "zone of privacy" and for the dominant purpose of litigation. I note from the mayor's public statement that the Joint Board hearing began in May 2010. The township's submission is that its proposal to upgrade the side road began as a part of that hearing process and since then it has sought a development permit in the proceedings before the NEC, which are currently subject to the appeal before the NEHO. In terms of timing, I am satisfied that the work and communications described in the 42 invoices that I have identified were undertaken while these proceedings were ongoing. From my review of the descriptive summaries in these invoices, I am also satisfied that this work and communications were undertaken for the dominant purpose of these proceedings. In relation to the remaining 57 invoices, although prepared while the litigation was ongoing, I am not persuaded that the descriptive summaries reveal the content of communications prepared for the dominant purpose of litigation.²⁹

[68] Subject to my determination of the issue of the township's exercise of discretion, I find that common law litigation privilege exemption under branch 1 in section 12 of the *Act* applies to 42 of the 99 invoices.

[69] Given my finding that the common law litigation privilege applies to the withheld information in 42 invoices, I do not need to decide whether the branch 2 statutory litigation privilege also applies to it. I will uphold the township's decision to withhold that information in the 42 invoices.

²⁹ The 58 invoices from which information has been withheld that I find are not exempt under section 12 are listed in the schedule to this order.

Branch two – litigation privilege in relation to the 58 remaining invoices

[70] Finally, the township relies on statutory litigation privilege for all the withheld information. I have found above that the information at issue in the 57 remaining invoices is not subject to common law litigation privilege, but I must now consider the township's statutory litigation privilege argument for them.

[71] I find that the statutory litigation privilege does not apply to the withheld information in the 57 invoices. This information relates to work done by the consultants, but as I found above, that work was not done "for" township counsel as required by the statutory privilege.

[72] I will now consider whether, if allowed, the alternative exemption under section 7(1) of the *Act* applies to the information withheld from the remaining 57 invoices.

Issue B: Should the IPC permit the township to claim a new discretionary exemption, under section 7(1) of the *Act*, outside of the 35-day window for doing so?

[73] As noted above, during the mediation stage of the appeal process, the township raised the discretionary advice or recommendations exemption in section 7(1) of the *Act* as an alternative basis for withholding the information from the 99 invoices.

[74] The *Code* provides procedural guidelines for parties involved in appeals before the IPC. Section 11.01 of the *Code* addresses the situation where an institution seeks to raise a new discretionary exemption during an appeal and states:

In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[75] The 35-day rule provides an opportunity for institutions to raise a new discretionary exemption without compromising the integrity of the appeal process. Where an institution is aware of the 35-day rule, disallowing a discretionary exemption claimed outside the 35-day period is not a denial of natural justice.³⁰

[76] In the Notice of Inquiry, I invited the parties to consider and provide

³⁰ *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

representations on any prejudice or compromise to the integrity of the appeal process caused by the township's late raising of the discretionary exemption in section 7(1) of the *Act*.

[77] The township states that when the appellant was provided with its submissions during mediation, they took no issue with it raising the additional discretionary exemption. The township submits that the appellant has had sufficient time to respond to its position that the records at issue fall within the advice or recommendations exemption. The township states that the application of section 7(1) is intertwined with the solicitor-client privilege exemption in section 12 and there is no prejudice to the appellant or compromise to the integrity of the appeal by it being permitted to raise it.

[78] The appellant states that the late raising of the discretionary exemption in section 7(1) prejudices them with respect to the appeal. The appellant does not address the nature of the prejudice in their representations.

[79] I have decided to permit the township to claim the additional discretionary exemption in section 7(1), outside the 35-day period provided for in the *Code*. I have considered the circumstances of the appeal and I am not persuaded that allowing the township to claim the additional discretionary exemption will cause prejudice to the appellant or compromise the integrity of the appeal.

[80] I agree with the township's submission that the appellant has had a reasonable opportunity to provide representations on the section 7(1) exemption, both during the mediation stage of the appeal and in the course of my inquiry. Accordingly, I will consider the possible application of section 7(1) to the information withheld from the remaining 57 invoices that I have determined are not exempt under the solicitor-client privilege in section 12.

Issue C: Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to the information at issue?

[81] Section 7(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.³¹

[82] Section 7(1) states:

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

³¹ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

[83] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to materials that relate to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred. "Advice" has a broader meaning and includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.³²

[84] Neither "advice" or "recommendations" include "objective information" or factual material.

[85] Section 7(1) applies if disclosure would "reveal" advice or recommendations, either because the information at issue itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.³³

[86] The application of section 7(1) is assessed at the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 7(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.³⁴

[87] Section 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7(1). Section 7(2) states, in part:

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material ...

[88] Factual information, as set out in paragraph (a), is an example of objective information. It does not contain opinion pertaining to a decision that is to be made but rather provides factual information.

³² See above at paras. 26 and 47.

³³ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

³⁴ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

Representations

[89] It is the township's position that the exemption in section 7(1) applies to the invoices because they are the subject matter of ongoing litigation and reflect the actions of the consultants to prepare for litigation. The township states that the summary details that have been withheld from the invoices provide information about the actions taken by the consultants at the direction of the township and its legal counsel and a summary of advice and/or recommendations provided as a result. The township submits that those who are privy to the ongoing litigation could easily deduce the otherwise privileged information.

[90] The township submits that the information in the invoices includes recommendations about proposed courses of action to be followed in relation to the specific projects that are connected to the side road upgrade and advice relating to tactics regarding the upgrade project itself. The township states that the application to the NEC and the subsequent hearing has been a lengthy process and courses of action suggested by the engineering consultants are outlined in the descriptive summaries of the work carried out.

[91] The township states that none of the exceptions to the section 7(1) exemption, which are set out in section 7(2) and section 7(3), apply to the invoices.

[92] It is the appellant's position that the redacted information in the 99 invoices does not constitute advice or recommendations so that the section 7(1) exemption does not apply.

[93] The appellant cites Order MO-3253-I and submits that the summary information in the invoices should be considered factual or background information and does not include policy opinions, possible courses of action or the opinion of the consultants or legal counsel. As factual information, the appellant submits that it falls within the exception to the exemption in section 7(2)(a).³⁵

[94] The appellant submits that, as the township acknowledges in its representations, the information redacted from each invoice is a "summary of the work completed" by the consultants.

Analysis and findings

[95] As I have noted above, the information withheld from the invoices consists of summaries of the work carried out by consultant engineers retained by the township.

[96] The township repeats many of its representations made in relation to the solicitor- client privilege exemption in section 12 in its submissions in relation to the

³⁵ Section 7(2)(a) provides that an institution shall not refuse to disclose a record that contains factual material.

section 7(1) exemption. It is the township's position that disclosure of the descriptive summaries would reveal the content of the engineering consultants' advice or recommendations.

[97] The township has made general references only to the advice or recommendations that it submits are exempt pursuant to section 7(1). In the Notice of Inquiry, I asked the township to specify the advice or the recommended course of action in the records that it asserts qualifies for exemption. Alternatively, the township was asked to explain how disclosure of the invoices might reveal the advice or recommendations. The township has not specified the advice or recommendation that it submits would be revealed by the disclosure of the descriptive summaries in the invoices.

[98] The information redacted from each invoice is a summary of the work completed by the consultants.

[99] From my review of the redacted portions of the 57 invoices that I have found are not exempt under the solicitor-client privilege exemption in section 12, I am not satisfied that the summaries of services rendered by the engineers qualify as "advice" or "recommendations" within the meaning of section 7(1). I find no reference in the invoices to possible alternative courses of action identified by the third party engineers, suggested actions that might qualify as recommendations or opinions expressed about which course of action the township should adopt regarding the side road upgrade

[100] As I have found that the advice or recommendations exemption in section 7(1) does not apply to the information withheld from the invoices, it is not necessary for me to consider the exception to the exemption in section 7(2)(a).

[101] Accordingly, I find that the exemption in section 7(1) of the *Act* does not apply to the information withheld from the remaining 57 invoices.

[102] I will now consider whether the township properly exercised its discretion under section 12 in respect of the withheld information in 42 invoices.

Issue D: Did the township exercise its discretion under section 12? If so, should the IPC uphold the exercise of discretion?

[103] As I have set out above, I have considered each invoice individually and found that the discretionary solicitor-client privilege exemption in section 12 applies to the information withheld from 42 of the invoices. The public interest override in section 16³⁶ has been raised by the appellant but cannot apply to information that is exempt under section 12.

³⁶ Section 16 of the *Act* provides that 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.

[104] The section 12 exemption states that an institution “may” refuse to disclose, meaning that the exemption is discretionary and an institution can decide to disclose information even if the information qualifies for exemption. An exemption must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. 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] While I may send the matter back to the township for an exercise of discretion based on proper considerations,³⁷ the IPC cannot substitute its own discretion for that of the township.³⁸

[106] The township states that its decision to withhold portions of the invoices was made in good faith and upholding its duty to remain transparent while protecting records that may prejudice ongoing litigation. The township submits that it worked through the 99 invoices, providing the appellant with appropriate information for all audit working papers and cost estimates in relation to the side road upgrade proposal. The township states that it did not apply an exemption to all the information in the records to prevent disclosure but carefully assessed each record and withheld only a small portion of each one. The township notes that in relation to each invoice, the appellant has been provided with the project name, invoice date, consultant, hours worked, rate and billings.

[107] The township submits that in exercising its discretion, it assessed all relevant factors, recognizing that:

- a. Information should be available to the public and only the required portions of documents were redacted;
- b. The records did not include any personal information relating to the appellant;
- c. The exemptions applied were limited in scope, specific and applicable to the same portion of each record;
- d. The appellant does not have a compelling need for the redacted information;
- e. Disclosure would not increase public confidence in an institution under the *Act*;

³⁷ Order MO-1573.

³⁸ Section 43(2) of the *Act*.

- f. The nature and sensitivity of the records is a concern and the importance of maintaining litigation and solicitor-client privilege is high;
- g. Some of the information is quite recent; and
- h. This is common practice of the institution in addressing similar requests.

[108] The appellant submits that the township wrongly exercised its discretion and reiterates its position that neither of the discretionary exemptions in section 12 or 7 applies to the information withheld from the invoices.

[109] I have considered the parties' representations and have decided to uphold the township's exercise of discretion. There is no evidence before me of relevant considerations that the township failed to take into account nor do I find that the township took account of irrelevant considerations or acted in bad faith when it decided to withhold the summaries of work from the 42 invoices to which I have found section 12 applies.

ORDER:

1. I uphold the township's decision on the application of the exemption in section 12, in part, and order the township to disclose to the appellant the information that I have found not to be exempt under that section.
2. I order the township to disclose to the appellant, in full, the 57 invoices listed in the schedule to this order, by providing copies by April 5, 2023.
3. In order to verify compliance with this order, I reserve the right to require the township to provide me with proof of disclosure in accordance with provision 2.

Original Signed By: _____
Katherine Ball
Adjudicator

_____ March 31, 2023

SCHEDULE

Records to which the exemption in section 12 of the Act does not apply:

Invoice #	Invoice date
1	January 16, 2020
2	April 21, 2020
3	June 23, 2020
4	July 30, 2020
5	August 18, 2020
6	September 18, 2020
7	October 19, 2020
13	August 14, 2020
16	March 25, 2020
17	March 25, 2020
18	March 20, 2019
19	April 22, 2019
20	May 24, 2019
21	June 18, 2019
22	August 23, 2019
23	October 18, 2019
24 (Submitted to the IPC as # 54 on September 16, 2022)	November 22, 2019
25	December 18, 2019

34	September 30, 2019
38	January 21, 2019
39	April 24, 2018
40	May 22, 2018
41	June 25, 2018
42	July 30, 2018
43	August 13, 2018
44	September 21, 2018
45	November 23, 2018
46	December 19, 2018
52	July 30, 2018
58	March 22, 2018
60	January 16, 2017
61	January 16, 2017
62 (Submitted to IPC as #26 on September 16, 2022)	April 29, 2016
63	May 25, 2016
75	March 22, 2016
76	April 29, 2016
77	May 25, 2016
78	June 14, 2016
79	July 20, 2016
80	August 29, 2016

81	September 29, 2016
82	October 28, 2016
83	January 16, 2017
84	February 17, 2016
85	May 22, 2015
87	June 23, 2014
88	December 19, 2013
89	November 21, 2013
90	December 19, 2013
91	November 21, 2013
92	December 19, 2013
93	August 13, 2013
94	October 11, 2013
95	November 11, 2013
96	December 5, 2013
97	December 5, 2013
98	November 21, 2013