



**Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2624

Appeal MA10-267

Township of Oro-Medonte



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NATURE OF THE APPEAL:

The Township of Oro-Medonte (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified mediation briefing package relating to the Township and the Nottawasaga Valley Conservation Authority (NVCA). The request indicated that the package was submitted by the Township to the Mining and Lands Commissioner in preparation for a mediation meeting held on a specific date in 2009.

In response to the request, the Township located and granted partial access to the responsive records. The Township then stated:

Access is denied to the “Executive Summary” portion of the document pursuant to section 12 [solicitor-client privilege] of the *Act*....

The appellant appealed the Township’s decision.

Mediation did not resolve this appeal and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I initially sent a Notice of Inquiry identifying the facts and issues in this appeal to the Township, and received representations in response. I then sent the Notice of Inquiry, along with a complete copy of the representations of the Township, to the appellant, who also provided representations in response.

The appellant’s representations set out the reasons why, in his view, the document at issue ought to be disclosed. As a result, I decided to send a Reply Notice of Inquiry, along with a complete copy of the representations of the appellant, to the Township. The Township was invited to address the issues raised in this appeal, in light of the appellant’s representations. In addition, the Township was asked to specifically address the issue of whether it properly exercised its discretion to claim the section 12 exemption in this appeal. In response, the Township provided reply representations to me.

RECORD:

The record at issue in this appeal consists of a 19-page “Executive Summary” document.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Township submits that section 12 of the *Act* applies to the record. Section 12 reads:

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.

Section 12 contains two branches as described below. To rely on this exemption, the Township must establish that one or the other (or both) branches apply.

Branch 1 derives from the first part of section 12, which permits the Township to refuse to disclose “a record that is subject to solicitor-client privilege”.

Branch 2 derives from the second part of section 12 and it is a statutory exemption that is available in the context of institution counsel giving legal advice or conducting litigation. The statutory exemption and common law privilege, although not necessarily identical, exist for similar reasons.

The Township takes the position that the record qualifies for exemption under the litigation privilege aspect of branch 2 of the exemption in section 12.

Branch 2: statutory privileges

General Principles

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation.

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution “in contemplation of or for use in litigation.”

Termination of litigation does not affect the application of statutory litigation privilege under branch 2. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (cited above)]

Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation. [*Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.]

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and
- the lack of a “zone of privacy” in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

Representations

The Township takes the position that the record qualifies for exemption under the litigation privilege aspect of branch 2 of the exemption in section 12. It relies on the recent decision of *Magnotta*, cited above, in which the Ontario Court of Appeal found that branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation. The Township reviews both the Court of Appeal decision and the earlier Divisional Court decision in some detail, and then reviews the requirements for the application of the section 12 exemption as it pertains to the record at issue. The Township argues that (i) the record was prepared by counsel employed or retained by the institution, and (ii) that the record was prepared “in contemplation of or for use in litigation.” The Township states:

First, the Township submits that the Disputed Record was prepared largely by the [named] law firm as counsel retained by the Township ... [and] the first component of branch 2 is satisfied.

The Township argues that second component of branch 2, regarding whether the Disputed Record was prepared in contemplation of or for use in litigation, is also satisfied on the basis of the Ontario Court of Appeal’s decision in *Magnotta*.

The Township then reviews the *Magnotta* decision, and argues that although that decision dealt with section 19 of the provincial *Freedom of Information and Protection of Privacy Act*, that section is similar to section 12 at issue in this appeal, and the principles of the *Magnotta* decision apply to the fact situation in this appeal as well. The Township then states:

The *Magnotta* case involved a request under [the provincial act] for the complete record of a mediated settlement between the LCBO and Magnotta Winery Corporation. The LCBO granted partial access to the requested information but claimed it was exempt from producing certain records based on section 19 of [the provincial act]. ...

... The Court of Appeal confirmed that documents prepared for mediation constitute records prepared for use in litigation and that settlement privilege is included in the second branch of the exemption.

The Township then refers to the specific record at issue in this appeal, and states:

In [this appeal], the Disputed Record was created for use in a consensual mediation between the Township and the NVCA that was administered by the Mining and Lands Commissioner (MLC). This arose as a result of the statutory avenue of appeal found in Section 8 of the *Conservation Authorities Act* R.S.O. 1990, c. C.27, which permits a municipality against which a levy is made to appeal, in certain circumstances, to the MLC.

While the mediation between the Township and the NVCA arose in the course of a statutory appeal, rather than in the course of civil litigation, the Township submits that the underlying rationale for including mediation in the meaning of litigation remains relevant. ...

The Township also provides representations supporting its position that the privilege under branch 2 of section 12 has neither been lost nor waived. With respect to the issue of the possible loss of privilege by termination of litigation, the Township refers to the fact that termination of litigation does not affect the application of statutory litigation privilege under branch 2. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*] (cited above), and states:

On this basis the Township maintains that the exemption under branch 2 of section 12 of [the *Act*] endures despite the fact that the litigation, i.e. the appeal of NVCA levy, for which the Disputed Record was created to be used in, has come to an end. We note that though the Township's appeals to the MLC have been withdrawn, the parties are attempting to implement the settlement reached at the mediation for which the Disputed Record was prepared.

The Township also provides representations in support of its position that privilege under branch 2 of section 12 has not been lost through waiver. It reviews the differences between the common law privilege and branch 2 privilege, and also states:

In addition ... the Township relies upon the decision in *Magnotta* to support its claim that it has not lost privilege by providing the Disputed Documents to either the NVCA or the mediator during the course of the mediation process. In *Magnotta*, the parties shared documents prepared for mediation, including briefs, with the mediator and each other without any subsequent loss of privilege. The Township asserts that it is not logical in this instance that the mere exchange of documents in the course of a mediation before the MLC would constitute waiver of privilege by either of the parties.

Lastly, the Township argues that the privilege is not lost due to a lack of a "zone of privacy" in connection with the record. The Township states:

... the Disputed Record falls within a reasonable "zone of privacy" as required by *Ontario (Attorney General) v. Big Canoe*, [2006 80 OR (3d) 761] In [that] case, the Divisional Court found that simple correspondence between counsel during the course of litigation did not fall within this zone and that it was reasonable in the circumstances for the adjudicator to require their release.

However, in *Magnotta* the Ontario Court of Appeal contrasted such correspondence with documents prepared by, or delivered to, counsel to assist with mediation and settlement discussions as part of the litigation process. The Court subsequently identified the mediation documents as clearly falling within the reasonable zone of privacy.

The appellant provides representations in which he argues that section 12 does not apply to the record. With respect to whether litigation privilege applies, the appellant states:

There is no longer any litigation as the Township has withdrawn its appeal. Staff of [the Township] and the [NVCA] are co-operating on a Memorandum of Understanding to define their continuing working agreement.

Analysis and Findings

I have carefully reviewed the record at issue and the representations of the parties. For the reasons that follow, I find that the record is exempt under branch 2, which is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation.

The Ontario Court of Appeal decision *Magnotta*, cited above, found that records prepared for use in the mediation or settlement of litigation are exempt under the statutory litigation privilege aspect of branch 2 contained in the provincial equivalent to section 12 (section 19 of the provincial act). More particularly, the Court of Appeal found that the word “litigation” in the second branch encompasses mediation and settlement discussions. The Court stated:

Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records – both those prepared by Crown counsel and those prepared by *Magnotta* – fall within the second branch and are exempt from disclosure.

In the specific circumstances of this appeal, I am satisfied that litigation existed at the time the record was prepared. The Township has indicated that the record was created for use in a consensual mediation between it and the NVCA which arose as part of the statutory avenue of appeal found in the *Conservation Authorities Act*. On my review of section 8 of that Act, I am satisfied that an appeal under that section constitutes “litigation” for the purpose of branch 2 of section 12. I am also satisfied that the record at issue was prepared for the purpose of settlement of this litigation, and was prepared by, or delivered to, counsel employed or retained by the Township to deal with the litigation.

In addition, the fact that the litigation is terminated does not affect the application of statutory litigation privilege under branch 2. [See *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (cited above)]

Furthermore, I am satisfied that the privilege has not been lost through either waiver or a lack of a “zone of privacy” as a result of the record having been provided to either the NVCA or the MLC. I agree with the position taken by the Township that *Magnotta* stands for the proposition that privilege is not lost by providing the record to opposing counsel or the mediator to assist with mediation and settlement discussions as part of the litigation process.

Accordingly, like the records in *Magnotta*, I find that that the record was prepared by or for counsel for the institution in contemplation of or for use in litigation, and is, therefore, subject to branch 2 statutory litigation privilege. On this basis, I find the record is exempt under the section 12 solicitor-client exemption. As this exemption is discretionary, I will now consider whether the Township properly exercised its discretion under section 12 of the *Act*.

EXERCISE OF DISCRETION

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

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

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution (section 43(2)).

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant (Orders P-344, MO-1573):

- 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
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and 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
- the historic practice of the institution with respect to similar information.

Representations

In his representations, the appellant identifies a number of factors which he believes should have been considered by the Township in exercising its discretion in this appeal. One of the factors referred to by the appellant is the fact that there is no longer any ongoing litigation, as the Township has withdrawn its appeal. The appellant also points out that the Township and the NVCA are co-operating on a Memorandum of Understanding to define their continuing working agreement and that, given the nature of the parties involved in this matter, disclosure would serve to provide transparency in government. The appellant states:

The Township and the NVCA are publically funded bodies and all of the monies being spent in this dispute are public funds. Accordingly, the public has a right to all information which illustrates how public funds are spent, as well as the goals and objectives of these organizations in protecting our lives, property, and the environment.

In the Township's representations on the exercise of discretion, it states that it considered the factors set out above, including the general principles of the *Act*, and that information should be accessible to the public and that exemptions from the right of access should be limited and specific. In addition, the Township refers to the Divisional Court decision in *Magnotta* (above), which discussed the difference between litigation privilege and settlement privilege as it pertains to the duration of the privilege. The Township refers to that court's statement that an important consideration in determining common law settlement privilege is "where discussions have led to a settlement, the litigation has resolved, but an argument arises over the terms of the settlement." The Township then states:

In regard to the matter the [record at issue] applies to, the parties involved have not yet resolved their disputes regarding the terms of the settlement reached at the mediation for which the [record at issue] was prepared (contained in a

Memorandum of Understanding) or its implementation. The heart of the dispute between the parties is not yet resolved

... the resolution of the matters at issue between the parties involved in the mediation for which the Disputed Record was prepared is not complete. It is not appropriate that the Disputed records, subject to solicitor-client and settlement privilege, be released.

In addition, the Township states that it considered the principle of the *Act* that information should be accessible to the public, and exemptions should be limited and specific. It refers to the fact that certain records were supplied to the appellant, but not the record at issue, and states:

The Township supplied the contents of the mediation brief itself, which were all public records – it appropriately exercised its discretion and only withheld access to that part of the document which contained confidential and privileged information.

On my review of all the circumstances in this appeal, I am satisfied that the Township has not erred in exercising its discretion not to disclose the record, as it has not done so in bad faith or for an improper purpose, nor has it taken into account irrelevant considerations or failed to take into account relevant ones. I also find that a particularly relevant factor is that, although the litigation is resolved, the resolution of certain issues addressed in the mediation for which the record was prepared is not complete.

Accordingly, I find that the record is exempt under section 12 of the *Act*.

ORDER:

I uphold the decision of the Township, and dismiss the appeal.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ May 18, 2011