Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-3059-R

Appeal PA-060057-1

Order PO-2598

Ministry of Community Safety and Correctional Services

March 2, 2012

Summary: The appellant made a request for settlement documents related to the termination of employment of a former Ontario Provincial Police Officer. Order PO-2598 was issued and the settlement documents were ordered disclosed. Order PO-2598 relied on the reasoning in Order PO-2405, and its reconsideration, Order PO-2538-R, which were judicially reviewed and overturned by the Divisional Court. The Court of Appeal subsequently affirmed the Divisional Court's decision. As Order PO-2598 relied on reasoning expressed in the orders that were overturned, the Commissioner, of her own initiative, initiated a reconsideration of Order PO-2598. The reconsideration was allowed, and applying the reasoning expressed by the Divisional Court and the Court of Appeal, section 19 was found to apply to the records at issue. Order PO-2598 was rescinded and the Ministry of Community Safety and Correctional Service's decision to withhold the settlement documents was upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19.

Orders Considered: Orders PO-2598, PO-2405, and PO-2538-R.

Cases Considered: *Ontario (Liquor Control Board) v. Magnotta Winery Corporation*, 2010 ONCA 681, 102 O.R. (3d) 545 (C.A.), affirming (2009) 97 O.R. (3d) 665 (Div. Ct.).

OVERVIEW:

[1] On July 30, 2007, I issued Order PO-2598 which required the Ministry of Community Safety and Correctional Services (the ministry) to disclose certain specified settlement documents under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*). The documents included the minutes of settlement, as well as a release and the resignation of a former police officer with the Ontario Provincial Police (the OPP). Following the issuance of that order, the Ministry of the Attorney General (MAG) and counsel for the affected parties commenced separate applications of judicial review of Order PO-2598 with the Ontario Superior Court (Divisional Court). Subsequently, I granted a full stay of Order PO-2598 pending the final disposition of the application for judicial review.

[2] In Order PO-2598, I relied on the reasoning of former Senior Adjudicator John Higgins in Order PO-2405, and its reconsideration in Order PO-2538-R, to find that although the records at issue were subject to settlement privilege, they were not exempt under branch 2 of section 19 of the *Act.* The judicial review of Order PO-2598 was placed on hold pending the final disposition of an application of judicial review of Order PO-2405 and Reconsideration Order PO-2538-R.

[3] On October 20, 2010, the Court of Appeal released its decision in *Ontario (Liquor Control Board) v. Magnotta Winery Corporation*.[1] The Court found that branch 2 of section 19 encompasses confidential records used in or generated by settlement discussions between an institution and a third party, including records prepared by counsel for a private litigant. For this reason, the Court dismissed the appeal from an earlier Divisional Court ruling that set aside Order PO-2405 and Reconsideration Order PO-2538-R.[2]

[4] As Order PO-2598 applied the reasoning outlined in Order PO-2405 and Reconsideration Order PO-2538-R which have since been overturned by the Court, this office is initiating, of its own initiative, a reconsideration of Order PO-2598.

RECORDS:

[5] The records at issue consist of settlement documents between the OPP and a now deceased former officer. Specifically, they include the following:

- minutes of settlement;

[1] 2010 ONCA 681 (*Magnotta*).
[2] (2009), 97 O.R. (3d) 665.

- release; and
- resignation.

ISSUE:

[6] Should the decision in Order PO-2598, which found that settlement documents were not exempt from disclosure pursuant to branch 2 of the solicitor-client privilege exemption at section 19 of the *Act*, be reconsidered in light of the Court of Appeal's decision in *Magnotta*?

DISCUSSION:

The reconsideration process

[7] Section 18 of the IPC's *Code of Procedure* (the *Code*) sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code* state as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.
>
> 18.03 The IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

Grounds for the reconsideration request

[8] In the circumstances of this case, pursuant to section 18.03 of the *Code* this office is initiating a reconsideration of PO-2598 on its own initiative, based on paragraph (b) of section 18.01, as there may be a jurisdictional defect in the decision.

[9] The decision in Order PO-2598 relied on the reasoning of former Senior Adjudicator Higgins outlined in Order PO-2405 and Reconsideration Order PO-2538-R,

which were quashed by the Divisional Court. Subsequently, the Court of Appeal affirmed the Divisional Court's decision.

Order PO-2598

[10] At the time that the appeal that gave rise to Order PO-2598 was initiated, Section 19 of the *Act* stated:[3]

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

[11] Section 19 contains two branches. Branch 2 is relevant in the current reconsideration. 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.

[12] As the records at issue in Order PO-2598 were settlement documents, it was necessary to determine whether records subject to settlement privilege fell within the scope of section 19. Following the reasoning expressed by former Senior Adjudicator Higgins in Orders PO-2405 and Reconsideration Order PO-2538-R, I found that settlement privilege was not included in either branch of section 19. Specifically with respect to branch 2, I found that although the settlement documents at issue were prepared by or for Crown counsel, given that they were prepared for use in settlement discussions and not for use in litigation, they did not meet the necessary criteria for branch 2 of section 19 to apply. As I found that none of the other claimed exemptions applied, I ordered the ministry to disclose the minutes of settlement, the release, and the resignation to the appellant.

[13] As noted above, Order PO-2598 was stayed pending the final disposition of a judicial review of that order initiated by MAG and the affected parties. Subsequently, the judicial review of Order PO-2598 was placed on hold pending the final disposition of an application of judicial review of Orders PO-2405 and PO-2538-R.

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[3] Section 19 was subsequently amended (amendments are not retroactive) to include a three provisions, and now reads:

> A head may refuse to disclose a record,
> (a) that is subject to solicitor-client privilege;
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Magnotta – the judicial review of Orders PO-2405 and PO-2538-R

Divisional Court decision

[14] On June 12, 2009, the Divisional Court released its judgment on the judicial review of Order PO-2405 and Reconsideration Order PO-2538-R setting aside both orders. The Court concluded that the records at issue in that appeal (records generated in the context of a settlement of several civil proceedings), were exempt from disclosure under both branch 2 of section 19 of the *Act*, as well as the common law doctrine of settlement privilege. At paragraph 81 of the reasons, Carnwath J. stated:

> All forms of [alternative dispute resolution], including both mandatory and consensual mediation, are part of the litigation process and are equally deserving of confidentiality and the protection of the branch 2 exemption under section 19 of *FIPPA*.[4]

[15] He concluded that where records are prepared by or for Crown counsel for use in any aspect of litigation, the public interest in transparency is superseded by a more compelling public interest in encouraging settlement of litigation.

[16] This office appealed the Divisional Court's decision to the Ontario Court of Appeal.

Ontario Court of Appeal decision

[17] In its decision issued on October 20, 2010, the Court of Appeal endorsed the view of the Divisional Court that records prepared for use in the mediation or settlement of litigation are exempt from disclosure under the statutory litigation privilege aspect found in branch 2 of section 19. The Court also found that based on the wording of section 19, this would extend to "contemplated" litigation. Similar to the record at issue in this appeal, the record in *Magnotta* was a settlement agreement that contained a confidentiality clause.

[18] More particularly, the Court of Appeal found that the word "litigation" in the second branch encompasses both 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. Nothing more need be said to explain why the materials prepared by Crown counsel fall within

[4] Supra note 2.

> the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions. To limit the second branch to records prepared by, or at the behest or on behalf of, Crown counsel is contrary to the plain meaning of the language of the second branch. Furthermore, it is antithetical to the public policy interest in settlement of litigation because it would lead to situations in which the government entity's records would be exempt from production while the private party's mediation material would be producible. . .
>
> The Disputed Records are documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Furthermore, the Disputed Records were explicitly cloaked in confidentiality. Before undertaking the mediation, the parties signed a mediation agreement that contained a confidentiality provision and the settlement documents were replete with extensive confidentiality provisions. Clearly, the Disputed Records fall within any reasonable "zone of privacy."[5]

[19] The Court of Appeal dismissed the appeal and affirmed the Divisional Court's decision.

Ministry's representations

[20] The ministry submits that the Court of Appeal's decision in *Magnotta* offers five compelling reasons as to why branch 2 of section 19 includes records created as part of settlement discussions. It submits that these reasons should be applied to the records at issue in Order PO-2598 to determine that they are subject to exemption pursuant to branch 2 of section 19. The ministry submits the five reasons are as follows:

> (1) settlement privilege has evolved and expanded to include alternative dispute resolution;
>
> (2) public interest favours settlement;
>
> (3) a plain reading of branch 2 of section 19 lends itself to an interpretation that is broader than litigation privilege;
>
> (4) recent judgments of the Supreme Court of Canada indicate that settlement privilege can only be abrogated with clear and explicit statutory language; and

[5] Supra note 1 at para. 44 and 45.

(5) an expectation of confidentiality protects the records within a "zone of privacy."

[21] Accordingly, the ministry submits that Order PO-2598 should be reconsidered and I am now obliged to find that the record at issue was prepared by or for ministry Crown counsel within the meaning of branch 2 of section 19.

Affected parties' representations

[22] The affected parties' representative submits that Order PO-2598 should be reconsidered, the decision should be overturned and the settlement documents should be exempt from disclosure pursuant to the exemption at section 19 of the *Act*. Specifically, the affected parties submit:

> Like the records at issue in the [*Magnotta*] litigation, the record:
>
> a. consists of minutes of settlement, and related settlement documents;
>
> b. was prepared by or for Crown counsel in contemplation of litigation; and,
>
> c. includes a clear confidentiality provision.
>
> Therefore, all of the criteria of [branch 2 of section 19] of the *Act* are met and the record is exempt from mandatory disclosure. The ministry's decision not to disclose the record was valid.
>
> Applying the reasoning in [*Magnotta*], the Commission's determination in Order PO-2598 that the record was not exempt under [section 19] was a jurisdictional error and warrants reconsideration.

Appellant's representations

[23] The appellant states that the *Magnotta* decision deals with minutes of settlement that dealt with some business agreement between the Liquor Commissioner Board of Ontario and Magnotta and the only entities impacted were Magnotta and consumers. He submits that the matter in the current appeal deals with:

> A pattern of conduct that has been allowed to creep into the interaction between senior government lawyers and private sector law firms, one that sees these law firms getting unfettered access to the provincial treasury. It must be remembered that for every million dollars that ingratiates the well-being of law firms, those funds do no make it to those in the province who have a greater need.

Analysis and finding

[24] In light of the findings in the *Magnotta* decision, it is now clear that branch 2 of section 19 of the *Act* includes records prepared for use in the mediation or settlement of actual or contemplated litigation. Subsequent orders issued by this office have found that in order to conclude that litigation was "contemplated," more than a vague or general apprehension of litigation is required.[6]

[25] The question of whether records were prepared for use in mediation or settlement of litigation or contemplated litigation, and/or whether litigation is reasonably in contemplation, is a question of fact that must be decided in the specific circumstances of each case.

[26] In this appeal, the records consist of a full and final settlement and legal release between the parties, as well as the resignation of the former officer. The records were prepared by counsel for the OPP to settle the issue of the cessation of the officer's employment, which was being appealed to the Ontario Civilian Commission on Police Services.

[27] Based on the circumstances surrounding the creation of the records at issue, I am satisfied that, as with the records in *Magnotta,* litigation was reasonably contemplated when they were created and that there was more than a vague or general apprehension of litigation. I am also satisfied that the records at issue amount to an agreement that was made in settlement of this reasonably contemplated litigation. Accordingly, I accept that the records at issue in Order PO-2598 were prepared by or for counsel for the OPP in contemplation of, or for use in litigation, and are, therefore, subject to the settlement privilege aspect of the statutory litigation privilege of branch 2 of section 19. On this basis, I find the minutes of settlement, the release, and the resignation are subject to the solicitor-client exemption at section 19.

[28] Section 19 is a discretionary exemption. If a discretionary exemption applies, the institution may decide whether or not to withhold the information based on the exemption or to disclose it. On appeal, the Commissioner may determine whether 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 purposes, or it fails to take into account relevant purposes.

[29] At the outset, the ministry chose to exercise its discretion to refuse to disclose the settlement documents. Having considered the original representations of the ministry and the subject matter of the information itself, I am satisfied that the ministry exercised its discretion not to disclose the settlement documents in a proper manner.

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[6] Orders PO-2323, MO-2609.

Conclusion

[30] In conclusion, having reconsidered my decision in Order PO-2598, I have determined that in light of the findings made by the Court of Appeal in *Magnotta*, the minutes of settlement, the release, and the resignation, are settlement documents subject to the solicitor-client privilege exemption at section 19 of the *Act*. I also find that the ministry appropriately exercised its discretion in its application of this exemption. Accordingly, I will rescind Order PO-2598 and uphold the ministry's decision not to disclose the records at issue.

.ORDER:

1. Order PO-2598 is rescinded.

2. I find that the records at issue are exempt from disclosure pursuant to the exemption at section 19 of the *Act* and uphold the ministry's decision not to disclose them to the appellant.

Original signed by: March 2, 2012
Catherine Corban
Adjudicator