Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-2815-I

Appeal MA11-555

City of Cornwall

December 7, 2012

Summary: The requester sought records regarding the departure of a senior manager from the city's employment. The city denied access to the responsive records pursuant to the discretionary exemptions in sections 6(1)(b), 11, and 12 and the mandatory personal privacy exemption in section 14(1) of the *Act*. This order upholds the city's decision and orders it to re-exercise its discretion.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) definition of personal information, 6(1)(b), 12, 14(1).

OVERVIEW:

[1] The City of Cornwall (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) from a member of the media for access to the following information:

> Any documents, motions or resolutions regarding the departure of former administrator [name of the affected person] from [named lodge], including any financial settlements or ongoing payments and who approved the terms of departure.

[2] The city located the responsive records and denied access to them pursuant to the discretionary exemptions in sections 6(1)(b) (closed meeting), 11 (economic and other interests) and 12 (solicitor-client privilege) of the *Act*.

[3] The requester, now the appellant, appealed the decision.

[4] During the course of mediation, the city issued a supplementary decision letter and added the mandatory exemption in section 14(1) (personal privacy) of the *Act* to withhold access to the records.

[5] No further mediation was possible and, the file was transferred to the adjudication stage of the inquiry process, where an adjudicator conducts an inquiry. I sought and received representations from the city and the affected person. I then sought representations from the appellant and provided it with a copy of the city's representations. Portions of the city's and all of the affected person's representations were withheld due to confidentiality concerns. The appellant did not provide representations in response.

[6] As the city did not provide representations on the application of the discretionary exemption in section 11 to the records, this exemption is no longer at issue.

[7] In this order, I uphold the city's decision and order it to re-exercise its discretion.

RECORDS:

[8] The records remaining at issue consist of:

- Minutes of Settlement and Release Agreement (hereinafter referred to as "the agreement"),
- Minutes In-Camera Committee of Council (hereinafter referred to as "the minutes"), and
- a five page letter with a three page attachment (hereinafter referred to as "the letter").

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?

C. Does the discretionary closed meeting exemption at section 6(1)(b) apply to the records?

D. Does the discretionary litigation privilege exemption at section 12 apply to the records?

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

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[9] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that

> correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[10] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[11] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[1]

[13] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[2]

[14] The city did not provide representations on this issue.

[1] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[2] Orders P-1409, R-980015, PO-2225 and MO-2344.

[15] Previous orders of this office have considered the contents of various types of agreements, such as employment contracts or settlement and/or severance agreements.[3] These orders have consistently held that information about the individuals named in the agreements, which include, *inter alia*, their name, date of termination and terms of settlement, concern these individuals in their personal capacity and thus qualifies as personal information. I am satisfied that the same considerations apply in the circumstances of this appeal, and that the agreement contains the personal information of the affected person.

[16] The letter is correspondence sent to the city by the affected person's solicitor that is explicitly of a private or confidential nature. I find that it, therefore, contains the affected person's personal information in accordance with paragraph (f) of the definition of personal information.

[17] In addition, although the letter is about the affected person in a professional capacity, it reveals something of a personal nature about the affected person and other individuals identified in the letter. This record contains the affected person's and other individual's employment history in accordance with paragraph (b) of the definition. It also contains the views or opinions of the affected person about other individuals, in accordance with paragraph (g) of the definition of personal information, this qualifies as the personal information of those individuals.

[18] The minutes contain information that is both responsive and not responsive to the appellant's request. The responsive information is found on pages 1 and 3 of this record. None of this information identifies the affected person by name. To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4] I find that this record does not contain the personal information of the affected person. I will consider below whether this record is exempt by reason of the other claimed exemptions.

[19] I will now consider whether the agreement and the letter are exempt on the basis that they fall within the ambit of section 14(1).

B. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?

[20] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

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[3] Orders M-173, MO-1184, MO-1332, MO-1405 and P-1348.
[4] Order PO-1880, upheld on judicial review *in Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[21] If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14.

[22] The section 14(1)(a) to (e) exceptions are relatively straightforward. The information does not fit within sections 14(1)(a) to (e). In this case the exception in section 14(1)(f) may apply. This section reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[23] The city submits that:

> The information in question was supplied in confidence and there is a reasonable expectation by [the affected person] that the Agreement was signed with the understanding that it was to be kept in confidence. Accordingly, it is believed that the release of this document, will unfairly damage [her] reputation through her efforts to attain gainful employment in or outside of this municipality.

[24] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[25] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14.

[26] It appears that section 14(4)(a) may apply. This section applies to the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution and reads:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> > discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution;

[27] This office has interpreted "benefits" to include entitlements, in addition to base salary, that an employee receives as a result of being employed by the institution. The following have been found to qualify as "benefits":

- insurance-related benefits,
- sick leave, vacation,
- leaves of absence,
- termination allowance,
- death and pension benefits,
- right to reimbursement for moving expenses, and
- incentives and assistance given as inducements to enter into a contract of employment [Orders M-23 and PO-1885].

[28] The term "benefits" does not include entitlements that have been *negotiated* as part of a retirement or termination package unless the information reflects benefits to which the individual was entitled as a result of being employed.[5]

[29] I find that section 14(4)(a) applies only to a portion of the agreement, not the letter. Based on my review of the agreement, I find that clause 2 of this record consists of information about benefits, including information about vacation pay and pension benefits, which are entitlements that were negotiated as part of a termination package of the affected person. This clause reflects benefits to which the affected person was entitled as a result of being employed. This information is, therefore, not exempt under section 14(1) by reason of the operation of section 14(4)(a). I will consider below whether this clause is exempt by reason of the other claimed exemptions.

[30] I will now consider whether any of the presumptions in paragraphs (a) to (h) of section 14(3) apply to the remaining personal information. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.[6] I have already considered section 14(4) and the public interest override in section 16 has not been raised in this appeal.

[31] It appears that section 14(3)(d) applies to some of the information at issue in the agreement and letter. This section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> relates to employment or educational history;

[5] Orders MO-1749, PO-2050, PO-2519 and PO-2641.
[6] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[32] Information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 14(3)(d) presumption.[7]

[33] A person's name and professional title, without more, does not constitute "employment history".[8]

[34] Based on my review of the letter, I find that it falls within the ambit of the presumption in section 14(3)(d) as it contains the employment history of the affected person and other individuals identified in the letter. In particular, this is a letter from the affected person's solicitor to the city which details the affected person's employment history with the city resulting in the affected person's release as an employee of the city. This letter also contains details of other identifiable individual's employment history vis-à-vis the affected person.

[35] I also find that clause 1 of the agreement contains the employment history of the affected person. This personal information also qualifies under the presumption in section 14(3)(d).

[36] I have also considered whether the agreement fits within the presumption in section 14(3)(f), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

[37] I find that this presumption does not apply to the remainder of the agreement. To qualify under this section, information about an asset must be specific and must reveal, for example, its dollar value or size.[9] However, as is the case in this appeal, lump sum payments that are separate from an individual's salary have consistently been found not to fall within section 14(3)(f).[10]

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[7] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344.
[8] Order P-216.
[9] Order PO-2011.
[10] Orders M-173, MO-1184, MO-1469, MO-2174 and MO-2318.

[38] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).[11]

[39] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[12] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[13]

[40] In this appeal, certain factors in section 14(2) may apply to the remainder of the agreement. The city and the affected person have raised the application of the following factors, all of which weigh against disclosure of the remaining information in the agreement:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[41] I found above that clause 2 of the agreement was not exempt under section 14(1) by reason of the exception in section 14(4)(a). I also found that the presumption in section 14(3)(d) applies to clause 1 of the agreement. The city has quoted the confidentiality clause in clause 8 of the agreement. The remaining clauses in the agreement include clauses about the timing of the cessation of the affected person's employment, the obligations of both the city and affected party after this cessation, the payment of monies, and various releases that most likely would be found in any severance agreement.

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[11] *John Doe*, cited above.
[12] Order P-239.
[13] Orders PO-2267 and PO-2733.

[42] Neither the city nor the affected person provided representations on specific clauses in the agreement.

[43] The affected person has provided confidential representations indicating that the personal information in the records is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[14]

[44] Both the city and the affected person submit that disclosure of the records will unfairly damage the reputation of the affected person. However, previous orders have determined that the applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.

[45] Upon review of the parties' representations, I agree that the personal information in clauses 6 and 11 of the agreement is highly sensitive and that disclosure of this information may unfairly damage the reputation of the affected person.

[46] Concerning paragraph (h), the city has provided in its representations[15] the wording of the confidentiality clause in the agreement, which reads:

> The parties mutually agree that, except as required by law or to implement these minutes, they will maintain strict confidentiality in relation to the terms of the within Minutes of Settlement, and in connection with the events leading up to the execution of the said Minutes, specifically including the details of the legal issues and allegations raised by the Senior Manager, and the city's deliberations and communications related to those issues and allegations.

[47] The factor in section 14(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[16] While parties to an agreement may agree to keep an agreement confidential, they are not able to unilaterally agree to remove records from the scope of the *Act*.[17] A non-disclosure clause agreed to by an institution covered by the *Act* and an employee must be analyzed in that context.

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[14] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[15] Page 2 of city's representations, under discussion of the closed meeting exemption [section 6(1)(b)].
[16] Order PO-1670.
[17] Orders MO-2318 and MO-2705.

[48] I have reviewed the information in the letter from the affected person's solicitor that caused the agreement to be entered into. I find that certain personal information in the agreement has been supplied by the affected person in confidence. In particular, I find that the personal information of the appellant in paragraphs 6 and 11 was supplied by her in confidence and that section 14(2)(h) applies to it.

[49] Therefore, the factors in sections 14(2)(f), (h) and (i) that weigh against disclosure apply to clauses 6 and 11. In the absence of representations on the factors in favour of disclosure, I find that the factors that weigh against disclosure prevail in this appeal. Accordingly, clauses 6 and 11 of the agreement are exempt by reason of the personal privacy exemption in section 14(1).

Conclusion

[50] In conclusion, I have found that the letter from the appellant's counsel and clause 1 of the agreement are exempt under section 14(1) as their disclosure is presumed to constitute an unjustified invasion of privacy under section 14(1) by reason of section 14(3)(d).

[51] In addition, I have found that clauses 6 and 11 of the agreement are exempt under section 14(1) because the factors in sections 14(2)(f), (h) and (i) apply to weigh in favour of privacy protection.

[52] Clause 8 of the agreement, which is a standard confidentiality clause, has been disclosed by the city.

[53] Therefore, remaining at issue is clause 2.[18] Also remaining at issue are the opening paragraphs and clauses 3, 4, 5, 7, 9, 10, and 12 to 14 of the agreement. I will consider below whether any of the other claimed exemptions apply to this information.

C. Does the discretionary closed meeting exemption at section 6(1)(b) apply to the records?

[54] 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.

[18] I found clause 2 not exempt by reason of the exception to section 14(1) in section 14(4)(a).

[55] For this exemption to apply, the institution must establish 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[19]

[56] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;[20] and

- "substance" generally means more than just the subject of the meeting.[21]

[57] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.[22]

[58] Remaining at issue are:

- the minutes, and

- the opening paragraphs and clauses 2, 3, 4, 5, 7, 9, 10, and 12 to 14 of the agreement.

[59] The city submits that all discussions surrounding this matter were conducted in closed meetings, held in accordance with sections 239(2) and (3.1) of the *Municipal Act*, to address matters pertaining to personal matters about an identifiable individual, litigation or potential litigation and advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

[19] Orders M-64, M-102, MO-1248.
[20] Order M-184.
[21] Orders M-703, MO-1344.
[22] Order MO-1344.

[60] The city provided copies of the agendas and corresponding minutes, as well as section 4.10 of its procedural bylaw number 2010-093, applicable to the closed meetings. The city states that:

> All required conditions for holding a closed meeting were met and provided to those entitled to notice, namely the Members of Council and senior management invited to the meeting.
>
> Vote was taken where directions were given to Administration.
>
> Releasing the document would reveal subject matters and information debated at the closed meeting.
>
> The subject matter has not been discussed or considered in a meeting open to the public due to the confidentiality clause [8 of the agreement].

[61] The affected person did not provide representations on the application of section 6(1)(b) to the records.

Analysis/Findings

[62] I agree with the city that part 1 and 2 of the tests under section 6(1)(b) have been met.

[63] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.[23]

[64] The in-camera minutes of the meeting indicate that it was properly held pursuant to sections 239(2)(b) and (f) of the *Municipal Act*, which read:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> > (b) personal matters about an identifiable individual, including municipal or local board employees;
> >
> > (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

[23] Order M-102.

[65] The meeting predates the date of the agreement. The purpose of this in-camera meeting was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.[24]

[66] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[25]

[67] Although parts 1 and 2 of the test under section 6(1)(b) have been met, I find that part 3 of the test has not been met with respect to the agreement. The meeting was held after the city's receipt of the letter from the affected person. However, the agreement was not in existence at the time of the meeting and the minutes do not contain any information about the terms of the agreement. The attachment to the minutes is the letter, which I have already found exempt by reason of the mandatory personal privacy exemption in section 14(1).

[68] I find that disclosure of the agreement would reveal merely the subject matter of the meeting, not the actual substance of the deliberations at the meeting.[26]

[69] However, I find that disclosure of the minutes of the in-camera meeting would reveal the actual substance of the deliberations at the meeting.[27] The minutes contain information about the discussion that took place at the meeting. I do not have any evidence that the subject-matter of the deliberations of the in-camera meeting has been considered in a meeting open to the public.[28]

[70] Therefore, subject to my review of the city's exercise of discretion, I find that the minutes are exempt by reason of section 6(1)(b). I will now consider whether section 12 applies to the information remaining at issue in the agreement.

D. Does the discretionary litigation privilege exemption at section 12 apply to the records?

[71] Section 12 states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client

[24] *St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.).
[25] Orders MO-1344, MO-2389 and MO-2499-I.
[26] *St. Catharines (City) v. IPCO*, (cited above).
[27] *St. Catharines (City) v. IPCO*, (cited above).
[28] Section 6(2)(b) of the *Act*.

> 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.

[72] The city submits that its legal counsel and legal counsel for the affected person were in communication on this matter. As well, the city refers to the minutes, which indicate that its counsel was present at the in-camera meeting. The city's legal counsel also was in communication with the city's Chief Administrative Officer concerning the resolution of the affected person's claim against the city.

[73] The city states that:

> [The affected person] was in a position to seek retribution and possible litigation against [it] for the manner in which [the city's] Council were dealing with the said events at the [affected person's place of employment] where she had been employed as the Administrator and Manager.

[74] The affected person did not provide representations directly on this issue, but did state that the agreement was a result of formal negotiations between her legal counsel and the city's legal counsel.

[75] Section 12 contains two branches. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply. It appears in this appeal that branch 2 applies. 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. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[76] Litigation privilege under branch 2 protects records created for the dominant purpose of litigation, actual or contemplated.[29]

[77] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant

[29] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).

> purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

[78] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[30]

[79] In *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (*Magnotta CA*),[31] the records that were found to be exempt by reason of section 19 of the *Freedom of Information and Protection of Privacy* Act[32] (*FIPPA*) were documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Those records were found to be explicitly cloaked in confidentiality. In *Magnotta CA* the settlement documents contained confidentiality provisions, as is the case in this appeal.

[80] In *Magnotta CA*, the records included copies of all agreements pertaining to the settlement and the Minutes of Settlement.

[81] In *Magnotta CA*, the dispute was over whether documents prepared for mediation and settlement were prepared for use in "litigation". The Court of Appeal determined that the Divisional Court did not err in finding that the records fell within the second branch of section 19 of *FIPPA*. In doing so, it stated that:

> 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

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[30] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer),* (2002), 62 O.R. (3d) 167 (C.A.).
[31] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[32] Section 19 of *FIPPA* is the provincial equivalent to section 12 of the *MFIPPA*.

> the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within 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.

[82] The agreement in this appeal consists of minutes of settlement and a release, settling the affected person's claim against the city. Like the situation in *Magnotta CA*, the agreement at issue in this order was prepared by, or delivered to, Crown counsel to assist with settlement discussions. This record was prepared by or for Crown counsel in contemplation of litigation.

[83] Based on my review of the agreement and the representations referred to above, I find that the agreement is subject to litigation privilege. This record was prepared by or for counsel employed by the city for use in the settlement of contemplated litigation. Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[33]

[84] I find that the agreement is subject to the statutory litigation privilege and that this privilege has not been lost.

[85] Accordingly, I find that the information remaining at issue in the agreement, namely the opening paragraphs and clauses 2, 3, 4, 5, 7, 9, 10, and 12 to 14 of the agreement, are subject to section 12 of the *Act*. I will now consider whether the city exercised its discretion in a proper manner concerning this information

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

[86] The sections 6(1)(b) and 12 exemptions are discretionary and permit 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.

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[33] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

[87] 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.

[88] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[34] This office may not, however, substitute its own discretion for that of the institution.[35]

[89] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[36]

- 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 any affected persons

[34] Order MO-1573
[35] Section 43(2) of the *Act*
[36] Orders P-344 and MO-1573

- 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.

[90] The city did not provide any representations on the exercise of its discretion, although asked to do so in the Notice of Inquiry. Therefore, I am unable to determine if the city exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. Accordingly, I will order the city to exercise its discretion with respect to the information that I have found subject to the discretionary exemptions in sections 6(1)(b) and 12 of the *Act*. This information consists of the minutes and the opening paragraphs and clauses 2, 3, 4, 5, 7, 9, 10, and 12 to 14 of the agreement.

ORDER:

1. I uphold the decision of the city that the mandatory exemption in section 14(1) of the *Act* applies to the letter and clauses 1, 6 and 11 of the agreement.

2. I uphold the decision of the city that the discretionary exemption in section 6(1)(b) of the *Act* applies to the minutes of the in-camera meeting.

3. I uphold the city's decision that the discretionary exemption in section 12 applies to the opening paragraphs and clauses 2, 3, 4, 5, 7, 9, 10, and 12 to 14 of the agreement.

4. I order the city to exercise its discretion under sections 6(1)(b) and 12 in accordance with the analysis set out above concerning the information in the minutes and the opening paragraphs and clauses 2, 3, 4, 5, 7, 9, 10, and 12 to 14 of the agreement. I order the city to advise the appellant, the affected person and this office of the result of this exercise of discretion, in writing. If the city continues to withhold this information, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to the affected person and to me. The city is required to send the results of its exercise of discretion, and its explanation to the appellant, with a copy to this office and to the affected person, by no later than **January 2, 2013**. If the appellant and/or the affected person wish to respond to the city's exercise of discretion, and/or its explanation for exercising

its discretion to withhold information, they must do so within 21 days of the date of the city's correspondence by providing me with written representations.

5. I remain seized of this matter pending the resolution of the issue outlined in provision 4.

Original signed by: December 7, 2012
Diane Smith
Adjudicator