

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2804-I

Appeal MA11-451

City of Thunder Bay

October 24, 2012

Summary: The appellant sought access to correspondence between the city and a third party confirming the conclusion of a legal proceeding, as well as the terms of settlement of the action. The city denied access to the 589 responsive records on the basis that they were all exempt under the solicitor-client privilege exemption in section 12. In this decision, the adjudicator finds that all of the records are subject to the discretionary exemption in section 12, but goes on to order the city to exercise its discretion with respect to the disclosure of the records.

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

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

OVERVIEW:

[1] An individual on behalf of a not-for-profit community organization submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act or *MFIPPA*) to the City of Thunder Bay (the city) for access to:

Correspondence between [a named company] and [the city] confirming the end of the lawsuit by [the named company] filed in 2010 and the terms of this settlement.

[2] After identifying 589 records responsive to the request, the city notified the company named in the request (the affected party) under section 21(1)(a) of the *Act*, which provides affected parties with an opportunity to make submissions with respect to the disclosure of records relating to them that "might contain information referred to in subsection 10(1)." The affected party opposed disclosure of the records.

[3] The city issued a decision letter to the appellant, denying access to the responsive records in their entirety, pursuant to the mandatory exemptions in section 10(1)(a) and (c) (third party information) and the discretionary exemption in section 12 (solicitor-client privilege). In the decision letter, the city confirmed that the specified lawsuit had been dismissed and provided the requester with a copy of the relevant court document as proof.

[4] The appellant appealed the city's decision to this office. A mediated resolution was not possible and the appeal was transferred to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

[5] The city and the affected party were provided with the opportunity to submit representations and severed versions of their submissions were shared with the appellant, pursuant to *Practice Direction Number 7*. In its representations, the city also raised the possible application of the discretionary exemptions in sections 11(c) and (d) of the *Act*, which are intended to protect information whose disclosure could harm the economic interests of the institution. The appellant also provided representations on the issues identified in the Notice of Inquiry.

[6] In this order, I uphold the city's decision to deny access to the records on the basis that they are exempt from disclosure under section 12. It was not, accordingly, necessary for me to consider the application of sections 10(1) and 11. I also order the city to exercise its discretion to apply section 12 to the records as it had failed to provide me with representations in support of its decision to deny access to them.

RECORDS:

[7] The records at issue are 589 documents, consisting of memoranda, reports, court documents, drawings, correspondence, leases, easements, easement transfers and option agreements in draft and final form, as well as email correspondence and attached documents.

ISSUES:

- A. Are the records exempt from disclosure under the discretionary solicitor-client privilege exemption in section 12?
- B. Are Records 2, 3, 4 and 115 exempt from disclosure under the mandatory third party information exemptions in sections 10(1)(a) and/or (c)?
- C. Are Records 2, 3, 4 and 115 exempt from disclosure under the discretionary economic interest exemptions in sections 11(c) and (d)?
- D. Did the city exercise its discretion under sections 11 and 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Are the records exempt from disclosure under the discretionary solicitor-client privilege exemption in section 12?

[8] The city takes the position that all 589 records at issue in this appeal are exempt from disclosure under section 12, which 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.

[9] Section 12 contains two branches as described below. 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. In this case, the city argues that both branches of the section 12 privilege apply, though the majority of their representations focus on the application of branch 2 to the records.

Branch 2: statutory privileges

[10] 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. The city argues that the statutory litigation privilege aspect of branch 2 applies to the records at issue in this appeal.

[11] 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" and 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].

[12] The city takes the position that the Court of Appeal decision in *Magnotta* “determined that settlement privilege existed under branch 2 and that mediation was included in the meaning of ‘litigation’ under the exemption in section 19 of *FIPPA*” [the *Freedom of Information and Protection of Privacy Act*] which is the provincial equivalent to *MFIPPA*. In its representations, the city provides a lengthy explanation of the reasoning contained in the decisions of both the Divisional Court and Court of Appeal and how that reasoning ought to apply to the records at issue in this appeal.

[13] The city argues that:

[t]he records were all created for use in litigation involving the City and the company named in the request for access to the records. Inherent in that litigation process was the parties’ willingness to engage in settlement discussions throughout the entire time of the parties’ dealings with each other. As discussed below, this approach is supported by established public policy promoting settlement of litigation as well as the rules of statutory interpretation applicable to *MFIPPA*.

[14] The city submits that because all of the records at issue “constitute documents prepared for use in settlement discussions as part of the litigation process”, they are exempt based on branch 2 litigation privilege, in accordance with the reasoning in the *Magnotta* decision.

[15] The appellant argues that many of the documents at issue in this appeal have been registered on title of the subject properties at the local land registry office under the *Land Titles Act* and are, accordingly, public documents. The other arguments put forward by the appellant relate to the public interest that exists in the disclosure of the agreements entered into between the city and the affected party following the settlement of the litigation between them.

Analysis and findings

[16] Based on my review of the records, it is plain that they represent the contents of the file that was compiled by the city solicitor in response to a threatened legal proceeding on behalf of the affected party. The records are voluminous and document the discussions, strategies, consultations and decisions made within the city solicitor’s office in response to the legal action. Most of the documents which comprise the records consist of memoranda, emails and other communications passing between the city solicitor and city staff in relation to the legal proceeding and their efforts to resolve it.

[17] Specifically, the records describe in great detail the strategies and "game plan" formulated by the city solicitor, outside counsel and city staff with respect to the conduct of the possible litigation and the steps to be taken to avert the action. The records also consist of a compilation of the pertinent documents which would permit an understanding of the issues between the affected party and the city. These records pertain to the original lease agreement, various studies and maps involving the subject lands and the correspondence which gave rise to the dispute that formed the basis for the lawsuit. Public documents such as deeds, leases and other publicly available documents that were compiled by the solicitor for her use in the litigation form part of her working papers and are, accordingly, exempt under the litigation privilege aspect of branch 2 of the privilege [Order PO-2733].

[18] I find that all of the records at issue are exempt from disclosure under the statutory branch 2 aspect of the section 12 litigation privilege exemption as they were prepared by or for counsel employed by the city "in contemplation of or for use in litigation". I further find that many of the records included as responsive to this request were "prepared for use in the mediation or settlement of actual or contemplated litigation". As a result, I conclude that these records also fall within the ambit of statutory branch 2 litigation privilege in accordance with the principles established in *Magnotta*. Accordingly, all of the records are exempt from disclosure under section 12.

[19] Much of the representations provided by the appellant speak to the public interest that exists in the disclosure of the contents of the records at issue, thereby giving rise to the possible application of the "public interest override" provision in section 16 of the *Act*, which reads:

An exemption from disclosure of a record under sections 7, 9, 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.

[20] Records which are exempt under section 12 are not, accordingly, subject to the application of section 16. As a result, I am unable to consider whether the "public interest override" provision applies to the records at issue in this appeal.

[21] Because I have found that the records meet the criteria for exemption under section 12, it is unnecessary for me to consider whether they also qualify for exemption under sections 10(1) or 11. However, I will review the manner in which the city exercised its discretion, below.

B. Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[22] 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, this office may determine whether the institution failed to do so.

[23] In the Notice of Inquiry sent to the parties, this office invited the parties to provide representations on the city's exercise of discretion. Specifically, they were asked to comment on the following:

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 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
 - exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[24] In the present appeal, despite being invited to do so in the Notice of Inquiry, the city has not provided any representations whatsoever which address the manner in which it has exercised its discretion not to disclose the records. The appellant refers generally to the public interest that exists in the disclosure of the information contained in the records, as this is an issue of concern in the local community. I am unable to make a determination as to whether it has exercised its discretion appropriately, using only relevant considerations because the city's representations do not speak to the exercise of discretion issue.

[25] I will, accordingly, order the city to exercise its discretion and, if it chooses to decline to disclose the records that are subject to exemption under section 12, I will require it to provide me with representations explaining how and why it made that determination. The city is encouraged to specifically address the following considerations in its submission:

- the public interest in the disclosure of the records;
- whether disclosure will increase public confidence in the city;
- that some of the records, in whole or in part, may otherwise be publicly available or available in other records that have been disclosed; and
- that any necessary exemptions from the right of access should be limited and specific.

ORDER:

1. I uphold the city's decision that the records are subject to exemption under section 12 of the *Act*.
2. I order the city to exercise its discretion with respect to the records found to be exempt under section 12 and to advise the appellant and this office of the result of this exercise of discretion, in writing, by no later than **November 14, 2012**.
3. If the appellant wishes to respond to the city's explanation for its exercise of discretion, he must do so in writing within 21 days of the date of the date of the city's correspondence by providing me with written representations.
4. I remain seized of this matter pending the resolution of the exercise of discretion issue addressed in order provisions 2 and 3.

Original signed by: _____
Donald Hale
Adjudicator

_____ October 24, 2012