Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2921

Appeal MA12-416

Town of Fort Erie

July 29, 2013

Summary: The appellant submitted a request to the town for access to records relating to the dismissal of the town's solicitor. The town denied access to the records, in their entirety, on the basis of sections 6(1)(b) (closed meeting), 12 (solicitor-client privilege) and 14(1) (personal privacy). The town also indicated that the records fell outside the scope of the *Act* pursuant to section 52(3)3 (labour relations). In this order, the adjudicator found that five of the six records at issue were excluded from the scope of the *Act* pursuant to section 52(3)3. Although the adjudicator found that record 1 (Minutes of Settlement) remained within the scope of the *Act* pursuant to section 52(4)3, she upheld the town's decision to withhold the record pursuant to section 12 of the *Act*. A number of issues were raised during the processing of this appeal, which were resolved in the order.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 1, 4(1), 12, 17, 52(3),52(4).

OVERVIEW:

[1] The appellant submitted a request to the Town of Fort Erie (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the information relating to the dismissal of the Town Solicitor. Following communications between the appellant and the town, the request was revised to include only the following:

1. Minutes of Settlement between [named individual] and the town
2. The reason for dismissal of [named individual]
3. Any documents/records filed by [named individual] regarding complaints and/or harassment complaints against any Member of Council of the town.

[2] The town located responsive records and denied access to them pursuant to sections 6(1)(b) (closed meeting), 12 (solicitor-client privilege) and 14(1) (personal privacy). The town indicated further that certain records responsive to parts two and three of the revised request fall outside the jurisdiction of the *Act* based on the exclusion at section 52(3) (labour relations) of the *Act*. In addition, the town indicated that portions of an e-mail exchange were not responsive to the appellant's request. The town also indicated in its decision letter that it was unable to disclose the Minutes of Settlement because it is bound by the Confidentiality Clause contained in the settlement agreement. The town attached an "Index of Records" to the decision letter containing a description of each record and the exemptions or exclusions claimed to withhold them.

[3] The appellant appealed the town's decision.

[4] During mediation, the appellant confirmed that he is pursuing access to all of the withheld records, including those deemed to be not responsive to the request. Accordingly, the scope of the request is also an issue in this appeal.

[5] Also during mediation, the town indicated that it is relying on section 52(3) of the *Act* to withhold the "Minutes of Settlement" document, which is responsive to part one of the request, and confirmed that it would not disclose any portion of the records at issue.

[6] Further mediation was not possible, and the file was forwarded to the adjudication stage of the appeal process. I decided to seek representations from the town and the named individual (the affected party), initially.

[7] On reviewing the records, I noted that the notes made by the Clerk (record 2) are in shorthand and virtually undecipherable. In the Notice of Inquiry that I sent to the town, it was asked to clarify whether a typed version of these notes was made by the Clerk and/or whether they were formalized into minutes of the closed session meeting. If so, the town was asked to provide a copy of them along with its representations. If such records existed, the town was asked to clarify whether they consider them as falling within or outside the scope of the request under the "scope of the request" heading.

[8] Both the town and the affected party submitted representations. After reviewing the submissions made by the affected party, I sent them to the town along with a supplementary Notice of Inquiry, and invited the town to address the issues raised by

the affected party. In addition, I asked the town to address several other issues, including reasonable apprehension of bias, issues relating to the Clerk's notes and the late raising of a discretionary exemption.

[9] The town provided supplementary representations in response.

[10] I then sought representations from the appellant on certain issues identified in the original and supplementary Notices of Inquiry. Specifically, I asked the appellant to address only the application of sections 12 and 52(3) and certain procedural matters, including the reasonable apprehension of bias and the late raising of a discretionary exemption.

[11] The representations submitted by the town were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. I decided not to provide the appellant with a copy of the affected party's representations. Instead, I briefly summarized the affected party's position on the records at issue as follows:

> The affected party claims that all of the records contain her personal information and has indicated that she consents to the disclosure of her personal information in records 1 and 3 and indicates her belief that the town should take this into consideration in its decision to withhold the records. She submits that record 1 could be disclosed "as required by law." She also takes the position that the exception to the exclusion in section 53(4) applies to record 1. In addition, the affected party identifies a record that she believes should have been included as a record responsive to the request.

[12] The appellant also submitted representations in response to the Notice that I sent to him.

[13] In this order, I find that the record identified by the affected party should have been included in the records identified as being at issue. However, I find that this record and records 2 through 5 are excluded from the scope of the *Act* pursuant to section 52(3)3. I find that the exception to the exclusion at section 52(4)3 applies to record 1, and it therefore falls within the scope of the *Act*. However, I find that record 1 is exempt under section 12.

RECORDS:

[14] The records at issue in this appeal are listed in the "Index of Records" prepared by the town. According to the index, there are five records at issue, which include the Minutes of Settlement between the affected party and the town (record 1), the Clerk's closed session notes (record 2), a letter to the affected party (record 3), a confidential

memorandum prepared by the affected party (record 4) and an e-mail exchange between staff of the town (record 5).

[15] In addition to the records identified by the town, a record identified by the affected party as a letter to the town from her lawyer is also included as a record at issue in this appeal.

ISSUES:

A: What is the scope of the request? What records are responsive to the request?

B: Does section 52(3) exclude the records from the *Act*?

C: Should the town be permitted to raise the discretionary exemption at section 12 for record 1 after the date permitted for claiming new exemptions?

D: Does the discretionary exemption at section 12 apply to record 1?

E: Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

PRELIMINARY MATTER:

Reasonable Apprehension of Bias

[16] Prior to submitting her representations, the affected party contacted this office to advise that she worked at this office for a short period of time in the early 1990's, at a time that I also worked here. We were both employed in a similar position. I provided this information to the parties. At the same time, I indicated that I was of the opinion that this situation, which occurred 20 years ago, does not affect my ability to conduct a fair and impartial adjudication. I then invited the parties to raise any concerns they might have arising from this situation in their submissions.

[17] The town stated that it did not have any concerns about our prior employment relationship unless I had maintained more recent communications with the affected party. The appellant did not address this issue.

[18] In general, "[t]he rules of natural justice and procedural fairness emphasize the right to an unbiased adjudication in administrative decision-making." [1] It should be

[1] See: Order MO-1519 for a full discussion of this issue.

noted that "[t]here is a presumption that a tribunal member will act fairly and impartially, in the absence of evidence to the contrary…"[2]

[19] In deciding whether the affected party and my previous work connection raises a reasonable apprehension of bias, I have taken into account the comments made by L'Heureux-Dube J. in *Baker* v. *Canada (Minister of Citizenship and Immigration)*:[3]

> The test for reasonable apprehension of bias was set out by de Grandpre J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394, 68 D.L.R. (3d) 716:
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> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information … that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[20] Apart from the brief period of time in the early 1990's during which the affected party and I had professional contact as a result of holding a similar position at this office, I have had no further personal contact with her. In my view, an informed person, viewing the matter realistically and practically, and having thought the matter through, would not find it likely that I would be unfair in deciding this appeal. Accordingly, I find that the affected party's prior employment at this office at the same time I was also employed here does not raise a reasonable apprehension of bias, and I will proceed with this adjudication.

DISCUSSION:

A: What is the scope of the request? What records are responsive to the request?

[21] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,

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[2] Comments on this issue made by Sara Blake in Administrative Law in Canada (3rd. ed.), (Butterworth's, 2001), at page 106.

[3] *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.).

> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[22] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[4]

[23] To be considered responsive to the request, records must "reasonably relate" to the request.[5]

[24] The town initially took the position that two portions of the e-mail exchange in record 5 are not responsive to the request. In addition, I asked the town to clarify whether a typed version of the notes comprising record 2 was made by the Clerk and/or whether they were formalized into minutes of the closed session meeting. If such records exist, the town was asked to clarify whether they consider them as falling within or outside the scope of the request under the "scope of the request" heading. Further, the affected party has raised the possibility that an additional record may be responsive to this request.

[25] Regarding the e-mail exchange in record 5, although the town initially claimed that two portions were not responsive to the request, it has changed its decision in its representations. The town consents to sharing one portion of the e-mail with the appellant, and now claims that the other portion of this record that it initially withheld as being non-responsive is exempt under section 12 of the *Act*. Accordingly, the issues regarding the scope of the request as they relate to this record have been resolved. I will assume that the town has or will provide the appellant with the portion of record 5 that is no longer at issue.

[26] Regarding the Clerk's shorthand notes, in its initial representations, the town confirmed that a typed version of the Clerk's shorthand notes does not exist, nor were these notes formalized into minutes of the closed session. In the supplementary Notice of Inquiry I included the following:

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[4] Orders P-134 and P-880.
[5] Orders P-880 and PO-2661.

> The majority of the clerk's notes are written in shorthand, which renders them unintelligible to me. These notes form part of the records at issue, but also provide evidence of the subject matter of the *in camera* meetings. Although I do not require that they be transcribed, I will require an affidavit from the clerk in which she identifies, in sufficient detail, the content of her notes.

[27] The town provided the requisite affidavit. It also expressed a concern that the contents of this affidavit would subsequently be considered part of the records at issue. The summary of the closed council meetings that I requested was intended to form part of the evidence regarding the application of the exemptions and exclusion claimed by the town. This information did not exist at the time the request was made and will not be included as a record at issue for the purposes of this appeal. Even if it were, given my findings below under the section 52(3) discussion, I would find that the information contained in the affidavit is excluded from the scope of the *Act*.

[28] With respect to the record identified by the affected party as responsive to the request, the town refers to the wording of the appellant's revised request and states:

> [T]he record submitted by the Affected party is not a responsive record pursuant to the request, particularly it is not a record filed by [named individual]. The record was prepared by counsel for [named individual] as correspondence addressed to counsel for the [town].

[29] The appellant does not address this issue in his representations.

[30] I do not accept the position taken by the town that the record identified by the affected party is not responsive to the request as it was not filed by the affected party. It is very apparent that communications between the town and the affected party were conducted by her legal counsel on her behalf. Having been retained by the affected party, her legal counsel effectively speaks in her name. I find that the town's interpretation of this issue is extremely narrow and does not accord with the principle enunciated above that the record must "reasonably relate" to the request. Based on the description of this record provided by the affected party and the town, I am satisfied that it relates to the matter identified in the request and is, therefore, reasonably related to the request.

B: Does section 52(3) exclude the records from the *Act*?

[31] The town claims that the exclusion at section 52(3)3 applies to exclude records 1, 2, 3, 4 and paragraphs 1 and 3 of record 5 from the jurisdiction of the *Act*. Having reviewed paragraph 2 of record 5, and the additional record identified by the affected party which I have found to be a responsive record in the context of the content in all

of the records at issue, I have also included paragraph 2 of record 5 and the additional record in the section 52(3) discussion.

General Principles

[32] Section 52(3)3 states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[33] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[34] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[6]

[35] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[7]

[36] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[8]

[37] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[9]

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[6] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

[7] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.

[8] Order PO-2157.

[9] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

[38] Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act.*[10]

[39] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.[11]

[40] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[12]

[41] As I noted above, the town claims that section 52(3)3 applies in the circumstances of this appeal.

Section 52(3)3: matters in which the institution has an interest

Introduction

[42] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part 1: collected, prepared, maintained or used

[43] The town submits that all of the records were collected, maintained and used by it in the course of addressing the employment issues relating to the affected party.

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[10] Orders P-1560 and PO-2106.
[11] *Ontario (Ministry of Correctional Services) v. Goodis (2008)*, 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[12] *Ministry of Correctional Services*, cited above.

[44] The appellant does not address this issue.

[45] All of the records were either prepared by or received by the town. I am satisfied that they were collected, prepared, maintained or used by the town. Accordingly, I find that the first part of the test is met.

Part 2: meetings, consultations, discussions or communications

[46] The town submits that the records were all used in relation to meetings, consultations, discussions and communications regarding the affected party.

[47] The appellant does not address this issue.

[48] Having reviewed the records and the submissions (both confidential and non-confidential), I am satisfied that all of the records were prepared or collected and used by the town in relation to meetings, discussions and communications. I find, therefore, that the second part of the test is met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[49] The phrase "labour relations or employment-related matters" has been found to apply in the context of, among other things, an employee's dismissal.[13]

[50] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[14]

[51] The town submits that the meetings, consultations, discussions and communications were about employment-related matters in which the town had an interest. The town submits further that the records are directly tied to this employment-related matter consistent with the findings in Order MO-1654-I (referred to above). The town states further that "there was a period of negotiations in which there was a real threat of litigation which involved the Town and raised it to a level which exceeded a 'mere curiosity or concern' ".

[52] The appellant does not address this aspect of the exclusion at section 52(3).

[53] The revised request, as worded, clearly requests records relating to the dismissal of the affected party. As noted in Order MO-1654-I, records that pertain to the dismissal of an employee have been found to be excluded from the scope of the *Act*. I am satisfied that all of the records at issue in this appeal are about employment-related matters in which the town has an interest. The records document the employment-

[13] Order MO-1654-I.
[14] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*.

related matters that were communicated by or to the town and which were eventually brought before council (records 3, 4 and 5 as well as the additional record identified by the affected party.) The clerk's notes (record 2) reflect the discussions held by council in closed session relating to the employment-related matter and the Minutes of Settlement (record 1) contains the agreement reached between the parties relating to this matter.

[54] Based on my review of the records and the town's submissions, I am also satisfied that the town had an interest in dealing with the employment-related matter concerning a member of its workforce, and in attempting to avoid litigation. Having found that all three parts of the section 52(3)3 exclusion have been met, I now turn to section 52(4) to determine whether any of the exceptions to the exclusion apply.

[55] Section 52(4) states:

> This Act applies to the following records:
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> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> *3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.*
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

[56] The town admits, and I agree, that record 1 (the Minutes of Settlement) are not excluded pursuant to section 52(3)3 as they fall within the exception at section 52(4)3. This record is clearly a negotiated agreement about an employment-related matter between the town and the affected party.

[57] Consequently, I find that this record is subject to the *Act*. Accordingly, I will proceed to consider whether any of the claimed exemptions applies.

[58] I find that the exception at section 52(4) does not apply with respect to the remaining records at issue. Because of this finding, records 2 through 5 and the additional record identified by the affected party fall outside the purview of the *Act*. Accordingly, I will not consider them further in this order.

C: Should the town be permitted to raise the discretionary exemption at section 12 for record 1 after the date permitted for claiming new exemptions?

[59] The town initially claimed the discretionary exemption at section 12 for record 5 (which is no longer at issue in this appeal). However, in its representations, the town claims that this exemption should also be applied to withhold record 1 from disclosure.

[60] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

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

[61] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[15]

[62] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[16] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[17]

[63] In the Notice of Inquiry that I sent to the parties, I asked them to respond to the following questions:

1. Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption or exemptions.

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[15] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[16] Order PO-1832.
[17] Orders PO-2113 and PO-2331.

2. Whether the institution would be prejudiced in any way by not allowing it to apply an additional discretionary exemption or exemptions in the circumstances of this appeal.

3. By allowing the institution to claim an additional discretionary exemption or exemptions, would the integrity of the appeals process been compromised in any way?

[64] The town submits that permitting the late raising of section 12 for record 1 would not prejudice the appellant, nor would it affect the integrity of the appeal process. On the other hand, the town submits that "it would suffer considerable prejudice" from a refusal to permit the additional discretionary exemption.

[65] The town refers to the decision in *Liquor Control Board of Ontario v. Magnotta Winery Corporation*,[18] and states:

> Given the impact of *Magnotta*, referenced herein, with respect to the greater public interest in settling potential litigation and honouring confidentiality clause[s] within Minutes of Settlement versus the public's ability to learn the financial details of a settlement, it is of central importance to the Town that this late discretionary exemption be permitted. The prejudice in which the Town would suffer should the discretionary exemption not be allowed would effectively be the circumvention of the highlighted principle establish by *Magnotta*.

[66] After noting the principles enunciated in previous orders of this office regarding the prompt identification of discretionary exemptions, including enabling early settlement of the matter, re-notification of affected parties and the diminished value of information with the passage of time, the town submits that these factors do not apply in the circumstances of this appeal.

[67] In this regard, the town states that there was no likelihood of early resolution of the matter as "the parties' respective positions were significantly opposed and that no reasonable resolution could have been achieved…" The town also takes the position that the information is not time-sensitive. The town points out that:

> Given the request for supplementary representations to the Town and the provision of representations by the Affected Party, the IPC has demonstrated a willingness to indulge the parties with additional time in order to maintain the Integrity of the appeal's process by allowing the time necessary to provide adequate representations which properly reflect the positions of the parties. Any perceived prejudice to the Appellant in

[18] 2010 ONCA 681.

> the allowing of the new exemptions is remedied by the provision of an additional period of time within which the Appellant could be afforded the opportunity to address the additional exemption claims.[19]

[68] With respect to any prejudice suffered by the parties as a result of permitting or not permitting the late raising of the discretionary exemption at section 12, the town submits that the appellant would not be significantly prejudiced, whereas the town submits that "the greater prejudice would fall to the Town given the sensitive nature of the Records, particularly Record 1 – Minutes of Settlement, and the *Act*'s intent in protecting solicitor/client privilege and the confidential nature of such records."

[69] The appellant does not address this issue.

[70] In determining whether to permit the town to claim the application of section 12 for record 1, I note that the decision in *Magnotta* was decided in 2010 and was therefore available to the town as a basis for claiming section 12 for the Minutes of Settlement in its initial decision. It should be noted that the late raising of section 12 for record 1 was not the only change that the town made to its decision at the mediation and adjudication stages, as is apparent in the discussions set out above.

[71] Generally speaking, I am not inclined to encourage careless decision-making in appeals, particularly where it causes undue delay in the final resolution. That being said, however, any delay in proceeding with this appeal was a result of a number of issues arising during the adjudication stage. As the town correctly points out, in order to provide the parties will a full opportunity to address all of the issues in this appeal, it was necessary to elicit supplementary representations on a number of issues, one of which was the late raising of a new discretionary exemption. I also note that section 12 had already been raised by the town for another record and any mediation relating to this exemption would have been canvassed during mediation. It is also relevant that the town has clearly evinced the position that none of the records should be disclosed and it is, therefore, unlikely that early resolution would have been achieved.

[72] In the circumstances, and in the absence of any objection by the appellant, I am prepared to permit the late raising of the section 12 exemption for record 1.

D: Does the discretionary exemption at section 12 apply to record 1?

[73] Section 12 states as follows:

> 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

[19] The town refers to Order MO-2070 in support of this argument.

> an institution for use in giving legal advice or in contemplation of or for use in litigation.

[74] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The town must establish that one or the other (or both) branches apply. The town submits that record 1 is protected by the litigation aspect of both branches. I will begin with the litigation aspect of branch 2.

[75] 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] 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." In addition, branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[20]

[77] The town maintains that the Minutes of Settlement "were prepared [by legal counsel retained by the town] for use in the settlement of contemplated litigation with the [affected party] and are a product of the confidential negotiated settlement to avoid litigation."

[78] The appellant does not address this issue. Rather, his representations focus on the public's right to obtain information about the activities of municipal council. I will address these submissions below.

[79] In Order PO-3059-R, Adjudicator Catherine Corbin reviewed the Court decisions in *Magnotta* as follows:

> ***Divisional Court decision***
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> 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[21] 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

[20] *Magnotta* (cited above).
[21] Section 19 is the provincial *Act* equivalent to section 12.

> litigation process and are equally deserving of confidentiality and the protection of the branch 2 exemption under section 19 of *FIPPA*.[22]

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.

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

Ontario Court of Appeal decision

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.

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 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

[22] Supra note 2.

> 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."[23]

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

[80] After reviewing the submissions made in that appeal, Adjudicator Corbin discussed the impact of the *Magnotta* decision on the disclosure of records of a similar nature to the one at issue in the current appeal:

> 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.[24]
>
> 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.
>
> 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.
>
> Based on the circumstances surrounding the creation of the records at issue, I am satisfied that, as with the records in *Magnotta,* litigation was

[23] Supra note 1 at para. 44 and 45.
[24] Orders PO-2323, MO-2609.

> 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.

[81] I agree with the approach taken in Order PO-3059-R and have applied it in the circumstances of the current appeal.

[82] After considering the town's submissions and reviewing the records at issue, I am satisfied that at the time record 1 was created, the relationship between the town and the affected party had reached a point where there was a very real potential for litigation. I am also satisfied that the lawyer retained by the town engaged in settlement discussions with the affected party in order to avoid litigation and that the Minutes of Settlement reflect the negotiated settlement that the parties arrived at following those discussions.

Loss of Privilege

[83] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[25] 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,*[26] and
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[27]

[84] I have no evidence before me that privilege has been lost. Accordingly, I find that record 1 is subject to exemption pursuant to the litigation aspect of the second branch of section 12.

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[25] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.)
[26] See: *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)
[27] *Ibid*.

E: Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[85] 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.

[86] 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.

[87] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[28] This office may not, however, substitute its own discretion for that of the institution.[29]

Relevant considerations

[88] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[30]

- 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

[28] Order MO-1573.
[29] section 43(2).
[30] Orders P-344, MO-1573.

- 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
- 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.

[89] In its initial representations, the town submits that in exercising its discretion to withhold record 1 it took into account the fact that the record was created through a negotiation process for the purpose of avoiding litigation. The town relies heavily on the confidentiality clause contained in the record and submits that it "must act reasonably to protect the confidentiality of the terms." Further, the town notes that "the subject matter of the settlement concerns a private contractual matter between the employer and the employee and there is a further obligation to ensure confidentiality regardless of the provision in the Minutes of Settlement." Finally, the town indicates that it has an interest in ensuring that these types of settlements remain confidential "in order to guard against establishing any form of past practice or precedent that may arise with future employment related matters."

[90] The town also indicates that it took into account the public interest in transparency and accountability, but determined that the settlement of potential litigation is a more compelling public interest.

[91] As I indicated above, in her representations, the affected party consented to the disclosure of her personal information contained in record 1. I provided the affected party's submissions to the town and asked it to provide further submissions that address this issue.

[92] In response, the town refers to certain terms of the Minutes of Settlement and submits that the appellant breached the terms of the agreement by consenting to its disclosure. Regarding the affected party's submission that the agreement could be

disclosed as required by law, the town submits that the "law" does not require disclosure, noting:

> [The *Act*] provides a discretionary exemption pursuant to Section 12, in that a record 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 applies in the circumstances. As a result, it is the Town's position that the "law" in the circumstances does not require disclosure of the record and in fact supports the Town in its decision not to disclose the record.

[93] The town reiterates its discussion regarding the courts' decisions in *Magnotta* stating:

> [T]he Court of Appeal supported the Divisional Court's decision that the disputed records, including the executed Minutes of Settlement which contained extensive confidentiality provisions, were exempt from disclosure under the Solicitor/Client privilege provision of the [provincial *Act*].

[94] In his submissions, the appellant explains why he is seeking the information at issue. He indicates that beginning in March 2011, he became concerned about the actions of town council and began to take an active role in questioning certain actions. He states that he is "appalled at the total disrespect certain councillors have shown senior staff of the [town]." He goes on to describe council's decision to have an operational review done on town staff. He indicates that "[t]he main area for improvement was identified as relationships between Town Staff and council, trust issues, and better Governance." Referring to the results of this review (which can be found on the town's website), the appellant notes that "the biggest room for improvement was with the council itself." The appellant notes that only three months later, the affected party was "placed on paid leave as a result of 'closed door' meetings." He claims further that "[l]ater it was disclosed that she had been dismissed without cause, which was done at a cost of over a quarter of a million dollars to the 30,000 residents of Fort Erie."

The appellant raises a number of concerns relating to council's actions, including additional expenses relating to the need to retain outside council for all legal advice. His greater concern, however, appears to be the manner in which certain councillors dealt with council business, the way they treated the affected party and other senior staff at council meetings, and money that the appellant believes was spent irresponsibly and unnecessarily. He indicates that there is a great deal of confusion among residents of the town relating to the affected party's termination, referring to a newspaper article about the matter.

[95] The appellant believes that information regarding the actions that councillors took "behind closed doors" while conducting town business should be made public. He does not see a "personal aspect" in this matter and believes the public interest overrides any private interest, if one exists.

[96] The appellant concludes:

> As far as the town's concern of setting a precedent, that could be referring to the ability to withhold information of suspected and witnessed unfair treatment of staff by council. If this is the case, the registered voters ultimately are responsible for the treatment of OUR[31] Town employees and we have the right to transparency when it comes to their treatment. All labour laws and fairness should be upheld and I suspect that this was not done in this case. If these men had been hired by a private firm, the board of directors that hired them would become responsible for their actions and have the power to fire them if they are not doing their job within the labour laws and/or following good business practice. In the case of elected officials, however, we have to wait for the next election to hold them accountable for their actions. I have no problem with that as it is the way our government operates.
>
> I am, like every other person who voted or chose not to vote in the last election, responsible and obligated to ensure that this town is seen as a fair and honest employer who follows the laws and procedures. I, like all other residents of this town, am responsible for the actions of this council. All 30,000 of us are paying the cost of what the council did to [the affected party]. We are all paying the cost of their actions.
>
> I feel that because we are paying that cost and living the consequences of this council's actions, that we are entitled to know the details and reasoning behind them. Then and only then can we have the opportunity to fairly decide in the election next year if we want to continue with the representatives that we voted for in the 2010 election.
>
> Hiding data from the people, with a wall of secrecy through closed door meetings, that keeps them from making informed decisions about a policy or a candidate is short-sighted and can be assumed to serve only the needs of the withholders, with little regard for the public that elected them.

[31] Emphasis in the original.

[97] Although the appellant did not raise the public interest override in section 16, his submissions touch on the public interest in town council's transparency and accountability. The public interest override does not apply to the exemption at section 12, and because it was not raised earlier in the process I will not consider it further. However, in my view, the appellant's arguments are very relevant to the town's exercise of discretion.

[98] As the appellant correctly points out, municipal councils are accountable to the public they represent. The purposes of the *Act* (as set out later in this discussion) clearly enshrine this important public value.

[99] The Williams Commission Report[32] discussed the rationale for the adoption of a freedom of information scheme in Ontario, which includes public accountability, informed public participation, fairness in decision-making and protection of privacy. With respect to "accountability", the Williams Commission Report stated at page 77:

> Increased access to information about the operations of government would increase the ability of members of the public to hold their elected representatives accountable for the manner in which they discharge their responsibilities. In addition, the accountability of the executive branch of government to the legislature would be enhanced if members of the legislature were granted greater access to information about government.

[100] In my view, the ability of the public to scrutinize the bases upon which municipal governments conduct themselves, treat municipal staff and spend public money is an important aspect of public accountability. Subject to the protection of personal privacy, a significant level of transparency is integral to the ability of the public to assess the actions of municipal government and to hold it accountable for the use of public funds.

[101] Because of the application of section 52(3), the details of matters concerning staff in the context of this access request are not subject to the *Act* as they were prepared and used in relation to employment-related matters in which the town has an interest. In my view, the contents of the Minutes of Settlement do not provide the appellant with much of the type of information that he is seeking, which is essentially an accounting of the actions taken by certain councillors in connection with the termination of the affected party.

[102] The appellant is also concerned about the use of public money resulting from council's actions, and this concern is a relevant consideration that the town should take into consideration in its exercise of discretion. The appellant's general concern about transparency and accountability is also a relevant consideration that the town should take into consideration in exercising its discretion to withhold the record.

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[32] Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report)

[103] Before turning to the town's submissions on the factors it took into account in exercising its discretion to withhold the Minutes of Settlement, it is important to address an issue raised by the town relating to the affected party's submissions. The town has asserted that the affected party has breached the terms of the agreement by consenting to its disclosure under the *Act*. Essentially, the town's position is that I am effectively precluded from ordering the disclosure of the Minutes of Settlement, and that the affected party is barred from consenting to its disclosure under the *Act* because this agreement contains a confidentiality clause.

[104] In my view, the town's position is contrary to the purposes and scheme of the *Act*.

[105] Section 1 sets out the purposes of the *Act*:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[106] Section 4(1) of the *Act* provides that every person has a right of access to records in the custody or under the control of an institution unless "the record or part falls within one of the exemptions under sections 6 to 15…." Accordingly, the scheme of the *Act* provides that if the information subject to the appellant's request is not exempt, he is entitled to have it disclosed to him.

[107] It is important to note that the *Act* does not provide that the right of access is subject to contractual limits.[33] Many orders of this office have discussed the issue of "confidentiality clauses" in the context of a claim that a record is exempt under section 10(1).[34] In these decisions, this office has consistently ordered the disclosure of commercial contracts, finding that confidentiality clauses, although helpful, are not determinative of whether a record is exempt under this provision or not.

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[33] See also: Section 53(1) of the *Act*, which provides that the *Act* prevails over a confidentiality provision in any other *Act* unless the other *Act* or this *Act* provides otherwise.
[34] Third party information.

[108] In Order PO-1993[35], I found that an institution's explicit agreement or assurance of confidentiality must remain subject to the provisions of the *Act*. Otherwise, the public's right of access to government-held information could always be defeated by the mere promise of confidentiality. I stated:

> ... [T]he legislature intended that issues relating to "confidentiality" with respect to records that fall within the scope of the Act are to be assessed and determined within that context.
>
> The intervenor's comments suggest that it has been led to believe that the Ministry has, in effect, provided a "guarantee" that records relating to the tendering process will be maintained in confidence. This is not a guarantee that the Ministry can give. At best, the Ministry may be able to assure potential bidders that it will recognize the confidential nature of this process, subject of course, to the requirements of the *Act*.[36]

[109] In my view, the underlying principles discussed above relate back to the purposes and overall scheme of the *Act*. The record at issue is an agreement between the town and the affected party, and contains the affected party's personal information. As a party to the agreement, the affected party has a clear interest in ensuring that the provisions of the agreement are adhered to. As I indicated above, the town initially claimed the application of the mandatory exemption at section 14(1), which provides that disclosure of personal information without the consent of the affected individual is prohibited. I decided to notify the affected party to seek her views on the disclosure of her personal information.

[110] Section 12 is a discretionary exemption and the town could have exercised its discretion to disclose the record in response to an access request. Before disclosing the record, however, the town would be required to notify the affected party and determine her views regarding disclosure. If she consented, under the *Act*, the town could disclose the record.

[111] In the context of a section 12 and/or 14(1) claim, the record falls within the scope of the *Act* and the provisions under the *Act*, including the provision of consent under section 14(1)(a) are intended to be available to any party affected by the disclosure of a record. The current discussion focusses on the application of section 12, and the affected party's consent is not relevant to whether the requisite elements of the exemption have been met. However, in my view, it is relevant to the factors that the town must take into consideration in exercising its discretion to withhold the record from disclosure.

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[35] (affirmed by the Court of Appeal in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563).

[36] See also: Order PO-2328 (upheld in *Ontario First Nations Ltd. Partnership v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 1103, Div. Ct.)

[112] Although it does not appear that the town took the affected party's consent into consideration initially, I sought additional submissions from it regarding this issue. The town provided submissions on why it believes the record should be withheld regardless of the affected party's consent. The town takes the position that, as a party to the agreement, it also has an interest in the manner in which the record is treated, and asserts that it would be harmed by disclosure. Recognizing that there are two specific interests at stake regarding this record (apart from a general accounting to the public), I am satisfied that the town took the affected party's consent into consideration in exercising its discretion to withhold the record from disclosure.

[113] With respect to the town's own interest in preserving the confidentiality of this agreement in connection with its more general interest in maintaining flexibility in the manner in which it deals with employment matters, I accept that this is a legitimate concern for the town and a relevant consideration in the town's exercise of discretion.

[114] With respect to the general issues of transparency and accountability, the town indicates that it recognized the importance of these principles, but felt that an equally importance principle as stated by the courts in *Magnotta*, is the settlement of potential litigation. In my view, this is also a relevant consideration in the exercise of discretion.

[115] After considering all of the arguments made by the parties, I find that the town has exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations. These relevant considerations include the fact that the record is subject to settlement privilege and that this privilege has been recognized by the courts in *Magnotta* as being a significant and important part of the litigation process. The record at issue in this appeal was negotiated by legal counsel for the town in order to avoid potential legal liability should the matter have proceeded to litigation. Another relevant consideration is the sensitivity of the record from the town's perspective. Finally, I am satisfied that the town took into consideration relevant considerations that favoured disclosure, even though it gave greater weight to those factors that favoured withholding the record.

[116] Having taken all of the circumstances of this appeal into consideration, I conclude that the town's decision to exercise its discretion not to disclose record 1 was reasonable. Accordingly, I uphold the town's decision that record 1 is exempt pursuant to section 12 of the *Act*.

[117] Because of these findings, it is not necessary for me to address the other exemptions raised by the town.

ORDER:

I uphold the town's decision.

Original Signed By: July 29, 2013
Laurel Cropley
Adjudicator