

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3092

Appeal MA12-546

Town of Fort Erie

September 3, 2014

**Summary:** The appellant sought access to records relating to a settlement reached by the Town of Fort Erie (the town) and a named individual. At the close of the mediation stage of the appeal, the sole record at issue was a Minutes of Settlement executed between the town and the named individual. The town relied on sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to deny access to the record in full. The appellant disputed the application of the claimed exemptions and also raised the application of the public interest override at section 16 of the *Act*. In this order, and consistent with a previous order relating to the same record, the adjudicator upholds the application of section 12 to the record. She finds the public interest override does not apply.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 12, 16, 52(3), 52(4).

**Orders and Investigation Reports Considered:** Orders MO-2921 and PO-3059-R.

**Cases Considered:** *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

### OVERVIEW:

[1] The sole issue remaining in this appeal is whether Minutes of Settlement between a town and an employee are exempt from disclosure under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The appellant submitted a request to the Town of Fort Erie (the town) under the *Act*, seeking the following information:

Any records or documentation which would represent any claim of harassment by [named individual] against the Council and/or individual Councillors.

Any records or documentation that represent a contract of settlement/separation between the [town] and [named individual] including any specific references to alleged harassment.

Record of which Councillors participated in any closed or open session discussions regarding the above-mentioned points.

Record of which Councillors (if any) declared a conflict of interest with respect to any closed or open session discussions regarding the above-mentioned points.

[3] The town located responsive records and granted access to some of them. The town denied access to the remaining records and parts of records pursuant to sections 6(1)(b) (closed meeting) and 52(3)3 (employment-related matters) of the *Act*. The appellant appealed the town's decision to this office. During the mediation stage of the appeal, the appellant raised the possible application of the public interest override at section 16 of the *Act*.

[4] At the conclusion of mediation, the town issued a revised decision letter in which it indicated it was relying on an additional exemption, section 12 (solicitor-client privilege) of the *Act*, and expanding its reliance on section 52(3) for some of the withheld records or parts of records. The appellant initially took issue with the town's late raising of a discretionary exemption, but subsequently withdrew this objection. Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeal process. At this stage, three records remained at issue: a confidential memorandum prepared by the named individual; Minutes of Settlement between the named individual and the town; and the town clerk's closed session notes.

[5] The adjudicator originally assigned to this appeal sought and received representations from the town and the appellant. These were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] During the course of the inquiry, the adjudicator issued an order in another appeal involving the same town and the same three records at issue in this appeal. In that order, Order MO-2921, the adjudicator found that the confidential memorandum and the clerk's notes fall outside the purview of the *Act* pursuant to section 52(3) of the *Act*. She found that the Minutes of Settlement are not excluded from the *Act*, that they

are exempt under section 12 of the *Act*, and that the public interest override at section 16 did not apply.

[7] Given the overlap in the records and the issues, the adjudicator invited the appellant in the present appeal to make representations on the findings in Order MO-2921. The appellant agreed that the memorandum and the clerk's notes, corresponding to Records 4 and 2 in Order MO-2921, fall outside the purview of the *Act*. Accordingly, only the Minutes of Settlement remain at issue in this appeal.

[8] For the reasons that follow, I uphold the town's decision to withhold the Minutes of Settlement, in their entirety, on the basis of the exemption at section 12.

### **ISSUES:**

- A. Does the discretionary exemption at section 12 apply to the Minutes of Settlement?
- B. Does the public interest override at section 16 apply in the circumstances?
- C. Did the town exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

### **DISCUSSION:**

#### **A. Does the discretionary exemption at section 12 apply to the Minutes of Settlement?**

[9] Section 12 of the *Act* 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 an institution for use in giving legal advice or in contemplation of or for use in litigation.

[10] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. The town must establish that one or the other (or both) branches apply. The town submits that the record is protected by the litigation aspect of both branches of section 12. I will begin with the litigation aspect of branch 2, the statutory privilege.

[11] 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 named individual and are a product of the confidential negotiated settlement to avoid litigation.”

[12] The appellant in Order MO-2921 did not address this issue. Rather, his representations focused on the public’s right to obtain information about the activities of municipal council and the town’s exercise of discretion. The appellant in the current appeal made detailed representations on the application of section 12 in the circumstances of this appeal, partly in response to the town’s submissions and partly in response to the decision in Order MO-2921. Before discussing the appellant’s submissions on this issue, I will first review the decision in Order MO-2921.

[13] In Order MO-2921, the adjudicator relied on the analysis in Order PO-3059-R, in which this office considered the Court of Appeal’s decision in *Liquor Control Board of Ontario v. Magnotta Winery Corporation (Magnotta)*.<sup>1</sup> In Order PO-3059-R, the adjudicator concluded that after *Magnotta*, it is clear that the statutory litigation privilege in section 12 of the *Act* (section 19 in the provincial equivalent to the *Act*) covers records prepared for use in the mediation or settlement of actual or contemplated litigation, including a settlement agreement containing a confidentiality clause. Order PO-3059-R refers extensively to the reasons in *Magnotta*, including the following passage summarizing the court’s conclusions:

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.”<sup>2</sup>

[14] In applying the reasoning in *Magnotta*, Order PO-3059-R states:

In light of the findings in the *Magnotta* decision, it is now clear that branch 2 of section 19 [in the provincial equivalent to the *Act*] includes records prepared for use in the mediation or settlement of actual or contemplated litigation.

....

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

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<sup>1</sup> 2010 ONCA 681.

<sup>2</sup> See above, at para. 45.

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 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 ... 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.

[15] In Order MO-2921, the previous adjudicator in this appeal applied the above approach, finding that the Minutes of Settlement are covered by the statutory litigation privilege in section 12.

[16] The appellant in this appeal does not directly address the findings in Order MO-2921. Rather, she submits that the analysis in *Magnotta* does not apply because the settlement agreement at issue in this appeal is distinguishable from the one considered by the Court of Appeal in *Magnotta*. I set out below the appellant's arguments on this point and my decision on each.

- The settlement agreement in the present appeal was prepared by counsel for the party named in the request, for use by that party, and not prepared by or for counsel for the town for use by the town or its counsel.

[17] The appellant does not elaborate further on this argument. I find it immaterial which party actually drafted the document. This was precisely the situation in *Magnotta*, where at least some of the records in dispute were prepared by Magnotta and delivered to Crown counsel "to assist with mediation and settlement discussions, a part of the litigation process."<sup>3</sup> The Court of Appeal explicitly recognized that both those documents prepared by Magnotta and delivered to the Crown, and those prepared by Crown counsel, fell within the statutory litigation privilege exemption, including the settlement agreement.

- Although the settlement agreement in the present appeal contains a confidentiality clause, it recognizes that that it "could be disclosed as

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<sup>3</sup> See above, at para. 45.

required by law.” In particular, section 52(4) of the *Act* brings settlement agreements back into the *Act* and subject to its provisions, “and therefore properly disclosed as ‘required by law.’”

[18] As the adjudicator noted in Order MO-2921, section 52(4) is an exception to the exclusion set out in section 52(3) of the *Act*. Section 52(4) provides that certain types of records, including the type of record at issue in this appeal, are subject to the *Act*. The adjudicator in Order MO-2921 found that the exception at section 52(4) applied to the record at issue here, and, having made that determination, proceeded to consider whether any of the claimed exemptions applied.

[19] The fact that a record is subject to the *Act* does not signify that its disclosure is “required by law.” Records subject to the *Act* may qualify for one or more of the exemptions from disclosure found in the *Act*. Having accepted that the record is subject to the *Act*, I must go on to consider whether any of the claimed exemptions apply to it.

- The settlement agreement in the present appeal “comingles the interests of the [town] in the settlement of the wrongful dismissal action with that of the named Councillors in their personal capacities in the settlement of the action against them for their ‘torts.’” As a result, the town has “no standing,” and, therefore, no interest that would be affected by the release of that portion of the agreement which speaks to the tort claim.

[20] Having reviewed the record, I am satisfied that it is an agreement signed by the town and the named individual to settle the dispute between the parties in order to avoid litigation. There is no doubt that the town is entitled to rely on the section 12 exemption.

- The Court of Appeal in *Magnotta* “made a clear finding of fact that the mediation documents were intended from the outset to be confidential.” After quoting from the decision, the appellant submits that “[such] confidentiality was not anticipated by the parties to the settlement document in this appeal and the named party specifically provided that the document may be released ‘when required by law’ fully anticipating possible subsequent litigation in which the terms of the settlement may be in issue.”

[21] The appellant submits that the decision in *Magnotta* is further distinguishable because in that case, *Magnotta* opposed disclosure of the records and the court found in those circumstances: “No one would willingly entertain settlement discussions with a government institution if it knew its confidential discussions would be made public.” In the current appeal, the record at issue does not contain “confidential discussions”

between the named individual and the town. Moreover, the named individual does not oppose disclosure of the record.

[22] I find no basis for the appellant's assertion that the parties had no expectation of confidentiality in the record at issue in this appeal. The town submits, and I accept, that the town and the named individual entered into settlement discussions, which resulted in the creation of the Minutes of Settlement, with a reasonably held expectation that any discussions or documents connected to this settlement were confidential. The Minutes contain an agreement to maintain the confidentiality of its provisions. The existence of a provision permitting disclosure "as required by law" does not undermine the expectation of confidentiality.

[23] The apparent consent of the named individual to disclosure of the Minutes of Settlement has no bearing on the question of whether the section 12 exemption applies. At the time the settlement was negotiated and executed, this individual agreed to all of its terms, as a means of resolving potential litigation. Her willingness to resile from one of its terms following its execution cannot result in a loss of the town's privilege.

[24] The appellant in the present appeal has not provided any basis for me to depart from the finding in Order MO-2921 on the application of section 12 to the same record. In conclusion, based on my review of the record and the parties' representations, I am satisfied that the Minutes of Settlement reflect a confidential agreement reached between the town and the named party for the settlement of contemplated litigation between them, and therefore falls within the ambit of the statutory litigation privilege in section 12. There is no evidence before me of any loss of privilege. Accordingly, I find the record is exempt from disclosure, subject to my findings on the town's exercise of discretion under this section.

[25] Given my finding, it is unnecessary to consider other aspects of the section 12 exemption, or the application of section 6(1)(b) to the same record.

[26] I will go on to consider the town's exercise of discretion under section 12, after addressing the appellant's argument concerning the application of the public interest override in the circumstances of this appeal.

**B. Does the public interest override at section 16 apply in the circumstances?**

[27] Section 16 states:

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.

[28] Section 16 does not refer to section 12. Nevertheless, the appellant argues that it should apply in the circumstances of this appeal. In particular, she submits that:

- The public interest “is the underlying concern in the *Act* and it overrides any consideration of settlement privilege,” with reference to the Divisional Court’s decision in *Ministry of Correctional Services v. McKinnon*, 2010 ONSC 3896 (*McKinnon*).
- The Court of Appeal in *Magnotta* (and other courts) recognized the “need to override the privilege where the ends of justice warrant it” (referring again to *McKinnon*).
- In the current appeal, the appellant believes that certain town councillors involved in the settlement “were operating in a situation of a clear conflict of interest and misappropriated public funds in a settlement of a civil claim against them personally.” She argues that these circumstances elevate this matter “into the realm of scrutiny of the motives and activities of the various Councillors who anticipated personal jeopardy as a result of the claim of the named individual.” She submits that records that may disclose malfeasance, such as conflict of interest on the part of municipal councillors, should be subject to disclosure pursuant to the public interest override.
- Although section 16 does not refer to section 12, the legislative drafters could not have anticipated “a situation where a conflict of interest disclosure would be required to override an apprehended s. 12 privilege.” In this regard, transparency requires disclosure.
- The majority of the discretionary exemptions under the *Act* are subject to section 16. “At common law, there are no exemptions for solicitor-client privilege. For all other privileges, however, exemptions may be found. The unfortunate title of section 12 as ‘solicitor-client privilege’ does not speak to the broader but less protected privilege contained in the second branch of section 12.”
- Although the litigation privilege is not terminated upon the conclusion of the matter, “there are a number of cases which state otherwise in the context of the necessity of that document for the purposes of other litigation between the same or different parties,” referring to *Mueller Canada Inc. v. State Contractors Inc.*, (1989) 71 OR (2d) 397 (*Mueller*).

[29] The appellant cites the decisions above as examples of instances where settlement documentation may be ordered to be produced in spite of its privileged



status where “the ends of justice warrant.” On my review, I do not find these cases to be relevant to the circumstances of the present appeal. They arise out of very different circumstances and are governed by different legal principles.

[30] In both the *McKinnon* and *Mueller* cases, the parties were involved in litigation and the court determined, based on the circumstances, that the agreements should be disclosed to a party to the litigation in order to enable the proper disposition of a central matter in the litigation. These are not the circumstances before me in this appeal. The question before me is whether Minutes of Settlement executed between the town and a named individual are exempt from disclosure pursuant to the claimed exemption under the *Act*.

[31] I am also not persuaded by the appellant’s arguments that a public interest override for settlement records should be read into section 16 of the *Act*. As she identifies, section 16 does not refer to section 12. The appellant suggests this may have been an oversight on the part of the legislative drafters, at least in respect of records exempt under the litigation aspect of the second branch of section 12. She also proposes that the public interest override should be available in any event for records “that may disclose malfeasance,” such as the conflict of interest she alleges on the part of town councillors. I see no basis on which I can expand the application of section 16 to the section 12 exemption.

[32] The Supreme Court of Canada addressed the issue of the absence, in Ontario’s access-to-information scheme, of a public interest override for solicitor-client privileged records in *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*.<sup>4</sup> In upholding the constitutional validity of this statutory scheme, the Supreme Court noted that consideration of the public interest is already incorporated in the discretionary language of the exemption.<sup>5</sup> To the extent that some of the appellant’s arguments concerning a public interest in disclosure may be relevant to the town’s exercise of discretion in applying section 12, I will address these under the next heading.

[33] I therefore find that section 16 does not apply to override the application of the section 12 exemption.

**C. Did the town exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?**

[34] The section 12 exemption is discretionary, and permits the town to disclose information, despite the fact that it could withhold it. The town must exercise its

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<sup>4</sup> 2010 SCC 23.

<sup>5</sup> Also at issue was also the constitutional validity of the absence of a public interest override for records exempt under a discretionary exemption for law enforcement records. The Supreme Court found that both law enforcement and solicitor-client privilege exemptions already incorporate the public interest to the extent applicable.

discretion. On appeal, the Commissioner may determine whether the town failed to do so.

[35] In addition, the Commissioner may find that the town 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.

[36] In either case, this office may send the matter back to the town for an exercise of discretion based on proper considerations.<sup>6</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>7</sup>

### **Relevant considerations**

[37] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>8</sup>

- 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

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<sup>6</sup> Order MO-1573.

<sup>7</sup> Section 43(2).

<sup>8</sup> Orders P-344 and MO-1573.

- 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 town
- the nature of the information and the extent to which it is significant and/or sensitive to the town, the requester or any affected person
- the age of the information
- the historic practice of the town with respect to similar information.

[38] The town submits that in exercising its discretion to withhold the record, it took into account the fact the record was created through a negotiation process for the purpose of avoiding litigation. Referring to the confidentiality clause contained in the record, the town submits that it must act reasonably to protect the confidentiality of the terms of the agreement. The town also 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." The town indicates that it has an interest in ensuring that these types of settlements remain confidential, in order to avoid establishing any form of precedent in respect of employment-related matters. 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.

[39] The town's representations on this issue largely reproduce its representations made in Appeal MA12-416 on the same issue, and are summarized in Order MO-2921 disposing of that appeal.

[40] I have canvassed many of the appellant's arguments relevant to the issue of the town's exercise of discretion under the previous headings, above. Her arguments for disclosure of the record centre on claims it may reveal the misconduct of certain town councillors involved in the settlement negotiations reflected in the record: she submits it is "clear that records which may disclose malfeasance, such as conflict of interest on the part of municipal Councillors, should be the records most readily disclosed on the basis of the overriding public interest." In addition, although the individual named in the record is not an affected party in the present appeal,<sup>9</sup> the appellant relies heavily on

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<sup>9</sup> The previous adjudicator in this appeal did not find it necessary to seek her representations as she was given an opportunity to make submissions as an affected party in the appeal giving rise to Order MO-2921, concerning some of the same records and issues.

that individual's consent to disclose the settlement agreement to which she is a party.<sup>10</sup> The appellant concludes by weighing the prejudice to the town of disclosing the record against prejudice to the appellant (representing the broader public) of withholding the record, and she argues that the prejudice to the town's ability to negotiate future employment-related settlements is outweighed by the benefit to taxpayers of knowing the full particulars of any payments made through the settlement agreement to settle any tort claims made against councillors.

[41] The adjudicator in Order MO-2921 considered similar arguments about the importance of disclosing records relating to the town's settlement with the named individual. Among other things, the requester in that appeal had raised concerns about council's actions in its dealings with the named individual and the use of taxpayer money to settle claims brought by the individual. The adjudicator concluded that the town had exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations. She found the town's decision to exercise its discretion not to disclose the record to be reasonable.

[42] In this appeal, I have no reason to view the town's exercise of its discretion any differently. There is nothing to suggest that it took into account any irrelevant considerations, or failed to take into account relevant ones. I have reviewed the appellant's arguments in favour of disclosure of the record and find nothing improper in the town's conclusion that these arguments were outweighed by the interests served by preserving the confidentiality of the settlement.

[43] With respect to the named individual's consent, although it is a relevant consideration, I find nothing improper in the town's decision not to give it precedence. As the adjudicator recognized in Order MO-2921, the town has a separate interest in the record, apart from that of the named party.

[44] In conclusion, I uphold the town's exercise of discretion in its application of section 12 to the record.

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<sup>10</sup> The named individual's consent to disclosure of the Minutes of Settlement was conveyed in her representations as an affected party in Appeal MA12-416.

**ORDER:**

I uphold the town's decision to withhold the record and dismiss this appeal.

Original Signed By:  
Sherry Liang  
Senior Adjudicator

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September 3, 2014