

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-3114

Appeal MA14-44

Municipality of Chatham-Kent

October 22, 2014

**Summary:** The municipality received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a database of the municipality's settled and pending liability cases. The ministry denied access to the database, relying on the discretionary solicitor-client privilege exemption at section 12 of the *Act*. The requester appealed the municipality's decision. In this order, the adjudicator upholds the municipality's decision on the basis that the database is exempt from disclosure under section 12.

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

### OVERVIEW:

[1] The Municipality of Chatham-Kent (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Data base of liability cases settled and pending, as announced to Municipal Council in a recent report. Please provide in Microsoft Excel format. If necessary to meet confidentiality requirements, the name of the litigant may be redacted.

[2] The municipality identified a database as responsive to this request, but denied access to it, claiming the application of the discretionary solicitor-client privilege exemption at section 12 of the *Act*.

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

[4] During the course of mediation, the appellant advised the mediator that he was pursuing access to the information contained in the database and that he was mainly interested in the locations of any accidents, the types of accidents and any settlement amounts. The appellant also confirmed that he is not pursuing access to the names of the individual litigants. The municipality reiterated its decision to withhold all of the information contained within the database pursuant to section 12 of the *Act*.

[5] Further mediation was not possible and the file was forwarded to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[6] I sought representations from the municipality and the appellant. These representations were shared in accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure* and *Practice Direction 7*. A portion of the affidavit filed with the municipality's representations was withheld in accordance with the confidentiality criteria set out in *Practice Direction 7*.

## **RECORDS:**

[7] The record at issue consists of a Microsoft Excel spreadsheet listing the status of all claims made against the municipality, currently pending or settled ("the database").

## **ISSUES:**

- A. Does the discretionary exemption for solicitor-client privilege at section 12 apply to the database?
- B. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **Background**

[8] The municipality submits in its representations that the purpose of the database is to track and record information in preparation for and for use in litigation. When the municipality receives notice of a claim or impending litigation, it commences an inquiry

into the circumstances giving rise to the claim. The information gathered as a result of that investigation is then summarized in the database, along with comments by internal and/or external legal counsel with respect to liability and damages related to each claim. In addition, the database includes estimates made by legal counsel with respect to settlement value and costs. The database is then used to make litigation decisions, including whether to settle or proceed to trial.

[9] The appellant seeks access to the database in order to be informed as to the causes behind what he describes as an apparent escalation of risks attributable to the municipality.

**Issue A: Does the discretionary exemption for solicitor-client privilege at section 12 apply to the database?**

[10] The municipality submits that the database is privileged in that it contains solicitor-client privileged communications and is also a document prepared in contemplation of or for use in litigation.

[11] 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 an institution for use in giving legal advice or in contemplation of or for use in litigation.

[12] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply. In this appeal, the municipality claims that both branches apply.

**Branch 1: common law privilege**

[13] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.<sup>1</sup> The municipality claims that both heads of privilege under branch 1 apply to the database at issue.

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<sup>1</sup> Order PO-2538-R and *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

### ***Solicitor-client communication privilege***

[14] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.<sup>2</sup> The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.<sup>3</sup>

[15] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.<sup>4</sup>

[16] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.<sup>5</sup>

[17] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>6</sup>

### ***Litigation privilege***

[18] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.<sup>7</sup>

[19] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, at pages 93-94,<sup>8</sup> the authors offer some assistance in applying the dominant purpose test, as follows:

The “dominant purpose” test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the

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<sup>2</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>3</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>4</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

<sup>5</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>6</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

<sup>7</sup> Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above see also *Blank v. Canada (Minister of Justice)*, cited above.

<sup>8</sup> Butterworth’s: Toronto, 1993.

person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the “dominant purpose” can exist in the mind of either the author or the person ordering the document’s production, but it does not have to be both.

. . . . .

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

### *Termination of litigation*

[20] Common law litigation privilege under branch 1 may be lost through termination of litigation, actual or contemplated.<sup>9</sup> However, termination of litigation may not end the privilege where the policy reasons underlying the privilege remain, despite the end of the litigation. Privilege may be sustained where, for example, there is related litigation involving the same subject matter in which the party asserting the privilege has an interest.<sup>10</sup>

### **Branch 2: statutory privileges**

[21] 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.

### ***Statutory solicitor-client communication privilege***

[22] Branch 2 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

### ***Statutory litigation privilege***

[23] 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.” Branch 2 also

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<sup>9</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.); *Blank v. Canada (Minister of Justice)*, cited above and Orders MO-1337-I, PO-1855, MO-2221 and PO-2441.

<sup>10</sup> *Carleton Condominium Corp. v. Shenkman Corp.* (1977), 3 C.P.C. 211 (Ont. H.C.).

includes records prepared for use in the mediation or settlement of actual or contemplated litigation.<sup>11</sup>

[24] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.<sup>12</sup>

## **Representations**

[25] The municipality submits that the database is exempt from disclosure under section 12, pursuant to both the common-law (branch 1) privilege and the statutory (branch 2) privilege.

[26] With respect to the common-law (branch 1) privilege, the municipality submits:

- that the database contains “confidential and privileged inquiry into the circumstances giving rise” to each claim, and contains solicitor-client communication privileged information. Further, the billing information is subject to solicitor-client communication privilege;
- that the database is created for the dominant purpose of litigation, and as such is subject to common-law litigation privilege. Further, the municipality submits that litigation privilege is not lost until all proceedings that share a common cause of action are completed.

[27] With respect to the statutory (branch 2) privilege, the municipality submits:

- that the database is exempt from disclosure under the statutory solicitor-client communication privilege, for the same reason as it is privileged under the common-law solicitor-client communication privilege;
- that the database is exempt from disclosure under the statutory litigation privilege, for the following reasons:
  - the database contains legal advice, assessment of liability and damages and settlement positions from internal and/or external legal counsel and as such is prepared by counsel for use in litigation;
  - statutory litigation privilege extends to include mediation

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<sup>11</sup> *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

<sup>12</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

and settlement discussions;

- there is no temporal limit on the application of the statutory litigation privilege; the privilege continues even if litigation has concluded.

[28] In support of its representations, the municipality filed an affidavit of its Legal Officer. That affidavit states in part:

The purpose of this database is to track and record information in preparation [for], or during the course of, litigation. When the [municipality] receives notice of a claim, or impending litigation, it commences a confidential privileged inquiry into the circumstances giving rise to the claim. This information is then summarized in the database along with comments by internal and/or external legal counsel for the [municipality] in regard to liability and damages related to each claim. In addition, the database includes estimates made by legal counsel with respect to settlement value and costs. This document is then used by management to make litigation decisions, including settlement or whether a matter should proceed to trial.

[29] The appellant submits that he is not interested in having access to any advice to the client or to legal billing information and that this information can be severed out of the database. He submits that the municipality's negligence has resulted in environmental, health or safety hazards for its citizens. He submits that liability costs for the municipality have escalated sharply in recent years and that citizens have a right to know what has caused this increase. He submits that the database can identify repetitive sources of risk, and enable citizens to enquire about corrective action taken (or not taken) by the municipality to reduce those risks.

[30] The municipality submits that the database cannot reasonably be severed without disclosing the information that is exempt under section 12. It submits that since the entire record is communicated to the municipal client, and is created for use in litigation, the entire record is subject to both solicitor-client communication and litigation privilege.

### **Analysis and conclusion**

[31] For the following reasons, I find that the municipality has demonstrated that the database is prepared by or for counsel employed or retained by an institution in contemplation of or for use in litigation, and as such, is exempt from disclosure pursuant to branch 2 of section 12 of the *Act*.

[32] As noted above, in his affidavit, the municipality's Legal Officer explains that upon receiving notice of a claim or impending litigation, the claim is investigated. The information gathered in the course of investigating a claim is inputted into the database along with comments by internal and/or external legal counsel in regard to liability and damages related to each claim. He explains that the database includes legal counsel's estimates with respect to settlement value and costs and is used by management to make litigation decisions, including whether to settle or whether a matter should proceed to trial. In the confidential portion of the affidavit, the Legal Officer describes the headings of the types of information that are included in the database.

[33] Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation. To meet the dominant purpose test, there must be more than a vague or general apprehension of litigation.

[34] In Order P-1551, former Adjudicator Big Canoe explained the scope of litigation privilege as follows:<sup>13</sup>

Litigation privilege, often referred to as the "work product" or "lawyer's brief" rule, protects documents which are not direct solicitor-client communications, but which are "derivative" of that relationship. This includes communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation. Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation.

[35] Having reviewed the ministry's description of the database and the representations of the parties, I am satisfied that the statutory exemption for litigation privilege under branch 2 of section 12 is applicable in the circumstances of this appeal. I have reached this conclusion based on the fact that the database is created by the municipality and its counsel and is the direct result of the municipality receiving notice of a claim or pending litigation. I find that there is more than a vague or general apprehension of litigation when the municipality receives such a notice. I am also persuaded that the information stored in the database is used by the municipality to make litigation decisions, including whether the municipality should agree to a settlement or whether a matter should proceed to trial. Branch 2 includes records prepared for use in the settlement of actual or contemplated litigation.<sup>14</sup> Finally, the evidence of the municipality is that the database is treated confidentially, with only the

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<sup>13</sup> While Order P-1551 addressed the issue of the common-law litigation privilege under branch 1 and not the statutory litigation privilege under branch 2, the adjudicator's explanation of the privilege holds equally true for the latter.

<sup>14</sup> *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.



municipality's lawyers and their assistants having access to it.

[36] I note that the database would appear to include information not only on pending claims, but also on claims that have been settled. However, while litigation privilege at common law may end with the termination of the litigation at issue, termination of litigation does not affect the application of statutory litigation privilege under branch 2.<sup>15</sup>

[37] The appellant submits that, pursuant to section 4(2) of the *Act*, only the privileged information in the database should be withheld, and any non-privileged information should be disclosed. I find, however, that the database does not contain any non-privileged information. As the entire database is created in contemplation of, and for use in litigation (including settlement decisions), it is not possible to disclose any portion of the database without disclosing information that is exempt from disclosure under section 12.

[38] I also find there is no evidence to suggest that privilege has been waived. The municipality states in its representations that there has been no disclosure of the database to third parties and that the database is password protected and saved in a secure file folder that can only be accessed by the municipality's internal lawyers and their assistants.

[39] I conclude that the database falls within the exemption under the branch 2 statutory litigation privilege provided for at section 12 of the *Act*.

[40] Given this finding, I do not need to consider the municipality's arguments that the database is also privileged under the branch 1 common-law solicitor-client communication or litigation privileges, or under the branch 2 statutory solicitor-client communication privilege.

### ***The appellant's public interest arguments***

[41] The appellant argues that there is a compelling public interest in the disclosure of the database, thereby raising the applicability of the public interest override found at section 16 of the *Act*, which provides:

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.

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<sup>15</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

[42] Section 12 of the *Act* is not listed as one of the sections in respect of which the public interest override is available.

[43] The Supreme Court of Canada addressed the issue of the absence of a public interest override for solicitor-client privileged records in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.<sup>16</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.

[44] Given the Supreme Court's finding and in the absence of any submissions from the appellant on the constitutional validity of section 16, I see no reason to revisit the issue of whether the public interest override at section 16 can apply to records that have been found to be exempt under section 12 of the *Act*. I will, however, consider the appellant's arguments about the public interest in disclosure in my discussion on the municipality's exercise of discretion below.

[45] In his representations, the appellant also raised the applicability of section 5(1) of the *Act*, which states in part:

Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

[46] This section requires the head of an institution to disclose any record that he or she has reasonable and probable grounds to believe should be disclosed in the public interest on the basis that it reveals a grave environmental, health or safety hazard to the public. However, the duties and responsibilities set out in section 5 belong to the head alone. Previous decisions of this office have found that the Commissioner does not have the power to make an order requiring disclosure of a record pursuant to section 5 of the *Act*.<sup>17</sup> I agree with those decisions and find that I do not have the jurisdiction to make any order under section 5(1).

[47] I conclude that, subject to my review of the municipality's exercise of discretion, the database is exempt from disclosure by virtue of the discretionary exemption at section 12 of the *Act*.

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<sup>16</sup> 2010 SCC 23.

<sup>17</sup> Orders 187, MO-2205.

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

***General principles***

[48] 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.

[49] 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.

[50] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>18</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>19</sup>

***Relevant considerations***

[51] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>20</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

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<sup>18</sup> Order MO-1573.

<sup>19</sup> Section 43(2).

<sup>20</sup> Orders P-344 and MO-1573.

- the privacy of individuals should be protected the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- 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.

### ***Representations***

[52] The municipality submits that it exercised its discretion under section 12 and that its reasons for withholding the database were provided to the appellant in its decision letter dated January 14, 2014. It submits that all relevant factors were considered, in particular the case law relating to solicitor-client privilege. The municipality referred to the decision of the Supreme Court of Canada in *Descôteaux v. Mierzwinski*,<sup>21</sup> which stipulates that a restrictive approach is necessary when assessing documents claimed to be subject to solicitor-client privilege. It also refers to the Supreme Court's decision in *R. v. McClure*,<sup>22</sup> where the Court held:

[S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

[53] The municipality submits that no irrelevant factors were considered in making the decision not to disclose the database, and that it exercised its discretion in good faith and with no improper purpose.

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<sup>21</sup> [1982] 1 S.C.R. 860

<sup>22</sup> [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35

[54] The appellant did not make submissions on the municipality's exercise of discretion although, as outlined above, he submitted that there is a public interest in disclosure of the database.

***Analysis and conclusion***

[55] I am satisfied that the municipality exercised its discretion in a proper manner. The above-noted jurisprudence of the Supreme Court on the importance of maintaining solicitor-client privilege is a relevant factor that the municipality legitimately considered. I see no error in its implicit assessment that this factor outweighs any potential public interest in disclosure of the database. Further, there is no evidence before me that the municipality considered improper factors or that it exercised its discretion in bad faith or for an improper purpose.

[56] Accordingly, I uphold the municipality's exercise of discretion under section 12 of the *Act*.

**ORDER:**

I uphold the decision of the municipality.

Original Signed by: \_\_\_\_\_  
Gillian Shaw  
Adjudicator

\_\_\_\_\_ October 22, 2014