

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3161

Appeal MA14-69

Township of Minden Hills

February 18, 2015

Summary: The appellant sought access to Minutes of Settlement entered into between the Township of Minden Hills (the township) and a named individual. The township relied on section 12 (solicitor-client privilege) and 14(1) (invasion of privacy) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to deny access to the record. 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, the adjudicator upholds the application of section 12 to the record and dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders PO-3059-R, MO-2921 and MO-3092.

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 issue in this appeal is whether Minutes of Settlement entered into between the Township of Minden Hills (the township) and a former 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 township under the *Act* for the following: "all records of payment from the Township of Minden Hills to [an identified individual] for the settlement/resolution of legal action taken by him against the township, including wrongful dismissal."

[3] The township identified a single responsive record, the Minutes of Settlement, and issued a decision denying access to it, citing the application of the exclusionary provision for labour relations records at section 52(3) of the *Act*, as well as the mandatory exemption for third party information at section 10(1) and the discretionary solicitor-client privilege exemption at section 12.

[4] The appellant appealed the township's decision to this office. During mediation, the township abandoned its reliance on sections 52(3) and 10(1) but advised that, in addition to section 12, it also relied on the mandatory personal privacy exemption at section 14(1) to deny access to the record. For his part, the appellant raised the possible application of the "public interest override" at section 16 of the *Act* as an issue in this appeal.

[5] No further mediation was possible and the appeal was transferred to the adjudication phase of the appeal, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the township, followed by the appellant. I shared the township's representations with the appellant, in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7* on the sharing of representations. I did not find it necessary to seek reply representations from the township.

[6] A third party whose personal information appears in the record was invited to make representations, but did not do so. However, he advised this office that he "would not consent nor deny consent to disclose" the Minutes of Settlement and that he would leave it to the adjudicator to decide the matter.

[7] For the reasons that follow, I find that the Minutes of Settlement are exempt from disclosure pursuant to the second branch of the solicitor-client privilege exemption at section 12 of the *Act*. The public interest override at section 16 is not available in respect of records exempt under section 12. As a result, I uphold the township's decision and dismiss the appeal.

RECORD:

[8] The sole record at issue consists of a two-page document entitled Minutes of Settlement.

ISSUES:

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

DISCUSSION:

Issue A: Does the discretionary exemption at section 12 apply to the Minutes of Settlement?

[9] 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.

[10] Section 12 contains two branches. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply. In this appeal, the township relies on a prior order of this office, Order MO-2921, and argues that the branch 2 litigation privilege applies.

[11] The branch 2 litigation privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege.¹ In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.²

[12] The Ontario Court of Appeal and previous orders of this office have held that the statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.³ This is discussed in detail below.

¹ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

² *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

³ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

[13] The township states that the Minutes of Settlement “were prepared by the Township’s legal counsel for use in the settlement of litigation initiated by [the affected party]; such minutes were a product of a confidential negotiated settlement which concluded the litigation”. The township submits that it is clear from the content of the Minutes of Settlement that they were intended to remain confidential.

[14] The township further submits that maintaining confidentiality where the Minutes of Settlement require confidentiality is of utmost importance for any future litigation. It argues that the disclosure of such minutes notwithstanding their clear wording would undermine the confidence of all parties in the settlement process.

[15] The township relies upon Order MO-2921, which adopted the reasoning contained in Reconsideration Order PO-3059-R, issued as a result of the Ontario Court of Appeal’s decision in *Liquor Control Board of Ontario v. Magnotta Winery Corporation (Magnotta)*.⁴ In *Magnotta*, the Court of Appeal held as follows:

[I]nterpreting the word “litigation” in the second branch to encompass mediation and settlement discussions is consonant with public interest considerations because the public interest in transparency is trumped by the more compelling public interest in encouraging the settlement of litigation.

...

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.”⁵

[16] In Order MO-2921, the adjudicator stated:

After reviewing the submissions made in that appeal, [the adjudicator in Order PO-3059-R] 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 [the provincial equivalent to section 12] of the *Act* includes records prepared for use in the mediation or settlement of actual or contemplated

⁴ 2010 ONCA 681.

⁵ See above, at paras. 36 and 45.

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.⁶

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 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.

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

[17] More recently, Order MO-3092 considered the application of section 12 to minutes of settlement. After reviewing *Magnotta* and Orders PO-3059-R and MO-2921, the adjudicator considered the appellant’s arguments and found that the appellant had

⁶ Orders PO-2323, MO-2609.

not provided any basis to depart from the reasoning set out in that line of cases. In addition, the adjudicator held that:

- It is immaterial which party actually drafted the document. Both those documents prepared by Crown counsel, and those prepared for Crown counsel, fall within the statutory litigation privilege exemption, including a settlement agreement.
- The apparent consent of the individual named in the Minutes of Settlement to disclosure of the Minutes has no bearing on the question of whether the section 12 exemption applies. At the time the settlement was negotiated and executed, the individual in question 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.

[18] In the present appeal, the appellant did not provide representations on the application of section 12 to the Minutes of Settlement. He did, however, provide representations on the township's exercise of discretion, which I will discuss in my findings under Issue B below.

[19] Having reviewed the Minutes of Settlement and the parties' representations, I find that the Minutes of Settlement are exempt from disclosure under branch 2 of section 12. I find that the Minutes of Settlement were prepared "for use in litigation". Specifically, I am satisfied that they reflect a confidential agreement reached between the township and the affected party that was entered into to settle an ongoing lawsuit. In his representations on the township's exercise of discretion, the appellant submits that, if the affected party does not object to disclosure, then the township's reliance on the confidentiality provisions of the Minutes of Settlement is self-serving. The appellant, however, does not argue that this results in a loss of the privilege. In any event, I agree with the finding in Order MO-3092 that the willingness of a party to resile from one of the terms of the Minutes following their execution does not result in a loss of the township's privilege.

[20] Neither party has submitted any evidence to suggest that privilege may have been lost through waiver. Accordingly, I find that the Minutes of Settlement are exempt from disclosure under the second branch of section 12, subject to my findings on the township's exercise of discretion, below.

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

[21] 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.

[22] 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.

[23] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁷ This office may not, however, substitute its own discretion for that of the institution.⁸

[24] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁹

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

⁷ Order MO-1573.

⁸ Section 43(2).

⁹ Orders P-344 and MO-1573.

- 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.

[25] The township submits that, in exercising its discretion in favour of non-disclosure of the Minutes of Settlement, it took into account the fact that it must be viewed by the public as acting reasonably to protect the confidentiality of settlement processes where confidentiality is a clear condition of the settlement. It submits that to do otherwise would undermine confidence in the settlement process. It further submits 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, it submits that it has an interest in ensuring 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.

[26] The appellant submits that, if the affected party did not object to the disclosure of the Minutes of Settlement, then the township ought to have taken into account other considerations, including the principle that information should be available to the public.

[27] I see no error in the township's exercise of discretion. While I agree with the appellant that an affected party's position on disclosure can be a relevant factor, it is not clear whether the affected party communicated his position on disclosure to the township. Indeed, the affected party's position, as communicated to this office, is essentially that he takes no position. In any event, the township's representations indicate that it is of the view that it has a separate interest in the record, distinct from that of the affected party,¹⁰ and that the position of the affected party, whatever it may be, would not take precedence over the township's interest. I see no indication that the township considered irrelevant factors or failed to consider relevant ones.

[28] I uphold the township's exercise of discretion in its application of section 12 to the Minutes of Settlement.

¹⁰ In this regard, see Orders MO-2921 and MO-3092.

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

[29] 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.

[30] Section 12 is not listed as one of the exemptions in respect of which the public interest override is available. The Supreme Court of Canada, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,¹¹ upheld the constitutional validity of this statutory scheme, noting that consideration of the public interest is already incorporated in the discretionary language of the exemption.

[31] The appellant made the following submissions on the public interest:

The Township relies upon Order MO-2921 – Town of Fort Erie, a decision which states,

“...where records are prepared by or for 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.”

In this case, litigation has already been settled and the public interest in transparency lies in realizing how much public money was spent on said settlement.

[32] The passage quoted by the appellant is taken from the Divisional Court's decision in *Magnotta*, which was upheld by the Court of Appeal. As noted above, the Court of Appeal stated something similar:

[I]nterpreting the word “litigation” in the second branch to encompass mediation and settlement discussions is consonant with public interest considerations because the public interest in transparency is trumped by the more compelling public interest in encouraging the settlement of litigation.¹²

¹¹ 2010 SCC 23.

¹² *Magnotta*, cited above, at para 36.

[33] I do not read the Court of Appeal's decision as inviting a consideration of whether the public interest is served by disclosure in any particular appeal.¹³ Rather, the Court of Appeal considered the public interest as an interpretive aid in determining whether "litigation" in branch 2 of section 19 (the equivalent in the provincial *Act* to section 12 in the municipal *Act*) includes mediation and settlement discussions. The Court concluded that, for the purposes of branch 2, "litigation" includes settlement discussions.

[34] I conclude that public interest considerations cannot override my finding that the Minutes of Settlement are exempt from disclosure under section 12 of the *Act*.

[35] In light of my findings, I do not need to consider whether the Minutes of Settlement are also exempt under the mandatory personal privacy exemption at section 14(1) of the *Act*.

ORDER:

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

Original Signed By: _____ February 18, 2015
Gillian Shaw
Adjudicator

¹³ I note that such an interpretation would be at odds with the Supreme Court's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, cited above at footnote 11.