Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3627

Appeal PA15-399

Peterborough Regional Health Centre

June 30, 2016

Summary: The appellant, a journalist, sought records relating to the termination of the employment of several employees of the Peterborough Regional Health Centre (PRHC). The records remaining at issue are Minutes of Settlement between PRHC and two former employees, and other settlement documents relating to one of the former employees. PRHC denied access to these records under section 19 (solicitor-client privilege) of the *Act*. In this order, the adjudicator relies on the Court of Appeal's decision in *Liquor Control Board of Ontario v. Magnotta Winery Corporation* and finds that section 19(c) applies. The adjudicator upholds PRHC's decision to deny access and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 19 and 23.

Orders and Investigation Reports Considered: Orders PO-3059-R, MO-2921 and MO-3161.

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681; *Ontario (Attorney General) v. Big Canoe*, (2006) 80 O.R. (3d) 761, 2006 CanLII 14965 (Div. Ct.); *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167, 2002 CanLII 18055 (C.A.); *Leonardis v. Leonardis*, 2003 ABQB 577; *Ross River Dena Council v. Canada (Attorney General)*, [2009] Y.J. No. 7 (S.C.); *Hallman Estate (Re)*, 2009 CanLII 49643 (ONSC); *Moore v. Bertuzzi*, 2012 ONSC 3248.

OVERVIEW:

[1] The appellant, a journalist, submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Peterborough Regional Health Centre (PRHC) for information ". . . regarding settlements with senior [PRHC] staff who were released from their jobs in 2014." In her initial request, the appellant named three former employees, and asked for "the settlement amounts (paid out in severance or otherwise)", as well as "costs for severance packages, benefits and other ancillary costs." She also asked for the former employees' employment contracts. The request was amended to add the name of one additional former employee, bringing the total number of employees who are the subject of the request to four.

[2] After notifying affected parties under section 28 of the *Act* and considering the representations it received in response, PRHC issued a decision to the appellant granting partial access to the records it identified as responsive.

[3] PRHC cited section 19 (solicitor-client privilege) to withhold settlement documents relating to three individuals and indicated that a settlement agreement relating to the remaining former employee (individual A) did not exist. PRHC granted access to most of information in the employment contracts and indicated that it had withheld "personal information which was limited to home addresses, employment start and handwritten signatures".

[4] The appellant filed an appeal of PRHC's decision to deny access.

[5] During mediation of the appeal, PRHC clarified that the information to which it denied access in the employment contracts was withheld pursuant to section 21(1) of the *Act*. PRHC also indicated that it had located the settlement agreement relating to individual A.

[6] Also during mediation, the appellant advised that she is pursuing access to the settlement amounts and settlement agreements relating to two individuals (individual A and individual B). Accordingly, settlement documents relating to those two individuals are at issue in this appeal. The appellant decided not to pursue access to the withheld portions of the employment contracts, and accordingly, these contracts, and section 21(1), are no longer at issue.

[7] No further issues were settled in mediation, and the file proceeded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. During the inquiry, I invited and received representations from PRHC and the appellant. I shared the non-confidential portions of PRHC's representations with the appellant pursuant to *Practice Direction 7* issued by this office.

[8] The only issues in this appeal are: whether the records remaining at issue are exempt under section 19 of the *Act* and if so, whether PRHC properly exercised its

discretion to apply this exemption.

RECORDS:

[9] The records remaining at issue are as follows:

- Minutes of Settlement relating to individual A;
- Minutes of Settlement and other settlement documents relating to individual B.

DISCUSSION:

Does the discretionary exemption at section 19 apply to the records?

[10] Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
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> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
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> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[11] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege.

Statutory Litigation Privilege

[12] PRHC relies on section 19(c), which extends the statutory privilege in section 19(b) to educational institutions and hospitals. As explained in more detail below, PRHC relies on *Liquor Control Board of Ontario v. Magnotta Winery Corporation*[1](*Magnotta*) to support its claim that section 19(c) applies. In *Magnotta*, the Ontario Court of Appeal found that the statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation. In this context, "litigation" includes contemplated litigation.[2]

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[1] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[2] See Order PO-3059-R.

[13] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[3]

[14] Only an institution may waive the statutory litigation privilege in section 19. Disclosure by Crown counsel to defence counsel during a criminal proceeding, for example, does not result in waiver of the statutory litigation privilege.[4]

[15] The parties' representations focus on four issues in relation to section 19: (1) does statutory litigation privilege apply? (2) has privilege been waived? (3) does an exception to privilege apply? (4) what is the impact of the public interest?

[16] I will address these issues in turn.

Does statutory litigation privilege apply?

[17] PRHC submits:

> . . . in [*Magnotta*], the Court of Appeal has confirmed that litigation privilege extends to settlement discussions and that settlement minutes, releases, and employee severance agreements are exempt from disclosure under s. 19 of [the *Act*].
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> More recently, in [Order MO-3161], this office upheld the Township of Minden Hill's decision to deny a request 'for all records of payment from the Township of Minden Hills to [a former employee] for the settlement/resolution of legal action taken by him against the township, including wrongful dismissal' on the basis that this information was protect[ed] by the [*Municipal Freedom of Information and Protection of Privacy Act*] statutory privilege at s. 12 which is the equivalent of [the *Act*] s. 19(c).
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> The principles underlying these two decisions apply to this appeal. The appellant seeks access to documents, which were prepared by legal counsel retained by PRHC [firm name], for use in settlement of contemplated litigation with two former employees. These documents are the product of . . . settlement entered by the [PRHC] to avoid litigation.

[18] The appellant's representations claim that the two employees whose information remains the subject of the narrowed request ". . . did agree to release any and all information about the public money related to their departures from the hospital."

[19] She goes on to state that these two former employees:

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[3] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167, 2002 CanLII 18055 (C.A.).
[4] See *Ontario (Attorney General) v. Big Canoe*, (2006) 80 O.R. (3d) 761, 2006 CanLII 14965.

> . . . now have their former employer making decisions about how their information is released. I find that to be contrary to the transparency principles of the Information and Privacy Commissioner. There is no countervailing privacy interest in the circumstances and there is a strong public interest in this information.

[20] This argument raises the issues of waiver and the public interest in disclosure. I will address these topics below, along with the question, also raised by the appellant, of whether an exception to privilege applies.

[21] With respect to the question of whether statutory litigation privilege could apply in the circumstances of this appeal, the appellant uses these submissions to argue that *Magnotta* is distinguishable. In the appellant's submission, the distinction arises because in *Magnotta*, both the LCBO and Magnotta wished to keep their settlement information private. The appellant submits that "[i]n this case, the two employees have waived the right to shield their severance agreements from public view." This is, in fact, a waiver argument. I will discuss it in more detail later in this order.

[22] The appellant's waiver argument is not a sufficient basis to distinguish *Magnotta*, which establishes the principle that statutory litigation privilege under section 19 encompasses settlement documents. In assessing whether section 19(c) could apply to the records at issue, therefore, *Magnotta* remains a highly relevant authority.

[23] The findings in *Magnotta* are discussed in Order PO-3059-R:

> . . . 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. [Emphasis added.]
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> More particularly, the Court of Appeal found that the word "litigation" in the second branch encompasses both mediation and settlement discussions. The Court stated:
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> > 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.

[24] The records at issue in this case are two sets of Minutes of Settlement, and two other documents that were part of the settlement relating to one former employee. In *Magnotta*, the records at issue were precisely analogous, as they consisted of Minutes of Settlement and documents relating to the implementation of the settlement.[5] In this case, the evidence, including the records themselves, makes it clear that they are records prepared by or for counsel employed by a hospital[6] for use in the settlement of contemplated litigation.

[25] I note that similar records were found exempt under section 19 (and the equivalent provision at section 12 in the *Municipal Freedom of Information and Protection of Privacy Act*) in Orders PO-3059-R, MO-2921 and MO-3161 (which was referred to in PRHC's representations, quoted above).

[26] Accordingly, subject to the discussion of waiver, exceptions to privilege and the public interest in disclosure, below, I find that statutory litigation privilege applies, and the records are exempt under section 19(c) of the *Act*.

Has privilege been waived?

[27] As already noted, the appellant submits that the former employees whose information is at issue in this appeal consented to disclosure, and by so doing, waived privilege. Beyond the appellant's assertion to this effect, I have not been presented with evidence of any such consent. But even if these parties consented to their information being disclosed, I have concluded, for the reasons that follow, that this would not establish waiver of statutory litigation privilege in the circumstances of this appeal.

[28] As mentioned above, previous jurisprudence has found that only an institution may waive the statutory litigation privilege in section 19. Authority for this interpretation is found in *Ontario (Attorney General) v. Big Canoe*,[7] where the Divisional Court considered the difference between common law privilege and the statutory litigation privilege created under branch 2 of section 19. The Court stated:

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[5] See para. 9 of the judgment in *Magnotta*, and the table of responsive records in Order PO-2405, which was the order under review.

[6] PRHC is a "hospital." See the definition in section 2 ("'hospital' means (a) a public hospital. . . .") and, more generally, the provisions of the *Public Hospitals Act*.

[7] Cited above at footnote 4.

> It is clear from Big Canoe, supra,[8] that the second branch of s. 19, unlike the first, does not simply import the common law into FIPPA. The second branch does not even refer to the common law litigation privilege. . . .[9]

[29] The Court then quotes the earlier decision[10], and uses it to underline the differences between the common law and statutory privileges:

> The error made by the inquiry officer was in assuming that the intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit.
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> In my view, this comment shows that Carthy J.A. agreed that the second branch was not an importation of common law litigation privilege, but an enactment in its own right. His subsequent finding that, unlike litigation privilege, the statutory exemption did not terminate when the litigation terminated, is consistent with this view.[11]

[30] The Court then discusses the impact of this distinction on the question of waiver of statutory litigation privilege. The Court states:

> If, as Big Canoe establishes, the second branch of s. 19 is not a mere statement of the common law, but an enactment on its own, *the exemption surely would have to be waived by the person having such authority: the head*.[12] [Emphasis added.]
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> . . .
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> . . . Just as nothing in the language of s. 19 suggests that the exemption is terminated by the termination of the litigation, similarly there is nothing in the language or the context to suggest that the FIPPA exemption is terminated by the loss of the common law litigation privilege. They are two separate matters. . . .[13]
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> . . . Where through [the *Act*], documents are sought which fit the description in the second branch of s. 19, the question of whether they

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[8] This is a reference to *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above at footnote 3.
[9] at para. 27.
[10] Cited above at footnote 3.
[11] at paras. 27 and 28.
[12] at para. 37. The "head" of an institution has decision-making powers under the *Act*. Under section 62(1), these powers are often delegated to other staff within an institution.
[13] at para. 43

> are, or ever were, privileged at common law is not the test. The test is the definition in the section. . . .[14]

[31] Under this analysis, the Court has found that only an institution may waive statutory litigation privilege. Applying this interpretation, statutory litigation privilege has not been waived because, clearly, PHRC has not waived it.

[32] Moreover, even if the common law principles relating to settlement privilege did apply, I conclude that, for the reasons that follow, no basis for finding waiver is established here.

[33] Waiver of settlement privilege at common law is different than other types of waiver. By definition, settlement documents have been shared between parties who are otherwise adverse in interest with a view to settling their dispute. Accordingly, although privilege may be waived when the possessor of the privilege voluntarily discloses privileged information to a party outside the solicitor-client relationship, this cannot be the case for settlement documents or they would never be privileged under section 19.

[34] Settlement privilege does not prevent a party from relying on an executed agreement to prove the existence of a settlement where, for example, one of the parties subsequently attempts to litigate the dispute.[15] That circumstance does not exist here.

[35] The waiver of settlement privilege is addressed in *Hallman Estate (Re)*,[16] where the Court states:

> Settlement privilege is one which belongs to both parties to the communication, and *neither can unilaterally waive it*. . . .[17] [Emphasis added.]

[36] Applying this principle here, the consent of the former employees, even if it had been obtained, would not be sufficient to find that settlement privilege had been waived.

[37] For all these reasons, I find that waiver is not established in this case and therefore does not negate the application of section 19(c).

Does an exception to privilege apply?

[38] The appellant relies on *Moore v. Bertuzzi*[18] to suggest that "a blanket veto is not

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[14] at para. 46
[15] See *Leonardis v. Leonardis*, 2003 ABQB 577 at para. 3.
[16] 2009 CanLII 49643 (ONSC).
[17] *Ross River Dena Council v. Canada (Attorney General)*, [2009] Y.J. No. 7 (S.C.), para. 51.
[18] 2012 ONSC 3248.

always required when it comes to settlement privilege. Instead, the appellant states that partial information can be disclosed on a case-by-case basis." The appellant quotes a paragraph from this judgment in which the Court states:

> The case law establishes that settlement privilege is not absolute and that it admits of exceptions where the settlement agreement must be disclosed to non-settling parties.[19]

[39] As discussed above, *Big Canoe*[20] establishes that branch 2 is not an importation of common law privilege into the *Act*. *Moore v. Bertuzzi* explores common law exceptions to settlement privilege. The principles in *Big Canoe* therefore suggest that these common law exceptions would not apply to statutory litigation privilege.

[40] Even if that is not so, and the exceptions are to be considered, *Moore v. Bertuzzi* does not assist the appellant. It deals with exceptions to settlement privilege where disclosure is required to ensure fairness in litigation. The paragraph quoted by the appellant makes this clear, as it goes on to state:

> . . . an otherwise privileged settlement agreement must be immediately disclosed *when the agreement changes the adversarial orientation of the lawsuit or the court needs knowledge of the settlement in order to maintain the fairness and integrity of its process*. . . . [Emphasis added.]

[41] In addition, the Court finds, contrary to the appellant's statement, that ". . . settlement privilege is a categorical or class privilege, and therefore the master erred in treating it as a case-by-case privilege."[21]

[42] The circumstances in *Moore v. Bertuzzi* do not exist here. We are not in the midst of court proceedings where settlement privileged documents must be produced in order to ensure fairness.

[43] For all these reasons, I find the appellant's arguments relating to exceptions to privilege do not negate the application of section 19(c).

What is the impact of the public interest?

[44] As part of her waiver argument, the appellant submits that the ". . . former employer making decisions about how their information is released" is ". . . contrary to the transparency principles of the Information and Privacy Commissioner. There is no countervailing privacy interest in the circumstances and there is a strong public interest in this information."

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[19] para. 99.
[20] Cited above at footnote 4. See para. 28 of the judgment.
[21] at para. 12

[45] This could be construed as a reference to the public interest override in section 23 of the *Act*. However, section 23 does not include section 19 in the list of exemptions that can be overridden by a compelling public interest in disclosure.[22] This argument does not assist the appellant because section 23 cannot apply here.

[46] The appellant also attempts to rebut the application of settlement privilege by referring to the public interest in disclosure. Referring to *Moore v. Bertuzzi*,[23] the appellant states that a party seeking to do so ". . . will seek to show that the demands of justice require the disclosure of the settlement agreement." In this case, it appears that the "demands of justice" are, in the appellant's view, established by a public interest in disclosure.

[47] As already noted, the principles in *Big Canoe*[24] suggest that common law exceptions to settlement privilege would not apply to statutory litigation privilege. Moreover, and in any event, this statement in *Moore v. Bertuzzi* must be read in its context, which was a discussion of the demands of fairness within a civil lawsuit. This is not a reference to "justice" in a wider sense that would encompass the public interest in the manner suggested by the appellant.

[48] For all these reasons, I find that the appellant's public interest arguments do not negate the application of section 19(c).

Conclusion re section 19

[49] I find that the records are exempt under section 19(c) of the *Act*.

Did the institution exercise its discretion under section 19(c)? If so, should this office uphold the exercise of discretion?

[50] The section 19 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.

[51] 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

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[22] Section 23 of the *Act* states: "An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."
[23] Cited above at footnote 18. See para. 116 of the judgment.
[24] Cited above at footnote 4.

- it fails to take into account relevant considerations.

[52] With respect to its exercise of discretion, PRHC submits:

> It is important to PRHC that the "zone of privacy" afforded by the privilege be maintained and protected. In exercising the discretion under s. 19(c) to refuse access to the settlement documents, the [PRHC] considered that settlement negotiations in employment related matters could become more difficult or complicated in the future for a number of reasons if the [PRHC] disclosed the settlement documents in the cases of the named former employees.
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> First, the [PRHC] reasonably expects that settlement negotiations will be more delicate and hindered if employees cannot be confident that settlement discussions and agreements will remain confidential.
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> Second, the [PRHC]'s capacity to negotiate advantageous settlements in wrongful dismissal cases and to protect its financial interests in such negotiations would be more difficult if employees can know the terms and conditions of prior settlements entered by the [PRHC]. . . .
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> Finally, the [PRHC] wishes to take a principled approach in this area. The [PRHC] does not believe it would be coherent to grant access to settlement documents involving one employee and not another. The [PRHC] does not wish to create a bad precedent.

[53] The appellant submits that:

> . . . this disclosure is about holding the institution accountable for its decisions and the public funds that result from them. . . . [The institution] is using Section 19 to shield itself from the fallout from its leaders' questionable decisions. Therefore, the costs arising from those decisions should be shared, allowing some discretion but not full discretion.
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> . . .
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> Section 19 seems to focus on protecting the legal process, including legal advice. This request is seeking the end result of that process – the actual cost. Whether it is divided between severance, legal costs or ancillary benefits needs to be explained. A lump sum would be insightful and fulfill the purpose of the initial request.

[54] The appellant's representations focus on transparency. Although PRHC does not

refer to that as a consideration, the Court of Appeal addressed this issue in *Magnotta*:[25]

> . . . interpreting 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.[26]

[55] I am satisfied that PRHC took relevant considerations into account, and did not rely on irrelevant considerations. This applies to its decision to withhold the records in full, and also to refuse partial disclosure.

[56] While I appreciate the appellant's transparency arguments, they do not alter this outcome.

ORDER:

I uphold PRHC's decision to deny access to the records under section 19(c) of the *Act*. The appeal is dismissed.

Original Signed by: June 30, 2016
John Higgins
Adjudicator

[25] Cited above at footnote 1.
[26] at para. 36.