

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3474

Appeal MA17-2

City of Windsor

July 26, 2017

Summary: The appellant journalist made a request under the *Municipal Freedom of Information and Protection of Privacy Act* to the City of Windsor to disclose the amounts it paid to expropriate two properties. The city withheld the information, citing several exemptions from disclosure in the *Act*, including the solicitor-client privilege exemption in section 12. This order upholds the city's exercise of its discretion to withhold the requested information under the solicitor-client privilege exemption in section 12 of the *Act*.

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

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII), 2010 ONCA 681.

OVERVIEW:

[1] The City of Windsor (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a journalist for access to the amounts the city agreed to pay to named individuals for two properties it expropriated.

[2] The city denied access to the records citing sections 10(1) (third party information), 11(a), (c) and (d), (harm to city's economic or financial interests), 12 (solicitor-client privilege) and 14(1) (personal privacy) (relying particularly on the presumption at section 14(3)(f)) of the *Act*.

[3] The appellant appealed the decision. Mediation did not resolve the appeal and the appellant asked for the appeal to proceed to adjudication, where an inquiry is conducted.

[4] During the inquiry into the appeal, I sought and received representations from the city and the appellant. Representations were shared in accordance with IPC *Practice Direction 7*.

[5] This order upholds the city's exercise of its discretion to withhold the records at issue under section 12 of the *Act*.

RECORDS:

[6] The information at issue is the amounts the city agreed to pay to named individuals arising from the city's expropriation of two properties. The city identified two records as containing the information responsive to the request:

1. a Full and Final Release agreement dated October 12, 2016 (release agreement); and
2. an Acceptance of Offer (made pursuant to section 25 of the Expropriations Act) dated July 14, 2016 (offer of settlement).

DISCUSSION:

[7] The city's representations submit that section 12 of the *Act* provides a "complete and emphatic answer to the issue of access to the records". Given the city's position regarding the application of the solicitor-client privilege exemption in section 12, I will first consider whether section 12 applies to the records and, if it does, whether I should uphold the city's exercise of discretion to withhold the records under that exemption.

[8] The city also relies on the other exemptions listed above to withhold the records, so if I find section 12 does not apply, or do not uphold the city's exercise of discretion under section 12, I will proceed to consider the application of these other exemptions to the records.

[9] Section 12 states:

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 is a statutory privilege that applies where the records were “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.” The statutory privilege, although not identical to the common law privilege, exists for similar reasons.

[11] The city must establish that one or the other (or both) branches apply. In its representations, the city asserts Branch 2, specifically statutory litigation privilege, applies to the two records.

[12] Statutory 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, such as communications between opposing counsel.¹

[13] Of importance for this appeal, statutory litigation privilege protects records prepared for use in the mediation or settlement of litigation.² In particular, the Ontario Court of Appeal in *Magnotta* found that statutory litigation privilege encompasses confidential records used in or generated by settlement discussions between an institution and a third party, including records prepared by counsel for a private litigant.

[14] The Court in *Magnotta* also found that the branch 2 privilege extends to “contemplated” litigation. Like one of the records at issue in this appeal, the record in *Magnotta* was a settlement agreement that contained a confidentiality clause. The court stated:

Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records – both those prepared by Crown counsel and those prepared by Magnotta – fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch.

. . .

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

¹ *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

² *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII), 2010 ONCA 681 (*Magnotta*). *Magnotta* considered the solicitor-client privilege exemption in the *Freedom of Information and Protection of Privacy Act*; the reasoning has been adopted for the equivalent section in the municipal *Act* at issue in this appeal-see for example, Orders MO-3161 and MO-3092.

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."

[15] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.³

Parties' arguments

[16] The city refers to the Court of Appeal decision in *Magnotta* and its subsequent application by this office.⁴ The city submits that both records at issue are within the scope of the principle outlined in *Magnotta*.

[17] The city submits the release agreement was prepared by or for counsel employed or retained by an institution for use in an aspect of litigation, and that it is indistinguishable from the type of document in *Magnotta*.

[18] The city says the offer of settlement also is within the scope of the *Magnotta* principle. The city submits that the record was prepared by or for counsel employed or retained by an institution for use in an aspect of litigation and is meant to encourage or bring about settlement.

[19] The appellant does not directly address whether section 12 applies to the records. The appellant raises other arguments related to the city's exercise of discretion which I will address below.

Analysis and finding

[20] In light of the *Magnotta* decision, and subsequent decisions of this office, it is clear that branch 2 of section 12 of the *Act* includes records prepared for use in the mediation or settlement of actual or contemplated litigation.

[21] 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.⁵

[22] 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.

³ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (2002), 62 O.R. (3d) 167 (C.A.).

⁴ The city refers in particular to Order PO-3059-R.

⁵ Orders PO-2323, MO-2609.

[23] In this appeal, the records consist of a full and final settlement and legal release, and an offer of settlement made under section 25 of the *Expropriation Act*. The records were prepared by or for counsel to settle the issue of the expropriation of two properties by the city. The release agreement is a record of settlement; the offer of settlement includes offers that are intended to achieve or at least facilitate a final settlement.

[24] Considering the records themselves and the circumstances surrounding the creation of the records at issue, I am satisfied that litigation was reasonably contemplated when the records were created and that there was more than a vague or general apprehension of litigation. I also note that the appellant's evidence of media coverage about disputes related to the expropriations is consistent with my finding that litigation regarding the expropriations was reasonably contemplated, if the settlements at issue had not occurred. I am satisfied that the records at issue amount to agreements that were made in settlement of reasonably contemplated litigation regarding the expropriations. Accordingly, I accept that the records at issue were prepared by or for counsel for the city in contemplation of litigation, and are, therefore, subject to the settlement privilege component of the statutory litigation privilege of branch 2 of section 12. I also note that there is no evidence to suggest that privilege may have been lost through waiver.

[25] In summary, I find the two records at issue fall within the scope of the solicitor-client privilege exemption at section 12 of the *Act*.

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

[26] 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. In an appeal, the Commissioner may determine whether the institution failed to do so.

[27] 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; or it fails to take into account relevant considerations.

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

[29] I am satisfied that the city exercised its discretion. The city relies on the reasoning in *Magnotta*, where the court stated that the public policy interest in

⁶ Section 54(2).

maintaining confidentiality in documents that encourage and bring about settlement of litigation outweighed the public interest in disclosure. The city argues, and I accept, that this is also a full answer to the appellant's argument that the public have a right to know the amounts of the settlements.⁷ The city's representations demonstrate that it considered the public interest in exercising its discretion.

[30] This is not to say the city does not have a discretion to disclose information that falls within the scope of section 12. The city accepts it has this discretion, acknowledging in its representations the examples cited by the appellant where institutions, including the city itself, have previously disclosed information about the financial costs of expropriation settlements.

[31] However, the city's decision to withhold the records containing the settlement cost information in this instance is consistent with the purpose of section 12 as outlined above, and the city therefore has a legitimate basis for its decision to withhold the records. I am satisfied that the city did not base its exercise of discretion on irrelevant factors.

[32] I therefore uphold the city's exercise of discretion to rely on section 12 to withhold the records at issue.

[33] As I have found section 12 applies to the records and have upheld the city's exercise of its discretion, it is not necessary for me to consider the application of the other exemptions the city also relied on to withhold the records at issue.

ORDER:

I uphold the city's exercise of discretion to withhold the records at issue under section 12 of the *Act* and dismiss the appeal.

Original Signed by: _____
Hamish Flanagan
Adjudicator

July 26, 2017 _____

⁷ The public interest override in section 16 was not at issue in this appeal and cannot apply to information withheld under section 12.