Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3924-I

Appeal MA19-00610

City of Thunder Bay

April 30, 2020

Summary: The City of Thunder Bay (the city) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* for a settlement agreement that terminated a lease and resolved a lawsuit filed against the city. The city issued a decision to deny access to the requested record under the discretionary solicitor-client privilege exemption in section 12. In this interim order, the adjudicator finds that the record is exempt under section 12, but orders the city to re-exercise its discretion.

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

Order Considered: Order MO-1184.

Cases Considered: *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (2002), 62 O.R. (3d) 167 (C.A.); *Liquor Control Board of Ontario v. Magnotta Winery Corporation (Magnotta)*, 2010 ONCA 681; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The City of Thunder Bay (the city) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

> [T]he agreement terminating the lease between the city and [an identified individual (the affected person)].

[2] The city issued a decision to deny access to the requested record under the discretionary solicitor-client privilege exemption in section 12 of the *Act.*

[3] The requester, now the appellant, appealed the city's decision to this office and a mediator was appointed to explore resolution. As mediation did not resolve this appeal, it proceeded to adjudication, where an adjudicator conducts an inquiry.

[4] At adjudication, representations were sought and exchanged between the city and the appellant in accordance with section 7 of the IPC's *Code of Conduct* and *Practice Direction 7*.

[5] In this interim order, I find that the record is exempt under section 12, but I order the city to re-exercise its discretion.

RECORD:

[6] At issue is an agreement entitled, "Minutes of Settlement."

ISSUES:

A. **Does the discretionary exemption at section 12 apply to the record?**

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

DISCUSSION:

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

[7] 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.

[8] 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 institution must establish that one or the other (or both) branches apply.

Representations

[9] It is the city's position that both branches of section 12 apply to the record. However, the city focused its representations on the second branch of the exemption. It submits that the statutory litigation privilege in branch 2 of section 12 protects the record, which it states was prepared by its legal counsel in the course of litigation for use in the settlement of litigation.

[10] The city relies on the 2010 case of *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (*Magnotta*),[1] where the Ontario Court of Appeal found that mediated settlement records were exempt from disclosure because they fall within the second branch of section 12.[2]

[11] The city states that the record was negotiated and drafted by external legal counsel retained by the city, as well as the City Solicitor (who is employed as in-house legal counsel for the city) as a means to settle the litigation with all relevant parties, who were also represented by legal counsel throughout the litigation and settlement negotiations. It notes that the title of the record, "Minutes of Settlement," evidences settlement of the litigation. The city says that:

> …with respect to the record, it has always been the expectation of the city, that the record, and any exchange of documents between the parties throughout settlement discussions and negotiations, would remain confidential and subject to settlement privilege.

[12] The city provided publicly available information from news articles and an Environmental Review Tribunal (ERT) decision to demonstrate that the record is subject to section 12. It states that these news articles and ERT decision reveal that:

- The affected person sued the city for more than seven million dollars and sought, among other things, an injunction requiring the city to cease diverting necessary water flows away from the affected person's hydroelectric generator (the generating station).

- The affected person and the city were also engaged in litigation before the ERT, wherein a settlement agreement (the record) was entered into between the parties. The decision of this tribunal speaks to ongoing settlement discussions between the parties throughout the litigation before the tribunal and, ultimately, settlement with respect to this aspect of litigation.

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[1] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[2] In *Magnotta*, the court was dealing with section 19 of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), the provincial equivalent to section 12 of *MFIPPA*.

- Once the settlement agreement was entered into, the lease between the city and the affected person was terminated and the affected person's power generating facility ceased operation.

[13] The appellant submits that the record was not prepared for use in the settlement of litigation. He states that the record is a final, conclusive document prepared after negotiations successfully ended and, therefore, it should not be considered to be protected by statutory privilege. He states:

> The statutory privilege that attaches to the records preceding the preparation of the record sought is not applicable to this specific document. The record sought is, in my submission, a settlement agreement. It is a contract, executed by the parties at the conclusion of negotiations. It is not privileged.

[14] The appellant states that the dominant purpose of the record was to codify an agreement between the two parties that put litigation behind them. The appellant refers to a 1999 IPC order, Order MO-1184, in support of his submission that the record is not privileged within the meaning of section 12. Relying on this order, he submits that once an agreement was reached and the document was executed by the parties, no litigation privilege for this record was possible

[15] The appellant refers to the ERT decision referenced above that reads:

> In a decision reached this week, the Environmental Review Tribunal said the city and [the affected person] reached an agreement in March to terminate a 40-year lease, originally signed in [year].

[16] The appellant states that:

> …the concept of solicitor-client privilege evolved in common law and was codified in statute law to ensure that none of the parties to litigation could use the pre-settlement communications of the other side as ammunition in a revival of the litigation post settlement. I am not seeking communications from either party that led to the settlement. Instead, I have requested the text containing the details both parties agreed would constitute a binding settlement.

[17] The city did not provide reply representations.

Analysis/Findings

[18] Branch 2 of the section 12 exemption, relied upon by the city, 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."

[19] The 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.[3]

[20] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[4]

[21] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[5]

[22] I am satisfied that the record at issue is exempt under the branch 2 statutory litigation privilege.

[23] In *Magnotta*, referred to above by the city, the Court of Appeal held that records prepared for use in the mediation or settlement of litigation are exempt under the statutory litigation privilege in section 19 of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent of section 12 of the *Act*). The Court's rationale was stated in the following terms:

> Alternative dispute resolution now forms an integral part of the civil litigation process in Ontario. Various alternative dispute resolution methods have been incorporated into the litigation process as can be seen by reference to the Rules of Civil Procedure, which regulate and help define the parameters of the litigation process. The Disputed Records were delivered as part of a mediation. In *Rogacki v. Belz*,[6] at paras. 44-47, this court observed that mandatory mediation is a part of the litigation process. There is no principled reason to treat mandatory and consensual mediations differently when considering whether they are part of the litigation process. Furthermore, 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….

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[3] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[4] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[5] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (2002), 62 O.R. (3d) 167 (C.A.).
[6] *Rogacki v. Belz,* [2003] O.J. No. 3809, 232 D.L.R. (4th) 523, 41 C.P.C. (5th) 78, 125 A.C.W.S . (3d) 806 (C.A.).

> 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] Both the city and the appellant agree that the record is a settlement agreement entered into between the city and the affected person to settle ongoing litigation. This agreement was prepared by counsel employed by the city for use in the settlement of litigation. The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.

[25] The appellant relies on Order MO-1184 for the finding that settlement privilege does not extend past the conclusion of litigation. However, that order does not represent the current state of the law and has been superseded by the 2010 case of *Magnotta* and the 2002 findings in *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*.[7] These cases confirm that termination of litigation does not end the statutory litigation privilege in section 12 with regard to settlement records in particular.

[26] The record at issue in this appeal resulted in the settlement of both the ERT proceedings and the litigation before the Superior Court of Justice. I find that settlement privilege applies to the record. According to the *Magnotta* case, this privilege falls within branch 2 of section 12 and, as a result, the record is subject to section 12. I have not been provided with evidence that this privilege has been waived or lost.

[27] Therefore, subject to my review of the city's exercise of discretion, the record is exempt under section 12 of *MFIPPA*.

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

[28] 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.

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

[29] 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.

[30] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[8] This office may not, however, substitute its own discretion for that of the institution.[9]

[31] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[10]

- 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
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

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[8] Order MO-1573.
[9] Section 43(2).
[10] Orders P-344 and MO-1573.

- 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.

[32] The city submits that it has considered all relevant factors and that a proper weighing of the considerations was undertaken in the exercise of its discretion under section 12. It points out that the record does not contain the appellant's personal information.

[33] It is the city's position that the record falls within the limited and specific exemption under section 12 of *MFIPPA*, which it states seeks to protect the underpinnings of solicitor- client relationships. Additionally, it submits that the city and the affected person, as the parties to the litigation, have a right to privacy by virtue of settling disputes out of court through a private agreement, which should be protected.

[34] The city states that the appellant has not provided a sympathetic or compelling need to receive the information in the record. Furthermore, it states that forcing disclosure on the basis that city residents "have a right to know" would result in the city being unable to "assert any sort of privilege should a taxpayer request access to any document," thereby rendering the application of the section 12 exemption in *MFIPPA* inoperable.

[35] Finally, it states that the historic practice of the city concerning privileged documents is to maintain their privileged status through non-disclosure.

[36] The appellant states that the city's response reveals a blanket, rote approach to disclosure of records, which he submits is at odds with what Canadians expect from their governments.

[37] The appellant refers to a similar appeal where the city refused to disclose a lease agreement with a private sector company for the Port Arthur Stadium, a municipally-owned baseball field. The appellant states that by obtaining disclosure of the lease agreement in that appeal, an agreement he says is similar to the city's agreement with the affected person in this appeal, the public was able to discover that:

- the baseball team paid no rent to the city for the facility,
- the baseball team was given other concessions by the city relating to profits from the sales of goods during their baseball games, and
- taxpayers were underwriting the entertainment of purchasers of tickets to the baseball games and the profits of the baseball team.

[38] The appellant states that the stadium lease agreement was a matter of public

interest and that the disclosure became a widely disseminated news item in the local media.

[39] In this appeal, the appellant states that the affected person was suing the city for millions of dollars[11] and that the media viewed the lawsuit as a matter of public interest. The appellant is seeking to find out the following information related to the agreement that resolved the seven million dollar lawsuit against the city and provided for the early termination of a 40-year lease of a generating station:

- How much the city paid the affected person to get him to abandon his generating station
- Who paid for the removal of this facility?
- Does the settlement agreement allow the city to become owner of this facility and to operate it?

[40] The appellant submits that the city did not take into account these details about the public interest in its settlement with the affected person, which could be expected to be contained in the record.

[41] As noted above, the city did not provide reply representations.

Analysis/Findings

[42] The Commissioner may review an institution's exercise of discretion under section 12. The Supreme Court of Canada noted an institution's discretion under the solicitor-client privilege exemption in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[12] where the court determined that:

> ...the "head" making a decision under ss. 14[13] and 19[14] of the *Act* has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant

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[11] The appellant refers to the news article provided by the city, referred to above.
[12] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, (also referred to in this order as the *Criminal Lawyers'* case).
[13] The law enforcement exemption in *FIPPA*.
[14] Section 19 of *FIPPA*, the equivalent to section 12 of *MFIPPA*.

interests, including the public interest in disclosure, disclosure should be made.

The Duty of the "Head" (or Minister)

The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) provides that where an exemption is claimed, "the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions".

The Duty of the Reviewing Commissioner

The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis added; p. 11.]

….

The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

> In the case before us, the Commissioner concluded that since s. 23[15] was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's[16] decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion…

[43] As stated in the *Criminal Lawyers'* case, the city has a residual discretion under section 12 to consider all relevant matters, and it is open to the Commissioner to review the city's exercise of discretion. In this appeal, therefore, I am reviewing the city's exercise of discretion under section 12.

[44] In this case, I find that the city did not properly consider whether to disclose the record in the circumstances, notwithstanding the privilege attached to it.

[45] The record reflects the terms of the early termination of a 40-year city lease in response to a multi-million dollar lawsuit and a related ERT hearing.

[46] I find that the city did not consider the actual contents of the record, including the fact that it could reveal:

- The amount the city paid, from taxpayer funds, to resolve the seven million dollar lawsuit and to terminate the 40-year lease for the power generating station;
- If the city paid for the removal of the power generating station; and,
- Whether the city is now the owner and/or the operator of the power generating station.

[47] I find that, in not taking into account these relevant considerations, the city did not properly consider whether disclosure of the record would increase public confidence in the operation of the city, especially regarding the financial terms in the record related to the settlement of the seven million dollar lawsuit against it. As well, I find the city did not take into account the public interest in the record, as evidenced by the news article it provided concerning this lawsuit.

[48] In addition, I find that the city has fettered its discretion by indicating that:

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[15] The public interest override section in *FIPPA*.
[16] In that case, the Minister of Public Safety and Security, as the minister was then known.

> … by forcing disclosure on the basis that city residents "have a right to know" would result in the city being unable to "assert any sort of privilege should a taxpayer request access to any document", thereby rendering the application of the section 12 exemption in *MFIPPA* inoperable.

[49] In doing so, the city has taken into account an improper consideration: that by exercising its discretion in this case to disclose, it would be unable in the future to exercise its discretion under section 12 to withhold access to a record. This is not the case, and I find that this constitutes an error in the exercise of the city's discretion in applying section 12.[17]

[50] Therefore, I find that the city has not exercised its discretion in a proper manner. Accordingly, I will order the city to re-exercise its discretion under section 12.

ORDER:

1. I order the city to re-exercise its discretion under section 12 in accordance with the analysis set out above, and to advise the appellant and this office of the result of this re-exercise of discretion, in writing.

2. If the city continues to withhold all or part of the record, I also order it to provide the appellant with an explanation of the basis for re-exercising its discretion to do so and to provide a copy of that explanation to me.

3. The city is required to send the results of its re-exercise of discretion, and its explanation to the appellant, with a copy to this office, by no later than **June 2, 2020**. If the appellant wishes to respond to the city's re-exercise of discretion and/or its explanation for re-exercising its discretion to withhold information, he must do so within 30 days of the date of the city's correspondence by providing me with written representations.

4. The timelines noted in order provisions 2 and 3 may be extended if the city or the appellant is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.

Original signed by: April 30, 2020

Diane Smith
Adjudicator

[17] See Interim Order MO-2552-I.