

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3948-I

Appeal MA19-00610

City of Thunder Bay

August 21, 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 Interim Order MO-3924-I, the adjudicator found that the record was exempt under section 12 but that the city had not exercised its discretion in a proper manner and she ordered the city to re-exercise its discretion.

In this second interim order, the adjudicator reviews the city's re-exercise of discretion under section 12 and finds that it has not re-exercised its discretion in a proper manner. She orders it to re-exercise its discretion again.

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

Orders Considered: Orders MO-3474, and MO-3924-I.

Cases Considered: *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 and I conducted an inquiry.

[4] I then issued Interim Order MO-3924-I, in which I found that the record is a settlement agreement entered into between the city and the affected person to settle ongoing litigation and is exempt under section 12, but that the city had not exercised its discretion in a proper manner. I ordered the city to re-exercise its discretion under section 12 in accordance with the analysis set out in the order.

[5] The city re-exercised its discretion and continues to deny access to the record at issue. I received representations from the city and the appellant on the city's re-exercise of discretion.

[6] In this second interim order, I review the city's re-exercise of discretion under section 12 and find that it has not re-exercised its discretion in a proper manner. I order it to re-exercise its discretion again.

RECORD:

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

DISCUSSION:

Did the city re-exercise its discretion under section 12? If so, should this office uphold the re-exercise of discretion?

[8] 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.

[9] 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.

[10] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹ This office may not, however, substitute its own discretion for that of the institution.²

[11] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³

- 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
- 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.

[12] In Interim Order MO-3924-I, in finding that the city did not properly exercise its discretion, I stated:

¹ Order MO-1573.

² Section 43(2).

³ Orders P-344 and MO-1573.

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 ERT⁴ hearing.

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.⁵

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.

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

... 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.

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 12.⁶

⁴ Environmental Review Tribunal.

⁵ See paragraph 46 of Interim Order MO-3924-I.

⁶ See Interim Order MO-2552-I.

Representations

[13] In response to Interim Order MO-3924-I, the city re-exercised its discretion and decided to continue to deny access to the record. In support of its re-exercise of discretion, it provided the following submissions:

[T]he city submits that it did not fetter its discretion. Rather, it appropriately applied the solicitor-client exemption under *MFIPPA*, even in light of the facts and public interests articulated by the appellant and adjudicator in the present case (including interest in the terms of the settlement, including financial terms, media interest in the litigation, and local media coverage), and denied disclosure. It would be very difficult, indeed, if not impossible, to justify disclosure of the record, or any portion of it, in this case, on these grounds in addition to any assertion by a taxpayer that it "has a right to know"...

[14] The city states that it properly considered the public interest in protecting the solicitor-client relationship and protecting the confidentiality of privileged information, as embedded in the exemption at section 12, and it maintains that these factors clearly outweigh the public interest considerations, as articulated by the appellant and in Interim Order MO-3924-I.

[15] The city explains that in re-exercising its discretion to determine whether the record or any portion of it should be disclosed, the City Clerk reviewed the following documents:

- a. the order,
- b. her delegated authority as City Clerk, pursuant to by-law, to make decisions with respect to requests under *MFIPPA*, including the approval, denial, or severance of information from records;
- c. reports to Council regarding settlement of the litigation; and
- d. relevant minutes of meetings at Committee of the Whole and City Council.

[16] The city states that in reviewing these latter three documents, in particular, the City Clerk determined in deciding to maintain her decision to withhold the record, that there had not been an intention by Council to waive any privilege in the record, nor had there been any intention by Council to waive any privilege associated with any portion of the record.

[17] The city further states that:

In the alternative, if the IPC or any court were to determine that the appropriate analysis to be undertaken in an institution's exercise or re-

exercise of discretion is [as set out] in the order, the City Clerk too undertook this task and determined that the decision to withhold the record and all portions of it must be upheld. This decision is based on the following:

- the public interest override section of *MFIPPA* does not apply to section 12 (solicitor-client privilege),
- any public interest in the record, or any portion of it, including those identified at paragraph 46 of the Order, does not outweigh the purpose of section 12 (solicitor-client privilege), which is designed to protect the solicitor-client relationship and protect the confidentiality of privileged documents and communications,
- the public interest as articulated by the adjudicator and appellant, including increasing public confidence in the financial operations of the city and the fact that the settlement of litigation was covered by local media evidencing public interest, does not amount to a "compelling public interest",
- the public interest as articulated by the adjudicator and appellant do not outweigh the other relevant factors that the city considered in its initial decision to withhold the record, such as the record does not include any personal information of the appellant, and
- by protecting the confidentiality of the record and most, if not all, minutes of settlement that the city enters into, the city is upholding public confidence in its operations.

[18] In response, the appellant states that the fact section 12 is not subject to the public interest override is not dispositive of the matter. He also points out that section 12 is permissive, by which I understand him to mean that it is discretionary.

[19] The appellant states that the City Clerk is required to consider when exercising her discretion "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 appellant submits that this requires an analysis of the harm created by the release of the record. He also submits that in the absence of an analysis of the sensitivity of the record, the city has failed to properly address the requirements of the interim order and, by inference, failed to properly exercise its discretion.

[20] The appellant submits that by fixating on solicitor-client privilege, the city has failed to provide an analysis of the exercise of its discretion in accordance with considerations found to be relevant in the interim order. He points out that the city's response to the interim order does not analyze:

- why people would have more confidence in the city if the city remained silent about how much it paid the affected person.
- why revealing the amount paid to the affected person is not a matter of public interest after announcing in a news release that it had reached a settlement with him.
- the actual contents of the record, including the fact that it could reveal:
 1. 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;
 2. If the city paid for the removal of the power generating station; and,
 3. Whether the city is now the owner and/or the operator of the power generating station.”
 4. Why keeping the record confidential “is upholding public confidence in its (the city’s) operations”.

[21] In reply, the city states that by virtue of the record falling within the discretionary exemption of section 12, it is presumed there is a harm which would be suffered as a result of release of the record and that there is a public interest in preventing that harm.

[22] The city submits that there is no requirement that it consider the harm that would result from the release of the record, nor why non-release of the record would increase public confidence. Rather, the consideration the city states that it must take into account is whether the release would increase public confidence.

[23] The city relies on Order MO-3474, which concerned a request for disclosure received by the City of Windsor regarding the amounts paid by the City of Windsor to property owners in the context of an expropriation. In that appeal, Adjudicator Hamish Flanagan held that the statutory litigation privilege branch of section 12 of *MFIPPA* applied to the records. Regarding the City of Windsor's exercise of discretion in not releasing the records at issue, he stated:

I am satisfied that the city exercised its discretion. The city relies on the reasoning in *Magnotta*,⁷ where the court stated that the public policy interest in 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

⁷ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

of the settlements. The city's representations demonstrate that it considered the public interest in exercising its discretion.

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.

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.

[24] The city maintains that the purpose of section 12 is protection of the public interest and by not releasing the record; the city has appropriately exercised its discretion, as there is significant public interest in maintaining the confidentiality of the record.

[25] In sur-reply, the appellant states that the city has continued to fail to address the consideration concerning the nature of the information and the extent to which it is significant and/or sensitive to the institution. He reiterates that section 12 is permissive and that the city may release the record. The appellant submits that the city should be required to at least attempt to make the case about why the information is significant or sensitive to the institution. He states:

[This] requires the city to examine the harm that would result from the release of the settlement agreement. In my submission, it is insufficient to claim an inherent sensitivity to the record because it falls within section 12 without explaining why...

I remind you of the important requirement that it is not possible to properly exercise discretion without taking into account the particular and specific circumstances of an individual request. An institution cannot adopt a fixed rule or policy and apply it in all situations. This is what the City of Thunder Bay is doing here. To continue to do so constitutes a fettering of discretion and represents non-compliance with an institution's statutory responsibility when responding to a request for information.

Analysis/Findings

[26] Based on my review of the parties' representations, I find that the city did not re-exercise its discretion in a proper manner. In particular, I am not satisfied that the city took into account proper considerations in its re-exercise of discretion.

[27] In considering whether to re-exercise its discretion to disclose the record, the city properly relies on the finding in Order MO-3474 that recognizes that institutions, including itself, have a discretion to disclose information that falls within the scope of section 12. However, it fails to take into account that in that order, the adjudicator had been provided evidence that the institution considered the public interest in the record in exercising its discretion not to disclose the record. That is not the case in this appeal.

[28] In re-exercising its discretion to not disclose the record, I find that the city did not appropriately consider the contents of the record and the specific considerations outlined in Interim Order MO-3924-I, as well as the purposes of the *Act*. In particular, I find that that the city did not properly consider:

- One of the purpose of the *Act* that information should be available to the public;
- The nature of the information in the record and the extent to which it is significant and/or sensitive to it, the appellant or the affected person; and,
- Whether disclosure of the specific information in the record identified in Order MO-3924-I,
 - 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.⁸

would increase public confidence in the operation of the city.

[29] Furthermore, I find that the city fettered its discretion by determining that it could not exercise its discretion to disclose any information from the record because it determined that Council had not intended to waive privilege.

[30] As stated in Interim Order MO-3924-I, 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*,⁹ where the court determined that:

⁸ See paragraph 46 of Interim Order MO-3924-I.

⁹ *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*).

...the "head" making a decision under ss. 14¹⁰ and 19¹¹ 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 interests, including the public interest in disclosure, disclosure should be made. [Emphasis added by me].

[31] Contrary to the findings in the *Criminal Lawyers' case*, I find that in re-exercising its discretion, the city did not do so on the basis of the facts and circumstances of this particular case.

[32] In particular, although the city considered the public interest in protecting the solicitor-client relationship and protecting the confidentiality of privileged information, I find that the city did not consider the public interest in disclosure of each of the following items that may be contained in the record:

- 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.

[33] Accordingly, I am not satisfied that the city has now properly re-exercised its discretion concerning the record. Therefore, I am not upholding the city's re-exercise of discretion to withhold the record under section 12 and I am ordering it to re-exercise its discretion again.

ORDER:

1. I order the city to re-exercise its discretion again 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.

¹⁰ The law enforcement exemption in *FIPPA*.

¹¹ Section 19 of *FIPPA*, the equivalent to section 12 of *MFIPPA*.

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 **September 21, 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: _____
Diane Smith
Adjudicator

_____ August 21, 2020