

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-4008-F

Appeal MA19-00610

City of Thunder Bay

February 9, 2021

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 Orders MO-3924-I and MO-3948-I, the adjudicator found that the city had not exercised its discretion in a proper manner under section 12 (solicitor-client privilege) and she ordered the city to re-exercise its discretion.

In this final order, the adjudicator reviews the city's second re-exercise of discretion under section 12 and finds that it has now re-exercised its discretion in a proper manner. She upholds the city's re-exercise of discretion and finds that the record is exempt under section 12.

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-3924-I and MO-3948-I.

OVERVIEW:

[1] This is the third and final order considering the City of Thunder Bay's (the city) exercise of discretion under the discretionary solicitor-client privilege exemption in section 12 of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*). The record at issue is the minutes of settlement that resolved a seven million dollar lawsuit against the city related to the early termination of a 40-year lease of a generating station.

[2] The access request specifically sought:

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

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

[4] 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.

[5] I then issued Interim Order MO-3924-I (the first interim order), in which I found that the record, a settlement agreement entered into between the city and the affected person to settle ongoing litigation, 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.

[6] The city re-exercised its discretion and continued 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.

[7] I then issued a second interim order, Interim Order MO-3948-I (the second interim order). In that order, I reviewed the city's re-exercise of discretion under section 12 and found that it had not re-exercised its discretion in a proper manner. I ordered it to re-exercise its discretion again in accordance with the analysis in the second interim order.

[8] In response to the second interim order, the city continued to withhold all of the record and provided the appellant and me with an explanation of the basis for re-exercising its discretion to do so. The appellant provided a response to the city's explanation for re-exercising its discretion to withhold the record.

[9] In this final order, I review the city's second re-exercise of discretion under section 12 and find that it has now re-exercised its discretion in a proper manner. I, therefore, uphold the city's re-exercise of discretion and its decision to deny access to the record under section 12.

RECORD:

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

DISCUSSION:

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

The first interim order

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

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 ERT¹ 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.²

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

¹ Environmental Review Tribunal.

² See paragraph 46 of Interim Order MO-3924-I.

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 12.³

The second interim order

[12] In response to the first interim order, 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"...

[13] The city explained 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.

[14] The city further stated that there had not been any intention by Council to waive any privilege associated with any portion of the record.

³ See Interim Order MO-2552-I.

[15] The appellant pointed out that the city's response to the first interim order did 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".

[16] In reply, the city stated 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.

[17] The city submitted 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.

[18] I then issued the second interim order, Interim Order MO-3948-I, where I ordered the city to re-exercise its discretion again.

Representations of the city in response to the second interim order

[19] In response to Interim Order MO-3948-I, the city repeats and relies on the submissions it made in response to the first interim order, and states:

In re-exercising her discretion, the City Clerk reviewed the following documents:

- (a) Interim Order MO-3924-I and Interim Order MO-3948-I (including submissions);

- (b) By-law Number 54-2004;
- (c) The privileged document;
- (d) Past practice of the city with respect to minutes of settlement;
- (e) Confidential Reports to City Council regarding settlement of the litigation; and,
- (f) Relevant minutes of meetings at Committee of the Whole and City Council.

[20] The city states that it determined that for public policy reasons, mainly, the protection of documents created in the course of litigation with a private party and the ability of the city to offer confidence in that important process, that the city did not exercise its discretion to disclose the privileged document in whole or in part.

[21] The city submits that it exercised its discretion with consideration of relevant factors including the following:

- the public interest override section of *MFIPPA* does not apply to section 12 (solicitor-client privilege);
- any public interest in the privileged document does not outweigh the purpose of section 12 (solicitor-client), which is designed to protect the solicitor-client relationship and protect the confidentiality of privileged documents and communications;
- the public interest as articulated in the [second interim order] and by the 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 in the order and by the appellant do not outweigh the other relevant factors that the city considered in its initial decision to withhold the privileged document ...; and,
- the public policy interest in maintaining confidentiality in documents in their entirety to encourage and bring about settlement of litigation matters, which is encouraged by maintaining confidentiality in those settlement documents, outweighs a member of the public's interest in the information.

[22] The city provided an affidavit from its City Clerk, who makes decisions on access requests made to the city. The City Clerk detailed further specific considerations taken into account by the city in deciding not to exercise its discretion to provide access to the record. These considerations included:

- The privileged document is a document produced as a result of litigation as against the city and involves a private third party;
- The city has a legal obligation to the third party to preserve the privilege attached to the privileged document;
- The appellant is not a party to nor a participant in the proceedings and the information is not his own;
- The issue involved in the litigation was not a public matter, but a private dispute between the litigant and the city;

[23] In response to these representations, the appellant states that the city did not properly re-exercise its discretion. He submits that the city's response to the second interim order is silent on the public interest issues raised in the second interim order and remains fixed on the public interest in maintaining solicitor-client privilege. He further submits that the city has not undertaken a proper analysis of how solicitor-client privilege would be undermined or harmed by disclosure of the records.

[24] The appellant further states that I should ignore the city's submissions on the need to protect third-party information, as this issue was never raised by the city in prior submissions.

Analysis/Findings

[25] 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.

[26] 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.

[27] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴ I may not, however, substitute my own

⁴ Order MO-1573.

discretion for that of the institution.⁵

[28] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁶

- 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.

[29] Based on my review of the parties' representations in response to the second interim order, I find that the city did re-exercise its discretion in a proper manner. In re-exercising its discretion to not disclose the record, I find that the city did appropriately consider the contents of the record and the specific considerations outlined in Interim Order MO-3948-I, as well as the purposes of the *Act*.

⁵ Section 43(2).

⁶ Orders P-344 and MO-1573.

[30] In particular, I find that as directed in the second interim order, the city has now properly considered the facts and circumstances of this particular case and has also considered:

- One of the purposes of the *Act*, which is 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 a third party; and,
- The public interest in disclosure of each of the following items identified in both interim orders,
 - 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.⁷

[31] As well, I find the city has considered whether disclosure of this specific information would increase public confidence in the operation of the city.

[32] In this order, in considering the city's re-exercise of discretion, I may not substitute my own discretion for that of the city.

[33] I find that the city has also now considered the information I ordered it specifically to consider in Interim Order MO-3948-I, namely, that it could exercise its discretion to disclose information from the record despite city council not intending to waive privilege.

[34] In response to the appellant's submissions, I find that the city has undertaken a proper analysis of how solicitor-client privilege would be undermined or harmed by disclosure of the records. I also find no evidence to support the assertion that the city is now seeking to apply the third party information exemption in section 10(1) of the *Act*, as alleged by the appellant.

[35] Accordingly, I am satisfied that the city has now properly re-exercised its discretion concerning the record. Therefore, I uphold the city's re-exercise of discretion to withhold the record under section 12.

⁷ See paragraph 46 of Interim Order MO-3924-I.

ORDER:

I uphold the city's re-exercise of discretion and find that the record is exempt under section 12.

Original signed by: _____
Diane Smith
Adjudicator

February 9, 2021 _____