

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4098

Appeal MA19-00217

Niagara Peninsula Conservation Authority

August 25, 2021

Summary: This order deals with a request for access to a settlement agreement entered into by the Niagara Peninsula Conservation Authority (the NPCA) and a former employee. The NPCA denied access to the agreement, claiming the application of the discretionary exemption in section 12 (solicitor-client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In this order, the adjudicator finds that the settlement agreement is exempt from disclosure under section 12 of the *Act*. She upholds the NPCA's exercise of discretion and dismisses the appeal.

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-4006 and PO-3651.

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681, Ontario (*Public Safety and Security*) v. *Criminal Lawyers' Association* 2010 SCC 23 (CanLii).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Niagara Peninsula Conservation Authority (the NPCA) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for a "Release agreement" reached between the NPCA and a named individual including all terms, financial or otherwise.

[2] The NPCA located a record responsive to the request, a Memorandum of Agreement with three attached appendices, and issued a decision denying access to it, claiming the application of the mandatory exemption in section 14(1) (personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the NPCA's decision to the office of the Information and Privacy Commissioner/Ontario (the IPC).

[4] Prior to the commencement of mediation, the NPCA issued a revised decision to the appellant, claiming the application of the discretionary exemption in section 12 (solicitor-client privilege) in addition to section 14(1).

[5] During the course of mediation, the appellant advised the mediator that he was still seeking access to the record. Also during mediation, the NPCA issued a revised decision, noting that one of the appendices in the record (a press release) was now being withheld under section 15(a) (information published or available to the public) of the *Act*. The NPCA provided the appellant with the web address where he could access that appendix. As a result, that appendix is no longer at issue.

[6] The appellant confirmed receipt of the revised decision, but advised the mediator that he wished to pursue access to the withheld information. The appellant also advised the mediator that he believes the public interest override in section 16 of the *Act* applies to the withheld information.

[7] The file was then transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator assigned to the file sought and received representations from the NPCA.¹ The file was then transferred to me to continue the inquiry. The NPCA's representations were shared with the appellant. Portions of the NPCA's representations were withheld, as they met the IPC's confidentiality criteria set out in *Practice Direction 7*. I have taken these withheld portions of the representations into consideration in coming to my conclusions set out in this order. Representations were then sought and received from the appellant, as well as reply representations from the NPCA.

[8] For the reasons that follow, I find that the record is exempt from disclosure under section 12 of the *Act* and I uphold the NPCA's exercise of discretion. I dismiss the appeal.

RECORD:

[9] The record at issue is a Memorandum of Agreement with three attached

¹ By way of background, the NPCA advises that it is a provincial planning authority, managing the impact of human activities, urban growth and rural activities on the Niagara Peninsula Watershed.

appendices, totalling seven pages in all.

ISSUES:

- A. Does the discretionary exemption at section 12 apply to the record?
- B. Did the NPCA exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 12 apply to the record?

[10] 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.

[11] 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. In this case, the NPCA is relying on the litigation privilege in Branch 2 of section 12.

[12] 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 and common law privileges, although not identical, exist for similar reasons.

[13] 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.²

[14] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.³

² See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

³ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (*Magnotta*).

[15] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.⁴

Representations

[16] The NPCA submits that the entirety of the record constitutes information produced in contemplation of litigation, and that previous IPC orders have followed the Court of Appeal's decision in *Liquor Control Board of Ontario v. Magnotta Winery Corporation*,⁵ finding that "litigation" for the purposes of section 12 includes settlement discussions. It goes on to argue that the IPC has also previously held that in order for contemplated litigation to be established, "there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation."⁶

[17] The NPCA submits that the Branch 2 privilege therefore applies to the record, which is a full and final settlement and legal release between the NPCA and the named individual. It further submits that the record was prepared by the NPCA's legal counsel to settle the issue of the cessation of the individual's employment with the NPCA. It goes on to argue that prior to the creation of the record, it had a sound basis for believing that there was reasonably contemplated litigation between the NPCA and the individual, as well as contemplated litigation with other individuals and entities.

[18] The NPCA further submits that the record was created through a negotiation between counsel representing the individual and the NPCA's legal counsel. The NPCA states:

Similar to the facts in Interim Order MO-2609-I, the settlement agreement contains a confidentiality provision, the record was prepared by counsel for both parties and was entered into for the purpose of settling the issue of the cessation of the named person's employment with the NPCA. The NPCA submits that based on these facts, litigation was reasonably "contemplated," in fact, it was all but imminent, and well beyond a "vague or general apprehension of litigation."

[19] The NPCA also submits that the head of NPCA has not waived privilege over the record.. The record, the NPCA submits, was created by counsel for both parties and is clearly within the "zone of privacy" as established in *Magnotta*.

[20] The appellant submits that in the event that section 12 is found to apply to portions of the record, other portions of the record are not exempt from disclosure

⁴ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

⁵ See note 3.

⁶ See Interim Order MO-2609-I.

under section 12 and ought to be disclosed to him. The appellant also relies on Orders MO-2563 and MO-3844. He submits that in Order MO-2563, the adjudicator found that the allocation of taxpayers' money for the payment of senior level public sector salaries roused strong interest and attention, which meant that the public interest in disclosure of certain salary information was compelling. In Order MO-3844, the adjudicator agreed with the appellant in that case, finding that the NPCA was plagued by a management crisis and that the turmoil at the NPCA was of an epic proportion such that the public had a right to know exactly what management was doing regarding compensating themselves.

[21] The appellant further submits that he does not believe the record qualifies as being created for the dominant purpose of litigation, and that the NPCA has not demonstrated that litigation was contemplated. He states:

The NPCA has released many people since the release of the Auditor General's report, many of the releases are speculated to be a direct outcome of the epic mismanagement, no litigation has occurred. Just the opposite is true, from the public perspective the NPCA has shown no interest in litigation, despite what must be a well-documented chain of events that might warrant it.

Analysis and findings

[22] The issue before me is whether the statutory litigation privilege in Branch 2 of section 12 applies to the settlement agreement between the NPCA and the named individual.

[23] Both the courts and the IPC have found in previous decisions that records of the type sought by the appellant in this appeal, including settlement agreements, are exempt from disclosure under section 12 of the *Act* and the equivalent provision in section 19 of the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

[24] In the *Magnotta* decision, the Ontario Court of Appeal found that the statutory litigation privilege in section 19 of *FIPPA* protects records prepared for use in the mediation or settlement of litigation, including the end products of such mediation or settlement discussions, such as settlement agreements and minutes of settlement. The Court stated, in part:

. . . 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*, 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.

....

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. . . .⁷

[25] Orders issued by the IPC since *Magnotta* have found that records prepared for use in the settlement of contemplated litigation, including settlement agreements and minutes of settlement, are exempt from disclosure under the statutory litigation privilege in section 19 of *FIPPA* and section 12 of the *Act*.⁸

[26] For example, in Order PO-3651, I applied *Magnotta* and found that severance agreements reached between the Niagara Health Service (NHS) and some of its former employees were subject to the statutory litigation privilege in section 19 of *FIPPA*. The adjudicator stated, in part:

The Ontario Court of Appeal decision cited above in the *Magnotta* case found that records prepared for use in the mediation or settlement of litigation are exempt under the statutory litigation privilege aspect found in branch 2 of section 19. Based on the wording of section 19, this would extend to "contemplated" litigation. Similar to the information at issue here, the record in *Magnotta* was a settlement agreement. More particularly, in *Magnotta* the Court of Appeal found that the word "litigation" in the second branch encompasses mediation and settlement discussions.

....

. . . I am also satisfied that the information at issue consists of agreements that were made in settlement of this reasonably contemplated

⁷ *Ibid.*, paras 36 and 44.

⁸ Orders PO-3627, PO-3651, MO-3597 and MO-3924-I.

litigation, or records that were used in the settlement of the issues among the parties. Most of the records were prepared by counsel for the NHS or by counsel for the former managers. Other records were prepared by the NHS's human resources staff. In all cases, the information was prepared to settle the issue of the cessation of the employees' employment with the NHS. In other words, I find that all the records at issue were prepared for use in the settlement of contemplated litigation.⁹

[27] The record at issue in this appeal is a settlement agreement entered into between the NPCA and the named individual, a former employee of the NPCA. I am satisfied that the record was created as a result of negotiation between counsel representing the individual and the NPCA's legal counsel, relating to the cessation of the individual's employment. From my review of the parties' representations and the overall circumstances of the matter, including the involvement of counsel, I am also satisfied that there was reasonably contemplated litigation between the former employee and the NPCA, and that the parties entered into a settlement agreement to resolve this contemplated litigation. I find, therefore, that the settlement agreement was prepared by or for NPCA's legal counsel for use in litigation, as required by the statutory litigation privilege in Branch 2 of section 12 of the *Act*. In addition, I find that there is no evidence to suggest that the NPCA waived this privilege.

[28] In response to the appellant's representations, I note that Orders MO-2563 and MO-3844, relied on by the appellant, can be distinguished because the records at issue in those appeals dealt with the salaries of various employees of institutions, either contained in employment agreements or as stand-alone items. These records were not, as is the case here, settlement agreements. I further note that the appellant has raised the possible application of the public interest override in section 16 of the *Act*, in which certain exemptions do not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. Section 16 of the *Act* does not apply where a record is exempt from disclosure under the solicitor-client privilege in section 12.¹⁰

[29] Regarding the appellant's position that the record could be severed and portions disclosed to him, as I have found that the statutory litigation privilege in section 12 applies to the record as a whole, the record cannot be severed to disclose certain information to the appellant. To do so would be to order disclosure of information that is exempt under section 12.

[30] In sum, I find that the settlement agreement between the NPCA and its former

⁹ Paras 21 and 23.

¹⁰ I also note as an aside the Court of Appeal's finding that including settlement documents in the protection afforded by section 12 in fact advances the public interest, as it promotes the settlement of disputes.

employee is exempt from disclosure under section 12 of the *Act*, subject to my findings regarding the NPCA's exercise of discretion. In light of my findings, it is not necessary to determine whether any information in these records is also exempt from disclosure under the personal privacy exemption in section 14(1) of the *Act*, which was also claimed by the NPCA.

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

[31] 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 IPC may determine whether the institution failed to do so.

[32] In addition, the IPC 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.

[33] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution.¹²

[34] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹³

- 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, and 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,

¹¹ Order MO-1573.

¹² Section 43(2).

¹³ Orders P-344 and MO-1573.

- 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, and
- the historic practice of the institution with respect to similar information.

Representations

[35] The NPCA submits that it took relevant factors into consideration in exercising its discretion, including the fact that the appellant is not seeking his own personal information and does not have a compelling or sympathetic need to receive the information contained in the record. The NPCA further submits that it accepts that one of the main tenets of the *Act* is that information should be made public and that disclosure of the record would increase public confidence in its operation. However, it submits that these factors are outweighed by the age of the information, and the nature of the information and the extent to which it is significant and/or sensitive to the institution.

[36] The NPCA goes on to argue that the information in the record is recent. It also submits that it has been its historical practice to withhold all information relating to settlement agreements affecting the cessation of employment.

[37] The NPCA also submits that the public interest override in section 16 is not applicable where a record is exempt from disclosure under section 12. In the event that I find that section 12 does not apply to the record, the NPCA submits that while there may be some public interest in the details of the settlement agreement, this public interest is not enough to outweigh the legitimate privacy concerns of the affected individual. In addition, the NPCA argues, any public interest in the cessation of employment of the individual with the NPCA is satisfied by the public press release that it sent out.

[38] The appellant submits that in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,¹⁴ the Supreme Court of Canada stated the following regarding section 19 of the provincial *Act*, which is similar to the exemption in section 12 of the *Act*:

. . . the "head" making a decision under ss. 14 and 19 of the [provincial *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

¹⁴ 2010 SCC 23 (CanLii).

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.

The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) [the provincial *Act's* equivalent to section 4(2) of the *Act*] 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."

[39] The appellant further submits that the NPCA has been under intense public scrutiny for the past five years and has been widely criticized for straying far from its provincial mandate and employing management and HR practices that are questionable. The public interest in the terms of release of NPCA senior staff is "beyond" compelling because the public has a right to know if the NPCA is "running rampant and unchecked in our system of governance . . ." In addition, the appellant submits that the financial compensation agreed upon between the NPCA and the named individual could be severed and disclosed under section 4(2) of the *Act*.

[40] The appellant also argues that the NPCA does not appear to have a policy regarding its historical practice of withholding settlement agreements.

[41] In reply, the NPCA submits that it in exercising its discretion, it took the public interest in the records into account. In this case, it argues, the record was properly withheld as it was prepared in contemplation of litigation to settle a matter between the NPCA and the named individual. As was the case in *Magnotta*, the public interest in encouraging settlement of litigation trumped the public interest in transparency.

[42] The NPCA also submits that it severed and disclosed the press release (which formed part of the record) to the appellant.

[43] Lastly, the NPCA submits that while it does not have an internal policy regarding the disclosure of information relating to the cessation of employment for staff members, its historical practice has been to consistently withhold this type of information.

Analysis and findings

[44] Section 12 is a discretionary exemption, not a mandatory exemption. Even though the settlement agreement is exempt from disclosure under section 12, the *Act* clearly allows the NPCA to exercise its discretion to disclose this record after considering all relevant factors, including any public interest in disclosure. However, in this case, the NPCA has chosen to exercise its discretion in favour of withholding the records, which it is entitled to do, as long as it exercises its discretion appropriately. I cannot substitute

my own discretion for that of the NPCA.¹⁵

[45] Based on the NPCA's representations, I am satisfied that it exercised its discretion and did so properly in deciding to withhold the settlement agreement under section 12 of the *Act*. It took into account relevant considerations, including any public interest in disclosure, as well as the importance of litigation privilege. There is no evidence before me to suggest that the NPCA took into account irrelevant considerations or that it exercised its discretion in bad faith or for an improper purpose. As a result, I uphold the NPCA's exercise of discretion under section 12.

ORDER:

I uphold the NPCA's access decision and exercise of discretion, and I dismiss the appeal.

Original Signed By: _____
Cathy Hamilton
Adjudicator

_____ August 25, 2021

¹⁵ *Supra* note 9.