

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4174

Appeal MA19-00734

Niagara Peninsula Conservation Authority

March 9, 2022

**Summary:** Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the appellant sought access to the terms of release or termination settlement documents for some former senior-level employees of the Niagara Peninsula Conservation Authority (the NPCA). While the NPCA initially denied any access to responsive records and information, it revised its decision during the appeal process, granting partial disclosure to the appellant. This included additional disclosures at the adjudication stage in response to the findings in IPC Orders MO-4026 and MO-4098, which also involved the NPCA and similar or identical records. In this order, the adjudicator upholds the NPCA's denial of access to the information remaining at issue in this appeal, being a settlement agreement, which is exempt under the statutory litigation privilege in section 12 of the *Act*, and portions of an employment agreement, which are not responsive to the request. She dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 12 and 17.

**Orders and Investigation Reports Considered:** Orders MO-3844, MO-4026, and MO-4098.

### OVERVIEW:

[1] This order addresses an appeal under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), through which the appellant seeks additional information from the Niagara Peninsula Conservation Authority (the NPCA) about the terms of release and termination settlements of some former NPCA employees. For

reasons I describe in detail below, I find that through the additional disclosures it made during the adjudication stage, the NPCA has already disclosed to the appellant all of the information to which he is entitled under the *Act*. I dismiss the appeal.

[2] I begin by setting out the background to this appeal, and some events that occurred after the NPCA's initial access decision, which led to additional disclosures to the appellant.

## **BACKGROUND:**

### **The access request, the initial decision, and the appeal**

[3] In August 2019, the appellant made a request to the NPCA under the *Act* for access to the terms of release or termination settlement documents for four named former senior-level employees of the NPCA. (The appellant is not one of the named individuals.) These individuals are "affected parties" in this matter, as their interests may be affected by disclosure of the requested information. In this order, I will refer to these individuals as Affected Parties 1, 2, 3, and 4.

[4] In October 2019, the NPCA issued a decision denying the appellant's request in full. In support of its denial of access, the NPCA cited the exemptions at section 12 (solicitor-client privilege) and section 14(1) (personal privacy) of the *Act*.

[5] The appellant was dissatisfied with the NPCA's decision and filed an appeal with the Information and Privacy Commissioner/Ontario (IPC).

[6] During the IPC process, the parties engaged in mediation, during which the following occurred.

[7] The NPCA notified two affected parties of the appeal, in order to seek their views on disclosure of their information to the appellant. After this notification, the NPCA decided to grant the appellant partial access to the records relating to those affected parties, Affected Parties 3 and 4. The NPCA communicated its revised decision to the appellant in a February 2020 letter. The NPCA also clarified in other correspondence to the appellant that it had withheld portions of the records on the basis they are not responsive to the request.

[8] The appellant continued to take issue with the NPCA's decision to withhold other information under sections 12 and 14(1) of the *Act*, and based on a claim of non-responsiveness. As a result, the appeal proceeded to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*.

### **Adjudication stage of the appeal process**

[9] At the adjudication stage, the IPC adjudicator formerly assigned to this appeal

file noted that the current appeal and two other appeals then before the IPC involved the same or similar records. (All three appeals involved the NPCA.) Given this, in August 2020, the adjudicator wrote to the parties in the current appeal (the appellant and the NPCA) to advise that she would place this appeal file (Appeal MA19-00734) on hold pending the resolution of the two related appeals, which were at more advanced stages of the adjudication process.

[10] While the current appeal was on hold, the adjudication of the two related appeal files continued. Those appeals resulted in the following orders:

- Order MO-4026, issued March 16, 2021. This order addressed a request for the employment agreements and terms of release for several former senior-level employees of the NPCA, including Affected Party 3. The adjudicator ordered the partial disclosure of salary information, the "termination allowance," and other information contained in the agreements.
- Order MO-4098, issued August 25, 2021. This order addressed a request for access to a settlement agreement with Affected Party 2. The adjudicator upheld the NPCA's denial of access to this record, in full.

[11] In the time between the release of these two orders, the current appeal file (which was then still on hold) was transferred to me.

[12] After the release of these orders (and the lapse of the deadlines for requesting reconsideration of the orders), I contacted the NPCA and the appellant, through IPC staff, to set out some preliminary views and to discuss next steps in this appeal. While the appellant was not a party to either of the concluded appeals, it was my preliminary view that the findings in those orders are relevant to the issues in the current appeal.

[13] First, I noted that the two orders mentioned above addressed two of the records at issue in the current appeal.

[14] In particular, in Order MO-4026, the IPC ordered partial disclosure of the record concerning Affected Party 3. I advised the parties of my preliminary view that the ordered disclosure included information responsive to the appellant's request in the current appeal (i.e., for the "terms of release or termination settlement documents" relating to Affected Party 3).

[15] In light of this, the NPCA agreed to disclose to the appellant the responsive portions of the record concerning Affected Party 3 (i.e., the terms of release). It later provided the appellant and me with copies of that disclosure.

[16] In addition, in Order MO-4098, the IPC upheld the NPCA's decision to withhold, in full, the record relating to Affected Party 2 (a settlement agreement), on the basis of the solicitor-client privilege exemption at section 12 of the *Act*.

[17] Given these developments, I shared with the parties my preliminary view that the records relating to Affected Parties 2 and 3 ought to be removed from the scope of the current appeal.

[18] Neither party took issue with my preliminary view, or provided other reasons why it would be appropriate for me to continue an inquiry in respect of records that had already been the subject of adjudication by the IPC. I therefore removed those records from the scope of the appeal.

[19] Second, I expressed the preliminary view that the records remaining at issue in the current appeal (namely, the records relating to Affected Parties 1 and 4) are similar in form and content to the records that were adjudicated on in Orders MO-4026 and MO- 4098. In particular:

- The record relating to Affected Party 1 is a settlement agreement between the NPCA and that affected party. This record is similar to the settlement agreement (relating to Affected Party 2) that the IPC found to be exempt, in full, under section 12 in Order MO-4098.
- The record relating to Affected Party 4 is an employment agreement between the NPCA and that affected party. This record is similar to the employment agreements that the IPC addressed in Order MO- 4026. As noted above, in that case, the IPC ordered partial disclosure of the employment agreements, including the terms of release (which is described in Order MO-4026 as the “termination allowance”).

[20] In response to this second observation, the NPCA revised its position in respect of the record relating to Affected Party 4. Specifically, the NPCA decided to disclose to the appellant the portions of the employment agreement that contain the terms of release. The NPCA provided the appellant and me with copies of this disclosure.

[21] The NPCA maintained its decision to withhold the settlement agreement relating to Affected Party 1, in full, on the basis of the discretionary solicitor-client privilege exemption at section 12 of the *Act*.

[22] These additional disclosures at the adjudication stage are set out in the NPCA’s October 2021 revised decision to the appellant. After the NPCA issued this decision, I asked IPC staff to follow up with the appellant to clarify his position in this appeal in view of these developments. After several months without a response, I set a final deadline to hear from the appellant about his intentions with respect to the appeal. The appellant contacted the IPC in January 2022 to indicate he is not withdrawing the appeal.

[23] As a result, I removed the hold on this appeal, and continued the inquiry under the *Act*.

[24] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

[25] However, in this case, after considering all the circumstances, including the events described above, I decided to begin my inquiry by initially seeking representations from the appellant. Among other things, I asked the appellant to confirm my understanding of the facts, and to address my preliminary views, as set out above and described in detail further below.

[26] The appellant did not submit representations. In the circumstances, I decided it is unnecessary to seek representations from the NPCA to decide the issues in this appeal.

[27] For the reasons that follow, I dismiss the appeal.

## **RECORDS:**

[28] Remaining at issue in this appeal are two records: a termination settlement agreement between the NPCA and Affected Party 1, which the NPCA has withheld in full; and an employment agreement between the NPCA and Affected Party 4, which the NPCA has disclosed in part.

## **ISSUES:**

- A. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the record concerning Affected Party 1? Should the IPC uphold the NPCA's exercise of discretion under section 12?
- B. Are the withheld portions of the record concerning Affected Party 4 responsive to the appellant's request?

## **DISCUSSION:**

### **A. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the record concerning Affected Party 1? Should the IPC uphold the NPCA's exercise of discretion under section 12?**

[29] The record concerning Affected Party 1 is a termination settlement agreement between the NPCA and Affected Party 1. The NPCA withheld this record, in full, on the basis of section 12 of the *Act*.

[30] As noted above, in Order MO-4098, the IPC found that a termination settlement

agreement between the NPCA and another party is exempt, in full, under the statutory litigation privilege in section 12.

[31] Section 12 states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[32] The statutory litigation privilege is contained in the “second branch” of section 12. It applies to records “prepared by or for counsel employed or retained by an institution [...] in contemplation of or for use in litigation.” Termination of litigation does not end the statutory litigation privilege.<sup>1</sup>

[33] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.<sup>2</sup> This includes the end products of such mediation or settlement discussions, such as settlement agreements and minutes of settlement.<sup>3</sup>

[34] Whether litigation was reasonably in contemplation, and whether the records were prepared for use in mediation or settlement of such contemplated litigation, are questions of fact that must be decided in the specific circumstances of each case. In order for litigation to be reasonably contemplated, there must be more than a vague or general apprehension of litigation.<sup>4</sup>

[35] Order MO-4098 concerned a request for access to the settlement agreement between the NPCA and an individual whom I have described in this order as Affected Party 2. The adjudicator in that case was satisfied, from her consideration of the parties’ representations and the overall circumstances, that there was reasonably contemplated litigation between the NPCA and Affected Party 2, and that the parties entered into the agreement to resolve the contemplated litigation. She concluded that the settlement agreement at issue there was subject to the statutory litigation privilege in section 12.

[36] The request giving rise to the current appeal included a request for termination settlement documents for several senior-level employees of the NPCA, including Affected Party 2. Because of the finding in Order MO-4098, I have removed from the

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<sup>1</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (2002), 62 OR (3d) 167 (CA).

<sup>2</sup> *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII) (*Magnotta*).

<sup>3</sup> The IPC has applied the Court of Appeal’s findings in *Magnotta* to find settlement agreements and similar records exempt by reason of the statutory litigation privilege in section 12 of the *Act* and the equivalent section in the *Act’s* provincial counterpart: see Orders PO-3627, PO-3651, MO-3597, and MO-4006, among many others.

<sup>4</sup> See Order MO-1337-I, which has been followed in Orders PO-2323, MO-2609-I, and many others.

scope of this appeal the settlement agreement concerning Affected Party 2. What remains at issue is a settlement agreement between the NPCA and Affected Party 1, which the NPCA also withholds, in full, based on section 12.

[37] In the current appeal, I have not sought specific representations from the NPCA on its application of section 12 to the settlement agreement between the NPCA and Affected Party 1. However, in seeking representations in first instance from the appellant in this appeal, I shared my preliminary view about the common circumstances underlying the settlement agreement considered in Order MO-4098 and the one at issue here. I provided the appellant with a copy of that order. While the appellant does not bear the burden of establishing that the statutory litigation privilege in section 12 does not apply to the record, the common circumstances and other similarities between the two settlement agreements could inform my determination of whether the record before me was prepared for use in the settlement of reasonably contemplated litigation.

[38] I also provided the appellant with a copy of Order MO-4026, which (among other things) elaborates on some of the widely reported governance issues at the NPCA. These orders (along with another order that is discussed in Order MO-4026) set out important context for the NPCA records that have been the subject of various access-to-information requests, including the request at issue here.

[39] The adjudicators in these orders accepted the evidence before them (including public documents such as news articles and a report of the Auditor General of Ontario<sup>5</sup>) of widespread public concern over financial mismanagement and governance issues at the NPCA in late 2018. The adjudicator in Order MO-4026 described the management issues as follows:

These articles indicate that there was chaos and confusion at the NPCA during this period. To summarize briefly, in late November [2018], the CAO at the time fired the Director of Corporate Services then in early December the outgoing NPCA board fired the same CAO and appointed someone who was formerly the NPCA's clerk as the acting CAO. One of the articles provided by the appellant points out that the NPCA's clerk has no senior leadership experience. At the time, this acting CAO was on bereavement leave. She then rehired the former Director of Corporate Services, who was then appointed the interim CAO. He then promoted three NPCA employees to executive positions. It is this interim CAO's interim executive employment agreement and the three employees' agreements that are the subject of this request.

[40] In this order, the adjudicator quoted from Order MO-3844, which also concerned NPCA records and included the following comments about the events at the NPCA

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<sup>5</sup> Office of the Auditor General of Ontario, "Special Audit of the Niagara Peninsula Conservation Authority" (September 2018). Available online here: [http://www.auditor.on.ca/en/content/specialreports/specialreports/NPCA\\_en.pdf](http://www.auditor.on.ca/en/content/specialreports/specialreports/NPCA_en.pdf).

during this time period:

The appellant [in the appeal giving rise to Order MO-3844] provided numerous news articles, as well as an Auditor General's report, that indicate that there is public interest in the expenses and other costs incurred by the NPCA, including the salaries of NPCA staff. There has been concern over irregularities related to salary increases, as well as concern about the hiring and firing of key senior personnel, including related litigation involving the NPCA.

[...]

I find that the appellant has demonstrated that there is a compelling public interest in the salary information requested. I accept that not only are there financial mismanagement concerns at the NPCA, but also salary-related concerns about unfair hiring practices and improper compensation packages for the top administrators at the NPCA.

[41] The above extracts provide key background for the appellant's request in this case. To reiterate, the appellant seeks the terms of release and termination settlement documents of four former senior-level NPCA employees. The responsive records include termination settlement agreements executed between the NPCA and Affected Party 1, and between the NPCA and Affected Party 2. As the appellant is no doubt aware, both affected parties are among those individuals whose employment arrangements with the NPCA have been the subject of widespread public interest, and—in at least one case—actual litigation involving a former senior-level employee.

[42] These circumstances informed the adjudicator's decision in Order MO-4098 that there was reasonably contemplated litigation between the NPCA and Affected Party 2. As a result, she found in that order that statutory litigation privilege applies to the termination settlement agreement with Affected Party 2. Taking into account the common underlying circumstances and other shared features of the two settlement agreements, including that both agreements were entered into to settle reasonably contemplated litigation, I formed the preliminary view that it was open to the NPCA to withhold the termination settlement agreement with Affected Party 1 on the same ground of statutory litigation privilege. Although I invited the appellant to address my preliminary views on this record and the circumstances of its creation, he did not do so.

[43] Therefore, despite the fact that I have not asked the NPCA for representations, I am satisfied, based on the above, that the statutory litigation privilege in section 12 of the *Act* applies to the settlement agreement between the NPCA and Affected Party 1. This is because, based on the background described above and my own review of the record, I accept that the agreement was executed between the parties in the settlement of reasonably contemplated litigation. There is no evidence that the privilege has been waived.



[44] There is also no evidence that the NPCA improperly exercised its discretion under section 12. While the solicitor-client privilege exemption is discretionary, the NPCA has in this case applied the privilege to withhold the settlement agreement in full, as it is entitled to do. The appellant has not led any evidence to suggest the NPCA failed to exercise its discretion or that it erred in its exercise of discretion under section 12, and I see no basis for finding that it has.

[45] For these reasons, I uphold the NPCA's denial of access to the settlement agreement between the NPCA and Affected Party 1 under section 12 of the *Act*.

**B. Are the withheld portions of the record concerning Affected Party 4 responsive to the appellant's request?**

[46] As noted above, during the adjudication stage, the NPCA disclosed to the appellant additional portions of the record relating to Affected Party 4. Specifically, the NPCA disclosed the entirety of the clause titled "Termination" in the employment agreement between the NPCA and Affected Party 4.

[47] As described in detail above, the NPCA made this disclosure after the release of Order MO-4026, in which the NPCA was ordered to disclose, among other things, the portion of an employment agreement addressing the "termination allowance" for an individual whom I have described in this order as Affected Party 3. After discussion with the IPC, the NPCA decided to disclose to the appellant in the current appeal additional portions of the employment agreement with Affected Party 4, in a manner consistent with the direction in Order MO-4026.

[48] Again, the request giving rise to the current appeal is a request for the "terms of release or termination settlement documents" of some named former employees of the NPCA. The responsive records include the NPCA's employment agreements with Affected Party 3 and with Affected Party 4. Because of the findings in Order MO-4026, the matter of access to the "terms of release" for Affected Party 3 is no longer at issue in this appeal. Neither are the portions of the employment agreement with Affected Party 4 that the NPCA has now disclosed to the appellant. As mentioned, this disclosure consists of the entirety of the section of the agreement titled "Termination."

[49] As a result, the only portions of the employment agreement with Affected Party 4 that remain issue are those that the NPCA has withheld on the ground they are not responsive to the appellant's request. Because he has pursued his appeal of the NPCA's revised decision, I understand the appellant to be challenging the NPCA's denial of access to these portions of the employment agreement.

[50] I have reviewed the record, and I agree with the NPCA that the withheld portions are not responsive to the appellant's request, which is clear on its face. The NPCA has already disclosed to the appellant the portions of the employment agreement that address his request for the "terms of release or termination settlement documents"

for Affected Party 4. The remaining portions of the employment agreement address other matters entirely, and do not “reasonably relate” to the request.<sup>6</sup> I find, as a result, that the NPCA appropriately identified these portions as non-responsive to the request, and I uphold the NPCA’s decision to deny access to them on this ground.

[51] Although given the opportunity, the appellant did not provide any basis to challenge the NPCA’s decision in respect of this record, or to suggest that other responsive records may exist.

[52] For all the reasons given above, I uphold the NPCA’s revised decision in full. I dismiss the appeal.

**ORDER:**

I dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Jenny Ryu  
Adjudicator

\_\_\_\_\_ March 9, 2022

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<sup>6</sup> Orders P-880 and PO-2661.