

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-2828-F

Appeal MA11-451

City of Thunder Bay

January 14, 2013

Summary: In Order MO-2804-I, the adjudicator found that records relating to the settlement of a threatened lawsuit brought against it by the proponent of a wind farm development were exempt under section 12 (solicitor-client privilege) on the basis that they were subject to settlement privilege. The city was ordered to re-exercise its discretion and advise the appellant and this office of the result. The city denied access to the records. In this decision, the city's exercise of discretion to deny access on the basis that they are exempt under section 12 is upheld.

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

Orders and Investigation Reports Considered: MO-2804-I and P-58

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

OVERVIEW:

[1] On October 24, 2012, I issued Interim Order MO-2804-I in which I upheld the application of the discretionary solicitor-client privilege exemption in section 12 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the records that were the subject of an access request and appeal. As part of the order

provisions of Interim Order MO-2804-I, I also ordered the City of Thunder Bay (the city) to exercise its discretion with respect to granting access to the records found to be exempt under section 12 and advise the appellant of the outcome of that exercise of discretion within a specified period of time. The appellant was then allowed time to respond to the city's submissions.

[2] Both parties have availed themselves of the opportunity to provide me with representations respecting the city's initial decision to exercise its discretion to deny access to the responsive records, as well as its re-exercise of discretion to refuse access to the records. In this final order, I will evaluate the appropriateness of that determination, taking into consideration all of the facts and circumstances present in this appeal.

[3] In this order, I uphold the city's re-exercise of discretion to not disclose the information at issue in this appeal.

DISCUSSION:

[4] In Interim Order MO-2804-I, I ordered the city to re-exercise its discretion with respect to the records found to be exempt under section 12 and included the following directions as to the manner in which that exercise was to be undertaken:

I will, accordingly, order the city to exercise its discretion and, if it chooses to decline to disclose the records that are subject to exemption under section 12, I will require it to provide me with representations explaining how and why it made that determination. The city is encouraged to specifically address the following considerations in its submission:

- the public interest in the disclosure of the records;
- whether disclosure will increase public confidence in the city;
- that some of the records, in whole or in part, may otherwise be publicly available or available in other records that have been disclosed; and
- that any necessary exemptions from the right of access should be limited and specific.

[5] The city has provided me with extensive and detailed representations describing its rationale for exercising its discretion not to disclose the requested records in this appeal. It begins by pointing out that the records at issue are subject not only to solicitor-client privilege on the basis that they are confidential communications between a solicitor and client, but that they are also subject to settlement privilege. The city

argues that the criteria for this head of privilege was described by the Divisional Court, and upheld by the Ontario Court of Appeal, in *Liquor Control Board of Ontario v. Magnotta Wineries Corporation*, 2010 ONCA 681.

[6] The city submits that all of the records at issue were found to be exempt under the statutory branch 2 aspect of litigation privilege under section 12 and that Order MO-2804-I determined that “they were prepared by or for counsel employed by the City in contemplation of or for use in litigation and/or mediation or settlement of actual or contemplated litigation.” It goes on to conclude that “[T]his finding is entirely consistent with the wording of the exemption and the interest it seeks to protect.”

[7] The city also states that the records do not contain the appellant’s personal information and that he was not a party to the litigation that gave rise to the creation of the records. It also refutes the arguments made by the appellant in favour of the public disclosure of the records on the basis that city residents “have a right to know” by pointing out that this would result in the city being unable to “assert any sort of privilege should a taxpayer request access to any document”, and thereby render the application of the section 12 exemption in the *Act* inoperable.

[8] The city concludes this portion of its representations by arguing in support of the public policy that exists in encouraging settlement of litigation which was recognized by both levels of court in *Magnotta* and that this interest “trumps the public policy interest in the transparency of government action.”

[9] The appellant has also provided me with extensive representations in response to the submissions of the city regarding the manner in which it decided to re-exercise its discretion not to disclose the records. The appellant begins by describing the context in which the original request for access to the records was made and the fact that the organization which made the request is opposed to the city’s support of a wind farm project on leased public land. The appellant argues that the records sought in this appeal lack the sensitivity of the records at issue in *Magnotta* or those at issue in *Ontario (Attorney General) v. Big Canoe* [2006] O.J. No. 1812 (Div. Ct.) and that the city’s statement that there is a “blanket exemption” that applies to all documents included in “a folder called settlement documents” is inappropriate.

[10] In response to this argument, I note that I reviewed each of the individual documents in Order MO-2804-I which were claimed to fall within the ambit of settlement privilege by the city and confirmed that they qualified for exemption on that basis. It is not necessary for the city to demonstrate that “the records requested contain personal information, expressly confidential information or sensitive Crown information”, as is asserted by the appellant. Rather, in order to establish the application of the section 12 exemption, the city is required to satisfy me that the records fall within the established criteria set out in the tests which were described in the Notice of Inquiry provided to the parties. In my decision in Order MO-2804-I, I

determined that the records qualified for exemption under section 12 on the basis that they were subject to settlement privilege and I have not been persuaded that this determination was incorrect.

[11] The appellant also relies on certain public interest arguments in support of his contention that the city's exercise of discretion was not made in an appropriate fashion. He suggests that City Council may not have been apprised of all the facts when it decided to refuse to disclose the records and that the records contain information that significantly impacts a number of people who are interested in the manner in which the wind farm proponent will use the city land. The appellant argues that there has been a lack of transparency in the conduct of the negotiations with the proponent and that disclosure of the information is necessary to ensure that the public interest is represented in the approval process for this project.

[12] Essentially, the appellant is seeking to make arguments in favour of a finding that there exists a compelling public interest in the disclosure of the records, despite the fact that the public interest override provision in section 16 has no application to records found to be exempt under section 12. He appears to be taking the position that the city has not adequately taken into account the fact that there is a great deal of interest in the wind farm project that is under discussion in the records. The basis for his arguments appear to be that the public ought to have access to this information to ensure that all points of view are considered before granting approval for the project.

CONCLUSION:

[13] 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.

[14] 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.

[15] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

[16] I have carefully reviewed the city's explanation in support of its decision to continue to withhold the information at issue in the requested records. I find that the city re-exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations. These relevant considerations include the fact that the records are subject to settlement privilege and that this privilege has been recognized by the courts in *Magnotta* as being a significant and important part of the litigation process. The records at issue in this appeal relate exclusively to the city's potential liability in a threatened legal proceeding brought against it by the wind turbine project's proponent. They consist of a wide assortment of documents, some of which are publicly available from land registry records, such as deeds, leases and other agreements registered on title. These documents continue to be available to any member of the public and are not otherwise inaccessible if disclosure does not take place as a result of this request and appeal.

[17] My ability to review the city's exercise of discretion is circumscribed by the limitations placed on me by the applicable law. As stated by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23, [2010] 1 S.C.R. 815, at paragraphs 68 and 69:

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 by the court].

[18] I determined in Interim Order MO-2804-I that the section 12 exemption was properly claimed and have now determined that the city has properly exercised its

discretion to claim the exemption in the circumstances. As noted above, it is my responsibility to ensure that the city's exercise of discretion was reasonable, taking into account all of the circumstances present in this appeal. I conclude that the city's decision to exercise its discretion not to disclose the records was reasonable. Accordingly, I will uphold the city's decision that the information at issue in this appeal is exempt by reason of section 12 of the *Act*.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed by: _____
Donald Hale
Adjudicator

_____ January 14, 2013