Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-3045-I

Appeal MA12-461

Halton Region Conservation Authority

May 7, 2014

**Summary:** The appellant made a request to the Halton Region Conservation Authority (the conservation authority) for access to records relating to proposed land development in the Town of Milton (Milton) and for a fee waiver. The conservation authority granted access to some records, but denied the appellant's request for a fee waiver. It also denied access to other records, claiming the application of the discretionary exemptions in sections 11(a) (valuable government information), 11(c) (economic and other interests), and 12 (solicitor-client privilege) of the *Act.* During the mediation of this appeal, the conservation authority advised the mediator that it was claiming the application of both branches of section 12 to all of the records, and also raised the application of the mandatory exemption in section 10(1)(a) (third party information), and the discretionary exemptions in sections 11(e) (economic and other interests), 7 (advice or recommendations) and 6(1)(b) (closed meeting) to some of records. The appellant raised the possible application of sections 5(1) (obligation to disclose) and 16 (public interest override), and appealed the fee estimate as well as the denial of a fee waiver.

In this order, the adjudicator upholds the conservation authority's decision with respect to section 12 of the *Act* and its denial of a fee waiver. Its exercise of discretion and decision regarding the application of section 11 is not upheld. The adjudicator is unable to consider section 5(1) of the *Act*. As a result of the records being exempt under section 12, it was not necessary to consider the fee estimate.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 5(1), 11, 12, 45(4), *Regulation 823*, s.8.

**Cases Considered:** *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

## OVERVIEW:

[1] This order deals with an appeal of a decision made by the Halton Region Conservation Authority (the conservation authority) regarding access to records relating to proposed land development in the Town of Milton (Milton). Both the conservation authority and the appellant provided background information regarding the proposed development.

[2] In January of 2007, a group of landowners (the landowners) applied for planning permission for urban developments to be located in Milton. For the developments to proceed, Milton required the preparation of a Subwatershed Impact Study (SIS), which is a technical engineering and environmental assessment of the proposed development area that informs the planning process. The conservation authority is a commenting agency to Milton on the SIS, and also has a memorandum of understanding with Halton Region to provide peer review advice on a number of engineering and natural heritage related issues. In addition to the SIS review, the landowners also required the conservation authority's regulatory approval of the re-alignment of several watercourses and the removal of some wetlands, including two watercourses and associated wetlands referred to as "NW-1-D" and "NW-1-E."

[3] In 2010, the landowners appealed their planning applications to the Ontario Municipal Board (OMB) on the basis that Milton had failed to make a decision within the proscribed timeline under the *Planning Act*. The conservation authority is a party to the OMB proceedings. The appellant is a participant in the proceeding, as well, although not a party. As part of the OMB process, the parties (Milton, the landowners, Halton Region, the Niagara Escarpment Commission and the conservation authority) have been involved in ongoing OMB ordered mediation and settlement discussions.

[4] The conservation authority's role in the mediation/settlement discussions has focused on working with the landowners, their technical consultants and the other parties to narrow the technical issues associated with the SIS and development proposals. In March of 2012 the conservation authority, with board approval, determined that the technical information provided to that date was sufficient for it to support in principle the relocation of NW-1-D and minor enhancements to NW-1-E. The conservation authority states that all of the records at issue were written or "assembled" after January 5, 2011, which is the date that it retained legal counsel to deal with the OMB appeal process.

[5] The appellant also provided me with background information, as follows. The landowner's application is for permission to build approximately 1200 homes, a hotel/conference centre, business park and other facilities in the Milton Heights

neighbourhood. Currently, there are approximately 125 homes in this former hamlet, located at the foot of the Niagara Escarpment. Correspondence from the conservation authority to Milton between 2005 and 2010 in response to the SIS illustrates that it consistently voiced strong opposition to the relocation of NW-1-D and the removal of wetlands. In March of 2012, the conservation authority's board of directors voted to support in principle the relocation of NW-1-D and the removal of the wetlands along NW-1-D and E. The appellant describes this as a "dramatic 180 degree turn," and indicates that she made this access request to assist in understanding why the conservation authority changed its position so dramatically.

[6] This order disposes of the issues raised as a result of an appeal of the access decision made by the conservation authority in response to the appellant's request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

1) Re: NW-1-D, NW-1-E and the wetlands on the [named] property:

- A copy of "Report #CHBD 02 12 10" referred to on page 6 of the minutes of the Conservation Halton Board of Directors Meeting 02 12, held on March 22, 2012;

- If "CHBD 02 14" noted on page 6 of the minutes referred to above is a report, a copy of that report;

- Copies of any notes of observations and conversations, emails, reports, letters, meeting minutes and other documentation related to this issue and prepared by Conservation Halton since August 27, 2010, i.e. subsequent to Conservation Halton's August 27th, 2010 letter to [named individual] of the Town of Milton re the SIS for Areas 1, 2, 3 & 4 and Revised Report (November 2009); and

- Copies of any correspondence/communication with the Canadian Pacific Railway (CPR).

2) Re: any outstanding items/concerns Conservation Halton has with the Subwatershed Impact Study (SIS):

- A copy of the table referred to in the minutes of the March 22, 2012 meeting of the Board of Directors. Those minutes refer to the table as "Summary of Outstanding Conservation Halton Items/Request for Milton Heights SIS /Planning Applications, February 2012;" and

- Copies of any notes of observations and conversations, emails, meeting minutes, reports, letters and other documentation prepared by Conservation Halton subsdividison August 2, 2010 regarding Conservation Halton's position and concerns/issues regarding the SIS.

3) Any other documents prepared since August 27, 2010 which are not covered in 1) and 2) above, which are contained in Conservation Halton's File MPR 386, and which are relevant to the proposed development, the SIS and Redside Dace:

- Including but not limited to copies of emails, letters, notes of conversations and meetings involving the Department of Fisheries and Oceans, the Ministry of Natural Resources, the Ministry of the Environment, the Canadian Pacific Railway (CPR), the Niagara Escarpment Commission and the Region of Halton.

4) the minutes referred to previously refer to the "Subwatershed Management Study (SWMS)".

[7] In response to the request, the conservation authority issued a fee estimate and interim access decision to the appellant, as well as a notice of time extension. In response, the appellant sent a letter and email to the conservation authority in which she revised her request and asked for a fee waiver, citing a number of reasons for the waiver. The conservation authority subsequently issued a revised fee estimate and denied the request for a fee waiver. The fee for non-third party records was $156.00. The appellant subsequently paid that fee and received those records. The fee estimate quoted for the third party records was $577.00.

[8] With respect to the fee waiver request, the conservation authority acknowledged that the records requested would be of some public interest, but stated that the records requested do not pertain to matters that put public health and safety in jeopardy. The request for a fee waiver was denied.

[9] The conservation authority subsequently issued its access decision with respect to the balance of the records (i.e. the records it had referred to as "third party records"). It denied access to the records, claiming the application of the discretionary exemptions in sections 11(a) (valuable government information) and (c) (economic and other interests), and 12 (solicitor-client privilege) of the *Act.*

[10] The appellant then filed an appeal of the conservation authority's decision to this office. During the mediation of the appeal, the conservation authority advised the mediator that it was claiming the application of both branches of section 12 to all of the

records, and also claiming the application of the mandatory exemption in section 10(1)(a) (third party information), as well as the discretionary exemptions in section 11(e) (economic and other interests), 7 (advice or recommendations) and 6(1)(b) (closed meeting) to some of the records.

[11] The appellant removed several records from the scope of the appeal, but also advised the mediator that she was of the view that, due to a public safety issue, the conservation authority should disclose the remaining records under section 5(1) (obligation to disclose) of the *Act.* She also confirmed that the appeal is in relation to all of the exemptions claimed, the fee estimate and the denial of a fee waiver. In addition, the appellant raised the possible application of the public interest override in section 16.

[12] The appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I received representations from the conservation authority, the appellant and six affected parties. Representations were shared in accordance with this office's *Practice Direction 7*. The conservation authority did not make any representations on the application of section 11 of the *Act*. The appellant advised in her representations that she was no longer disputing how the fee for the records that were disclosed to her was calculated and this issue is, accordingly, resolved.

[13] For the reasons that follow, I uphold the conservation authority's decision with respect to section 12 of the *Act* and its denial of a fee waiver. However, I do not uphold its exercise of discretion and the decision regarding the application of section 11. I am unable to consider section 5(1) of the *Act*. Lastly, as a result of the records being exempt under section 12, it is unnecessary for me to consider the fee estimate issued by the conservation authority in regard to these records.

## RECORDS:

[14] There are 108 records, consisting of reports, studies, reviews, peer review comments, surveys, maps, emails, staff notes, memoranda, correspondence, agendas, minutes of meetings, issues lists, and terms of reference.

## ISSUES:

A: Did the institution have an obligation to disclose the records under section 5(1)?

B: Does the discretionary exemption at section 11 apply to the records?

C: Does the discretionary exemption at section 12 apply to the records?

D: Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

E: Should the fee be waived?

## DISCUSSION:

### Issue A: Did the institution have an obligation to disclose the records under section 5(1)?

[15] Section 5(1) states:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

[16] Section 5(1) is a mandatory provision which requires the head to disclose records in certain circumstances. In Order 65, former Commissioner Sidney B. Linden found that the duties and responsibilities set out in section 11(1) of the provincial *Act* (the provincial equivalent provision to section 5(1) of the municipal *Act*) belong to the head alone. I concur with former Commissioner Linden's interpretation and adopt it in this appeal. As a result, I do not have the jurisdiction to make an order pursuant to section 5(1) of the *Act*. Therefore, I am unable to consider this section in this order and will not comment on it any further.

### Issue B: Does the discretionary exemption at section 11 apply to the records?

[17] The conservation authority has claimed the application of sections 11(a), (c) and (e) to some records.

[18] Section 11 states, in part:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;

> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

[19] The purpose of section 11 is to protect certain economic interests of institutions. Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act.*[1]

[20] The conservation authority did not make any representations on the application of this exemption. 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. In the absence of evidence from the conservation authority that this exemption applies, I find that it has not met its burden of proof. Consequently, I do not uphold this exemption for any of the records for which it has been claimed. However, section 12 has also been claimed to apply to these records and I will consider it below.

**Issue C: Does the discretionary exemption at section 12 apply to the records?**

[21] The conservation authority is claiming the application of both branches of section 12 to all of the records at issue. 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.

[22] The conservation authority has divided the records into five categories as follows:

> 1. Solicitor-client communications between it and its legal counsel often disseminated internally at the conservation authority. Some of the communications contain attachments which it prepared for its legal counsel (and vice versa) or by the landowners or their consultants and shared with legal counsel.

[1] Order MO-2363.

2. Mediation/settlement records containing third party technical information. These records were provided to it by the landowners as part of the mediation/settlement discussions, or are its or Halton Region's responses to and evaluations of the landowners technical information.

3. Mediation/settlement records consisting of communications between legal counsel for the parties involved in the OMB proceedings.

4. Mediation/settlement records consisting of conservation authority internal communications.

5. Mediation/settlement records of meetings regarding same.

[23] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

### *Branch 1: common law privilege*

[24] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[2]

[25] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[3] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[4]

[26] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[5]

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[2] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[3] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[4] Orders PO-2441, MO-2166 and MO-1925.
[5] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[27] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[6] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[7]

[28] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege; and
- voluntarily evinces an intention to waive the privilege.[8]

[29] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[9] Waiver has been found to apply where, for example:

- the record is disclosed to another outside party;[10]
- the communication is made to an opposing party in litigation;[11] or
- the document records a communication made in open court.[12]

[30] The conservation authority claims the application of solicitor-client communication privilege in branch 1 of section 12 to 45 records, consisting of the records described in category 1, above. In particular, the conservation authority submits that all of these records, with one exception, consist of communications[13] between its legal counsel and staff regarding legal strategy, positions and advice on how to proceed with the OMB proceedings. Legal counsel, it argues, was retained for the express purpose of representing its interest in the OMB appeal.

[31] The exception is one record, which is a report to the conservation authority's board of directors, with supporting speaking notes and power point slides. The conservation authority states that these records were prepared by staff and legal counsel and used by legal counsel for an oral briefing to the board on the mediation/settlement discussions. This briefing, it also states, was held in camera.

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[6] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[7] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[8] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[9] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).
[10] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[11] Orders MO-1514 and MO-2396-F.
[12] Orders P-1551 and MO-2006-F.
[13] Either by email or hard copy correspondence.

[32] The conservation authority also submits that:

- The solicitor-client communications are of a confidential nature, based on the context of the communications (mediation/settlement discussions) and also that many of the records are marked as being confidential and subject to solicitor-client privilege;

- The entire continuum of communications is exempt, not merely the portion that contains the advice itself, including the various email attachments and letter enclosures;[14] and

- The solicitor-client privilege has not been waived, and none of the records have been disclosed to a third party.

[33] The appellant submits that some of the facts in the records for which branch 1 was claimed exist independently from the solicitor-client privileged content and that it appears, based on the index, that some of the records are not communications with legal counsel and were not prepared by or for legal counsel. The appellant cites Order PO-3150 in which the appellant contended that a reference to the fact that counsel was involved does not render the communication privileged. Lastly, the appellant submits that consideration should be given to whether the records can be severed.

*Analysis and finding*

[34] I have reviewed the records for which the conservation authority has claimed the application of branch 1 of the solicitor-client privilege exemption in section 12, as well as the representations of the parties. I find that these records qualify for exemption under branch 1 of the section 12 exemption.

[35] The records contain ongoing communications between conservation authority staff and its external legal counsel,[15] which it retained to represent its interests in the settlement/mediation that the OMB ordered all parties to participate in. In particular, disclosure of the records would reveal:

- Staff seeking legal advice from legal counsel on particular subjects;

- Instructions given by staff to legal counsel;

- Legal advice given by legal counsel to staff;

[14] Relying on Order MO-2198.
[15] The content of several of the records for which this exemption was claimed are duplicated in other records. This duplication does not affect my finding. I raise it as an observation only.

- Legal counsel's review of draft materials; and

- Discussions between staff and legal counsel of steps to be taken to proceed in terms of the settlement negotiations with parties to the OMB appeal.

[36] All of the records are marked as being subject to solicitor-client privilege. It is clear from my review of the records that there was a solicitor-client relationship between the conservation authority and the legal counsel with whom the communications take place. I am also satisfied that these records constitute direct communications of a confidential nature between conservation authority staff and its legal counsel for the purpose of seeking and giving professional legal advice, as well as providing instructions to legal counsel on the issues arising as a result of the ongoing settlement discussions. The records were either prepared by legal counsel or by conservation authority staff for legal counsel and form part of the "continuum of communications" between a solicitor and client. In addition, based on my review of the conservation authority's representations, it has not waived its solicitor-client privilege.

[37] Under section 4(2) of the *Act*, an institution must disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, I am not persuaded by the appellant's argument that these records can be severed to withhold only the legal advice. I find that the records represent communications containing legal advice and related information, and do not contain communications for other purposes which are unrelated to legal advice. Consequently, I find that the records, in their entirety, are subject to solicitor-client privilege and, subject to my review of the conservation authority's exercise of discretion, are exempt from disclosure under branch 1 of section 12.

### *Branch 2: statutory privileges*

[38] Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. The conservation authority is claiming the application of ligation privilege in branch 2 of section 12 to the remaining records described in categories 2 through 5, above.

[39] Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are exempt under branch 2

statutory litigation privilege.[16] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[17]

[40] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[18]

[41] The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution*;[19] and
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[20]

[42] The conservation authority submits that the remaining 63 records consist of confidential mediation and settlement records prepared for use in the OMB appeal. In support of its position, the conservation authority cites Order MO-2624 in which Adjudicator Frank DeVries found that litigation privilege in branch 2 includes records relating to appeals before administrative bodies, such as the OMB. In addition, it argues that this privilege also extends to records prepared for use in mediation or settlement discussions, including records prepared by a third party and provided to the institution during the course of the mediation/settlement.[21]

[43] The conservation authority submits that all of the 63 records pertain to the OMB litigation and were written, assembled or prepared since the appeal was filed in 2010. According to the conservation authority, some of the records consist of technical material (letters, memos, reports and studies) that were provided by the landowners to it, and, in turn, its subsequent responses to the landowners. Some of these records may contain technical material that was prepared before litigation was contemplated. However, in all instances the third party material was assembled into a "responsive format" after litigation began, and was provided to the conservation authority in order to substantiate positions being taken during mediation or in response to requests made during mediation. These records are a compilation of the relevant documents which would permit an understanding of the issues between the parties that forms the basis for the OMB proceeding.[22]

[44] Other records, the conservation authority states, are emails between legal

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[16] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733.
[17] Cited above.
[18] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (*Magnotta*).
[19] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).
[20] *Ibid.*
[21] *Magnotta* at note 17.
[22] Relying on Order MO-2804-I.

counsel for the parties involved in the OMB appeal, in which the parties attempt to narrow the issues to be addressed before the OMB or directly engage in mediation/settlement discussions. It argues that these records cannot be characterized as simple correspondence, as they contain the actual settlement discussions.

[45] In addition, the conservation authority argues that some of the records are internal discussions that were not shared with the landowners, but formed the basis of the conservation authority's position taken in the context of the mediation/settlement discussions. Other records organize and memorialize mediation/settlement meetings.

[46] Lastly, the conservation authority states that the privilege has not been waived or lost, as none of the records have been shared with anyone who is not a party to the ongoing mediation/settlement discussions.

[47] The six affected parties, who are the landowners and their consultants, provided joint representations. They submit that they provided records to the conservation authority for the sole purpose of settlement discussions, and that there was an express and implied understanding that they would be treated as confidential. They argue that disclosure of the records would interfere with and possibly end the settlement negotiations. Lastly, they submit that the records are exempt from disclosure under branch 2 of section 12 of the *Act*.

[48] The appellant submits that in order to be exempt under branch 2, the record must have been created for the "dominant purpose" of ongoing or anticipated litigation and, therefore, the date the record was created is relevant. The appellant disagrees with the conservation authority's argument that the date the record is compiled is relevant. She states that it may be that the records were actually created for the dominant purpose of *Planning Act* approvals, even though they may have been used in settlement discussions. In addition, the appellant argues that even if branch 2 applies to the records, the facts, as opposed to the legal argument, contained in a litigation privileged record are not privileged.[23]

[49] In addition, the appellant states that there are currently 52 participants involved in challenging the OMB proceeding. She states that she and her partner "represent" approximately half of them. The appellant then goes on to distinguish the facts in the *Magnotta* case, arguing that members of the public were not participants in *Magnotta*, and also that the issues during litigation and settlement in *Magnotta* were different than in the OMB proceeding. The appellant further notes that unlike the anonymous requester in *Magnotta*, she is a known requester and the reasons for her request are also known.

[50] The appellant also submits that she is concerned that the conservation authority

[23] Relying on a presentation entitled "*Current Issues in Privilege for In-House Counsel*," Davies Law Firm, November 21, 2012.

may be "mixing" records related to the normal planning application process, with records related to the OMB appeal and/or to an ongoing civil litigation matter regarding a culvert.[24] She goes on to state that if the records have been shared with all of the parties to the OMB appeal, who are not involved in the culvert litigation, then privilege has been waived.

*Analysis and finding*

[51] I have carefully reviewed the records at issue and the parties' representations. For the reasons that follow, I find that the records are exempt under branch 2 of section 12 of the *Act*.

[52] As previously stated, a group of landowners sought certain planning permission from Milton in relation to proposed developments. For the developments to proceed, Milton required the preparation of a Subwatershed Impact Study (SIS), which is a technical engineering and environmental assessment of the proposed development area that informs the planning process. The conservation authority is a commenting agency to Milton on the SIS, and also has a memorandum of understanding with Halton Region to provide peer review advice on a number of engineering and natural heritage related issues. In addition to the SIS review, the landowners also required the conservation authority's regulatory approval of the re-alignment of several watercourses and the removal of some wetlands, including two watercourses and associated wetlands referred to as "NW-1-D" and "NW-1-E."

[53] The landowners subsequently appealed to the OMB on the basis that Milton had failed to make a decision within the proscribed timeline under the *Planning Act*. As a result, the OMB ordered the landowners (and their consultants), the conservation authority, Halton Region, Milton and the Niagara Escarpment Commission to engage in mediation/settlement. The parties then engaged in mediation/settlement discussions which took place over a protracted period of time. The conservation authority's role in the mediation/settlement discussions was focused on working with the landowners, their technical consultants and the other parties to narrow the technical issues associated with the SIS and development proposals.

[54] I note that two SIS's prepared by the landowners and their consultants are available on Milton's website.[25] The first SIS is dated as "revised October 2009" and the second is dated "October 2013" and subsequently "revised February 2014." These SIS's are in relation to the proposed developments that are the subject matter of the appellant's request.

[24] According to the appellant, the civil litigation regarding a culvert involves the landowners and the conservation authority. It is separate from the OMB appeal.
[25] At www.Milton.ca.

[55] The records for which the conservation authority has claimed the application of branch 2 of section 12 consist of technical reports, studies, reviews, peer review comments, surveys, maps, emails, staff notes made in preparation for meetings, memoranda, correspondence, agendas, minutes of meetings, issues lists, and terms of reference. All of the records relate to the issues raised by the SIS. Some of the records contain technical information, authored by the landowners' consultants, which were then provided to the conservation authority. Other records consist of the conservation authority's response to the technical information provided by the landowners. Some records reflect ongoing negotiations between the parties' various legal counsel in regard to the issues raised by the SIS, and the resulting modifications made to the SIS, or describe attempts to narrow and resolve the issues.

[56] In addition, other records consist of communications between conservation authority staff and its legal counsel regarding next steps in the settlement/mediation. One record consists of a report provided to the conservation authority's board of directors. Part of the report contains information provided by staff and the other part contains information provided by legal counsel. All of the information in this record relates to and describes the issues that were resolved in the settlement/mediation discussions and the outstanding issues, including the approach to be taken going forward in regard to those outstanding issues.

[57] It is clear from my review of the records that their disclosure would reveal:

- the content of the actual settlement/mediation discussions between the parties; or
- discussions of the strategies formulated by the conservation authority's legal counsel and staff with respect to the approach to be taken in the settlement/mediation discussions; or
- discussions regarding the structural approach to be taken in the settlement/mediation discussions as between the various legal counsel; or
- details of the issues that were resolved and the issues yet to be resolved; or
- technical information provided to the conservation authority by the landowners through their legal counsel to assist in the settlement/mediation discussions, the purpose of which was to narrow the technical issues associated with the SIS and planning proposals.

[58] The Ontario Court of Appeal's decision in *Magnotta* found that records prepared for use in the mediation or settlement of litigation are exempt under the statutory

litigation privilege aspect of branch 2 contained in the provincial equivalent of section 12 (section 19 of the provincial act). More particularly, the Court of Appeal found that the word "litigation" in the second branch encompasses mediation and settlement discussions. The Court stated:

> 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.

[59] In the specific circumstances of this appeal, I am satisfied that litigation existed at the time the records were prepared and/or compiled. The conservation authority has indicated that the records were created for use in OMB ordered settlement/mediation between it and the other parties which arose as part of the statutory avenue of appeal found in the *Planning Act*. On my review of sections 22(7), 34(11) and 51(34) of that Act, I am satisfied that an appeal under that section constitutes "litigation" for the purpose of branch 2 of section 12. I am also satisfied that the records at issue were used for the purpose of settlement/mediation of this litigation, and was prepared by, or delivered to, legal counsel retained by the conservation authority to deal with the litigation. In addition, even if the litigation is terminated, that fact does not affect the application of statutory litigation privilege under branch 2.

[60] Furthermore, I am satisfied that the privilege has not been lost through either waiver or a lack of a "zone of privacy" as a result of some of the records having been provided to the conservation authority by the landowners' legal counsel. *Magnotta* stands for the proposition that privilege is not lost by the sharing of a record to opposing counsel to assist with mediation and settlement discussions as part of the litigation process.

[61] Moreover, even if some of the information in the records is also publicly available on, for example, Milton's website, which contains the two SIS's, the records at issue were compiled by legal counsel for use in the settlement/mediation and, therefore, form part of his working papers.[26] In addition, I note that the identity of the requester and the reasons behind an access request do not have any effect on whether a record is found to be exempt under section 12.

[62] Consequently, I find that the remaining records at issue are exempt from disclosure under the statutory branch 2 aspect of the section 12 litigation privilege exemption as they were prepared by or for legal counsel employed by the conservation authority "in contemplation of or for use in litigation," in the sense that they were prepared for use in the mediation or settlement of actual litigation in accordance with

[26] Order PO-2733.

the principles established in *Magnotta*. Accordingly, all of the records are exempt from disclosure under section 12.

[63] In her representations, the appellant raises the public interest that exists in the disclosure of the contents of the records at issue, thereby giving rise to the possible application of the "public interest override" provision in section 16 of the *Act*, which reads:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[64] Records which are exempt under section 12 are not, accordingly, subject to the application of section 16. As a result, I am unable to consider whether the "public interest override" provision applies to the records at issue in this appeal.

[65] Because I have found that the records meet the criteria for exemption under section 12, it is unnecessary for me to consider whether they also qualify for exemption under sections 6, 7, or 10(1). However, I will review the manner in which the conservation authority exercised its discretion, below.

**Issue D: Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?**

[66] 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.

[67] 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; or
- it fails to take into account relevant considerations.

[68] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[27] This office may not, however, substitute its own discretion for that of the institution.[28]

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[27] Order MO-1573.
[28] Section 43(2).

[69] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[29]

- the relevant purposes of the *Act*, including the principles that information should be available to the public, and exemptions from the right of access should be limited and specific;
- the wording of the exemption and the interests it seeks to protect;
- 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; and
- the historic practice of the institution with respect to similar information.

[70] The conservation authority submits that its exercise of discretion should be upheld, as it took into consideration the purposes of the *Act*, including that information should be available to the public and exemptions from the right of access should be limited and specific. It states that it also exercised its discretion without bad faith and not for an improper purpose. The conservation authority goes on to state that the primary factor that compelled it to exercise its discretion not to disclose the records at issue is the need to protect the integrity of the OMB process currently underway. It states:

> This process requires that [its] staff and Board are able to speak freely and frankly with their counsel without fear that the advice will be disclosed to another participant in the OMB hearing. It also requires that

[29] Orders P-344 and MO-1573.

> [it] uphold the duty of confidentiality to [third] parties engaged in mediation/settlement discussions.

[71] The conservation authority also submits that it evaluated whether any of the records could be severed in a manner that would disclose additional information while protecting material which is exempt. However, it goes on to state that given the single issue nature of the records, which deals entirely with the issues before the OMB, there was no opportunity to sever otherwise disclosable information from any of the records.

[72] Further, the conservation authority submits that it considered the public interest and determined that there is no public interest in circumventing the OMB process, which already serves the public interest, because any settlement agreement, including the supporting SIS will be filed with the OMB and provided to the appellant. In addition, the conservation authority states that if the settlement/mediation is unsuccessful, the pertinent information will form the basis of the litigation and be entered into evidence. It states:

> In either instance, the Appellant will have an opportunity to understand [its] position, to evaluate the sufficiency of the [landowners'] submissions, and to make representations before the OMB.

[73] Lastly, the conservation authority argues that consideration of the public interest in the non-disclosure of the records is an integral part of any determination as to whether there is a compelling public interest in disclosure. It states that in this instance, the compelling public interest in encouraging settlement of litigation ensures that any consideration of public interest weighs in favour of non-disclosure.

[74] The appellant submits that the conservation authority did not exercise its discretion properly because it failed to take into account that information should be available to the public, and exemptions from the right of access should be limited and specific. In addition, the appellant is of the view that the conservation authority did not take into consideration:

- the public's compelling need for the information in order to participate in public consultation processes;
- whether disclosure will increase public confidence in the operation of the institution;
- the need to keep the public apprised of significant developments, that is, its change in position on the wetlands and creek; and
- the fact that there are approximately 50 participants at the OMB who have a keen interest in what is going to happen to the property.

[75] Furthermore, the appellant submits that the conservation authority took into account an irrelevant factor, namely that she is a participant in the OMB proceeding, and that in focusing strictly on it, the conservation authority misunderstood and misrepresented her interests and motives, which is to obtain access to the information in order to inform residents' participation in various public consultation processes to protect the community, watercourses, wetlands and watershed.

[76] Lastly, the appellant argues that it is illogical for the conservation authority to take the position that the public interest in encouraging settlement of litigation is more compelling than the public interest in transparency of government action, particularly when the environment and public health and safety is at stake.

*Analysis and finding*

[77] I have carefully reviewed the representations of the conservation authority and the appellant. I am not satisfied that the conservation authority has properly exercised its discretion, as it failed to consider additional relevant factors. I make this finding in part due to a change in circumstances regarding the OMB proceeding. I note that the 2014 version of the SIS is now posted on Milton's website, and I have reviewed the memorandum[30] of an oral decision delivered by OMB Member M.C. Denhez on February 18, 2014. In that decision, M.C. Denhez stated that since the appeal was filed in 2010, twelve Board prehearing conferences and eight Board mediation sessions were conducted. As a result, almost all of the issues were resolved between the applicants, Halton Region and Milton, and that they were also resolved between the other parties, including the conservation authority.

[78] As the integrity of the OMB process was one of the primary factors the conservation authority considered in exercising its discretion not to disclose the records, the change in circumstances regarding the OMB appeal may have an impact on the exercise of discretion.

[79] In addition, based on the conservation authority's representations, I am not persuaded that it considered the additional relevant factor of whether disclosure of the records will increase public confidence in the conservation authority.

[80] Consequently, I will order the conservation authority to re-exercise its discretion and, if it chooses to decline to disclose the records, or parts thereof that are subject to the exemption under section 12, I will require it to provide me with representations explaining how and why it made that determination. The conservation authority is encouraged to specifically address the following considerations in its representations:

- the current status of the OMB proceeding;

[30] Issued on March 19, 2014 with respect to files PL101316, PL101334 and PL101335. Available on www.omb.gov.on.ca.

- whether disclosure of the records will increase public confidence in the conservation authority; and

- that some of the records, in whole or in part, may otherwise be publicly available or available in other records that have been disclosed.

**Issue E: Should the fee be waived?**

[81] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.
>
> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

[82] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 45(1) and outlined in section 8 of Regulation 823 are mandatory

unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees.[31]

[83] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.[32] The institution or this office may decide that only a portion of the fee should be waived.[33]

[84] Given that I have found the records at issue to be exempt from disclosure under section 12, my consideration of the denial of a fee waiver is limited to the fee that the appellant has already paid for the records the conservation authority disclosed to her.

[85] The appellant submits that the fee should be waived because the records pertain to matters of public health or safety. In particular, she submits that the landowners require the approval of the conservation authority to remove wetlands and relocate a creek to make room for residential development. The appellant states that she believes that this removal and relocation poses a health and safety issue. She also states that if one accepts the "death by a thousand cuts" analogy, the conservation authority's decision poses a grave environmental concern; not an immediate risk, but an insidious risk. The appellant also submits that there is a strong relationship between watercourses, wetlands, the health of the watershed and human health and cites a number of reports in support of her position, including a watershed report card found on the conservation authority's website, which gave Milton a "poor" rating. She also quotes from a brochure published by the Ministry of Natural Resources,[34] which states that wetlands act as a filter to remove sediments, absorb nutrients and render many chemicals less harmful from surface water runoff.

[86] In addition, the appellant submits that the fee should be waived because the disclosure of the records she received has already yielded a public benefit. She states that she shared one of the records with the Niagara Escarpment Commission (NEC) and believes that record was "instrumental" in NEC's decision to seek party status at the OMB pre-hearing conference in November of 2012. In support of her position, the appellant provided a staff report of the NEC in which there is a discussion of the possible removal of a policy limiting density adjacent to the Niagara Escarpment Plan area and the proposed diversion of a stream from Milton Heights to cross into the Niagara Escarpment Plan area.

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[31] Order PO-2726.
[32] Orders M-914, P-474, P-1393 and PO-1953-F.
[33] Order MO-1243.
[34] Entitled "*Wetlands are Important*."

[87] Furthermore, the appellant states that many of the records she received underscored the concerns and resistance conservation authority staff had regarding the removal of the wetlands and the relocation of NW-1-D, and that this disclosure strengthened her resolve to obtain answers and hold the conservation authority's board accountable.

[88] The conservation authority argues that a fee waiver is not warranted, as there is no evidence that the payment of the fee will cause financial hardship, and also because the subject matter of the records does not pertain to public health or safety. It concludes that disclosure and dissemination of the records will not benefit public health or safety.

*Analysis and finding*

[89] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest;
- whether the subject matter of the record relates directly to a public health or safety issue;
- whether the dissemination of the record would yield a public benefit by;

    (a) disclosing a public health or safety concern, or

    (b) contributing meaningfully to the development of understanding of an important public health or safety issue; and

- the probability that the requester will disseminate the contents of the record.[35]

[90] The focus of section 45(4)(c) is "public health or safety". It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know." There must be some connection between the public interest and a public health and safety issue.[36]

[35] Orders P-2, P-474, PO-1953-F and PO-1962.
[36] Orders MO-1336, MO-2071, PO-2592 and PO-2726.

[91] The appellant argues and I agree that dissemination of the records could yield a public benefit by encouraging public debate about potential health and safety issues relating to possible alterations to the wetlands, watercourses and/or watersheds as a result of the proposed development.

[92] However, I find that there is insufficient evidence before me that the records the appellant has already received from the conservation authority contain specific information which identifies an actual public health or safety concern concerning the wetlands, watercourses, and/or watersheds. Accordingly, in my view, there is insufficient evidence demonstrating a clear connection between the information contained in the records the appellant has received from the conservation authority and a public health or safety issue identified by the appellant – the potential public health and safety risks associated related to the proposed development and its effect on the wetlands, watercourses and/or watersheds.

[93] As a sufficient connection between the records and a public health or safety concern has not been established, part 1 of the test has not been met and the appellant is not entitled to a fee waiver.

[94] In sum, I uphold the conservation authority's decision with respect to section 12 of the *Act* and its denial of a fee waiver. However, I do not uphold its exercise of discretion and decision regarding the application of section 11. Lastly, I am unable to consider section 5(1) of the *Act*.

## ORDER:

1. I uphold the conservation authority's decision that the records are subject to exemption under section 12 of the *Act*, and I uphold the denial of the fee waiver.

2. I order the conservation authority to re-exercise its discretion with respect to the records found to be exempt under section 12 and to advise the appellant and this office of the result of this exercise of discretion, in writing, by no later than **June 12, 2014**.

3. If the appellant wishes to respond to the conservation authority's explanation for its exercise of discretion, she must do so in writing within **21 days** of the date of the date of the conservation authority's correspondence by providing me with written representations.

I remain seized of this matter pending the resolution of the exercise of discretion issue addressed in order provisions 2 and 3.

Original Signed By: May 7, 2014
Cathy Hamilton
Adjudicator