

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3389

Appeal MA16-56

Town of Newmarket

December 19, 2016

Summary: The Town of Newmarket withheld information responsive to the appellant's request for information about litigation involving a residential property in Newmarket under sections 12 (solicitor client privilege) and 6(1)(b) (closed meeting) of the *Municipal Freedom of Information and Protection of Privacy Act*. Section 12 applies to the withheld information in issue. The town's exercise of discretion with respect to disclosure of the information is upheld, and the appeal is dismissed.

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

OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of Newmarket (the town) for access to information regarding dealings between the town and employees or elected officials involving town-owned land and buildings.

[2] The town granted partial access to responsive records, withholding some records under sections 6(1)(b) (closed meeting), 12 (solicitor-client privilege) and 14 (personal information) of the *Act*.

[3] The appellant appealed the town's decision denying access to information about litigation involving a particular residential property in Newmarket.

[4] During mediation, the town agreed to disclose the total amount of legal fees it incurred for litigation regarding the residential property.

[5] Mediation did not resolve the remaining issues and the appellant requested the appeal proceed to the adjudication stage for an inquiry, seeking access to:

1. the itemized legal invoices for the town in defending the litigation,
2. the total cost of the settlement of the litigation, including the defendant's legal fees and any settlement amounts; and
3. records that set out the rationale for the town settling the litigation.

[6] During the inquiry into the appeal, I sought and received representations from the town and the appellant. Representations were shared in accordance with *IPC Practice Direction 7*.

[7] I find that section 12 applies to the withheld records and uphold the town's exercise of discretion with respect to disclosure of the records. The appeal is dismissed.

RECORDS:

[8] The withheld records responsive to the appellant's focussed request are:

1. itemized legal invoices for the litigation;
2. a document titled Minutes of Settlement relating to the litigation; and
3. two legal and development services reports to closed sessions of the town's committee of the whole.

DISCUSSION:

Issue A: Does the discretionary exemption at section 12 (solicitor-client privilege) apply to the records?

[9] 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.

[10] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 is a statutory privilege. It is applied where the

records were “prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.” The statutory and common law privileges, although not identical, exist for similar reasons. The institution must establish that one or the other (or both) branches apply.

[11] The town relies on both the common law and statutory privileges to withhold records under section 12.

[12] The appellant concedes that the records in issue are subject to solicitor client privilege and that the privilege has not been waived. The appellant’s position is that the town should exercise its discretion to waive privilege for a range of reasons, which are discussed further below. Because the appellant accepts that the records in issue are privileged, I will provide only a brief discussion of this issue.

[13] From my review of the records, I agree with the parties that the records in issue fall within the scope of section 12. The legal invoices fall into the category of information referred to in previous orders as “legal billing information”, which is presumptively privileged unless the information is “neutral” and does not directly or indirectly reveal privileged communications.¹ It is clear that disclosure of the legal invoices would reveal privileged communications because the legal invoices contain detailed narrations of the legal work undertaken by the town’s legal advisors.

[14] The Minutes of Settlement is a record of the settlement of litigation involving the town, so is clearly a record prepared for use in the mediation or settlement of litigation, to which solicitor client privilege applies.²

[15] Finally, the closed session minutes contain 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 Solicitor client privilege applies to these records.

[16] As noted above and as the parties agree, there is no evidence that privilege has been waived in any of the records in issue.

[17] Given that section 12 applies to the records, I will not go on to consider whether the closed session minutes can also be withheld under the section 6(1)(b) exemption.

¹ *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2007 CanLII 65615 (ON SCDC); see also *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA).

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

³ *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860.

Issue B: Did the city exercise its discretion under the *Act*? If so, should this office uphold the exercise of discretion?

[18] 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. In an appeal, I may determine whether the institution failed to do so.

[19] In addition, I 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.

[20] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations. I may not, however, substitute my own discretion for that of the institution [section 54(2)].

[21] The appellant's representations accept that the town exercised its discretion. The appellant's representations go on to outline circumstances relating to the creation of the withheld records that it says are unique. These circumstances centre around the fact that the litigation involved the private interests of a town councillor. The appellant makes these observations to support its view that disclosing the records would aid public understanding of how the litigation was managed by the town. The appellant argues that the town has a fiduciary duty to the public that supports disclosure. In sum, the circumstances the appellant outlines are an argument, based on the public interest, that the town should exercise its discretion in favour of disclosing the records.

[22] I am satisfied that, in exercising its discretion, the town considered the factors the appellant raises, among other relevant factors. In particular, in discussing its exercise of discretion, the town acknowledges that the litigation related to a town councillor. The town disagrees with the appellant that this supports disclosure of the records. The town's position is that the councillor's private interests had no bearing on the outcome of the litigation and therefore that this circumstance does not support disclosure of the records.

[23] With regard to the town owing the public a fiduciary duty, I note that the town states that it considered the principle that information should be available to the public and that exemptions to the right of access should be limited and specific. This principle, in my view, addresses the intent of the appellant's point regarding the town having a fiduciary duty to the public.

[24] As noted above, I cannot substitute my own discretion for that of the town. I am satisfied that the town exercised its discretion after considering relevant factors. In addition to the factors discussed above raised by the appellant, these factors include the town's desire to protect solicitor-client privileged communications, and that the town sought to honour a confidentiality undertaking in a settlement agreement. I am satisfied that the town did not base its exercise of discretion on irrelevant factors.

[25] I therefore uphold the town's exercise of discretion to rely on section 12 to withhold the records in issue.

ORDER:

I uphold the town's decision to exercise its discretion to withhold the records in issue under section 12 of the *Act*.

Original Signed by: _____
Hamish Flanagan
Adjudicator

December 19, 2016 _____