Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-3597

Appeal MA14-61-2

The Corporation of the Town of Amherstburg

April 26, 2018

**Summary:** The town received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to minutes of settlement relating to three terminated employees. The town denied access to the records pursuant to the statutory litigation privilege exemption in section 12 of the *Act*. The adjudicator applies *Liquor Control Board of Ontario v Magnotta Winery Corporation* and upholds the application of section 12 to the minutes of settlement.

**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:** Orders PO-3627, PO-3651, PO-2323 and MO-2609.

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

## BACKGROUND:

[1] The sole issue in this appeal is whether three minutes of settlement are exempt from disclosure pursuant to the statutory litigation privilege exemption at section 12 of the Municipal Freedom of Information and Protection of Privacy Act (the Act).

[2] The appellant submitted a request to the Town of Amherstburg (the town) under

the Act for access to the following information:

> I request copies of all documents related to the employment of [three named individuals], including employment contracts, letters of understanding related to their employment, severance agreements, or other records pertaining to any settlement or termination payments relating to their departures, letters of resignation or termination, correspondence including internal memos related to their departure, resolutions and any committee, council or other meeting minutes related to their departments.

[3] The town located responsive records and issued a decision that stated in part:

> Firstly, with regards to your request for documents relating to any settlement or termination payments relating to [the three named individuals'] departures, letters of resignation or termination, … I deem this information to be personal information as set out in the *Act*. In accordance with section 14(5) of the *Act*, "A head may refuse to confirm or deny the existence of a record if the disclosure of the record would constitute an unjustified invasion of personal privacy. R.S.O. 1990, c. M.56, s. 14(5)". In that regard, I hereby advise that I will not confirm nor deny the existence of any of the above documentation as noted.
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> Secondly, with regard to your request for copies of all documents related to the employment of [the named individuals], including employment contracts, letters of understanding related to their employment, I would refer you to the attached index of records and applicable exemptions.

[4] The appellant appealed the town's decision to this office, which appointed a mediator to try to effect a settlement of the matter. During mediation, the appellant pointed out that the circumstances surrounding the named individuals' departures from the town were a matter of public knowledge. The appellant suggested that the mere decision to confirm that records exist could not constitute an invasion of privacy as it was apparent that records must exist. The appellant confirmed that she was only seeking copies of settlement or termination agreements and payments relating to those individuals.

[5] The town agreed to review its decision. It conducted an additional search, located records and issued a new decision. In its revised decision, the town advised that it had located the three settlement agreements and that, after consulting the three affected parties, it was denying access to the agreements in accordance with the exemption for third party information at section 10(1) of the *Act*. As a result of the new decision, Appeal MA14-61 was closed.

[6] The appellant appealed the new decision to this office and this appeal, Appeal

MA14-61-2 was opened. The assigned mediator contacted the three affected parties, all of whom objected to any portion of the records being disclosed, on the basis that disclosure would constitute an unjustified invasion of their personal privacy. Accordingly, the mediator added the mandatory personal privacy exemption at section 14(1) to the issues in this appeal.

[7] As no further mediation was possible, the appeal proceeded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by inviting representations from the town and three affected parties. The town and one affected party provided representations. The affected party objected to the release of the minutes of settlement relating to him/her.

[8] The town, in its representations, added the potential application of two discretionary exemptions to the minutes of settlement: the exemption for an institution's economic interests at sections 11(c) and (d) of the *Act*, and the solicitor-client privilege exemption at section 12. I sought and received supplementary representations from the town on the late raising of these discretionary exemptions, the applicability of sections 11 and 12 of the *Act*, and the town's exercise of discretion pursuant to sections 11 and 12. I then provided copies of the town's representations to the appellant[1] along with a Notice of Inquiry inviting representations. The appellant pointed out that she had already provided representations (the appellant submitted unsolicited representations early in the inquiry process, disputing the application of sections 10 and 14, and raising the potential applicability of the public interest override at section 16). This office reminded the appellant that she had not provided representations on the new issues raised by the town. The appellant, however, did not file additional representations.

[9] In this order, I uphold the town's application of section 12 to the minutes of settlement and dismiss the appeal.

## RECORDS:

[10] The records at issue are three minutes of settlement agreements between the town and three individuals.

## ISSUES:

A. Is the town permitted to raise the section 12 exemption following the 35-day period for raising discretionary exemptions?

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[1] Pursuant to *Practice Direction 7: Sharing of Representations* and section 7 of the *Code of Procedure*. The affected party's representations were withheld from the appellant in accordance with the criteria for withholding representations found in *Practice Direction 7*.

B. Does the discretionary exemption at section 12 apply to the records?

C. Should I uphold the town's exercise of discretion under section 12?

## DISCUSSION:

### A: Is the town permitted to raise the section 12 exemption following the 35-day period for raising discretionary exemptions?

[11] In its representations, the town raised for the first time the potential application of section 12 of the *Act.*

[12] This office's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[13] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process.[2] In determining whether to allow the town to claim a new discretionary exemption outside the 35-day period, I must also balance the relative prejudice to the town and to the appellant.[3] The specific circumstances of each appeal must be considered in determining whether discretionary exemptions can be raised after the 35-day period.[4]

[14] The town submits that there is no prejudice to the appellant as a result of the town raising section 12 during adjudication, because if the exemption applies, the appellant is not entitled to the information. On the other hand, the town submits that it would be prejudiced if it were not allowed to raise the exemption, because if it is ordered to disclose the information, this would be in violation of its agreement to keep

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[2] *Ontario (Ministry of Consumer and Commercial Relations v Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[3] Order PO-1832.
[4] Orders PO-2113 and PO-2331.

the minutes of settlement confidential. The town submits that the integrity of the appeal process would not be compromised because there would be an adjudication on the merits of the appeal.

[15] This office has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter. The adoption and application of this policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*.[5] Nevertheless, this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

[16] I am required to weigh and compare the overall prejudice to the parties. In doing so, I must consider any delay or unfairness that could harm the interests of the appellant, as against harm to the town's interests that may be caused if the exemption claim is not allowed to proceed. In order to assess possible prejudice, the importance of an exemption claim and the interests the exemption seeks to protect in the circumstances of the particular appeal can be important factors.

[17] For the following reasons, I allow the town to raise the applicability of the section 12 exemption to the records at issue.

[18] First, the appellant had notice before the expiration of the 35-day period that the town wished to exempt the information for which it now claims the section 12 exemption, since the town's decision was to deny access to the records, albeit pursuant to other exemptions.

[19] Further, the town raised the section 12 exemption before the appellant was invited to make her representations. Therefore, the inclusion of the newly claimed exemption for the information at issue has not resulted in any delays to the adjudication process. The appellant has also been provided with a full opportunity to respond to the town's representations and to provide representations as to whether the information qualifies for exemption under section 12.

[20] I have also considered the potential prejudice to the town if I do not allow it to claim the section 12 exemption. I accept the town's submission that there is some potential prejudice to it in the circumstances if it is ordered to disclose information that would be exempt from disclosure under section 12. The Supreme Court of Canada has described the solicitor-client exemption as "all but absolute".[6]

[21] Having weighed the comparative prejudice of each of the parties, I am satisfied that the appellant will not be prejudiced and the integrity of the adjudication process

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[5] See footnote 2.
[6] See *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 53.

will not be compromised if I allow the town to raise the application of the section 12 exemption beyond the 35-day time period, and that there would be some prejudice to the town if I do not allow it to raise this exemption. Therefore, I have decided to permit the town to raise the application of section 12 to the records at issue.

## B. Does the discretionary exemption at section 12 apply to the records?

[22] The town raises the application of both the common law and statutory privileges contained in section 12 of the *Act.* Section 12 states as follows:

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

[23] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply. Because I find below that branch 2 (the statutory privilege) applies, I do not need to decide whether branch 1 (the common law privilege) also applies.

[24] Branch 2 is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation."

[25] The statutory litigation privilege, in particular, applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." In contrast to the common law (branch 1) litigation privilege, termination of litigation does not end the statutory litigation privilege in section 12.[7] The Ontario Court of Appeal has also held that the reference to "litigation" in section 12 includes mediation or settlement of litigation.[8] This is discussed further below.

[26] The town submits that litigation was contemplated, though not initiated. The town also submits that the records are part of a negotiation in respect of the termination of the employment of three individuals. These negotiations occurred on a without prejudice basis, and a request for confidentiality was made by the lawyers for the three individuals.

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[7] *Ontario (Attorney General) v Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[8] *Liquor Control Board of Ontario v Magnotta Winery Corporation*, 2010 ONCA 681.

***Analysis and findings***

[27] For the following reasons, I am satisfied that the records at issue are exempt under the branch 2 (statutory) litigation privilege.

[28] In *Liquor Control Board of Ontario v Magnotta Winery Corporation*,[9] the Ontario Court of Appeal held that records prepared for use in the mediation or settlement of litigation are exempt under the statutory litigation privilege in section 19 of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent of section 12 of the *Act*). The Court's rationale was stated in the following terms:

> Alternative dispute resolution now forms an integral part of the civil litigation process in Ontario. Various alternative dispute resolution methods have been incorporated into the litigation process as can be seen by reference to the Rules of Civil Procedure, which regulate and help define the parameters of the litigation process. The Disputed Records were delivered as part of a mediation. In *Rogacki v. Belz*, at paras. 44-47, this court observed that mandatory mediation is a part of the litigation process. There is no principled reason to treat mandatory and consensual mediations differently when considering whether they are part of the litigation process. Furthermore, interpreting the word "litigation" in the second branch to encompass mediation and settlement discussions is consonant with public interest considerations because the public interest in transparency is trumped by the more compelling public interest in encouraging the settlement of litigation….
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> Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records -- both those prepared by Crown counsel and those prepared by Magnotta -- fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions.

[29] Orders issued by this office since *Magnotta* have applied it in finding that records prepared for use in the settlement of contemplated litigation are exempt under the statutory litigation privilege. In Order PO-3627, for example, the records at issue were minutes of settlement between an institution and two former employees. In finding that the records are exempt under statutory litigation privilege, Adjudicator John Higgins stated as follows:

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[9] [2010] OJ No 4453 (CA).

> The records at issue in this case are two sets of Minutes of Settlement, and two other documents that were part of the settlement relating to one former employee. In *Magnotta*, the records at issue were precisely analogous, as they consisted of Minutes of Settlement and documents relating to the implementation of the settlement. In this case, the evidence, including the records themselves, makes it clear that they are records prepared by or for counsel employed by a hospital for use in the settlement of contemplated litigation.

[30] Similarly, Order PO-3651 applied *Magnotta* and also included a discussion of what constitutes "contemplated" litigation. In finding that severance agreements relating to former employees of the Niagara Health Service were subject to the statutory litigation privilege, Adjudicator Cathy Hamilton stated as follows:

> The Ontario Court of Appeal decision cited above in the *Magnotta* case found that records prepared for use in the mediation or settlement of litigation are exempt under the statutory litigation privilege aspect found in branch 2 of section 19. Based on the wording of section 19, this would extend to "contemplated" litigation. Similar to the information at issue here, the record in *Magnotta* was a settlement agreement. More particularly, in *Magnotta* the Court of Appeal found that the word "litigation" in the second branch encompasses mediation and settlement discussions.
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> In my view, in order to conclude that there was "contemplated" litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation. The question of whether records were prepared for use in mediation or settlement of litigation or contemplated litigation, and/or whether litigation is reasonably contemplated, is a question of fact that must be decided in the specific circumstances of each case.
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> In the specific circumstances of this appeal, based on the [Niagara Health Service]'s representations, I am satisfied that litigation was reasonably contemplated, and that there was more than a vague or general apprehension of litigation between it and the former managers. I am also satisfied that the information at issue consists of agreements that were made in settlement of this reasonably contemplated litigation, or records that were used in the settlement of the issues among the parties. Most of the records were prepared by counsel for the NHS or by counsel for the former managers. Other records were prepared by the NHS's human resources staff. In all cases, the information was prepared to settle the issue of the cessation of the employees' employment with the NHS. In other words, I find that all the records at issue were prepared for use in the settlement of contemplated litigation.

[31] 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. As noted in Order PO-3651 and other orders of this office, in order for litigation to be reasonably contemplated, there must be more than a vague or general apprehension of litigation.[10]

[32] The records at issue in this appeal are minutes of settlement between the town and three individuals. As noted by the town in its representations, each of the three individuals was represented by counsel in the negotiations leading to the minutes of settlement. Given this, and from my review of the minutes themselves and the other records that were initially at issue, I find that there was more than a "vague or general apprehension of litigation" between the parties. I am satisfied that litigation between the individuals and the town was reasonably contemplated, and that the parties entered into the minutes of settlement as a means of settling this reasonably contemplated litigation. I find, therefore, that the records were prepared by or for counsel employed or retained by an institution for use in contemplation of litigation.

[33] Accordingly, the minutes of settlement at issue in this appeal are subject to the branch 2 statutory litigation privilege. There is no evidence before me to suggest that this privilege has been waived. I find, therefore, that the minutes of settlement are exempt from disclosure pursuant to section 12 of the *Act.*

[34] Given my finding, it is not necessary for me to decide whether the common-law litigation privilege in section 12 applies, or whether the exemptions at sections 10, 11 and/or 14 also apply.

[35] The appellant has raised the application of the "public interest override" found at section 16 of the *Act*, which reads as follows:

> An exemption from disclosure of a record under sections 7, 9, 9.1, 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.

[36] Section 12 is not listed as one the exemptions to which the public interest override can apply. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[11] the Supreme Court of Canada upheld the constitutionality of the absence of section 19 of the provincial *Act* (the provincial equivalent to section 12 of the *Act*) from section 23 (the provincial equivalent to section 16 of the *Act*). The Court noted that an institution must consider the public interest in disclosure of the information when exercising its discretion under section 19.

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[10] See Orders PO-2323 and MO-2609.
[11] 2010 SCC 23.

## C. Should I uphold the town's exercise of discretion under section 12?

[37] 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. 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.

[38] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[12] This office may not, however, substitute its own discretion for that of the institution.[13]

[39] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional considerations may be relevant:[14]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

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[12] Order MO-1573.
[13] Section 43(2).
[14] Orders P-344 and MO-1573.

- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

***Representations***

[40] The town submits that in exercising its discretion in favour of non-disclosure, it considered several factors including the following:

- while the information may be of interest to the public, there is no compelling reason for its disclosure
- the appellant is not seeking access to her own personal information
- the three individuals in question sought and were granted confidentiality as a term of the settlement of the threatened litigation
- the information is dated

[41] The town also submits that it did not take into account irrelevant considerations, or exercise its discretion in bad faith or for an improper purpose.

***Analysis and findings***

[42] Based on the town's representations, I am satisfied that it properly exercised its discretion in deciding to withhold the minutes of settlement pursuant to section 12 of the *Act.* The town took into account relevant considerations, including any public interest in disclosure, and the assurances of confidentiality given to the individuals in question. Moreover, there is no evidence that the town took into account irrelevant considerations or that it exercised its discretion in bad faith or for an improper purpose. For these reasons, I uphold the town's exercise of discretion under section 12.

## ORDER:

I uphold the town's application of section 12 to the records at issue and dismiss the appeal.

Original Signed by: April 26, 2018

Gillian Shaw
Adjudicator