

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3729

Appeal MA17-537

Niagara Peninsula Conservation Authority

January 31, 2019

Summary: The Niagara Peninsula Conservation Authority (the NPCA) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records related to a specific lawsuit. The NPCA denied access to the responsive records, in part, under the discretionary solicitor-client privilege exemption in section 12. In this order, the adjudicator partly upholds the NPCA's decision to deny access under section 12, but orders the NPCA to disclose the total amount of legal fees in an invoice.

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

Orders Considered: Order MO-2190.

OVERVIEW:

[1] The Niagara Peninsula Conservation Authority (the NPCA) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

All documentation and all communication sent or received, including internal communication, in regards to the [named company] & [named individual] and the subsequent legal action whether sent, received or in

control of the NPCA or the NPCF (Niagara Peninsula Conservation Foundation). The timeframe would be May 1, 2015 until the present.¹

[2] The NPCA issued a decision denying access to the records responsive to the request, in their entirety, pursuant to section 20.1 of the *Act* based on its view that the request was frivolous or vexatious.

[3] The requester (now the appellant) appealed the NPCA's decision.

[4] During mediation, the NPCA reconsidered its decision to deny the request on the basis that it was frivolous or vexatious, and it decided to process the request. The NPCA notified an affected third party of the appellant's request and advised that party that it intended to disclose the responsive records in part. The NPCA also advised the affected third party that the decision could be appealed to this office.

[5] As no third party appeal was filed with this office, the NPCA issued a decision letter to the appellant, disclosing the records responsive to the request, in part. The NPCA denied access to some information, pursuant to sections 10(1) (third party information), 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*.

[6] As mediation did not resolve the remaining issues in this appeal, it proceeded to adjudication where an adjudicator conducts an inquiry. During adjudication, the appellant withdrew his access claim regarding the personal information of another individual on page 83 and information about a third party on page 230. Therefore, the exemptions in sections 10(1) and 14(1) are no longer at issue in this appeal,² leaving the application of section 12 (solicitor-client privilege) to the withheld information as the sole issue to be decided.

[7] Representations were sought, received and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I find that section 12 applies to the information at issue, in part. I order the NPCA to disclose the total amount of legal fees in the invoice at page 200 of the records to the appellant. I uphold the NPCA's decision to deny access to the remaining information at issue in the records under section 12.

RECORDS:

[9] The NPCA claims that section 12 applies to the emails and attachments at pages

¹ The request is dated September 6, 2017.

² This information consisted of a copy of another individual's driver's license and a bank account number on a cheque.

21 to 23, 33 to 48, 52 to 61, 63 to 65, 67 to 159, 164 to 185, 197 to 200, and 295 to 296 of the records.³

ISSUES:

- A. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records?
- B. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[10] 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.

[11] 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.

Representations

[12] The NPCA submits that both branches of the test apply, as the email and attachments were prepared by legal counsel employed by the NPCA for the purposes of providing legal advice on an issue.

[13] The NPCA states that the records are subject to solicitor-client communication privilege, because they consist of emails and attachments between members of the NPCA and the NPCA's legal counsel and disclosure would reveal the substance of the legal advice sought by the NPCA and provided by its legal counsel. The NPCA states that it is not clear whether the attachments to the email, which include statements of

³ Pages 207 to 210 were at issue, but since these pages are a duplicate of pages 197 to 200, I have removed them from the scope of the appeal.

defence, are the last draft or final version.

[14] The NPCA states that the legal billing information at pages 197 to 200 is not neutral, as it reveals the dates on which legal advice was sought and received, and the nature and type of advice provided. It submits that disclosure would jeopardize the confidentiality of the legal advice given, in particular with respect to legal strategies and the progress of litigation.

[15] The NPCA states that some of the records are also subject to the statutory litigation privilege. The NPCA specifically identifies emails with draft statements of defence at pages 40 to 48 and 52 to 61, the emails at pages 63 to 65 regarding court actions, an email with a letter related to litigation at pages 33 to 39, as well as the emails and attachments at pages 164 to 185 and pages 295 to 296. It states that, in addition, these pages of the records were provided to the NPCA's lawyer as part of the "continuum of communications" within the context of seeking and providing advice regarding the court actions and as such, are protected by the solicitor-client communication privilege.

[16] The NPCA further states that past orders⁴ have found copies of statements of defence and emails dealing with the content of statements of defence to be exempt from disclosure under both Branch one, the common law solicitor-client communication privilege, and Branch two, statutory litigation privilege, of section 12.

[17] The appellant believes that many of the documents the NPCA has refused to release may be internal communications or some other forms of communication that do not qualify for protection under the solicitor-client privilege exemption.

Analysis/Findings

[18] I will consider Branch 2 first. 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." The statutory and common law privileges, although not identical, exist for similar reasons.

[19] Statutory litigation privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing

⁴ The NPCA relies on *Puslinch (Township) (Re)*, 2009 CanLII 60397 (ON IPG) at p. 6-7; *City Front Developments Inc. v. Toronto District School Board*, 2007 CanLII 6925 (ON SC) at para. 12.

counsel.⁵

[20] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.⁶

[21] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.⁷

[22] Pages 21 to 23, 33 to 39, and 80 to 82, contain correspondence between opposing counsel and I accept that these records were prepared for use in the settlement of litigation. As statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation,⁸ I find that these records are exempt by reason of litigation privilege in Branch 2 of section 12.

[23] Pages 40 to 48 and 52 to 61 consist of emails to the NPCA from its legal counsel attaching draft statements of defence. Pages 63 to 65, 67 to 79, 84 to 185 and 295 to 296 contain correspondence between the NPCA's lawyer and the NPCA. I accept, and I find, that all of these emails and their attachments were prepared for use in giving legal advice and are subject to solicitor-client communication privilege. I also find that the privilege in these records has not been lost through waiver. I have no evidence that these pages of the records have been disclosed to outsiders that do not have a common interest with the NPCA.⁹

[24] I now turn to the common law solicitor-client communication privilege in Branch 1 of section 12. This 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.¹⁰ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹¹ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹²

[25] Confidentiality is an essential component of the privilege. Therefore, the

⁵ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

⁶ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

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.

⁹ See J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹⁰ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹¹ Orders PO-2441, MO-2166 and MO-1925.

¹² *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

institution must demonstrate that the communication was made in confidence, either expressly or by implication.¹³ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹⁴

[26] Pages 197 to 200 consist of an invoice sent from the NPCA's lawyers to the NPCA. This record is covered by Branch 1 (common law) solicitor-client communication privilege.

[27] Under the Branch 1 solicitor-client communication privilege, legal billing information is presumptively privileged unless the information is "neutral" and does not directly or indirectly reveal privileged communications.¹⁵ In the Notice of Inquiry, the NPCA was asked to address the question of whether the legal billing information is privileged in this case, with reference to the following questions:

(1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?

(2) could an "assiduous inquirer", aware of background information, use the information requested to deduce or otherwise acquire privileged communications?¹⁶

[28] As noted above, the NPCA states that this record reveals the dates the legal advice was sought and received from its legal counsel, as well as the nature and type of advice provided. It submits that disclosure would jeopardize the confidentiality of the legal advice given, in particular with respect to legal strategies or the progress of litigation.

[29] The invoice shows dates relating to when the services were charged and details of the nature of the services rendered.

[30] Many orders have held that the total amount of legal fees paid by an institution would not allow for an assiduous requester or knowledgeable counsel to discern information relating to the litigation strategies employed.¹⁷ I find that page 200, which only reveals the total amount of legal fees paid by the NPCA and the name of the law

¹³ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹⁴ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

¹⁵ *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

¹⁶ See Order PO-2484, cited above; see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

¹⁷ See for example Orders PO-2483 and PO-2548 F.

firm that charged these fees, is neutral information and is not privileged.

[31] I agree, however, that the very detailed information in the invoice on pages 197 to 199, including the handwritten comments thereon, reveals information relating to litigation strategies employed by the NPCA's counsel. These portions of the invoice reveal the dates relating to when the services were charged and details of the nature of the services rendered by the NPCA's lawyers. The findings in Order MO-2190 are applicable in this appeal. In that order, the adjudicator found that disclosure of a lawyer's invoices would "reveal privileged information about the solicitor-client relationship, permitting inferences to be drawn about the instructions given, as well as revealing or permitting accurate inferences to be drawn about the precise legal services provided." The adjudicator found that the invoices were exempt under Branch 1 of section 12. In the circumstances, based on my review of the relevant parts of the invoice, I find that the portions remaining at issue constitute privileged information and qualify for exemption under Branch 1 of section 12.

[32] In conclusion, except for the total amount of legal fees paid and the recipient law firm found at page 200 of the invoice, I find that all of the records at issue are subject to solicitor-client privilege. The records at issue are not the type of records referred to by the appellant in his representations, namely, internal communications or other forms of communication that do not qualify for protection under the solicitor-client privilege exemption.

[33] Accordingly, other than page 200, which I will order disclosed, the information at issue in the records is exempt under section 12.

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

[34] 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.

[35] 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.

[36] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁸ This office may not, however, substitute its own discretion for that of the institution.¹⁹

[37] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁰

- 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
- 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.

[38] In exercising its discretion with respect to section 12, the NPCA states that it took into account the following considerations:

¹⁸ Order MO-1573.

¹⁹ Section 43(2).

²⁰ Orders P-344 and MO-1573.

"1. *The purpose of the Act, being transparency and protection of privacy, and the limited nature of the exemptions:* the records in issue are not in the public domain; releasing them will not add to the public interest in transparency, but will cause prejudice to the NPCA;

2. *The importance of preserving solicitor-client privileged information:* this consideration is fundamental. Legal advice sought by the NPCA and the NPCF and provided to it by its legal counsel is privileged. At no point did the NPCA waive their rights to solicitor-client privilege;

3. *The wording of the exemption and the interests it seeks to protect:* the information sought to be protected falls squarely within the scope of the exemption for solicitor-client privileged information;

4. *The public's interest in receiving the redacted information:* the public has no interest in receiving the information sought by the requester;

5. *Whether the requester has a sympathetic or compelling need to receive the information:* the requester has no sympathetic or compelling need for the information, which consists entirely of the seeking, formulating or giving of legal advice between the NPCA and its legal counsel;

6. *Whether disclosure will increase public confidence in the operation of the NPCA:* disclosure of the records in issue would have no effect on the public confidence in the operation of the NPCA; and,

7. *The nature of the information and the extent to which it is significant and/or sensitive to the institution, requester or affected person:* the information is highly sensitive to the NPCA in that it relates to its constitutionally protected right to solicitor-client privilege. While the information sought may be significant to the requester, it is constitutionally protected information and may only be ordered disclosed when absolutely necessary, which is not the situation in this instance."²¹

[39] The appellant submits that the NPCA has not acted in good faith in the past. He states that the NPCA does not deal with freedom of information requests in good faith and he argues that its responses repeatedly demonstrate a bad faith, and even adversarial, approach to requests made of the organization.

Analysis/Findings

[40] Based on my review of the records and the parties' representations on the

²¹ Emphasis added by the NPCA.

exercise of discretion under section 12, particularly the NPCA's detailed representations set out above, I find that the NPCA exercised its discretion in a proper manner. I am satisfied that in deciding to withhold the records under section 12, the NPCA did not take into account improper considerations. While the NPCA's statement that the information "may only be ordered disclosed when absolutely necessary" is incorrect,²² I am satisfied overall that the NPCA took into account relevant circumstances, including the constitutionally protected nature of solicitor-client privilege. Above, I concluded that the information at issue in the records is subject to section 12. There is simply insufficient evidence before me upon which I could find, as the appellant submits, that the NPCA did not deal with this access request in good faith; nor do I conclude that bad faith could be inferred from the NPCA's exercise of discretion in this appeal.

[41] Accordingly, I uphold the NPCA's exercise of discretion to deny access to the solicitor-client exempt information under section 12.

ORDER:

1. I order the NPCA to disclose page 200 to the appellant by **February 22, 2019**.
2. I uphold the NPCA's decision to deny access to the records remaining at issue under section 12.

Original Signed by: _____

Diane Smith
Adjudicator

February 8, 2019 _____

²² This office cannot substitute its discretion for that of the NPCA and order disclosure of information that is exempt under section 12. The NPCA, on the other hand, has the discretion to disclose information that is subject to section 12, and it is not a requirement that the disclosure be "absolutely necessary" for it to do so.