Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3743

Appeals MA17-342 and MA17-343

City of Hamilton

March 20, 2019

Summary: In this order, the adjudicator upholds the City of Hamilton's decision to deny access to records related to its Transgender and Gender Non-Conforming Protocol under section 12 (solicitor-client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act*. In the first of two requests, the appellant sought access to a draft of the protocol and correspondence accompanying it when the city provided the draft protocol to the Ontario Human Rights Commission. In the second request, the appellant sought access to the draft protocol returned to the city with the Ontario Human Rights Commission's comments. The city denied access to the four records identified as responsive to the requests, in their entirety. In the result, the appeals are dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12 and 16.

Orders and Investigation Reports Considered: Orders PO-3059-R and PO-3627.

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681; *Ontario v. Criminal Lawyers' Association,* 2010 SCC 23; *Ontario (Attorney General) v. Big Canoe,* [2006] O.J. No. 1812 (Div. Ct.).

OVERVIEW:

[1] This order addresses the decisions issued by the City of Hamilton (the city) in response to the following two access requests submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

> In December of 2016 or January of 2017 a draft of the Transgender and Gender Non-Conforming Protocol was submitted to the Ontario Human Rights Commission [OHRC] by the City of Hamilton. This request is for a copy of that same draft protocol and covering letter of submission to the Ontario Human Rights Commission.
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> And,
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> In February of 2017 the Ontario Human Rights Commission provided the City of Hamilton with comments on the draft Transgender and Gender Non-Conforming Policy which had been submitted to the Ontario Human Rights Commission by the City of Hamilton for their review. This request is for a copy of the OHRC comments provided to the City of Hamilton.

[2] The city identified a letter and draft protocol as responsive to the first request, and identified an email and its attachment (the draft protocol with review comments) as responsive to the second request. The city issued two decision letters denying access to the records responsive to each request, relying on the exemptions in sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*.

[3] The requester (now the appellant) appealed both access decisions to this office, which resulted in the opening of Appeals MA17-342 and MA17-343 and the appointment of a mediator to explore the possibility of resolution. The parties' positions and submissions were exchanged during the mediation stage, but the city maintained its decision to deny access under sections 7(1) and 12 of the *Act*. The appellant maintained his position that the exemptions did not apply and he also claimed that even if they did, the records should be disclosed on the basis of the public interest override in section 16 of the *Act*. Since a mediated resolution was not possible, the appeal proceeded to the adjudication stage where an adjudicator may conduct an inquiry.

[4] As the adjudicator, I decided to conduct a joint inquiry into the appeals. During the inquiry, I invited and received representations from the city and the appellant. I shared the non-confidential portions of the city's representations with the appellant pursuant to *Practice Direction 7* issued by this office. After I provided the appellant's representations to the city, it submitted a brief response that essentially reiterated its initial submissions.

[5] In this order, I uphold the city's decision to deny access to the records under section 12, and I dismiss the appeals.

RECORDS:

[6] The records at issue in the two appeals consist of a two-page cover letter from the city to the OHRC accompanied by a 16-page draft protocol (Appeal MA17-342) and a three-page email accompanied by a 17-page draft protocol with OHRC comments

(Appeal MA17-343). These records, identified as Records 1 to 4, are described in greater detail, below.

ISSUES:

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

B. Did the city exercise its discretion under section 12 properly in withholding the records?

DISCUSSION:

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

[7] Section 12 provides that:

> 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.

[8] 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.

[9] In these appeals, the city claims that Branch 2 statutory litigation privilege applies to the records.

[10] 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.

[11] 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.[1]

[12] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[2]

Representations

[13] Although I set out only the non-confidential representations of the city,[3] below, I have considered the city's complete representations in making my decision.

[14] The city describes Record 1 as a "request letter" marked "Private & Confidential," sent by its Senior Solicitor to the OHRC's Manager of Legal Services and Inquiries on December 22, 2016. The request letter accompanied Record 2, which was a working draft of the city's Transgender and Gender Non-Conforming Protocol (the draft protocol), dated December 20, 2016. The city describes Record 3 as an email marked "Solicitor-Client Privileged," sent by the same Senior Solicitor to her client, a Human Rights Specialist in the city's Human Resources Division. Finally, the city describes Record 4 as the version of the draft protocol that includes the comments and recommendations of a Senior Policy Analyst of the OHRC.

[15] The city explains that the draft protocol was prepared by a City of Hamilton multi-disciplinary working group comprised of staff from Human Resources, Policy, Human Rights, and Access and Equity, with support from Legal Services. Relying on *Magnotta*, the city submits that branch 2 of section 12 applies to the four records because they are all documents prepared for use in the mediation or settlement of actual litigation. Specifically, the city claims the records are directly related to the implementation of the Minutes of Settlement respecting the human rights application brought against the city and the Hamilton Street Railway (HSR) by A.B., a transgender woman, "after she was denied entry to a woman's washroom … at the MacNab Street Transit Terminal." According to the city,

> The Minutes of Settlement are strictly private and confidential as between the City and A.B. and came about after the parties participated in a confidential Mediation/Adjudication with a Vice-Chair from the Human Rights Tribunal at the outset of the first day of the hearing of A.B.'s application scheduled before the Tribunal. The parties signed a Mediation/Adjudication Agreement that confirmed that the mediation was a confidential process.

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[1] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[2] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (*Magnotta*).
[3] The same version of the city's non-confidential representations shared with the appellant during the inquiry.

[16] The city identifies the draft protocol and communications it had with the OHRC as necessary to the process of implementing the settlement reached between the city/HSR and A.B. as the parties to her human rights application. The city explains that the draft protocol enclosed with the request letter to the OHRC was a record prepared by the multi-disciplinary working group for legal counsel employed by the city for use in litigation. The city submits that the draft protocol and the request letter form a complete communication sent by the city's legal counsel to the OHRC and which, the city argues, are integral components of this purposive communication to the OHRC.

[17] The city submits that Record 3, the January 9, 2017 email from its Senior Solicitor to the city's Human Rights Specialist, constitutes a confidential communication between the city's lawyer and her client in furtherance of the settlement of A.B.'s litigation against the city/HSR, and its implementation, and it is exempt under section 12 on that basis. Further, Record 4, as the draft protocol that included the OHRC's comments and recommendations, reflects a record that was prepared by the OHRC for legal counsel employed by the city for use in litigation, particularly the settlement of A.B.'s human rights application.

[18] According to the city, because the records are documents prepared by, or delivered to, the city's lawyer to assist with effecting the settlement reached in A.B.'s human rights application, they form a part of the litigation process and fall within "any reasonable zone of privacy."

[19] In addressing the issue of waiver, the city submits that it has never "deviated from the settlement privilege" that applies to the records at issue. Regarding Records 1, 2 and 4, specifically, the city submits that consulting with the OHRC about the working draft protocol should not be considered a waiver of the privilege as that consultation was necessary to the settlement and the documents are clearly related to it. According to the city, Record 3, as an email between a client and her solicitor, also remains privileged as a confidential communication in furtherance of the settlement of the litigation. In particular, the city submits that "at no time did the City indicate an intention to waive the protection of settlement privilege that attached to the records." The city adds that there is no evidence that the city (or A.B.) "altered their understanding that the communications and records would not be otherwise disclosed or used" and, therefore, there is no basis for a finding of any intentional and voluntary waiver of the privilege.

[20] Finally, the city acknowledges that although section 4(2) of *MFIPPA* requires an institution to disclose as much of any responsive record as can reasonably be severed without disclosing material that is exempt, section 12 is a "class privilege" and, therefore, severance of any records that are exempt on that basis is neither appropriate

nor required.[4]

[21] The appellant's representations do not directly address the application of the solicitor-client privilege exemption in section 12.

[22] Although the appellant acknowledges that the city has denied his request for access to the records at issue based on solicitor-client privilege, he maintains that the records should be disclosed in the public interest. However, section 12 is not listed in section 16 as one of the sections in respect of which the public interest override is available.[5] The Supreme Court of Canada addressed the absence of a public interest override for solicitor-client privileged records in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[6] In upholding the constitutional validity of this statutory scheme, the Supreme Court noted that consideration of the public interest is already incorporated in the discretionary language of the exemption. Therefore, insofar as the appellant's arguments on the public interest relate to the city's exercise of discretion in denying access under section 12, they are set out below.

Analysis and findings

[23] As established by *Magnotta,* the statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of actual or contemplated litigation.[7]

[24] The appellant does not seek the Minutes of Settlement related to the human rights application against the city, but rather a draft version of the Transgender and Gender Non-Conforming Protocol passed by City Council, as well as related communications involving the OHRC and other city staff. For these four records to qualify for exemption, I must be satisfied that the records were prepared by or for counsel employed or retained by an institution and that the records were prepared in contemplation of, or for use in, litigation.

[25] The human rights application brought against the city and the HSR by A.B. satisfies the requirement that there be actual (or reasonably contemplated) litigation. Next, based on the city's representations and the circumstances of these appeals, I find that the four records at issue consist of settlement-related documents, all of which were

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[4] The city's representations on section 12 as a class-based privilege refer to *Ontario (Ministry of Finance) v. Ontario (Assistant Information & Privacy Commissioner),* 1997 Carswell Ont 831 (Ont. Div. Ct.), *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 (SCC), at para. 12), and *Descôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

[5] Section 16 of *MFIPPA* states: "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."

[6] *Ontario v. Criminal Lawyers' Association*, 2010 SCC 23.

[7] *Magnotta*, cited above. See also Orders PO-3059-R and MO-2921.

prepared by or for legal counsel employed by the city for use in the settlement of the litigation related to A.B.'s human rights application. The city's evidence establishes that Records 1 to 4 were required as part of the settlement relating to A.B.'s human rights complaint against the city (and HSR) or were incidentally created as part of the process of implementing the settlement to meet the city's obligations and to avoid litigation.

[26] On the issue of confidentiality, and as I stated above, the statutory litigation privilege does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege.[8] In these appeals, therefore, I specifically considered the fact that some of these communications – Records 1, 2 and 4 – were between the city and an outside organization, the OHRC. In the circumstances, however, I am satisfied that there existed a "zone of privacy" around the preparation and use of the records. Based on my consideration of the city's confidential and non-confidential representations, I accept that the city's sharing of Records 1, 2 and 4 with the OHRC was in furtherance of meeting its obligations under the Minutes of Settlement with A.B. In this context, I find that the exchange of the draft protocol and related communication between the city and the OHRC did not remove the records from the "zone of privacy" intended to be protected by the litigation privilege.

[27] I asked the city to address the issue of waiver in relation to the statutory litigation privilege claimed for the records. In response, the city maintains that it did not waive the privilege, nor did it evince any intention to do so. I accept the city's position, and I find that waiver is not established in relation to the statutory litigation privilege applying to Records 1 to 4.

[28] As already noted, the termination of litigation does not end the statutory litigation privilege.[9] There is no temporal limit. Since the settlement of the human rights litigation here does not serve to end the statutory litigation privilege, I find that the records are exempt under branch 2 of section 12, subject to my review of the city's exercise of discretion, below. Finally, I agree with the city, and I find, that since the records are exempt on this basis, they cannot reasonably be severed under section 4(2) of the *Act*.

Issue B: Did the city exercise its discretion under section 12 properly in withholding the records?

[29] 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

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

[99] See Order PO-3627, pages 5-8, for discussion of the statutory litigation privilege waiver issue in *Big Canoe (2006)* and *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (2002) 62 O.R. (3d) 167 (C.A.).

discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[30] 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.

[31] In either case, I may send the matter back to the city for an exercise of discretion based on proper considerations.[10] However, this office may not substitute its own discretion for that of the institution.[11]

Representations

[32] The city lists 17 considerations that it claims it took into account in exercising its discretion under section 12 to deny access to the records. The considerations mentioned by the city include, but are not limited to, the following:

- the principle that exemptions to the right of access should reflect the specific and limited circumstances where non-disclosure is necessary for the proper operation of municipal institutions;
- the conclusion that disclosure will not increase public confidence in the city's operations;
- the fact that disclosure could have an adverse effect on the ability of city staff to properly advise Council; and
- the fact that the final version of Records 2 and 4 was made public.

[33] The city also submits that it considered the wording of section 12 of *MFIPPA* and the interests it serves to protect, which were engaged in this situation. Specifically, the city says that it considered the importance of the solicitor-client relationship, the actual communications contained in the records and the importance of the city "being able to implement and satisfy terms of minutes of settlement in a responsible and effective way." The city maintains that its exercise of discretion is consistent with the principles

[10] Order MO-1573.
[11] Section 43(2).

that inform the concept of privilege.[12]

[34] The appellant's submissions do not directly address the city's exercise of discretion in denying access to the records under section 12. However, his explanation about why he is seeking access to these particular records indicates a desire to scrutinize the city's process in adopting the protocol and, particularly, the terminology ultimately chosen for use in it. The requested documents are more than "a mere settlement between the city and one individual, they were the foundations upon which a public policy was formed which impact every citizen of Hamilton. Public policy and the formation of public policy must be open to public scrutiny without exception."

[35] Citing section 20(1) of Ontario's *Human Rights Code*,[13] the appellant argues that "the city protocol by allowing males to enter and use the public intimate female facilities, is in conflict with the Code which permits sex-segregated facilities on the ground of public decency." The appellant suggests that access to the draft protocols and related documents is essential to understanding certain changes that were made to it prior to the final version. He states that these changes "significantly increased the accessibility of males who may enter public intimate female facilities from males who lived as females (lived gender identity) to males who simply self-identify as females." In the appellant's view, since individuals could rely on the terminology of self-identification used in the final protocol for their own "nefarious purposes," the city is obliged to disclose the records.

Analysis and findings

[36] Arguments on the public interest considerations that may be raised by an access request frequently find connection with concerns about the transparency of government action or decision-making. In these appeals, I understand the appellant's arguments about a public interest in understanding the rationale and the process by which the language in the protocol's final version was chosen to suggest such a concern. However, as the Court of Appeal in *Magnotta* observed about settlement-related records:

> . . . 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

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[12] The city's representations on the public interest override elaborate on the "fundamental importance of solicitor-client privilege" and its class-based status, as articulated in *Magnotta* and *Criminal Lawyers' Association*, cited above.

[13] R.S.O. 1990, CHAPTER H.19; section 20(1) "Restriction of facilities by sex." The appellant also refers to a related OHRC policy titled "Policy on preventing discrimination because of gender identity and gender expression," January 2014.

> the more compelling public interest in encouraging the settlement of litigation.

[37] I agree, and I have considered this reasoning in my decision to uphold the city's exercise of discretion. I am satisfied that the city took relevant considerations into account in denying access to the records, in their entirety, based on the non-confidential relevant considerations I excerpted from its representations, above. The extensive jurisprudence of the Supreme Court and the Ontario Court of Appeal on the importance of maintaining solicitor-client privilege is a relevant factor that the city was legitimately entitled to consider.

[38] I am also satisfied, based on the evidence provided, that the city did not rely on irrelevant considerations in deciding to withhold the records or exercise its discretion in bad faith or for an improper purpose.

[39] Accordingly, I uphold the city's exercise of discretion under section 12 of the *Act*. As I have upheld the city's exercise of discretion to withhold the records under section 12, in their entirety, there is no need for me to consider whether section 7(1) applies to Records 2, 3 and 4, or portions of them.

ORDER:

I uphold the city's decision to withhold the records under section 12 of the *Act*, and I dismiss Appeals MA17-342 and MA17-343.

Original signed by	March 20, 2019
Daphne Loukidelis Adjudicator	