Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4006

Appeal MA18-423

City of Greater Sudbury

February 4, 2021

Summary: The appellant is a journalist who submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Greater Sudbury (the city) for records relating to a settlement reached between the city and a former employee of the mayor's office who had sued the city for wrongful dismissal. The city denied access to these records under the discretionary exemption in section 12 (solicitor-client privilege) and the mandatory exemption in section 14(1) (personal privacy) of the *Act*, and the appellant appealed the city's access decision to this office. In this order, the adjudicator finds that the settlement agreement and any other responsive records are exempt from disclosure under section 12 of the *Act*. He upholds the city's access decision and dismisses the appeal.

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, MO-3597 and MO-3924-I.

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.

OVERVIEW:

[1] In 2016, a former employee of the mayor's office sued the City of Greater Sudbury (the city) for wrongful dismissal and sought $300,000 in damages. She alleged that she had been wrongfully fired from her position after complaining that she was being harassed by the mayor's chief of staff.[1] In 2018, the city settled the lawsuit with her but did not publicly release any details, including the amount (if any) of the settlement.[2]

[2] The appellant, who is a journalist, submitted an access request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records:

> I am looking for information on the settlement between the mayor's office and [a named individual], a former employee of [the mayor]. [The named individual] sued the city after she was fired, alleging harassment by [the mayor's chief of staff]. I am looking to find out whether [the named individual] received a settlement from [the] city in response to her lawsuit. If she received a cash settlement, I'm hoping to find out how much, and for what reasons was she awarded money. I'm also hoping to find out whether [the] city admitted any guilt, and whether an apology was given to [the named individual] as a result of the settlement.

[3] The city denied access to the records under the discretionary exemption in section 12 (solicitor-client privilege) and the mandatory exemption in section 14(1) (personal privacy) of the *Act*. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute.

[4] This appeal was not resolved during mediation and was moved to adjudication where an adjudicator may conduct an inquiry. I sought representations from both the appellant and the city and asked them to focus primarily on whether the requested records are exempt from disclosure under section 12 of the *Act* and, if so, whether the city exercised its discretion appropriately in withholding the records under that exemption. I received representations from both parties.

[5] In this order, I find that the records requested by the appellant are exempt from disclosure under section 12 of the *Act*. I uphold the city's access decision and dismiss the appeal.

---

[1] "$300K lawsuit alleges harassment in the mayor's office," at: www.sudbury.com/local-news/300k-lawsuit-alleges-harassment-in-the-mayors-office-309474

[2] "Denied: City refuses to say how mayor's office lawsuit was settled," at www.sudbury.com/local-news/denied-city-refuses-to-say-how-mayors-office-lawsuit-was-settled-961790

RECORDS:

[6] The city did not provide the IPC with a copy of the records at issue. However, based on the city's representations, the responsive records in its custody or under its control can be described as those that contain information about the settlement reached between the city and the former employee of the mayor's office who sued the city for wrongful dismissal. Such records would include the settlement agreement itself and any other records that identify the terms of that agreement.

ISSUES:

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

B. Did the city exercise its discretion under section 12? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

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

[7] 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.

[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 and includes: (1) Statutory solicitor-client communication privilege and (2) statutory litigation privilege.

[9] I have decided to start my analysis by examining whether the statutory litigation privilege in branch 2 of the section 12 exemption applies to those records held by the city that contain information about the settlement reached between itself and the former employee of the mayor's office who sued the city for wrongful dismissal. These records would include the settlement agreement and any other records that identify the terms of that agreement.

[10] The 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 counsel.[3]

[11] Both the courts and the IPC have found in previous decisions that records of the type sought by the appellant in this appeal, including settlement agreements, are exempt from disclosure under section 12 of the *Act* and the equivalent provision in section 19 of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).

[12] In *Liquor Control Board of Ontario v. Magnotta Winery Corporation*,[4] the Ontario Court of Appeal found that the statutory litigation privilege in section 19 of *FIPPA* protects records prepared for use in the mediation or settlement of litigation, including the end products, such as settlement agreements and minutes of settlement. The Court stated, in part:

> . . . 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.
>
> . . . .
>
> 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

---

[3] 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).

[4] 2010 ONCA 681.

> were provided to Crown counsel for use in the mediation and settlement discussions [5]

[13] Orders issued by the IPC since *Magnotta* have found that records prepared for use in the settlement of contemplated litigation, including settlement agreements and minutes of settlement, are exempt from disclosure under the statutory litigation privilege in section 19 of *FIPPA* and section 12 of the *Act*.[6]

[14] For example, in Order PO-3651, Adjudicator Cathy Hamilton applied *Magnotta* and found that severance agreements reached between the Niagara Health Service (NHS) and some of its former employees were subject to the statutory litigation privilege in section 19 of *FIPPA*. She stated, in part:

> 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.
>
> . . . .
>
> . . . 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.[7]

[15] In its representations, the city states that the statutory litigation privilege may be applied to records prepared by or for counsel "in contemplation of or for use in litigation." It adds that it retained legal counsel to represent its interests in the litigation matter referenced in the appellant's access request, and that the responsive records were created in the context of that litigation.

---

[5] *Ibid.*, paras 36 and 44.

[6] Orders PO-3627, PO-3651, MO-3597 and MO-3924-I.

[7] Paras 21 and 23.

[16] The city submits that because it retained legal counsel and the records fall within the category of records described in *Magnotta*, including settlement agreements, the statutory litigation privilege in section 12 of the *Act* applies to the records requested by the appellant. It further submits that this privilege was not expressly or tacitly waived and although the litigation matter has concluded, the statutory litigation privilege in section 12 does not end with the conclusion of the litigation.

[17] The appellant states that he understands that solicitor-client privilege is essential in the legal system but submits that the way those principles are being applied in this case shows that there is a gap that effectively allows the city to hide the cost of misdeeds from the public.

[18] The records at issue in this appeal are those records held by the city that contain information about the settlement reached between itself and a former employee of the mayor's office who sued the city for wrongful dismissal, including the settlement agreement and any other records that identify the terms of that agreement. The former employee was apparently represented by legal counsel in the subsequent negotiations that led to the settlement agreement reached between herself and the city.

[19] In these circumstances, I am satisfied that there was litigation between the former employee and the city, and that the parties entered into a settlement agreement to resolve this litigation. I find, therefore, that the settlement agreement and any other records that are responsive to the appellant's access request were prepared by or for counsel employed or retained by city for use in litigation, as required by the statutory litigation privilege in section 12 of the *Act*.

[20] There is no evidence before me to suggest that the city waived this privilege. I find, therefore, that the settlement agreement reached between the city and the former employee of the mayor's office, and any other responsive records, are exempt from disclosure under section 12 of the *Act.*

B. Did the city exercise its discretion under section 12? If so, should the IPC uphold the exercise of discretion?

[21] 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 IPC may determine whether the institution failed to do so. The IPC 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

[22] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[8] The IPC may not, however, substitute its own discretion for that of the institution.[9]

[23] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[10]

- 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.

[24] The "public interest override" in section 16 of the *Act* cannot apply to records that are exempt from disclosure under section 12. However, in *Ontario (Public Safety and*

---

[8] Order MO-1573.

[9] Section 43(2).

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

Security) v. Criminal Lawyers' Association,[11] the Supreme Court of Canada commented on the duty of the head of an institution to consider all relevant interests in exercising its discretion, including the "public interest" in disclosing records. It stated:

> . . . [T]he "head" making a decision under ss. 14 and 19 of [*FIPPA*] has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, *including the public interest in disclosure*, disclosure should be made.[12] [emphasis added]

[25] The city submits that it appropriately exercised its discretion when applying the section 12 exemption. It asserts that the IPC along with the judiciary have consistently determined that records created as a result of confidential mediations or negotiations are exempt from disclosure through access-to-information regimes. It cites Order MO-3743, in which Adjudicator Daphne Loukidelis stated that:

> . . . 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.[13]

[26] The city further states that it also considered the impact that disclosure may have on its ability to navigate future negotiations. It submits that as established in *Magnotta*, disclosing records produced in the context of confidential negotiations would have a negative impact on any future negotiations. It asserts that opposing parties may not be willing to engage in negotiations if they believe that confidential discussions could be made public as a result of an access request.

[27] The city also states that it considered that because the nature of the information is quite sensitive and does not relate to the appellant but rather another identifiable individual, it did not act in bad faith when exercising its discretion or act contrary to its historic practices regarding litigation privileged materials.

[28] With respect to any public interest in disclosing the records that might exist, the city states that the legislation, the judiciary and the IPC have consistently determined that the public interest in accessing litigation privileged materials is not so great as to overcome the interests protected by section 12 of the *Act*. To support its position, it cites

---

[11] 2010 SCC 23.

[12] *Ibid.* at para 66.

[13] Para 37.

a passage from *Magnotta* in which the Court stated that, ". . . the public interest in transparency is trumped by a more compelling public interest in encouraging settlement of litigation."[14]

[29] The city submits that all of the above factors are appropriate considerations that it took into account in exercising its discretion under section 12, which led to its decision to deny access to the records requested by the appellant.

[30] In his representations, the appellant argues that there is a public interest in disclosing at least part of the settlement agreement. He submits that taxpayers have the right to know if their tax dollars are being spent because of the misconduct of public employees. He states:

> In this case, a staffer sued over the way she was treated as an employee – and over the reasons she was ultimately let go. The city said it would defend the case in court, and then made an out-of-court settlement. As a result, the public has no idea if the claims were justified, or how much was paid to the claimant. The city potentially has used privacy laws to cover up misbehaviour of the mayor's chief of staff. The law as written offers no way for the public to know.
>
> . . . At the very least, the amount paid (if any) to the employee who sued should be a matter of public record. If the city wants to expand – for example, defending the settlement by saying they admitted no guilt, but decided it would be cheaper to settle – that's up to them. But allowing politicians and their top bureaucrats to pay settlements for wrongdoing -- and hide it from the public using privacy laws – is a significant problem. . .

[31] In my view, the appellant has raised a number of compelling transparency arguments as to why the settlement agreement reached between the city and a former employee who sued the city for wrongful dismissal should be disclosed. I would point out that although the appellant alleges that, "[t]he law as written offers no way for the public to know," this is not entirely accurate. Section 12 is a discretionary exemption, not a mandatory exemption. Consequently, even though the settlement agreement and any other responsive records are exempt from disclosure under section 12, the *Act* clearly allows the city to exercise its discretion to disclose these records after considering all relevant factors, including any public interest in disclosure. However, in this case, the city has chosen to exercise its discretion in favour of withholding the records, which it is entitled to do, as long as it exercises its discretion appropriately. I cannot substitute my own discretion for that of the city.[15]

---

[14] *Supra* note 4 at para 25.

[15] *Supra* note 9.

[32] Based on the city's representations, I am satisfied that it exercised its discretion and did so properly in deciding to withhold the settlement agreement and other responsive records under section 12 of the *Act.* It took into account relevant considerations, including any public interest in disclosure. There is no evidence before me to suggest that the city took into account irrelevant considerations or that it exercised its discretion in bad faith or for an improper purpose. As a result, I uphold the city's exercise of discretion under section 12.

CONCLUSION:

[33] I find that the settlement agreement reached between the city and the former employee of the mayor's office and any other responsive records are exempt from disclosure under section 12 of the *Act.* As a result, it is not necessary to determine whether any information in these records is also exempt from disclosure under the personal privacy exemption in section 14(1) of the *Act*, which was also claimed by the city.

ORDER:

I uphold the city's access decision and dismiss the appeal.

Original Signed by: February 4, 2021

Colin Bhattacharjee
Adjudicator