

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4528

Appeal MA21-00683

Township of Hornepayne

May 31, 2024

**Summary:** The Township of Hornepayne received a request under the *Act* for an agreement between it and a certain company. The township identified a confidential by-law with an attached settlement agreement as the responsive record. In this order, the adjudicator finds that the records are not exempt under the discretionary exemption at section 12 (solicitor-client privilege) of the *Act*. However, she finds that the record is subject to common law settlement privilege and need not be disclosed under the *Act*.

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

**Orders Considered:** Orders PO-4406 and MO-2471.

**Cases Considered:** *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.); *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.); *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.); *Sable Offshore Energy Inc. v. Ameron International Corp.* 2013 SCC 37; *Kelvin Energy Ltd. v. Lee*, 1992 CanLII 38 (SCC), [1992] 3 S.C.R. 235; *Liquor Control Board of Ontario v. Magnotta Winery Corp.*, 2010 ONCA 681; *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35; *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 (CanLII); *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737; *Clayton v. SPS Commerce Canada Ltd.*, 2018 ONSC 5017 (CanLII); *Howes v. Howes*, 2018 ONSC 6297; *Aly v. Halal Meat Inc. et al* 2012 ONSC 2585; *Richmond (City) v. Campbell*, 2017 BCSC 331 (CanLII).

## **OVERVIEW:**

[1] The Township of Hornepayne (the township) received a request under the Act, as follows:

“I request a copy of the one (1) AGREEMENT which constitutes the exception where [a named company] does not pay the same rate as all other property owners in Hornepayne.”

[2] In response to the request, the township issued a decision denying access to the record under the mandatory exemption at section 10(1) (third party information) and the discretionary exemption at section 12 (solicitor-client privilege) of the Act.<sup>1</sup>

[3] The requester,<sup>2</sup> now the appellant, appealed the township’s decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] I conducted an inquiry into the appeal. The township, the named company (the affected party), and the appellant were invited and provided representations about the issues under appeal.

[5] For the reasons that follow, I uphold the township’s decision to not disclose the record and dismiss the appeal.

## **RECORD:**

[6] The township provided the record at issue to the IPC. It is a confidential township by-law and attached agreement between the township and a specified company (the affected party).

## **ISSUES:**

- A. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the record?
- B. Does common law settlement privilege apply to the record?

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<sup>1</sup> The township did so after notifying the named company, pursuant to its obligation to do so under section 21 of the *Act*.

<sup>2</sup> Through his legal representative.

## **DISCUSSION:**

### **Issue A: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the record?**

[7] For the reasons that follow, I find that section 12 does not apply to the by-law and agreement (the record).

[8] In my view, it is useful to begin by highlighting the nature of the record itself, which I have reviewed.

#### ***What is the record?***

[9] The township explains that a dispute about the affected party's water and sewer account arose, resulting in a settlement between the township and affected party, and to give effect to the settlement agreement, the township passed a by-law (of a specified number). The township describes the by-law and settlement agreement as "the record," indicating that these are not separate records.

[10] The township states that the "record was mutually generated" between the township and the affected party in that it "reflects the settlement of a commercial dispute."<sup>3</sup> It explains that the agreement contains "precise balances that were owing on the third party's accounts with the [t]ownship" and a "payment arrangement between the [t]ownship and the third party."<sup>4</sup> Both the township and the affected party refer to this agreement in the context of avoiding litigation: the township states that "[l]egal action was well within contemplation in the circumstances," and the affected party expresses wariness of "a chilling effect on settlement agreements reached between parties who wish to avoid public litigation."

[11] The appellant's arguments focus on his belief that the record at issue is a commercial agreement that should be accessible under the Act.

[12] However, for the benefit of the appellant, since I have reviewed the record, I can confirm that it is a confidential by-law giving effect to a settlement agreement between two parties (the township and the affected party).

#### ***Given the nature of this record, it does not meet the tests for section 12***

[13] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

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<sup>3</sup> The township describes the record this way in its representations about its section 10(1) claim, which appear earlier on its representations than its section 12 and common law settlement privilege representations.

<sup>4</sup> See Note 3.

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.

[14] Section 12 contains two different exemptions, referred to in previous IPC decisions as “branches.” Branch 1 (“subject to solicitor-client privilege”) is based on common law. It encompasses two types of privilege: solicitor-client communication privilege and litigation privilege. Branch 2 a statutory privilege created by the Act. It 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. The institution must establish that at least one branch applies.

[15] For the purposes of this appeal, it is not necessary to elaborate further on these branches because the record at issue does not meet a basic requirement of each branch: confidentiality between a client and their lawyer.<sup>5</sup> By its nature, the record at issue, as a by-law giving effect to an attached settlement agreement involving opposing sides to a dispute, is not a confidential record between a client and their own legal counsel.

[16] Therefore, the record cannot qualify as exempt from disclosure under either branch of section 12 of the Act. As a result, it is not necessary to discuss other ways that the record does not meet the exemptions under section 12.

[17] Since the record does not qualify under either branch of section 12, I will turn to the township’s claim that the record is subject to common law settlement privilege, next.

### **Issue B: Does common law settlement privilege apply to the record?**

[18] The township submits that the reasoning in Order PO-4406 applies to the record at issue in this appeal, and therefore, cannot be disclosed in response to the request. For the reasons that follow, I agree.

#### ***Settlement privilege***

[19] The Supreme Court of Canada has found that “promoting settlement [is] ‘sound

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<sup>5</sup> That requirement underlies the various interests that each of the exemptions exists to protect (for example, the rationale for the common law litigation privilege is ensuring that a lawyer has a “zone of privacy” in which to investigate and prepare for a trial); *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39). The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in *their lawyer* on a legal matter (Orders PO-2441, MO-2166 and MO-1925). This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)]. The privilege does not cover communications between a lawyer and a party on the other side of a transaction [*Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)].

judicial policy' that 'contributes to the effective administration of justice.'"6 It applies to agreements made as a result of settlement discussions as well as offers and compromises made during negotiations.7

*It is a "class" privilege*

[20] Settlement privilege is a common law class privilege that protects the confidentiality of communications and information exchanged for the purpose of settling a dispute.8

[21] As a "class" privilege, common law settlement privilege attracts a presumption of non-disclosure.

[22] Courts have found that this presumption can be overcome in narrow circumstances related to fairness and rights of litigants in the same or related proceedings.9 I pause here to note that there is no suggestion that the appellant is a litigant in the same or related underlying dispute that was between the township and the affected party.

[23] Common law settlement privilege is distinct from both the common law solicitor-client privilege and common law litigation privilege (other "class" privileges), though there may be differing levels of overlap between the three privileges.10

*The three-part test*

[24] The Supreme Court of Canada has recognized that "settlement privilege extends beyond documents and communications expressly designated to be 'without prejudice.'"11

[25] For settlement privilege to apply to a record, these three criteria must be met:

1. A litigious dispute must be in existence or within contemplation;
2. The communication must be confidential and made with the express or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed; and

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<sup>6</sup> *Sable Offshore Energy Inc. v. Ameron International Corp.* 2013 SCC 37, relying on *Kelvin Energy Ltd. v. Lee*, 1992 CanLII 38 (SCC), [1992] 3 S.C.R. 235, at p. 259.

<sup>7</sup> *Liquor Control Board of Ontario v. Magnotta Winery Corp.*, 2010 ONCA 681.

<sup>8</sup> *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35.

<sup>9</sup> For example, exceptions have been made to prove the existence or terms of a settlement agreement (see *Union Carbide, supra*) and to provide evidence relevant to allegations of misrepresentation, fraud or undue influence (*Sable, supra*). The courts have also made exceptions to prevent over-compensation of a party [see *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 (CanLII)].

<sup>10</sup> *Sable, supra*.

<sup>11</sup> *Ibid*, citing *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737.

3. The purpose of the communication must be to attempt to effect a settlement.<sup>12</sup>

[26] Settlement privilege applies whether or not a settlement is reached.<sup>13</sup>

[27] Common law settlement privilege is shared by opposing parties (whereas both solicitor-client and litigation privileges apply to one side of a dispute). No party holding settlement privilege can waive it unilaterally. All parties to the litigation must waive the privilege before any elements of their settlement discussions can be disclosed.<sup>14</sup>

[28] Although settlement privilege only arises in the context of existing or contemplated litigation, lawyers do not need to be involved for a successful claim of settlement privilege.

***Can records that are not exempt under section 12 nevertheless be subject to common law settlement privilege?***

[29] The IPC considered this question for the first time in Order PO-4406 and found that they can.<sup>15</sup>

[30] In Order PO-4406, the IPC found that the Legislature could have limited the scope of how common law settlement privilege applies in the Act, but it did not do so. Therefore, without such clear and explicit statutory language limiting the scope of common law settlement privilege, it should apply to records held by institutions <sup>16</sup> (if they meet the three criteria for settlement privilege). The IPC held that to find otherwise would be:

unreasonable and unjust to deprive government litigants, litigants with claims against government or subject to claims by government, or litigants otherwise engaged in confidential settlement discussions in which the government was participating, of the settlement privilege available to all other litigants. Not allowing settlement privilege would discourage third parties from engaging in meaningful settlement negotiations with government institutions, which would be costly to taxpayers or otherwise

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<sup>12</sup> *Clayton v. SPS Commerce Canada Ltd.*, 2018 ONSC 5017 (CanLII); *Howes v. Howes*, 2018 ONSC 6297 (CanLII).

<sup>13</sup> *Ibid.*

<sup>14</sup> While settlement privilege is held by the parties to litigation, the Courts have found that settlement privilege applies to communications with non-parties or to documents held by non-parties (such as a mediator), as long as the three criteria listed above are met. For example, in *Aly v. Halal Meat Inc. et al* 2012 ONSC 2585, the Ontario Superior Court of Justice found that settlement privilege applied to the communications of two non-parties who had been asked by the parties to the litigation to assist them in resolving their litigation by engaging in informal mediation discussions.

<sup>15</sup> The IPC did this in an appeal involving the corresponding provincial Act (the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 91).

<sup>16</sup> That is, to institutions that are subject to the *Act*.

unfairly limit options for the efficient resolution of litigation available to purely private parties.<sup>17</sup>

[31] Although common law settlement privilege is not an exemption under the Act, if it applies to a record requested under the Act, “access applicants are not entitled to information protected by” it, as reasoned by the British Columbia Supreme Court (in a case that the IPC found persuasive in Order PO-4406).<sup>18</sup>

[32] The township relied on Order PO-4406. I agree that the reasoning in Order PO-4406 is relevant in this appeal, and I adopt it. Common law settlement privilege applies to a record held by township if the record meets the three criteria for the privilege. I consider that question next.

***Does common law settlement privilege apply to the record at issue?***

[33] For the following reasons, I find that the record at issue in this appeal meets the three-part test for common law settlement privilege.

*Part 1 – existing or contemplated litigation*

[34] The appellant argues that the township’s evidence about part one is insufficient. I disagree.

[35] The township explains that “legal action was well within contemplation in the circumstances.” The affected party also notes that it and the township wanted “avoid public litigation.”

[36] The appellant argues that neither the township nor the affected party established that there was contemplated litigation through their brief references to avoiding litigation about “an unknown dispute.” The appellant submits that I should apply the reasoning in Order MO-2471, where the IPC did not uphold a claim that certain records were exempt from disclosure under the exemption at section 12, regarding litigation privilege. In that order, the adjudicator found that nothing beyond the assertion that the privilege applied was provided to substantiate the claim that there was reasonably contemplated litigation.

[37] Although the issue in Order MO-2471 was not whether the records were subject to common law settlement privilege, I have considered the appellant’s argument that the reasoning about sufficiency of evidence for contemplated litigation may be relevant here,

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<sup>17</sup> On that asymmetry, the adjudicator in Order PO-4406 also highlighted para. 91 of the Ontario Divisional decision in *Magnotta, supra*:

It [the asymmetry] denies to all government institutions the privilege available to private litigants otherwise found to be applicable to mediation and settlement materials. All private litigants can engage in settlement discussions confident that settlement materials will remain confidential. The IPC would have it that the Crown can not. That is true asymmetry.

<sup>18</sup> *Richmond (City) v. Campbell*, 2017 BCSC 331 (CanLII).

and I find that it is not.

[38] In my view, it is not reasonable to consider the township's statements about the three-part test in isolation of other representations about the record and without regard to the nature and content of the record itself (a copy of which was provided to the IPC).

[39] As noted, the township explains that the record relates to a commercial dispute between the township and the affected party. It also explains that the record governs the terms of the affected party's water usage and contains information about the affected party's prior water usage before the settlement between the parties was reached. In my view, the township's explanation of its position about the harms that would reasonably be expected by disclosure of this record also support its position that litigation was contemplated. For example, the township submits:

It is in the Township's interests that such information continues to be provided as settlements have a number of advantages over litigation, as recognized by the Supreme Court of Canada.<sup>19</sup> The Township would be deprived of the benefits of settlement if third parties refused to continue providing information to facilitate such settlement.

[40] Furthermore, based on the description of the records at issue in the Order MO-2471, they are different from the one at issue in this appeal. The records in Order MO-2471 were described as "various memoranda, emails and notes,"<sup>20</sup> but the record before me is a confidential by-law giving effect to a settlement agreement. In my view, this is a significant, basic difference underlying the reasoning that considered the sufficiency of evidence about contemplated litigation in Order MO-2471. That is, the adjudicator in Order MO-2471 was commenting on records (memoranda, emails, or notes) that by their nature may not necessarily demonstrate any existing or contemplated litigation, unlike a by-law giving effect to a settlement agreement. And based on my review of the record in this appeal, I find that the record itself is evidence that supports the position of the township and the affected party that legal action was "well within contemplation," and that there was a desire to avoid that through the settlement which is evidenced in the record. I cannot elaborate further without disclosing the content of the record.

[41] Therefore, this appeal involves more than a late claim, without any substantiating evidence to support it, as was the case in Order MO-2471. Based on my review of the record itself and the representations of the township and the affected party, I am satisfied that the record was generated in circumstances where litigation was contemplated. As a result, the record meets part one of the test.

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<sup>19</sup> The township cites *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35.

<sup>20</sup> The order states that these were described more fully in the institution's revised index of records.



*Parts 2 and 3 - confidentiality and purpose*

[42] I find the record also meets parts two and three of the test for settlement privilege.

[43] To meet part two, the communication must be confidential and made with the express or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed. To meet part three, the purpose of the communication must be to attempt to effect a settlement.<sup>21</sup>

[44] The appellant's representations do not directly address these parts of the test for common law settlement privilege.<sup>22</sup>

[45] In its representations, the township shared language from the record explicitly requiring that the terms of it be kept confidential. Based on these representations and my review of the record, I find that the record meets part two of the test.

[46] I also find that it is clear from the record that it was generated for the purpose of settling the commercial dispute between the township and the affected party. Therefore, I find that it meets part three of the test.

[47] In conclusion, for the reasons set out above, I find that common law settlement privilege applies to the record and it is therefore not accessible to the appellant in response to the request. Given this finding, it is not necessary for me to also consider the township's alternate claim that section 10(1) of the Act applies to the record.

**ORDER:**

I uphold the township's decision not to disclose the record at issue, and I dismiss the appeal.

Original signed by: \_\_\_\_\_  
Marian Sami  
Adjudicator

\_\_\_\_\_ May 31, 2024

<sup>21</sup> *Clayton, supra; Howes, supra.*

<sup>22</sup> After citing Order MO-2471 in regards to part one of the test, the appellant states:  
The agreement relates to the rate paid by [the affected party] for a public service. The same information is available publicly as it relates to other entities using water and sewer services within the township in a by-law. Section 12 does not apply.