

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4552

Appeal MA22-00162

The Corporation of the Town of Midland

July 30, 2024

Summary: An individual requested access to a Full and Final Release and Confidentiality Agreement (the Release) relating to a specified property, that was received by The Corporation of the Town of Midland (the town). The town denied full access to the Release on the basis that it is subject to solicitor-client privilege (section 12). In this order, the adjudicator upholds the town's decision that the Release is subject to solicitor-client privilege 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 Considered: Orders MO-3474 and MO-3560.

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

OVERVIEW:

[1] The record at issue in this appeal relates to a zoning dispute between The Corporation of the Town of Midland (the town) and the affected parties about the affected parties' property.

[2] In October 1984, the affected parties purchased a specified property in Midland. In 1989, the affected parties started operating a transportation business on their property. In 2004, the affected parties alleged that the town rezoned their property from

highway commercial to residential.

[3] In that context, the town received a 5-part request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for records relating to the affected parties' property.

[4] After notifying the affected parties, the town granted full access to records responsive to parts 1 and 2 of the request. With respect to parts 3 and 4, the town stated that no responsive records exist for those parts. With respect to part 5, the town denied access, in full, to the "Full and Final Release and Confidentiality Agreement" (the Release), relying on section 12 (solicitor-client privilege) for the whole record and section 14(1) (personal privacy) for portions of the record.

[5] The requester (now the appellant) appealed the town's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[6] During mediation, the appellant advised that he is only pursuing access to the Release. He also raised the potential application of the public interest override at section 16, which was added to the scope of the appeal.¹

[7] The town attempted but was unsuccessful at obtaining consent from the affected parties to disclose the Release to the appellant.

[8] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[9] The adjudicator initially assigned to this appeal invited the town and the appellant to provide representations on the issues in this appeal. She received representations from both parties.² This appeal was subsequently transferred to me to continue the adjudication. I reviewed the parties' representations and decided to invite the town and the appellant to provide representations on exercise of discretion.³

[10] For the reasons that follow, I uphold the town's decision that the Release is exempt under section 12.

¹ Due to my finding that the Release is exempt under section 12, I did not consider section 16 as it cannot apply to override section 12. Section 16 states:

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.

² The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Code of Procedure*.

³ The town's representations on its exercise of discretion were shared in accordance with the confidentiality criteria in the IPC's *Code of Procedure*.

RECORDS:

[11] The record at issue is titled "Full and Final Release and Confidentiality Agreement" (the Release), a 3-page document.

DISCUSSION:

[12] The sole issue I will determine in this appeal is whether the solicitor-client privilege exemption at section 12 applies to the Release.⁴ For the reasons that follow, I find that it does.

[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:

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." The first branch ("subject to solicitor-client privilege") is based on common law. The second branch ("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") is a statutory privilege created by the *Act*. The statutory and common law privileges, although not identical, exist for similar reasons. The institution must establish that at least one branch applies.

[15] The town submits that the statutory litigation privilege applies to the Release.

Branch 2: statutory privilege

[16] The branch 2 exemption 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.

Statutory litigation privilege

[17] This 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

⁴ As a result of my finding on whether section 12 applies to the Release, it is not necessary for me to consider whether section 14(1) applies to portions of it.

privilege, such as communications between opposing counsel.⁵

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

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

Representations

[20] The town submits that the statutory litigation privilege applies to the Release. It submits that the Release was prepared by its legal counsel and was the result of confidential legal negotiations undertaken by its legal counsel and the affected parties (the releasors). The town also submits that the Release was the culmination of a negotiation that contemplated litigation as one possible outcome. It submits that the statutory litigation privilege has not been lost through waiver.

[21] The appellant submits that the statutory litigation privilege does not apply to the Release. He explains that the lawsuit between the affected parties and the town was dismissed on consent in June 2017.

[22] In his representations, the appellant also references a Settlement Agreement. He submits that the town acted beyond its legislated authority provided by the *Municipal Act, 2001*⁸ the *Planning Act*,⁹ and zoning by-law when it executed the Settlement Agreement.

[23] The appellant submits that there was loss of privilege with respect to the Release because the Settlement Agreement, which he submits includes a release, was an “out of court” agreement which was provided to the Court to obtain the Court Order required for registration of the Settlement Agreement on the title.

[24] The appellant also submits that the Settlement Agreement was provided to the town’s insurer and, therefore, loss of privilege occurred. He explains that the cash payment was paid directly by the insurer to the affected parties.

Analysis and findings

[25] For the reasons below, I find that the town has established that the Release is subject to the statutory litigation privilege in section 12 of the *Act*.

[26] As mentioned above, the Release is a 3-page document titled “Full and Final

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 S.O. 2001, c. 25.

⁹ R.S.O. 1990, c. P.13.

Release and Confidentiality Agreement” between the affected parties and the town. To be clear, it is one document. The appellant’s reference to a Settlement Agreement¹⁰ in his representations is a different document than the Release that is before me in this appeal.¹¹

[27] The town claims that the Release is subject to statutory litigation privilege.

[28] In *Liquor Control Board of Ontario v. Magnotta Winery Corporation (Magnotta)*, the Ontario Court of Appeal found that the statutory litigation privilege in section 19 of *Freedom of Information and Protection of Privacy Act (FIPPA)* protects records prepared for use in the mediation or settlement of litigation, including the end products of such mediation or settlement discussions, such as settlement agreements and minutes of settlement.¹²

[29] [56] IPC decisions 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.¹³

[30] In Order MO-3474, the adjudicator considered whether a full and final release agreement and an acceptance of offer were exempt under section 12. After citing *Magnotta* and considering whether the litigation was reasonably contemplated, the adjudicator found that the two records at issue in his appeal were exempt under statutory litigation privilege of branch 2 of section 12.

[31] In Order MO-3560, the adjudicator also considered whether a final and full release was exempt under section 12. After citing *Magnotta* and considering whether the litigation was reasonably contemplated, the adjudicator found that the final and full release was prepared by the institution in contemplation of or for use in litigation, including settlement negotiations, and was therefore subject to branch 2 statutory litigation privilege.

[32] I agree with the adjudicators’ approaches taken in these past IPC orders and adopt it for the purpose of this appeal.

[33] The Release is an agreement between the town and the affected parties. From my review of the parties’ representations and of the Release itself, I am satisfied that the Release was created as a result of negotiations between the town’s legal counsel and the affected parties relating to the litigation between these parties. I am also satisfied that there was litigation between the town and the two affected parties as demonstrated by

¹⁰ It was effectively made on June 23, 2017 between the affected parties and the town.

¹¹ It appears that the appellant has a copy of the Settlement Agreement as he provided a copy of it along with his representations.

¹² 2010 ONCA 681 at paras 43-44 (*Magnotta*).

¹³ Orders PO-3627, PO-3651, MO-3597 and MO-3924-I.

an Amended Statement of Claim¹⁴ issued by the affected parties against the town and other court documents.¹⁵ It is clear that the town and the affected parties agreed to the Release to resolve their litigation. I find, therefore, that the Release was prepared by the town's legal counsel for use in litigation, as required by the statutory litigation privilege in branch 2 of section 12 of the *Act*.

[34] The appellant submits that loss of privilege occurred. However, his arguments about loss of privilege relates to the Settlement Agreement that he refers to in his representations, which is not the record at issue in this appeal. As discussed above, the Release is a different document from the Settlement Agreement.

[35] I note that the town claims that it has not waived privilege over the Release. As there is no evidence before me that waiver has occurred by the town and/or the affected parties, I find that there has been no waiver over the Release.

[36] Section 12 is a discretionary exemption. Therefore, it permits an institution to disclose the information subject to that exemption 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.

[37] The town submits that it properly exercised its discretion. It submits that it properly considered that the confidentiality clause in the Release and the fact that the affected parties did not consent to having it disclosed. The town also submits that it considered the factor that the Release contained financial information about the affected parties.

[38] Although the appellant provided lengthy representations on exercise of discretion and I have considered them, I will only be discussing what is relevant to this appeal. The appellant submits that the town re-zoned the affected parties' property and, in doing so, it failed to adhere to the official plan, zoning by-law and provincial statutes (such as the *Municipal Act, 2001* and the *Planning Act*). He submits that the town exercised its discretion not to disclose the Release to hide the re-zoning of the affected parties' property from the public, and therefore, that its exercise of discretion was in bad faith or for an improper purpose.

[39] It is clear that the appellant is unhappy with the town's action in re-zoning the affected parties' property and believes that the re-zoning was not done in accordance with the official plan, zoning by-law and provincial statutes. However, whether or not the town followed the correct procedures to re-zone the affected parties' property is not an issue for me to consider in this appeal. Despite the appellant's submission, there is no reasonable basis for me to find that the town exercised its discretion for an improper purpose. Accordingly, I am not persuaded that the town decided to withhold the Release in bad faith or for an improper purpose as suggested by the appellant.

¹⁴ Amended on June 9, 2015.

¹⁵ These documents were attachments to the appellant's representations.

[40] In addition, the appellant submits that he has a sympathetic or compelling need to receive the Release in the event that he sells his property he will need to disclose zoning implications.

[41] From my review, the Settlement Agreement clearly identifies the zoning designations for the affected parties' property. However, whether or not the appellant requires the Release for his own purposes is not a relevant consideration in my review of the town's exercise of discretion. As I have found that section 12 applies to the Release, the town may exercise its discretion not to disclose the Release, provided that its exercise of discretion is proper.

[42] Based on the town's representations and the nature and content of the Release, I find that the town properly exercised its discretion to withhold the Release pursuant to the discretionary exemption at section 12 of the *Act*. I am satisfied that the town took into account relevant considerations in exercising its discretion, such as the fact that the affected parties did not consent and the fact that the Release contained financial information. The town also considered that there is a confidentiality clause contained in the Release. I am also satisfied that the city did not consider any irrelevant considerations or act in bad faith or for an improper purpose. Accordingly, I uphold the town's exercise of discretion in deciding to withhold the records at issue pursuant to the section 12 exemption.

[43] Based on the reasons set out above, I find that the Release is exempt under section 12.

ORDER:

I uphold the town's decision and dismiss the appeal.

Original signed by: _____
Lan An
Adjudicator

July 30, 2024 _____