

Information and Privacy Commissioner,  
Ontario, Canada



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

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## RECONSIDERATION ORDER MO-2713-R

Appeal MA09-161

West Nipissing Police Services Board

April 4, 2012

**Summary:** The police received a request for a severance agreement which it entered into with its former chief. The police denied access stating that the sole responsive record falls outside the parameters of the *Act* under section 52(3)3 or, in the alternative, that the discretionary exemptions in sections 6(1)(b) (closed meeting), 11 (economic and other interests), 12 (litigation privilege), and the mandatory exemption in section 14(1) (personal privacy) would apply to the record. The appellant raised the issue of the applicability of the public interest override at section 16 of the *Act*. In Order MO-2609-I, section 12 was found to apply to exempt the entire record and the police were ordered to re-exercise their discretion. In Order MO-2645-I, the police were ordered to re-exercise their discretion again. In response, the police sought a reconsideration of Order MO-2645-I. Based on all of the representations received in response to the reconsideration request, the adjudicator determined that the police had exercised their discretion properly and upheld their decision to deny access to the record.

**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:** MO-2609-I, MO-2645-I.

**Cases Considered:** *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681, *St. Catharines (City) v. IPCO*, 2011 ONSC 2346, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] S.C.J. No. 23.

## **OVERVIEW:**

[1] The West Nipissing Police Services Board (the police) received a request from a member of the media under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

[a]ny contract that may contain financial or other details entered into between the West Nipissing Police Service Board and [the Chief of Police] and was made with consideration to past personal services provided by [this individual] dated June or July 2008.

[2] The police located the responsive record and issued a decision denying access to it, citing the exclusionary provision in section 52(3) and the discretionary exemption in section 12 (litigation privilege) of the *Act*.

[3] The requester, now the appellant, appealed this decision.

[4] During mediation, the police issued a revised decision letter in which they reiterated their position that the record falls outside the parameters of the *Act* under section 52(3)3. The letter also stated that in the alternative, the police take the position that the discretionary exemptions in sections 6(1)(b) (closed meeting), 11 (economic and other interests), 12 (litigation privilege), and the mandatory exemption in section 14(1) (personal privacy) would apply to the record. The appellant raised the issue of the applicability of the public interest override at section 16 of the *Act*.

[5] As mediation did not resolve this appeal, the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. After receiving representations from all the parties to the appeal, I issued Interim Order MO-2609-I. That order contains the following order provisions:

1. I order the police to re-exercise their discretion in accordance with the analysis set out above and to advise the appellant, the Chief and this office of the result of this re-exercise of discretion, in writing. If the police continue to withhold all or part of the record, I also order them to provide the appellant with an explanation of the basis for exercising their discretion to do so and to provide a copy of that explanation to the Chief and to me. The police are required to send the results of their re-exercise, and their explanation to the appellant, with the copy to this office and to the Chief, no later than April 18, 2011. If the appellant and/or the Chief wish to respond to the police's re-exercise of discretion, and/or their explanation for exercising their discretion to withhold information, they must do so

within 21 days of the date of the police's correspondence by providing me with written representations.

2. I remain seized of this matter pending the resolution of the issue outlined in provision 1.

[6] In accordance with provision 1 of Interim Order MO-2609-I, the police re-exercised their discretion and decided to continue to withhold the record, in its entirety, from the appellant. The police provided the appellant with an explanation of the basis for exercising their discretion to withhold the record and provided a copy of that explanation to the Chief and to me. Neither the Chief nor the appellant responded to the police's explanation as to the re-exercise of their discretion.

[7] After receiving representations from the police and the appellant, I issued Order MO-2645-I. In that order, I determined that the police did not properly re-exercise their discretion in a proper manner because they did not properly consider certain factors listed in Interim Order MO-2609-I and improperly considered other irrelevant or improper factors.

[8] As a result, I ordered the police to re-exercise their discretion again. However, instead of re-exercising their discretion, the police provided representations seeking a reconsideration of Order MO-2645-I. I received representations in response to the non-confidential portions of the police's reconsideration representations from the appellant. I then provided a copy of the appellant's representations to the police and received representations in reply from the police reiterating their initial reconsideration representations.

[9] In this order, I reconsider Order MO-2645-I and dismiss the appeal.

## **RECORD:**

[10] The record at issue is an agreement dated July 11, 2008 and includes Attachment 1 to the agreement, but not Schedule B. This schedule was disclosed to the appellant during the adjudication stage of this appeal.

## **DISCUSSION:**

### **Are there grounds under section 18.01 of the *Code of Procedure* to reconsider Order MO-2645-I?**

[11] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[12] The police ask that I reconsider Order MO-2645-I and uphold their exercise of discretion. In support, they rely on all three grounds under Section 18.01 of the IPC's *Code of Procedure*.

[13] In Order MO-2609-I (the first interim order), I determined that the Police had not exercised their discretion in a proper manner, by failing to take into account the following relevant factors:

- (a) that information should be available to the public;
- (b) the statutorily mandated practice of the Police with respect to similar information in the record;
- (c) that disclosure of similar information is required by law;
- (d) the public interest in the record;
- (e) whether disclosure will increase public confidence in the operation of the Police;
- (f) that some of the information in the record may be otherwise available;
- (g) that some of the information in the record would have been disclosed but for the application of the discretionary section 12 exemption;
- (h) the passage of time since the agreement was executed; and,

- (i) that any necessary exemptions from the right of access should be limited and specific.

[14] Accordingly in Order MO-2609-I, I ordered the police to re-exercise their discretion taking into account these factors. In Order MO-2645-I, I ordered the police to re-exercise their discretion as I found that they still had not taken into account these factors.

[15] The police provided both confidential and non-confidential representations in favour of a finding that they had properly responded to the order provisions in Order MO-2609-I. Therefore, the police contend that there were defects in MO-2645-I upon which to base a reconsideration.

[16] In response to the non-confidential portions of the police's representations, the appellant submits that the onus of justifying any exemption should be on the institution seeking such an exemption. The appellant also submits that the passage of time is not a legitimate excuse to refuse access to public information and that there is continued public interest in this matter, as it continues to be a popular topic of conversation at local gatherings and the appellant continues to get numerous requests for information.

[17] The appellant also states that as, "any necessary exemptions must be limited and specific", proper reasons must be stated for every part of the record the police wish to withhold, and not applied generally to the whole record. The appellant submits that:

The [police] also argue that the IPC has not provided enough direction as to the proper factors that should be considered, stating "The IPC does not indicate what it would have the [police] consider..." Again, the onus should not be on the IPC, but on the [police] itself, to come up with valid reasons for withholding public information. Moreover, I feel the IPC has indeed been abundantly clear in its decision, particularly in the paragraph stating "The Police gave the section 12 exemption greater weight than the application of the other exemptions in determining whether to grant access." This paragraph goes on to list specific clauses that would have been ordered disclosed, and which sections would have supported this. The [police] submission does not address these specific clauses, preferring to defend the broad application of one exemption to the entire record, at its sole discretion. It adds that "the [police] would have no reason to engage in a speculative exercise about which portions of the record would be released." No reason?! I submit that public accountability is not only a reason to go through this exercise, but an obligation.

Finally, the [police] continues to argue that "The exemption is necessary to maintain the confidentiality of negotiated settlements," despite the fact that your order clearly discredits this opinion. There are also suggestions

that disclosure would have negative financial consequences on the institution, and while this appears to be speculative, it is difficult to make arguments when we have not been given all of the [police's] submissions. I will defer to your judgement on this argument, which seems to suggest that financial consequences are mere conjecture and not a valid argument. As for the confidentiality of the settlement, I submit again that any institution that wanted to withhold otherwise public information and circumvent *MFIPPA*, could do so at will by simply including a confidentiality clause in their agreements. If this were sufficient cause for an exemption, public accountability would be lost, or at best, left to the goodwill of public officials.

[18] In this order, I will first summarize my findings in Order MO-2645-I and the police's non-confidential arguments made in support of their reconsideration request. I will then provide my findings, taking into account all of the representations from both the police and the appellant.

[19] Factors (a) and (i)

- (a) information should be available to the public; and
- (i) any necessary exemptions should be limited and specific.

In Order MO-2645-I, I found that:

The Police did not provide specific representations on these factors.

Concerning factor (a), the Police should have specifically considered the requirement set out in section 1 that one of the purposes of the Act is to provide a right of access to information under the control of institutions in accordance with the principle that information should be available to the public.

Concerning factor (i), the Police have not considered whether they could have restricted the application of the discretionary exemption regarding litigation privilege in section 12 to certain portions or clauses of the record.

[20] The police submit that in response to Order MO-2609-I they identified both factors (a) and (i), which they considered to be factors of general application that may be superseded by more specific considerations. The police submit that they determined that other factors should prevail in this case and that I am seeking to improperly substitute my own discretion for that of the police.

- [21] Factors (b), (c) and (f)
- (b) The statutorily mandated practice of the Police with respect to similar information in the record;
  - (c) That disclosure of similar information is required by law; and
  - (f) Some information may otherwise be available.

In Order MO-2645-I, I found that:

The Police state that if the record contains salary or benefits amounts that are subject to *PSSDA* [*Public Sector Salary Disclosure Act*] they will, in fact, be disclosed separately from the *MFIPPA* process in an aggregate amount. The Police did not consider whether any specific portions of the record contain this type of information and whether to disclose these portions. Nor did the Police consider whether any other information in the record may be available other than pursuant to the *PSSDA*.

[22] The police submit that Order MO-2609-I does not indicate what the police should consider or indeed if any other such statutes, regulations or other means, apply in this situation. They state that this is an impossible task in the absence of any information about the statutes, regulations or other means that I am referring to.

[23] The police state that they do not understand the portion of Order MO-2645-I in which I stated that the police "did not consider whether any specific portions of the record contain this type of information (i.e. information available under *PSSDA*) and whether to disclose these portions." With respect to this factor, the police determined that on balance the applicable considerations supported exercising discretion to deny access to the entire record. Based on their conclusion, the police would have no reason to engage in a speculative exercise about which portions of the record would be released if the existing factors did not exist.

- [24] Factor (g)
- (g) Disclosure would occur but for the application of section 12 of *MFIPPA*.

In Order MO-2645-I, I found that:

The Police gave the section 12 exemption greater weight than the application of the other exemptions in determining whether to grant access. The Police did not consider the findings in Interim Order MO-2609-I that, but for section 12, I would have ordered disclosure of clauses 5, 6, 7 and 14 of the record as these clauses were subject to the exception to section 14(1) in section 14(4)(a). In addition, I would have ordered disclosure of clauses 8, 9, 11, 13, 15 to 17 as being subject to the factors in favour of disclosure in section 14(2).

But for the section 12 exemption, I would have only withheld clauses 1, 2, 3, 4, 10, 12 and Attachment 1 of the record under the mandatory exemption in section 14(1).

The Police have also not considered that the section 12 litigation privilege exemption is discretionary and that, but for the application of section 12, many clauses in the record would have been ordered disclosed.

I also found in Interim Order MO-2609-I, that the Police had not considered severing specific parts of the record with a view to disclosing as much information as possible. The Police have still not considered this factor.

[25] The police submit that they considered this factor, but found that other factors outweighed it in significance. The police submit that I confused the amount of weight to be assigned to the factor with consideration of the factor. They also submit that although I can consider whether relevant factors have been considered, I cannot substitute my own discretion for that of the police.

[26] Concerning the section 12 litigation privilege exemption, the police acknowledge that they were required to exercise their discretion and also considered severing specific parts of the record. They provided confidential representations as to why they did not disclose parts of the record in the circumstances of this case.

[27] Factors (d) and (h)  
(d) Public Interest in the record; and  
(h) Passage of time since the agreement was executed

In Order MO-2645-I, I found that:

Concerning factor (d), as set out above, the appellant provided detailed representations concerning the public interest in the record. Although the Police may not be directly aware of any current public debate or inquiry into the terms of the record, they have not addressed the public interest considerations outlined above by the appellant, which is a media outlet. Nor have the Police made any effort to ascertain independently whether there are now any public interest concerns in the information contained in the record. Concerning factor (h), the Police claim that the passage of time may have reduced the public relevance of the record. However, the Police have not considered the application of this factor to the specifics of this appeal, as outlined in Interim Order MO-2609-I. In Interim Order MO-2609-I, I stated that:



In addition, other information in the agreement may be available as a result of the passage of time since the request was made, such as payments made to the Chief that have been reported on the Ministry of Finance website or the fulfillment of certain terms. Purely factual information may have also been otherwise available if the request sought related documents, such as cheques, cheque requisitions or accounting entries. Documents of this nature, which would reveal factual financial information, would normally not be subject to the section 12 exemption (see for example Order MO-2346-I).

[28] The police submit that in response to Order MO-2609-I, the passage of time often reduces public interest in the matter and that there does not appear to be any current interest in the record at the present time.

[29] Other Factors (Efficacy of the Mediation Process/Costs to the Organization)

In Order MO-2645-I, I found that:

...The Police have also not taken into consideration the relevant factor set out in section 64(1) concerning the availability of information under the *Act* that may not otherwise be available to a party to litigation. This section reads:

This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

Furthermore, a party cannot contract out of its obligations under the *Act*. In Order PO-2520, Senior Adjudicator John Higgins stated that:

Section 10(1) [of *the Freedom of Information and Protection of Privacy Act* (the provincial *Act*), section 4(1) of the *Act*] creates an express and unambiguous right of access to records "in the custody or under the control" of an institution such as the College, subject to exceptions that do not include the provision of a contract.

In my view, therefore, the *Act* applies in the circumstances of this appeal regardless of the contents of any agreement to the contrary, and the right of access in section 10(1) must be decided within the four corners of the statute. The Commissioner's authority is unaffected.

Accordingly, I find that the Police's consideration of the factors that disclosure of the record would result in an incentive to parties to litigate is improper. I also find, following the reasoning in Order PO-2598, that the Police's claim that significant economic costs would flow from disclosure is improper.

[30] The police submit that this case law has no application in this instance. They state that my decision in Order PO-2598 deals with whether an institution has provided sufficient evidence to support a reasonable inference that economic harms will result under section 11. This is premised on the language of the statute which expressly states that an institution can only apply section 11(c) and (d) where it has "reasonable grounds" to suspect the harms will occur. The police note that this case does not deal with section 11 and furthermore, there is no similar language in the *Act* with respect to the exercise of discretion.

[31] The police also state that the recent decision of the Court of Appeal in *Liquor Control Board of Ontario v. Magnotta Winery Corporation*<sup>1</sup> referred to in Order MO-2609-I was ignored in Order MO-2645-I. They refer to paragraph 29 of that decision, which states in part:

Again, Carnwath J. concluded ***that the public policy interest in encouraging settlement, as embodied in the common law concept of settlement privilege, trumps the public policy interest in the transparency of government action.*** This interpretation he viewed as plausible and efficacious because it complies with s. 1(a), which provides for "necessary exemptions" that are "specific and limited". The exemption is necessary to maintain the confidentiality of negotiated settlements. It is specific and limited by the circumstances of this case. Further, he opined, the interpretation is acceptable because it leads to a conclusion that is both reasonable and just. ***No one would willingly entertain settlement discussions with a government institution if it knew its confidential discussions would be made public*** [emphases added by police].

[32] The police state that the decision of the Court of Appeal in *Magnotta* supports a conclusion that considerations of mediation efficacy and avoidance of unnecessary litigation costs are relevant considerations to take into account in the very creation of the settlement privilege.

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<sup>1</sup> 2010 ONCA 681.

***Analysis/Findings***

[33] As stated above under section 18.01 of the *Code of Procedure*, the IPC may reconsider an order where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

[34] Order MO-2609-I required the police to take into account the following factors in exercising their discretion:

- a) that information should be available to the public;
- b) the statutorily mandated practice of the Police with respect to similar information in the record;
- c) that disclosure of similar information is required by law;
- d) the public interest in the record;
- e) whether disclosure will increase public confidence in the operation of the Police;
- f) that some of the information in the record may be otherwise available;
- g) that some of the information in the record would have been disclosed but for the application of the discretionary section 12 exemption;
- h) the passage of time since the agreement was executed; and,
- i) that any necessary exemptions from the right of access should be limited and specific.

[35] I also found in Interim Order MO-2609-I, that the Police had not considered severing specific parts of the record with a view to disclosing as much information as possible.

[36] In Order MO-2645-II determined that the police had not complied with the order provisions of Order MO-2609-I. Based upon my review of the police's confidential and non-confidential representations in support of their reconsideration request, I find that the police have now exercised their discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. The relevant considerations considered by the police include those outlined in Order MO-2609-I. In addition, the police have considered

- 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.

[37] The police have provided extensive representations as to the exercise of their discretion, as set out above. This also included confidential representations, which I am unable to refer to in this order. In reviewing the police's representations on the exercise of their discretion in their entirety, I find that they have provided sufficient information as to how they exercised their discretion in response to Order MO-2609-I. Taking into account the police's confidential and non-confidential representations and considering the appellant's representations, I find that the police have considered all of the factors set out in Order MO-2609-I and have therefore, complied with Order MO-2645-I.

[38] In Order MO-2609-I, I decided that because the entire record was created as a result of the settlement of contemplated litigation that it was subject to the discretionary exemption in section 12. The Court of Appeal in *Magnotta* found that the public policy interest in encouraging settlement, as embodied in the common law concept of settlement privilege, trumps the public policy interest in the transparency of government action. Given the significant interest that parties attach to preserving confidentiality of terms of settlement consistent with the public interest, I find that in the circumstances of this appeal, the police have a broad discretion to protect their interest. The presence of any confidentiality clause in a record that is subject to section 12 settlement privilege is a relevant factor in an institution's exercise of discretion.

[39] The authority of the Commissioner to return matters to an institution for further consideration is referred to in the *Ontario (Public Safety and Security) v. Criminal Lawyers' Association (CLA)*.<sup>2</sup> In *CLA*, the Supreme Court of Canada cited with approval comments made by the Commissioner, as follows:

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

In my view the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure

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<sup>2</sup> [2010] S.C.J. No. 23.

that the concepts of fairness and natural justice are followed.

[40] The Court in *CLA* also described the scope of the Commissioner's reviewing authority, as follows:

The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for any improper purpose; the decision took into account irrelevant consideration; or, the decision failed to take into account relevant considerations.

[41] In *St. Catharines (City) v. IPCO*,<sup>3</sup> the Divisional Court found that:

...the Adjudicator had jurisdiction to return the issue of the exercise of discretion to the City for further consideration. The decision was a reasonable one, as the City's representations on the exercise of its discretion did not show that it considered relevant factors in refusing to disclose the exempt portions of the record, nor did it show that it considered the public and private interests in disclosure and non-disclosure. While the City argued that the Adjudicator has substituted its decision for that of the City, that is not the case.

[42] In this appeal, based upon my review of the parties' representations in their entirety, including the confidential representations of the police, I find that in the exercise of their discretion the police have now demonstrated that they considered all of the relevant factors outlined in Orders MO-2645-I and MO-2609-I in refusing to disclose the record. The police have also demonstrated that they considered the public and private interests which exist in both disclosure and non-disclosure. I am satisfied that the police exercised their discretion properly in the circumstances of this appeal. Therefore, I will not return the issue of the exercise of the police's discretion to them again and I will uphold their decision on this issue.

[43] Accordingly, I am reconsidering Order MO-2645-I. As I have found that the police exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors, I am upholding the police's exercise of discretion and dismissing the appeal.

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<sup>3</sup> 2011 ONSC 2346.

**ORDER:**

I uphold the police's exercise of discretion and dismiss the appeal.

Original Signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

\_\_\_\_\_ April 4, 2012