

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2740-F

Appeal MA10-471

Brantford Police Services Board

May 25, 2012

Summary: The police received a request for access to a report relating to a specified investigation. Portions of the responsive record were withheld under section 38(a), together with the law enforcement exemption in section 8. Interim Order MO-2717-I upheld the application of the law enforcement exemption to the record and ordered the police to re-exercise their discretion. This order upholds the police's re-exercise of decision under section 38(a).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 38(a).

OVERVIEW:

[1] The Brantford Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to the "Officer's Reports and Chief's Complaint [report]" relating to a specified investigation.

[2] The police identified a single record as responsive to the request and issued a decision granting partial access to it. Portions of the record were withheld under section 38(a), together with the law enforcement exemptions in sections 8(1)(a), (b), (d) and (h), 8(2)(a) and (c), 8(3), as well as section 38(b) (personal privacy).

[3] The requester (now the appellant) appealed the access decision of the police to this office, which appointed a mediator to explore resolution of the issues. During mediation, the police advised that they are not relying on section 8(3) (refuse to confirm or deny existence of a law enforcement record). Accordingly, section 8(3) was removed from the scope of this appeal.

[4] The appellant advised the mediator that he wished to pursue access to the undisclosed information in the record he received, with the exception of the names of individuals. He confirmed that he was not seeking access to any additional records.

[5] At that point, the mediator contacted four of the six individuals identified in the record (as affected persons) to determine if they would provide consent to disclose information relating to them. All of the affected persons contacted declined to provide their consent.

[6] As it was not possible to resolve this appeal through further mediation, it was transferred to the adjudication stage, where a written inquiry is conducted. Representations were received from the police and the appellant and shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*. I then issued Interim Order MO-2717-I.

[7] In Interim Order MO-2717-I, I found the record exempt by reason of section 38(a), read in conjunction with section 8(2)(a), but ordered the police to re-exercise their discretion and to provide the appellant and this office with an explanation of the basis for withholding the information at issue in the record.

[8] In accordance with Interim Order MO-2717-I, the police re-exercised their discretion and disclosed additional information from the record to the appellant. They also provided the appellant and this office with an explanation for the reasons that they continued to withhold information from the record. The appellant provided a response to this explanation.

[9] In this order, I uphold the police's re-exercise of discretion.

RECORD:

[10] At issue are the severed portions of a 12-page report prepared by a police sergeant.

DISCUSSION:

The sole issue is whether the police properly exercised its discretion.

[11] The section 38(a) 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 Commissioner may determine whether the institution failed to do so.

[12] 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.

[13] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

[14] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- 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 historic practice of the institution with respect to similar information.

[15] In re-exercising their discretion with respect to the information at issue in the 12 page record, the police provided further disclosure to the appellant. The police state that they withheld some of the information supplied to an investigator by a third party about another individual, who is now deceased.

[16] The police state that they did not initially seek consent from third party individuals identified within the records as the appellant had answered yes to the following question on the access/correction request, "if the record requested contains the personal information of another person would a copy of the record with all third party information edited satisfy your request?" As well, they state that the appellant answered no to the following question on the access request form "Do you consent to the release of your name as requester to any person who is affected by your request?"

[17] Based on the request as completed by the appellant, the police state they understood that the appellant was not interested in any personal information of individuals identified within the record. At mediation, the appellant requested just the information contained in the records without the names of the authors of the information. After the appeal was filed, the mediator contacted a number of the affected parties to determine if they would consent to disclose information in the record that relates to them. The police state that all of these parties were adamant that their information not be shared with the appellant. The police also state that allowing access to the remaining information in the record would very easily allow the appellant to identify the authors of the information.

[18] Concerning the police's re-exercise of discretion, the appellant requested that his specific representations not be shared with the police. In general, his representations raised questions about the manner in which the police processed his request and the manner in which the police responded to Interim Order MO-2717-I.

[19] The appellant also disputes the police's submission that disclosure of the remaining information in the record without individuals' names would allow him to deduce these individuals' identities. He relies on two orders that do not contain an analysis of an institution's exercise of discretion.¹

[20] The appellant further submits that the police's heavy-handed redaction of the record demonstrates that the police continue to act in bad faith.

Analysis/Findings

[21] Based on my review of the record in its entirety and the parties' representations, I find that the police re-exercised their discretion properly, taking into account relevant considerations and not taking into account irrelevant considerations.

[22] I disagree with the appellant that the manner in which the police responded to Interim Order MO-2717-I was improper. I find that the manner in which the police re-exercised their discretion was proper.

[23] The record contains the personal information of the appellant and other identifiable individuals in their personal capacity.² The information remaining at issue in the record includes sensitive personal information of identifiable individuals other than the appellant gathered in the course of a law enforcement investigation into the cause of death of an individual. In Interim Order MO-2717-I, I stated that:

Included in the record is information about allegations made against the appellant. I find that there are portions of the record concerning the details of the investigation into these allegations that relate solely to the appellant or could be provided to the appellant without identifying who provided this information to the police or without disclosing the personal information of other individuals. This information includes information that relates solely to the appellant that was provided by individuals in their official capacity or where severance of the name of the individual who was the source of this information about the appellant would not lead to the revelation of the author of this information.

[24] I find that the police have taken into account these findings in the re-exercise of their discretion. I am, thereby, upholding the police's re-exercise of discretion.

¹ Orders PO-2037 and PO-2040.

² Interim Order MO-2717-I.

ORDER:

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

Original Signed By: _____

May 25, 2012

Diane Smith
Adjudicator