

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2717-I

Appeal MA10-471

Brantford Police Services Board

April 11, 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, and the personal privacy exemption in section 38(b). This order upholds the police's decision under section 38(a) and orders the police to re-exercise their discretion.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 38(a), 8(2)(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) has been removed from the scope of this appeal.

[4] The appellant advised the mediator that he wishes to pursue access to the undisclosed information in the record he received, with the exception of the names of individuals. He confirmed that he is 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*.

[7] In this order, I find the record is exempt by reason of section 38(a), read in conjunction with section 8(2)(a), and order the police to re-exercise their discretion.

RECORD:

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

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) in conjunction with the section 8(2)(a) exemption apply to the information at issue?
- C. Did the institution properly exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[9] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[10] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[11] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

[13] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

[15] The police submit that the record contains information supplied to an investigator by a third party about another individual, who is now deceased. The police state the personal information in the record includes the personal opinions or views of individuals in accordance with paragraphs (e) and (g), as well as an individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual in accordance with paragraph (h) of the definition of personal information in section 2(1).

[16] The appellant submits that the redacted information would include his personal information or information that is not personal information.

Analysis/findings

[17] Based on my review of the record, I find that it contains the personal information of the appellant and other identifiable individuals in their personal capacity. I agree with the police that paragraphs (e), (g) and (h) of the definition of personal information

in section 2(1) apply. The record also contains personal information of these individuals in accordance with paragraphs (a) and (b) of the definition of that term in section 2(1).

B. Does the discretionary exemption at section 38(a) in conjunction with the section 8(2)(a) exemption apply to the information at issue?

[18] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[19] Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[20] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[21] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[22] In this case, the police relied on section 38(a) in conjunction with sections 8(1)(a), (b), (d) and (h), and 8(2)(a) and (c) in their decision letter. However, the police have only addressed sections 8(2)(a) and (c) in their representations.

[23] I will first determine whether section 38(a) in conjunction with section 8(2)(a) applies to the record. This section reads:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[24] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[25] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

[26] The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)].
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose, sanctions [Order P-1117].

[27] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

[28] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

[29] The police submit that the record is a report that was prepared as a result of an investigation into an allegation of misconduct made against a police officer from which a law enforcement proceeding could have proceeded. They state that they are an agency which has the function of enforcing and regulating compliance with the law.

[30] The appellant did not provide representations as to whether the record is a law enforcement report in accordance with section 8(2)(a). However, he referred to Orders PO-2085 and MO-1578. I have reviewed these orders and note that they address issues arising from the possible application of section 8(1)(a) [or its provincial equivalent of section 14(1)(a)], not section 8(2)(a).

Analysis/findings

[31] In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

[32] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

[33] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

[34] Section 8(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added), rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption [Order PO-2751].

[35] An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous [Order MO-1238].

[36] Based upon my review of the record, I find that it is properly characterized as a "report" for the purposes of section 8(2)(a). I find that the record represents a formal statement or account of the information gathered by a police sergeant investigating allegations of misconduct made against the appellant. In addition to summarizing and analyzing the information, it contains the results of the collation and consideration of that information, along with the sergeant's conclusions concerning the institution of law enforcement proceedings against the appellant.

[37] I also find that the report was prepared in the course of law enforcement undertaken by the police, specifically the analysis of law enforcement information pertaining to the appellant conducted by the police. Finally, I am satisfied that the police are an agency which has the function of enforcing and regulating compliance with the law. Accordingly, I conclude that all three parts of the section 8(2)(a) test have been met.

[38] Because I have found that all of the requirements of section 8(2)(a) have been established, the record qualifies for exemption under section 38(a). Therefore, I will now consider whether the police exercised their discretion in a proper manner under section 38(a) with respect to the record.

C. Did the institution properly exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

[39] 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.

[40] 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.

[41] 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)].

[42] 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.

[43] The police provided both confidential and non-confidential representations on this issue. In their non-confidential representations, the police submit that the appellant would have been notified of the complaint and the details surrounding the investigation that was to be conducted. The appellant would have also been advised of the outcome of the complaint under the provisions for complaints against police. The appellant is now seeking the information that each involved party supplied to the investigator during the investigation.

[44] Although the appellant advises that he does not require the names of the persons listed in the record, the police state that, due to the limited number of persons interviewed, further disclosure would identify exactly who the individuals were who provided information to the police during the investigation into the appellant's conduct. The police state that they also considered that the affected persons did not consent to the release of their personal information.

[45] Concerning the police's exercise of discretion under section 38(a), the appellant disputes that he has been provided with the outcome of the complaint and details of the investigation.

[46] Based on my review of the record and the parties' representations, I agree with the appellant that the police did not exercise their discretion properly with respect to portions of the record at issue.

[47] 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.

[48] Although the record is a law enforcement report that qualifies for exemption under section 8(2)(a) of the *Act*, section 38(a) also applies to it. As stated above, the section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. Based on my review of the information remaining at issue in the record, I will order the police to re-exercise their discretion under section 38(a).

ORDER:

1. I order the police to re-exercise their discretion and to advise the appellant 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 information at issue in 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 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, by no later than **May 2, 2012**. If the appellant wishes to respond to the police's re-exercise of discretion, and/or their explanation for exercising their discretion to withhold information, he 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.

Original signed by: _____

Diane Smith
Adjudicator

_____ April 11, 2012