

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3214-I

Appeal MA14-565

Town of Niagara-on-the-Lake

June 30, 2015

Summary: This appeal addresses the appellant's request for access to the identifying information of a complainant which was withheld by the town from a by-law complaint. The town relied on section 38(a) in conjunction with section 8(1)(d) (confidential source of information) to deny access to this information. This order finds that section 8(1)(d) applies to the withheld information but orders it to exercise its discretion under section 38(a) regarding the granting of access.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 1, 2(1), 2(2.1), 2(2.2), 8(1)(d) and 38(a).

Orders Considered: Order MO-2238.

BACKGROUND:

[1] The Town of Niagara-on-the-Lake (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for all records related to a "letter of notice" from a named by-law enforcement officer and addressed to the requester. The letter of notice related to a "licensed villa" at a specified location.

[2] Citing section 8(1)(c) of the *Act* (reveal law enforcement investigative techniques) in its decision letter but reproducing the language of the section 8(1)(d) exemption (refusal to disclose identity of a confidential source of information) the town

denied access to a complaint, which it had identified as being responsive to the request.

[3] The requester (now the appellant) appealed the town's denial of access.

[4] Shortly after the appellant's appeal form was filed with this office, the town clarified that its initial decision letter had inadvertently stated that it relied on section 8(1)(c) when the town had intended to rely on the discretionary exemption at section 8(1)(d) to deny access to the information. Accordingly, the application of section 8(1)(c) was no longer at issue in the appeal.

[5] At mediation, the mediator advised that because the complaint might contain the personal information of the appellant along with the personal information of another identifiable individual (the affected party), section 38(a), in conjunction with section 8(1)(d) of the *Act*, might apply. As a result, the possible application of the discretionary exemption at section 38(a) of the *Act* was added as an issue in the appeal. Also during mediation, the town reconsidered its initial decision and issued a revised decision, disclosing the content of the complaint to the appellant. The town continued to withhold the name, address, email address and telephone number of the complainant under section 38(a), in conjunction with section 8(1)(d) of the *Act*. The affected party did not respond to the mediator's attempt to obtain their position on disclosure.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I commenced my inquiry by sending the town and the affected party a Notice of Inquiry setting out the facts and issues in the appeal.

[7] The town responded in a letter advising that:

The [town] does not believe that there are additional factors, which are relevant to the appeal, in addition to the information previously submitted to the IPC.

[8] The town also writes that at mediation the record at issue was disclosed to the appellant, "with personal information severed, subject to *MFIPPA* section 8(1)(d)".

[9] The affected party did not provide responding representations.

[10] I then sent the appellant a Notice of Inquiry. The appellant provided responding representations.

RECORDS REMAINING AT ISSUE:

[11] The records remaining at issue consist of the withheld portions of the bylaw complaint.

Issue A: Does the record contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[12] 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 if 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;

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

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

(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 (2.1) 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.

[15] 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.²

[16] 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.³

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[18] Having reviewed the record at issue, I find that it contains the affected party's personal information, including their name, address, email address and telephone number. The record also contains the affected party's complaint about the appellant's property and assertions about the conduct of the appellant, which qualifies as the appellant's personal information. Accordingly, I find that the record contains the

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

personal information of the appellant and the affected party as that term is defined in section 2(1).

Issue B: Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(d) exemption apply to the information at issue?

[19] 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.

[20] 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.

[21] 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.⁵

[22] 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.

[23] In this case, section 38(a) is being considered in conjunction with section 8(1)(d).

[24] The appellant submits that the complaint was without substance and alleges that the affected party is engaging in "stalking" on an "ongoing basis", "causing emotional stress and fear for our safety and that of our tenants", as well as adversely affecting the appellant's business. In support of these assertions, the appellant provided two letters of differing dates from the appellant's guests complaining about the conduct of an individual on an adjoining property.

[25] With respect to the application of section 8(1)(d) specifically, the appellant submits that:

⁵ Order M-352.

The ethical duty of confidentiality must, at times, be balanced against competing ethical considerations or legal or professional requirements that call for disclosure of information obtained or created.

If the person who provided the confidential information does not agree to the disclosure, a disclosure can still be made without consent under the following circumstances: when the vital interests of any person are threatened, and the disclosure is made to a relevant, appropriate person; when it is in the public interest to do so and the disclosure is made to a relevant, appropriate person.

[26] The appellant further asserts that the town does not rely on receiving information solely from a confidential source for by-law enforcement matters. In support of this proposition the appellant relies on town by-law 4634-13 governing short term rentals, and specifically refers to section 5(3) of the by-law, which permits attendances and inspection by by-law enforcement officers.

Section 8(1)(d)

[27] Section 8(1)(d) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

[28] 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)

[29] The term “law enforcement” has been found to apply to a municipality’s investigation into a possible violation of a municipal by-law.⁶

[30] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁷

[31] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.⁸ The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁹

Section 8(1)(d): confidential source

[32] The institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.¹⁰

[33] As I indicated above, complaints made about by-law infractions qualify as law enforcement matters. In all the circumstances, including statements on the town’s website¹¹ regarding the confidentiality of a by-law complainant’s identity, I find that at the time the affected party submitted their complaint, they had a reasonable expectation that their identity would remain anonymous.¹²

[34] In the circumstances of the appeal before me, I find that section 38(a), in conjunction with section 8(1)(d) applies to exempt the withheld information at issue from disclosure.

⁶ Orders M-16 and MO-1245.

⁷ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

⁸ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁰ Order MO-1416.

¹¹ www.notl.org.

¹² See, for example: Order MO-2238.

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

[35] 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.

[36] 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.

[37] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹³ This office may not, however, substitute its own discretion for that of the institution.¹⁴

Relevant considerations

[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁵

- 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

¹³ Order MO-1573.

¹⁴ Section 43(2).

¹⁵ Orders P-344 and MO-1573.

- 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.

[39] Citing the purpose of the *Act* set out in section 1 of the statute¹⁶, the appellant submits that:

It is not the purpose of the *Act* to shield an individual's engagement in fraudulent complaints and illegal activity such as defamation or harassment, nor is the purpose of the *Act* to deprive the individual victim of this activity from its fundamental right to resort to justice, and from pursuing its lawful rights.

[40] The appellant alleges that it is in the public interest that the identity of the complainant be disclosed. The appellant submits that the non-disclosure of the withheld information "deprives us of the means to establish if there is a relation or complete identification with the harassing individual engaging in a serial manner in unlawful, fraudulent and defamatory conduct and to seek legal remedies".

¹⁶ Section 1 reads: The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[41] The appellant asserts that the town should have exercised its discretion in favour of disclosing the withheld information. The appellant submits that it should have taken into account the following two considerations in the exercise of its discretion:

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester and the affected party
- The requester has a sympathetic or compelling need to receive the information

[42] The appellant submits that without the disclosure "we are deprived of our fundamental right to resort to justice, of equality of legal weapons, and from the pursuing of our lawful rights."

[43] The town did not provide representations on their exercise of discretion under section 38(a), in conjunction with section 8(1)(d). In the absence of their representations on this issue, although I have found that section 8(1)(d) applies to the withheld information, I will order the town to exercise their discretion under section 38(a) with respect to the withheld information. In exercising its discretion under section 38(a), the town is to take into account the appellant's submissions and the relevant considerations listed above.

ORDER:

1. I order the town to exercise its discretion under section 38(a) of the *Act* and to provide both the appellant and me with an outline of the factors it considered in exercising its discretion by **July 31, 2015**.
2. I remain seized of this matter in order to deal with any issues stemming from the exercise of discretion by the town.

Original Signed By: _____
Steven Faughnan
Adjudicator

_____ June 30, 2015