

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3231-I

Appeal MA14-565

Town of Niagara-on-the-Lake

August 18, 2015

Summary: The appellant sought access to the identifying information of a complainant which was withheld by the town from a by-law complaint. In Interim Order MO-3214-I, I determined that this information was subject to exemption under section 38(a), in conjunction with section 8(1)(d) (confidential source of information) and ordered the town to exercise its discretion. This order does not uphold the town's exercise of discretion and orders it to re-exercise its discretion.

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

Orders Considered: Orders MO-1287-I, MO-3214-I and P-58.

OVERVIEW:

[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.

[11] After conducting my inquiry under the *Act*, I issued Interim Order MO-3214-I.

[12] I upheld the town's application of the exemption at section 38(a), in conjunction with section 8(1)(d), but determined that the town had to exercise their discretion under section 38(a) with respect to the withheld information. At paragraph 43 of the interim order, I required the town to take into account the appellant's submissions and the relevant considerations that I set out in detail in Interim Order MO-3214-I when exercising its discretion.

[13] In addition, Order provision 1 of Interim Order MO-3214-I required the town to provide both the appellant and me with an outline of the factors it considered in exercising its discretion.

[14] In response to Interim Order MO-3214-I, the town provided me with a letter simply stating:

Further to the Interim Order MO-3214-I referenced above, please be advised under *MFIPPA* section 38(a) the Corporation of the Town of Niagara-on-the-Lake, in exercising its discretion not to disclose personal information, considered section 8(1) of the *Act* as follows:

8(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(d) 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.

[15] The following is my finding on the town's exercise of discretion under section 38(a).

DISCUSSION

[16] An institution'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.¹ It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.²

[17] Based on the town's letter, I find that it has not properly exercised its discretion. Instead, the town simply sets out the section of the *Act* it applied in denying access to the information sought. This is not sufficient and does not address the direction I gave

¹ Order MO-1287-I.

² Order P-58.

the town that in exercising its discretion it was to take into account the appellant's submissions and the relevant considerations that I set out in detail at paragraphs 38 to 42 of Interim Order MO-3214-I.

[18] Accordingly, I have decided to again return this appeal to the town for the purpose of properly exercising its discretion in making a decision whether or not to withhold the undisclosed personal information pursuant to section 38(a) of the *Act*. I encourage the town to review paragraphs 38 to 42 of Interim Order MO-3214-I before it provides me with further representations on the exercise of its discretion.

ORDER:

1. I order the town to exercise its discretion under section 38(a) of the *Act* with respect to the information I have found exempt under section 38(a) in Interim Order MO-3214-I.
2. I order the town to provide me with representations on its exercise of discretion by **September 9, 2015**.
3. I may share the town's representations with the other parties to this appeal unless they meet the confidentiality criteria identified in Practice Direction 7. If the town believes that portions of its representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to the portions it seeks to withhold.
4. I remain seized of this appeal to deal with the town's exercise of discretion.

Original Signed By: _____
Steven Faughnan
Adjudicator

August 18, 2015