

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **FINAL ORDER MO-3350-F**

Appeal MA13-438

Corporation of the Town of Arnprior

August 23, 2016

**Summary:** This final order follows Interim Order MO-3174-I. The appellant sought access to records relating to an assessment of the town's IT system performed by a named company. The town granted partial access to the responsive records, denying access to portions of them under a number of discretionary exemptions including sections 7(1) (advice and recommendations) of the *Act*. Interim Order MO-3174-I upheld, in part, the town's application of section 7(1) to portions of the records but ordered the town to re-exercise its discretion with respect to its application of that section. The town filed a Judicial Review of Interim Order MO-3174-I which was subsequently dismissed. The town was therefore required to comply with the terms of the interim order and re-exercise its discretion with respect to the severances made pursuant to section 7(1). In this final order, the adjudicator upholds the town's re-exercise of discretion and dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 7(1).

**Orders and Investigation Reports Considered:** Interim Order MO-3174-I.

**Cases Considered:** *Corporation of the Town of Arnprior v. Information and Privacy Commissioner of Ontario*, 2016 ONSC 2904.

### **OVERVIEW:**

[1] This is a final order addressing Appeal MA13-438, following Interim Order MO-

3174-I and the dismissal of the Judicial Review of that order in *Corporation of the Town of Arnprior v. Information and Privacy Commissioner of Ontario*.<sup>1</sup>

[2] Interim Order MO-3174-I addressed a request filed under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to an assessment of the Corporation of the Town of Arnprior's (the town's) Information Technology (IT) resources. In that order, among other findings, I found that the discretionary exemption for advice and recommendations at section 7(1) of the *Act* applied to portions of the records at issue. However, I found that in exercising its discretion not to disclose those portions the town took into account irrelevant considerations. As a result, I ordered the town to re-exercise its discretion with respect to its application of section 7(1) to the portions of records for which it was claimed.

[3] Subsequently, the town filed a Judicial Review of Interim Order MO-3174-I (to be heard together with the Judicial Review of related Order MO-3175) with the Superior Court of Justice. On April 29, 2016, the Court dismissed the Judicial Review and upheld both orders in *Corporation of the Town of Arnprior v. Information and Privacy Commissioner of Ontario*.<sup>2</sup>

[4] As a result of the dismissal of the Judicial Review, the town was required to comply with both orders, including the provision in Interim Order MO-3174-I whereby I ordered the town to re-exercise its discretion with respect to the information that it had severed pursuant to the exemption at section 7(1) of the *Act*.

[5] In compliance with Interim Order MO-3174-I, the town provided me with representations on its re-exercise of discretion with respect to its application of section 7(1) to the records. The town's representations were shared with the appellant who in turn provided submissions on whether he was of the view that the town's re-exercise of discretion was appropriate.

[6] The sole issue that remains to be determined in Appeal MA13-438 is whether the town's re-exercise of discretion with respect to its application of section 7(1) to the records at issue was in compliance with its obligations under the *Act*. In this final order, I uphold the town's re-exercise of discretion and dismiss the appeal.

## **DISCUSSION:**

[7] In Interim Order MO-3174-I, I ordered the town to re-exercise its discretion to withhold portions of two records at issue in that appeal pursuant to the discretionary exemption for records containing advice and recommendations set out in section 7(1) of the *Act*.

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<sup>1</sup> 2016 ONSC 2904.

<sup>2</sup> *Ibid.*

[8] Where a discretionary exemption applies, the institution is permitted 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.

[9] 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.

[10] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations. This office may not, however, substitute its own discretion for that of the institution.<sup>3</sup>

[11] In Interim Order MO-3174-I, I found that the factors identified by the town as having been considered in its exercise of discretion not to disclose the requested information to the appellant under section 7(1) of the *Act* were irrelevant considerations in the circumstances of the appeal. The town had submitted that it had exercised its discretion not to disclose the information as the requester had “no sympathetic or compelling need to receive the information” and that disclosure would decrease public confidence in the operations of the town. I found that the factors applied by the town in its exercise of discretion did not diminish the requester’s general right of access (with limited and specific exemptions) under the *Act* and ordered it to re-exercise its discretion. The town did so.

### **Representations:**

[12] In its representations outlining its re-exercise of discretion, the town states that it continues to exercise its discretion to withhold the portions of the records to which the exemption at section 7(1) of the *Act* applies. It states that in re-exercising its discretion, it weighed the appellant’s general right of access against the interests protected by section 7(1), noting that the purpose of that section is to protect the deliberative process. It submits that it considered the appellant’s interest in receiving the information, as well as the general public interest in access to this type of information in the hands of government. The town also submits that it considered the nature of the advice and recommendations in question.

[13] The town submits that it considered that section 7(1) recognizes that the public interest in access to information about the operations of municipal government does

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<sup>3</sup> Section 43(2).

not require disclosure of every piece of advice received, every recommendation considered, pursued, or rejected in the course of government administration. The town submits that section 7(1) protects the ability of municipalities to receive confidential advice from employees and consultants and that the assurance of confidentiality promotes the free flow of advice, and promotes informed and quality decision making. It submits that in exercising its discretion it considered whether withholding the information at issue would serve this objective, and concluded that disclosure would have a negative impact on its ability to obtain frank and candid advice and recommendations from consultants with respect to its IT infrastructure.

[14] The town submits that it also considered that the advice or recommendations that have been withheld relate to its IT infrastructure, which has been increasingly subject to threats arising from deliberate intrusion attempts, as well as risks arising from simple age and insufficiency of its systems. It submits that the advice or recommendations for improvements to the system which have been withheld under section 7(1) relate to its security and reliability which, it submits are matters of significant importance to the town. It submits that for these reasons, it is of the view that maintaining the confidentiality of the advice and recommendations is important.

[15] The town submits that it also considered the fact that section 7(1) was found to apply to only portions of the records at issue (specifically, only to the actual recommendations in the report), and that the appellant will be granted access to "large portions of the records at issue even though the town exercises its discretion to withhold the advice and recommendations."

[16] The town concludes that it determined that "the prejudice to its ability to obtain confidential advice arising from disclosure would outweigh any public interest in the release of the records in question to the appellant" and reiterates that it continues to exercise its discretion to withhold the portions of the records to which the exemption at section 7(1) applies.

[17] The appellant submits that the town's re-exercise of discretion should not be upheld as it failed to take into account relevant considerations, took into account irrelevant considerations, and was performed in bad faith.

[18] Specifically, the appellant submits that the town has rejected many relevant considerations despite the fact that they could apply them, and that this is disrespectful of the access to information process. Some of the considerations that he submits are relevant and should weigh in favour of the disclosure of the information that has been withheld include:

- information should be available to the public;
- exemptions from the right of access should be limited and specific;
- there is no personal information being sought;

- that his need to access the information is compelling in the sense that there is an injustice that needs to be recognized and addressed in relation to wanton and haphazard expenditure of public funds approved by elected officials;
- he is an individual citizen and not a corporation and has a right of access to public records;
- disclosure of the information will increase public confidence in the town;
- the nature of the information is mundane and banal given its origins; and,
- the information being sought is now more than three years old and likely now benign and dated as it relates to a fast paced constantly changing industry.

[19] Additionally, the appellant submits that the town's argument that disclosure would give rise to digital trespass and alleged cyber hacking is baseless, and therefore an irrelevant consideration for the purposes of its re-exercise of discretion not to disclose the information at issue.

[20] Finally, the appellant submits that the town re-exercised its discretion in bad faith resulting in no change from its original position. He submits that the re-exercise of discretion was cursory and is just one of a number of examples of behaviour by the town demonstrating its lack of good faith.

### **Analysis and finding**

[21] Having considered the representations of both the town and the appellant, I am satisfied that the town has re-exercised its discretion in deciding to continue to withhold portions of the records under the section 7(1) exemption in good faith and not for an improper purpose, or based on irrelevant considerations.

[22] In re-exercising its discretion, I accept that the town turned its mind to relevant factors and weighed the competing interests of disclosure and non-disclosure. It considered the purpose of the section 7(1) exemption and the impact that disclosure of the information at issue would have on its ability to seek advice and recommendations from consultants. It also considered the limited amount of information that was not disclosed, and the nature of that information which it perceives to consist of sensitive information about the town's IT infrastructure. I accept that these considerations are relevant. Additionally, I have no specific evidence before me to support a conclusion that the town's re-exercise of discretion was in bad faith or for an improper purpose.

[23] I acknowledge that the appellant's position is that the town should have re-exercised its discretion to disclose additional information thereby revealing the advice and recommendations contained in the records at issue. I also recognize that he is of the view that in balancing the competing interests of his own general right of access with the purpose of the section 7(1), the town did not consider or give sufficient weight

to certain considerations that favour disclosure. However, by virtue of the application of a discretionary exemption such as section 7(1), the town is entitled to exercise its discretion to withhold information that consists of advice or recommendations and in Interim Order MO-3174-I, I found that section 7(1) applied. Additionally, as previously stated, while this office may send the matter back to the town for a re-exercise of discretion if the institution erred; if the exercise of discretion is valid, this office may not substitute its own discretion for that of the town.

[24] Having accepted that the town acted in good faith, considered relevant factors and did not considered irrelevant ones when it re-exercised its discretion to continue to withhold portions of the records pursuant to section 7(1) of the *Act*, I accept that the town re-exercised its discretion appropriately.

[25] In the circumstances, I find that the town has re-exercised its discretion in a proper manner and I uphold it. Accordingly, the appeal is dismissed.

**ORDER:**

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

Original Signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

\_\_\_\_\_ August 23, 2016