

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3309-F

Appeal MA14-565

Town of Niagara-on-the-Lake

April 29, 2016

**Summary:** The appellant sought access to the identifying information of a by-law complainant which was withheld by the town. In Interim Order MO-3214-I, the adjudicator 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. In Interim Orders MO-3231-I and MO-3257-I, the adjudicator did not uphold the town's exercise of discretion and ordered it to re-exercise its discretion. In this final order, the adjudicator upholds the town's 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 38(a).

**Orders Considered:** Orders MO-1287-I, MO-3214-I, MO-3231-I and MO-3257-I.

### 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] 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.

[5] 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.

[6] 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)".

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

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

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

[10] 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 its discretion under section 38(a) with respect to the withheld information. At paragraphs 38 to 43 of the decision, I wrote the following regarding the exercise of discretion:

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

- 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 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 statute, 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".

[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.

[11] 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.

[12] 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.

[13] I then issued Interim Order MO-3231-I. Again, I did not uphold the town’s exercise of discretion and ordered it to re-exercise its discretion. My determinations are set out at paragraphs 17 and 18 of that decision, where I wrote:

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 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.

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.

[14] In response to Interim Order MO-3231-I, the town provided me with a further letter, which states:

Further to your letter dated August 18, 2015 and Interim Order MO-3231-I referenced above, please be advised under the *Municipal Freedom of Information and Protection of Privacy Act (Act)* section 38(a) the Corporation of the Town of Niagara-on-the-Lake considered the following in exercising its discretion not to disclose personal information:

- The privacy of individuals should be protected. The town has provided all information except the personal information of the confidential source being name, email address, property address and telephone number.
- The historic practice of the town with respect to similar information. The town does not disclose personal information provided by a confidential source.
- Disclosure would identify a confidential source of information in respect of a law enforcement matter. Section 8(1) states: 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 appellant was provided an opportunity to comment on the town's letter and provided extensive responding submissions.

[16] The appellant took the position that the town had, once again, failed to comply with the direction given in both previous interim orders. Namely, that in exercising its discretion, the town 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.

[17] The appellant further submitted that the most recent letter provided by the town:

... makes no mention, does not address, completely ignores and does not take into any consideration in the exercise of its discretion [the appellant's] submissions and the relevant considerations set out in detail in paragraphs 39 to 42 of Interim Order MO-3214-I, as directed therein and re-ordered with MO-3231-I.

In doing so the town does not comply with the mandate and, indeed, spirit of the *Act* which is the balance of privacy protection with the public's right to know by scrupulously weighing these factors in this case.

[18] The appellant submitted that, in particular, the town does not consider that the personal information the appellant seeks is "necessary to [the appellant] for the protection of [her] fundamental and legal rights".

[19] The appellant further submitted that:

[The appellant has] in detail explained in [her] representations submitted during this inquiry ... that the person regarded by the town as the confidential source provided the town with false and defamatory information ..., a fact confirmed by the town's investigation pursuant to the complaint that could lead to criminal charges and the deprivation of our business licence. [The appellant] further alleged as set out in paragraph 24 of Interim Order MO-3214-I that this person may be engaging in serial illegal activities including stalking [and] harassment, and it is impossible for [the appellant] to exercise [her] fundamental and legal rights unless the identity of the person is disclosed.

[20] With respect to the town's historic practice, the appellant submitted that the town's website setting out the process for submitting by-law complaints "implies a 'blanket non-disclosure'" over the information of a complainant and thereby disregards the mandate of the *Act* to balance access and privacy rights under section 38(a).<sup>1</sup>

[21] Finally, she submitted that that the alleged confidential source, "may be continuing its illegal agenda and defamation" based on a recent notification by the town of another complaint.

[22] The town was invited to comment on the appellant's submissions. It advised that it had nothing to add.

[23] I then issued Interim Order MO-3257-I. Again, I did not uphold the town's exercise of discretion and ordered it to re-exercise its discretion. Order Provision 2 of Interim Order MO-3257-I required the town to provide me with its representations on the exercise of its discretion.

[24] In response to Interim Order MO-3257-I, the town provided me with a further letter, which states:

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<sup>1</sup> The appellant refers to Order MO-1287-I in support of this submission. The appellant also compares the town's website to an excerpt from the by-law enforcement website of the City of Hamilton to support her position that the wording of the town's website does not suggest an exercise of discretion.

Please be advised [that the town] considered the following in exercising its discretion:

- The privacy interest of the other individual whose personal information is contained in the record being name, email address, property address and telephone number
- The requester was provided access to all of their own personal information contained in the record.
- The record [relates] to a law enforcement matter and disclosure would identify a confidential source of information.

[25] The appellant was once again provided an opportunity to comment on the town's letter and provided responding submissions.

[26] The appellant took the position that the town has still failed to properly exercise its discretion by not taking 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.

[27] The appellant submits that:

Instead the town reiterates the content of its previous correspondence of September 1, further unsubstantiated and weakened by the withdrawal of the argument about "historic practice" which is not included in this latest response after we pointed out that essentially through its website the town "advertises" a blanket non-disclosure and a biased implementation of the *Act*.

We are at a loss to understand nor justify the defiance of the town which besides disclosing at the mediation stage the content of the defamatory complaint it received, has refused to comply with all Interim Orders during the entire inquiry.

We request as in detail and extensively explained repeatedly throughout the Appeal process the disclosure of the identity of the other affected party because without this information we are deprived of equality in legal weapons so as to protect ourselves from individuals engaging in illegal activities as quoted in paragraph 19 of Interim Order MO-3214-I and are deprived of our fundamental right to resort to justice to protect vital human rights.

## **DISCUSSION:**

[28] 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.<sup>2</sup> 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.<sup>3</sup>

[29] I am now satisfied that town has properly exercised its discretion under section 38(a). In making this finding I have considered all the circumstances of this appeal including that the town has: reviewed the appellant's extensive submissions on the exercise of discretion; reviewed three interim orders directing it to reflect on and consider its exercise of discretion; considered the nature of the withheld information, being the identity of a confidential source of information; and provided more fulsome letters explain its exercise of discretion which both implicitly and explicitly state its considerations in the exercise of its discretion.

[30] I start by finding that there is insufficient evidence before me to establish that the town exercised its discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations. The town was well aware of the wording and purpose of section 8(1)(d) and that it was withholding the identity of a confidential source of information. It set out the section clearly in its letter responding to Interim Order MO-3214-I. Based on my review of all the materials before me, I also find that there is no evidence that the town was withholding the information for a collateral or improper purpose. There is also no evidence before me that the town took into account any irrelevant considerations. Nor am I satisfied that it was biased or that it fettered its discretion in any way.

[31] With respect to other relevant considerations, as set out in the town's letter responding to Interim Order MO-3231-I, the town also considered that the privacy of individuals should be protected, the historic practice of the town and that disclosure would identify a confidential source of information in respect of a law enforcement matter. Furthermore, as set out in the town's letter responding to Interim Order MO-3257-I, the town added that the requester was provided access to all of their personal information contained in the record.

[32] As a result of receiving and reviewing the appellant's representations and the Interim Orders issued in the course of this appeal and based on the materials the town received and those that it provided, I am satisfied that the town was aware of the reason for the request, why the appellant wished to obtain the information, and the appellant's arguments as to why it should disclose the information. I am satisfied that in

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<sup>2</sup> Order MO-1287-I.

<sup>3</sup> Order P-58.



proceeding as it did, and based on all the circumstances, the town considered why the appellant sought access to the information, whether the requester had a sympathetic or compelling need to receive the information, the relationship between the requester and an affected person as well as the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or the affected person. In addition, the town considered whether the requester was an individual or an organization. The information was relatively recent, so, in my view, the age of the information was not a relevant factor.

[33] In all the circumstances and for the reasons set out above, I uphold the town's exercise of discretion.

**ORDER:**

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

Original Signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ April 29, 2016