

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3890-F

Appeals MA18-19-2, MA18-20-2, MA18-21-2, MA18-22-2 and MA18-408

Strathroy-Caradoc Police Service

January 21, 2020

Summary: This order deals with the Strathroy-Caradoc Police Service's (the police) exercise of discretion in denying access under section 38(a), in conjunction with section 8(1)(b) to records relating to the death of the appellants' minor child. In Interim Order MO-3847-I, the police were ordered to re-exercise their discretion. In this final order, the adjudicator upholds the police's re-exercise of discretion, and dismisses the appeals.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 8(1)(b) and 38(a).

Orders and Investigation Reports Considered: MO-3847-I.

OVERVIEW:

[1] This final order disposes of the remaining issue raised as a result of five appeals filed with this office in response to five access requests made by the requesters under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Strathroy-Caradoc Police Service (the police) for records relating to the tragic death of their minor child. In response to the requests, the police denied access to all of the records, in full. The police advised the requesters that the records relate to a matter that is part of an open and ongoing investigation file, claiming the application of the discretionary exemptions in sections 8(1)(a) (law enforcement matter) and 8(1)(b) (law enforcement investigation).

[2] The requesters (now the appellants) appealed all five decisions to this office. During the mediation of the appeals, the mediator advised the police that the records

would be more properly considered under the discretionary exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1). The police agreed. Consequently, section 38(a) was added as an issue in the appeals.

[3] The appeals then moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry. I conducted an inquiry and on October 11, 2019, I issued Interim Order MO-3847-I. In that interim order, I found that the discretionary exemptions found at section 8(1)(b) and 38(a), in conjunction with section 8(1)(b) of the *Act* applied to exempt all of the records at issue from disclosure. However, I did not uphold the police's exercise of discretion and, in order provision 2, I ordered them to re-exercise their discretion within 30 days of the date of the interim order, and to provide this office and the appellants with representations, describing their re-exercise of discretion.

[4] On the issue of whether the police properly exercised their discretion, I stated in Interim Order MO-3874-I:

In this instance, based on the representations provided, I am not satisfied that the police properly exercised their discretion in not disclosing the records that I have found to be exempt from disclosure under the law enforcement exemption. As previously stated, the ministry¹ provided the representations on the police's behalf and, based on those representations, I am not persuaded that the police independently exercised their discretion in not disclosing the records. The exercise of discretion is conducted by the head of an institution. In this instance, I am not satisfied that the head of the Strathroy police exercised their discretion. In sum, I do not uphold the police's exercise of discretion to not disclose the records to the appellants under section 8(1)(b) on its own, or section 38(a), in conjunction with section 8(1)(b), and I will order them to re-exercise their discretion.

[5] I received representations from the police within the 30 day period, as ordered in Interim Order MO-3874-I. However, it appears that the police did not provide a copy of the representations to the appellants, as the appellants contacted this office to advise that they had not received the police's representations. Staff of this office subsequently contacted the police, which advised that they mailed their representations on the issue of their exercise of discretion to the appellants on November 28, 2019. Staff of this office then contacted the appellants on two occasions to inquire if they would be providing representations in response to the police's representations. The appellants

¹ The Ministry of the Solicitor General (the ministry) provided representations on the police's behalf in these appeals. The ministry is the institution in related appeals PA18-7, PA18-181, PA18-182, PA18-183 and PA18-295, resulting in Order PO-3999.

responded by stating that they had received “a letter” from the ministry, but not from the police and, therefore, they had nothing to respond to.²

[6] For the reasons that follow, I uphold the police’s exercise of discretion, and dismiss the appeals.

RECORDS:

[7] The voluminous records consist of audio recordings, search warrants, a sudden death report, third party statements, photographs, supplementary reports, meeting minutes, emails, officers’ notes and other correspondence.

DISCUSSION:

[8] The sole issue remaining in these appeals is whether the police properly exercised their discretion under section 38(a), in conjunction with section 8(1)(b) in denying access to the records at issue.

[9] The sections 8(1)(b) and 38(a) exemptions are discretionary, and permit 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.

[10] 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, or it fails to take into account relevant considerations.

[11] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³ This office may not, however, substitute its own discretion for that of the institution.⁴

[12] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁵

² See note 1.

³ Order MO-1573.

⁴ See section 43(2).

⁵ Orders P-344 and 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 and exemptions from the right of access should be limited and specific;
- 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; and
- the historic practice of the institution with respect to similar information.

[13] The police submit that they re-exercised their discretion in compliance with Interim Order MO-3847-I, and they have determined that the records should not be disclosed. The police further submit that they took into consideration protecting the integrity of investigative records, stating:

. . . [T]he Police Department noted that the OPP⁶ is the *only* police service that is conducting the law enforcement investigation involving the responsive records. As such, the Police Department, in re-exercising its discretion considered that if the OPP, as the sole investigating agency, was opposed to the release of the records out of concern it would harm its investigation, the Police Department should also, in principle, oppose release. The Police Department would not want to interfere with and harm the OPP or any law enforcement agency's investigation, and indeed this concern would presumably be true of any police agency. This is what the Police Department believed would happen if it exercised its discretion in opposition to that of the OPP, in the circumstances of this request.

⁶ I note that the OPP is the Ontario Provincial Police.

[14] The police go on to argue that they agree with my reference to the Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queens Printer, 1980) pp. 294 - 295 (the Williams Commission Report) in Interim Order MO-3874-I, and that they took into account the following excerpt from the report in re-exercising their discretion:

. . . public access to investigative files would do much to frustrate the conduct of investigations, and premature disclosures prior to trial would impair the ability of the prosecution to effectively present its case.

[15] Based on the police's representations, I am satisfied that they re-exercised their discretion properly in deciding to withhold the records at issue under section 38(a), in conjunction with section 8(1)(b). I find that police took into consideration the importance of the integrity of ongoing law enforcement investigations and that this has been the historic practice of the police with respect to similar information. I also find that the police did not take any irrelevant factors into consideration in exercising their discretion, nor did they exercise their discretion in bad faith.

ORDER:

1. I uphold the police's exercise of discretion in denying access to the records under section 38(a), in conjunction with section 8(1)(b).
2. I dismiss the appeals.

Original Signed By: _____
Cathy Hamilton
Adjudicator

_____ January 21, 2020