



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1570

Appeal MA-010159-1

Thames Valley District School Board



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NATURE OF THE APPEAL:

The Thames Valley District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to or copies of “all videotapes showing [the requester’s son] and/or [another named individual] recorded in the halls and common areas of [a named secondary school]” at a specified date and time. The Board initially advised the requester that access to the videotape in question was denied pursuant to the law enforcement exemption in section 8 of the *Act* as the tape was then in the possession of the St. Thomas City Police. The tape was later returned to the Board by the Police following the conclusion of a criminal proceeding. The Board then advised the requester that access to the requested videotape was being denied under the invasion of privacy exemption in section 14(1) of the *Act*.

The request was made by the father, in his capacity as the son’s legal guardian. I will, therefore, treat this request as having been made jointly by both the father and son. The requester’s son was assaulted at the school on April 12, 2001 and the requester is seeking access to any recorded images of the attack which might have been captured by one of the school’s surveillance cameras. The requester’s son was seriously injured as a result of the assault and a civil action against the individual who was criminally convicted in connection with this attack is now being contemplated by the requester, on behalf of his son.

The requester, now the appellant, appealed the Board’s decision to deny access to the videotape. During the mediation of the appeal, the Board decided to withdraw its reliance on the section 8 law enforcement exemption. In the Report of the Mediator that was provided to the parties at the conclusion of mediation, the possible application of section 38(b) of the *Act* was raised as the videotape appeared to contain the personal information of the son.

As further mediation was not possible, the matter was moved into the adjudication stage of the appeal process. I decided to seek the representations of the Board, initially. The Board made submissions that were then shared, in their entirety, with the appellant, along with a copy of the Notice of Inquiry. The appellant indicated that he wished to rely on the submissions provided to this office earlier in the processing of this appeal. I also provided a Notice of Inquiry to 19 students whose images appear on the videotape, seeking their views on its disclosure to the appellant. I did not receive any representations from any of these individuals.

The sole record at issue in this appeal is a videotape depicting the events of a specified date, between the hours of 11:00 a.m. and 1:00 p.m. and 2:00 p.m. and 3:00 p.m., as viewed by a camera located in a common area of a secondary school in St. Thomas.

DISCUSSION:

PERSONAL INFORMATION

The term “personal information” is defined in section 2(1) of the *Act* to mean “recorded information about an identifiable individual”.

The Board takes the position that because the videotape consists of photographic images of identifiable students and staff (the affected persons), it contains their personal information, as that term is defined in section 2(1) of the *Act*.

The appellants submit that because the video camera was located in a “quasi-public” area of the school, the affected persons do not have a reasonably-held expectation of privacy in the images captured by the cameras. This submission is not relevant to my determination of whether the tape contains personal information. However, I will address this point below in my discussion of the application of sections 14(1) and 38(b) of the *Act*. In addition, the appellants argue that the recorded information on the videotape is not about identifiable individuals as the names of the affected persons are not apparent to the viewer.

Based on my review of the videotape and the submissions of the parties, I find that the videotape contains information which qualifies as “personal information” as that term is defined in section 2(1). The information clearly is recorded, albeit in video rather than written, form. The videotape reveals the faces and other physical characteristics of the affected persons and the appellant’s son, as well as their locations and movements at certain times. In addition, given the fact that the appellant and/or his son would be familiar with most, if not all of these individuals, I find that they are identifiable. This finding is consistent with previous orders of this office regarding photographs, such as M-528, MO-1378 and MO-1410.

INVASION OF PRIVACY

Section 36(1) of the *Act* gives individuals a right of access to their own personal information held by an institution. Section 38, however, creates certain exceptions to that right of access. Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant (or his son) and other individuals, the Board has the discretion to deny the appellant access to that information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure of the record to the appellant would constitute an unjustified invasion of another individual’s personal privacy (Orders M-1146 and MO-1535).

Section 38(b) of the *Act* introduces a balancing principle. The Board must weigh the appellant’s right of access to the personal information of his son against other individuals’ right to the protection of their privacy. If the Board determines that release of the information would constitute an unjustified invasion of the other individuals’ personal privacy, then section 38(b) gives the Board the discretion to deny access to the personal information of the appellant’s son.

Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Those sections are relevant to the issues under both section 14(1) and section 38(b). Section 14(2) provides some criteria for the head to consider in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information disclosure of which are presumed to constitute an unjustified invasion of

personal privacy. Section 14(4) refers to certain types of information whose disclosure of which does not constitute an unjustified invasion of personal privacy.

With respect to section 14(3), the Divisional Court has held that once a presumption against disclosure has been established, it cannot be rebutted by one or more of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, if section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to in favour of disclosure.

The Board's Position

The Board submits that the disclosure of the videotape would constitute a presumed unjustified invasion of personal privacy under section 14(3)(h) as the record "indicates the racial and ethnic origin" of the affected persons. Section 14(3)(h) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The Board also takes the position that the consideration listed in section 14(2)(e) is applicable to the personal information in the videotape. The sections provides:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all of the relevant circumstances, including whether,

the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

In support of its contention that section 14(2)(e) is a relevant consideration in determining whether the disclosure of the personal information contained in the videotape would constitute an unjustified invasion of personal privacy, the Board submits that:

. . . if the videotape is disclosed, the individuals displayed on the videotape, who are easily identifiable by the appellant's son, may be subjected to harassment as to their level of knowledge, etc. regarding this event which is not, in the Board's view, appropriate and is contrary to the purpose of the *Act*, as found in section 1(b), which is [to] protect the privacy of individuals with respect to personal information about themselves held by institutions.

The Board goes on to suggest that other, unlisted considerations under section 14(2) are also applicable to the present situation. It argues that:

. . . while students are aware that they are being videotaped at their school while in school corridors and common areas, this expectation is premised upon the understanding that the use of such surveillance is intended for school purposes, such as student monitoring, security, etc. The Board suggests that there is no expectation on the part of these students that their images will be disseminated as a result of private interests thereby exposing them to involvement in private issues and concerns.

As such, the Board submits that there is no diminished privacy expectation on the part of students being videotaped or alternatively, if there is any diminution, it arises only as a result of school related interests.

Lastly, with regards to the section 14(2) factors, the Board submits that disclosure of this personal information may cause public confidence in the integrity of the Board to suffer, which is relevant consideration when dealing with a publicly funded institution and which therefore operates, in the Board's submission, to support a finding that disclosure constitutes an unjustified invasion of personal privacy.

The Appellants' Position

As noted above, the appellant submits that the students whose images are captured in the "quasi-public" areas of the school, such as common areas and corridors, do not have a reasonable expectation of privacy as the cameras are perceived as being "security cameras" and, as such, "are not meant to record private information."

The appellant indicates that he is considering initiating a civil action on behalf of the son for damages to compensate for the injuries that he incurred in the assault. As such, this raises the possible application of the consideration listed in section 14(2)(d) which states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

Findings

Does the Presumption in Section 14(3)(h) Apply?

I do not accept the position taken by the Board with respect to the application of section 14(3)(h) to the personal information contained in the videotape. While some of the physical characteristics of some of the affected persons are evident, I find that the presumption in section 14(3)(h) requires something more. In order to satisfy the requirements of the presumption, the

record must “indicate the individual’s racial or ethnic origin”. In the present situation, the videotape does not convey this type of specific information. Rather, it simply displays a photographic image of the individual without any accompanying indication as to the racial or ethnic origin of the person. While it may be possible to draw certain assumptions about the racial or ethnic origin of the people who appear on the videotape, I find that the tape itself does not “indicate” such information with the requisite degree of specificity.

Therefore, the presumption in section 14(3)(h) does not apply.

Do the Considerations Listed Under Sections 14(2)(d) and (e) and the Unlisted Factors Apply?

Section 14(2)(e)

With regard to the application of the consideration listed in section 14(2)(e), the Board has not provided me with any evidence to substantiate its allegation that the disclosure of the record to the appellant will unfairly expose any of the affected persons to pecuniary or other harm. In my view, the prospect of any such harm resulting from disclosure is speculative and remote, at best. I find that this consideration is not applicable in the present circumstances.

Unlisted Consideration – Privacy Expectations of the Individuals

The Board also relies on the privacy expectations of the affected persons as an unlisted consideration weighing against disclosure. On the other hand, the appellant contends that the affected persons did not have an expectation of privacy as the cameras were located in “quasi-public” areas of the school and their existence was well-known to students and staff.

While the lack of response from the 19 students who were provided with copies of the Notice of Inquiry ought not to be interpreted as demonstrating their consent to the disclosure of the videotape, I believe that it is indicative of a lessened expectation of privacy on the part of these individuals.

In my view, the affected persons have a reasonable expectation that the tape recordings in which they appear will not be used for any purpose beyond school safety and security. I accept that people may be aware of the existence of the cameras, and that they are located in areas people would consider “quasi-public”. Despite this, in my view, people have a reasonable expectation that the tape recordings will only be used for the limited purpose for which they were installed. I do not accept that persons automatically waive or lose their privacy rights upon entering a public area, even if they are aware of the existence of surveillance cameras. As stated in this office’s “*Guidelines for Using Video Surveillance Cameras in Public Places*” (October 2001), “Pervasive, routine and random surveillance of ordinary, lawful public activities interferes with an individual’s privacy.” I find that the privacy expectation of the affected persons is a significant factor weighing against disclosure.

Section 14(2)(d)

The appellants rely on the consideration listed in section 14(2)(d) which favours the disclosure of personal information where it is “relevant to a fair determination of rights”. In order for section 14(2)(d) to be regarded as a relevant consideration, the appellants must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Orders P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)] and PO-1764]

The right the appellant is seeking to enforce is a legal, as opposed to a moral, right and is related to a contemplated proceeding for damages suffered as a result of the assault. In my view, the disclosure of the contents of the videotape will assist the appellant in determining whether or not to proceed with these contemplated proceedings and may, ultimately, represent evidence of some significance in that litigation, should it be pursued. Accordingly, I find that section 14(2)(d) is a relevant consideration strongly favouring the disclosure of the personal information on the tape.

Other Considerations

I have reviewed the remaining listed considerations in section 14(2) and find that none applies.

Conclusion

In my view, balancing the appellant’s interest in gaining access to the record against the personal privacy interests of the affected persons, I find that the consideration in section 14(2)(d) weighing in favour of disclosure outweighs the significance of the expectation of privacy protection held by the individuals whose images are captured on the tape, the sole factor weighing against disclosure. My finding is based, in part, on the fact that the request is limited in scope to the critical times, and thus it cannot be said that the appellants are embarking on a broad “fishing expedition”. I have also taken into account the fact that the appellant’s purpose in seeking access is closely related to the health and safety purpose for which the cameras were installed.

The Board and the appellant agree that the incident which gave rise to the request took place at approximately 3:00 p.m. on the day in question. In order to minimize the intrusion into the personal privacy of the individuals recorded on the videotape, the appellant should be granted access only to the information recorded between 2:30 p.m. and 3:30 p.m. on the specified date. In this way, the appellant will be able to review the tape for the period in which the assault occurred and the infringement of the personal privacy of the other individuals will be lessened somewhat.

To summarize, I find that the disclosure of the personal information in the specified portion of the videotape would not constitute an unjustified invasion of personal privacy under section 38(b) of the *Act*.

ORDER:

1. I order the Board to disclose that portion of the videotape which includes only the period from 2:30 p.m. to 3:30 p.m. on the specified date to the appellant by providing him with a copy by no later than **October 22, 2002** but not before **October 17, 2002**.
2. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of the videotape disclosed to the appellant in accordance with the terms of Provision 1.

Original signed by:
Donald Hale
Adjudicator

September 17, 2002