



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2911

Appeal PA09-408

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for the following information:

...any and all statements, videos, pictures, etc. regarding an assault which occurred at [a named] Corrections Centre on [date].

The Ministry located the responsive records and in its initial decision it advised that partial access was granted to them. Access to the remaining information was denied in accordance with sections 49(a) in conjunction with section 14 (law enforcement), 15(b) (relations with other governments), 49(b) (personal privacy) and 49(e) (correctional record) of the *Act*. The Ministry further advised that access to the video could not be granted, as it could not be located.

In a supplementary decision, the Ministry advised that the named Correction Centre (the Correction Centre) located the requested video and that access to the video was being denied in accordance with section 49(a), in conjunction with section 14, and sections 49(b) and 49(e) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During mediation, the Ministry issued a revised decision and released additional records.

At the end of mediation, the appellant confirmed that he would proceed to the adjudication stage of the appeal process only with respect to the Ministry's denial of access to the video. As well, the Ministry advised that it was no longer relying on 49(e) of the *Act* to deny access to the video. Therefore, all issues were settled except for the appellant's request for access to the video which was being denied under section 49(a), in conjunction with section 14, and section 49(b).

The file was transferred to adjudication, where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry, initially. I received representations from the Ministry, a complete copy of which was sent to the appellant, along with a Notice of Inquiry. I did not receive representations from the appellant.

RECORDS:

The only record at issue is a video.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

- (2) Personal information does not include information about an individual who has been dead for more than thirty years.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Ministry submits that:

The record that is the subject of this appeal is a video of approximately 12 minutes in duration that was recorded by video monitoring equipment mounted at one end of a day room at the Correctional Centre... The day room is situated next to inmates’ cells, and those cells are clearly visible in the background.

The part of the [Correctional Centre] which the video captures is occupied by inmates who are awaiting trial or sentencing. The inmates who are awaiting trial have been denied judicial interim release or bail. Bail is guaranteed in section 11(e) of the *Canadian Charter of Rights and Freedoms*, except in limited circumstances, because the denial of bail violates the presumption of innocence. Therefore, inmates are incarcerated without bail because they have been charged with a particularly serious offence, such as murder; they are considered to be a flight risk; there are concerns for public safety; or, there is a finding that detention is necessary to maintain confidence in the administration of justice.

The video monitoring equipment that is the subject of this appeal is mounted so that most of the day room is visible along with the cells in the background. At the time that the video was recording, the day room was occupied by inmates who lived in the adjacent cells. Up to 32 inmates may live in the cells at any one time, and the day room is their living space. In the video, you can see many inmates walking around the room, socializing, and generally going about their daily activities. Included in part of this video is an incident between the appellant, who

was incarcerated at the time, and another inmate. However, the incident is only partly visible...

[T]he Ministry submits that the disclosure of the record would constitute an unjustified invasion of privacy of the inmates whose images were recorded on the video. The day room where inmates spend part of their days is their living room. While video monitoring is a reality for inmates, they nevertheless do not expect images collected by the video monitoring equipment to be disclosed for non-law enforcement related purposes. None of the inmates whose images are featured are aware of, or have been given an opportunity to make representations in respect of this appeal...

The video contains the personal information of inmates, including the appellant, who were occupying the day room at [the Correction Centre] while they were being recorded by the video. The release of the video would therefore not only reveal the images of the inmates, but would indicate that these individuals were incarcerated at [the Correction Centre] during a particular period of time. The IPC has stated in its 2007 Guidelines for the Use of Video Surveillance Cameras in Public Places that if a video monitoring system displays the "characteristics of an identifiable individual or the activities in which he or she is engaged, its contents will be considered personal information". This video fits within this definition, and therefore must be considered personal information, according to the IPC Guidelines.

Analysis/Findings

Based upon my review of the record, I find that it does not reveal information about an identifiable individual. Therefore, I find that the video does not contain personal information as it is not reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, cited above].

Accordingly, as the video does not contain personal information, the personal privacy exemption in section 49(b) cannot apply. In addition, section 49(a) cannot apply, as the video does not contain the appellant's personal information. As the Ministry has claimed that the law enforcement exemption at section 14 applies, I will determine if the video is exempt under that section.

LAW ENFORCEMENT

The Ministry relies on the following exemptions in section 14(1):

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (j) facilitate the escape from custody of a person who is under lawful detention;
- (k) jeopardize the security of a centre for lawful detention; or
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

Except in the case of section 14(1)(e), where section 14 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

The Ministry submits that:

The words "reasonably be expected to" must consider the context of what is captured on the video. The video records inmates, many of who have been denied bail, who have been charged with having committed a violent offence, and/or who have been convicted and are awaiting sentencing. The inmates are obviously incarcerated against their will. Their activities are restricted and regulated so that they will not pose any harm to themselves, to other inmates, to the employees of the institution or to the public.

Further, the video captures the design of a typical day room in a contemporary correctional institution. Correctional institutions such as [the Correction Centre] are increasingly designed using modules or pods, which are decentralized, and which allow for greater control over inmate movements. This means that this video would not only capture the interior space of [this Correction Centre], but also others that are designed in the same way...

The Ministry provided an affidavit from the Security and Investigations Manager at the Correction Centre who states that:

...The disclosure of the video would reveal the non-capabilities of the video cameras. As soon as it were known exactly what our video cameras recorded, the inmates housed at [the Correction centre] could be more likely to go out of the camera view and commit offences.

There are thirty-two (32) inmates who are housed in each wing. Their identities would be compromised if any unauthorized person viewed this video. If the information were released to the general public, it could pose a security risk to the staff, it might facilitate escape by inmates, and inmates bringing in contraband and causing damage to the physical structure of the institution.

A significant portion of the inmates in custody at [the Correction Centre] are known to be affiliated with gangs, organized crime syndicates and other groups of individuals that pose a high security threat to the public as well as this institution. Once the video is disclosed, it could be available to such criminals and criminal organizations.

Concerning the particular exemptions, the Ministry submits that:

Section 14(1)(j): escape from lawful custody

The video captures the configuration of the day room at [the Correction Centre]. Individuals watching the video can learn about how the space is organized, and its proximity to the cells. This type of information, could, if released, facilitate the escape from custody of a person who is under detention either at the present time, or at any time in the future; at [this Correction Centre], or in any other correctional institution that is similarly designed.

Section 14(1)(k): security of a centre for lawful detention

...release of the video will make correctional institutions more difficult to manage. The Ministry is concerned that inmates will not want to be captured by the videos if they know that they are subject to disclosure at any time, and can thereafter be posted on the Internet in perpetuity. Inmate efforts to be reintegrated into society after their release from custody could be hampered by the presence of video images on the Internet showing them incarcerated.

Section 14(1)(l): commission of an unlawful act or control of crime

Any record that can facilitate the escape from custody of an inmate ...will also facilitate the commission of a crime. Everyone who escapes from lawful custody is in contravention of subsection 145(1)(a) of the Criminal Code.

A second concern ...is that the disclosure of the video would reveal what and where the video monitoring equipment records. This information could be used to facilitate the commission of a crime.

Analysis/Findings

Based upon my review of the video and the Ministry's representations, I find that the Ministry has provided "detailed and convincing" evidence to establish a "reasonable expectation of harm" if the video is disclosed. In particular, I am satisfied that section 14(1)(k) (jeopardize the security of a detention centre) applies to the video. Therefore, it is unnecessary for me to determine which of the other exemptions apply to this record.

In determining whether section 14(1)(k) applies, I have considered the findings in Order PO-2332, where Adjudicator John Swaigen considered the application of section 14(1)(k) to a security audit undertaken of a maximum security detention centre. This audit contained detailed information about the operational security and procedures required in the day-to-day operation of a maximum security correctional facility. In Order PO-2332, Adjudicator Swaigen stated:

In my view, much of the information in the security audit would be obvious to most people. It is a matter of common sense and common knowledge that certain kinds of security measures, such as locks, fences and cameras would be present in certain locations and would be checked periodically in certain ways and that other practices and procedures described in the OSAW would be routine. However, the Ministry points out that "to a knowledgeable individual, the absence of a particular topic, identified deficiencies, or the unavailability of certain security-enhancing measures at a given correctional facility could suggest a potential security vulnerability".

I accept that even information that appears innocuous could reasonably be expected to be subject to use by some people in a manner that would jeopardize security. Knowledge of the matters dealt with in the security audit could permit a person to draw accurate inferences about the possible absence of other security precautions. Such inferences could reasonably be expected to jeopardize the security of the institution by aiding in the planning or execution of an escape attempt, a hostage-taking incident, or a disturbance within the detention centre. As the Ministry states, disclosure of the contents of the security audit to a requester can result in its dissemination to other members of the public as well.

I agree with and adopt this reasoning of Adjudicator Swaigen. The video at issue in this appeal shows how the interior space is configured in a day room in a specific correctional centre. The configuration of the day room and surrounding cells is also present in other correction centres in the province.

This video could be used to jeopardize the security of the correction centre where it was taken, as well as other correctional institutions that are designed the same way. The correction centre where the video was shot is a maximum security institution which houses individuals who have

committed serious offences, including high-risk inmates. These inmates present a risk to staff, other inmates, and the community.

The video reveals the exact layout of the day space area. If the information was released to the general public, it could pose a security risk to the staff and the inmates of correction centres with the same layout. I find that the video could suggest potential security vulnerabilities by revealing the manner in which the day space is recorded by the video camera, thereby jeopardizing the security of the Correction Centre, as well as other centres for lawful detention which have the same or a similar layout. Taking into consideration that the law enforcement exemption must be approached in a sensitive manner (*Ontario (Attorney General) v. Fineberg*, cited above), I find that section 14(1)(k) applies to the record in this appeal, the video.

In conclusion, subject to my review of the Ministry's exercise of discretion, I find that the record in this appeal is exempt by reason of section 14(1)(k) of the *Act*.

EXERCISE OF DISCRETION

The section 14(1) exemption is discretionary, and permits 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.

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.

In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, 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
 - 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.

The Ministry submits concerning its exercise of discretion under section 14(1) that:

The disclosure of a video that shows an interior space of a correctional institution puts the security of that institution at risk. The Ministry believes that disclosure of the video would be contrary to public expectations, as well as contrary to the public interest.

Analysis/Findings

The information at issue in this appeal is significant to the Ministry. The video does not depict the specific details of the assault on the appellant; as well, he does not have a sympathetic or compelling need to receive disclosure of the video. The historic practice of the Ministry is not to release similar information.

Therefore, I find that the Ministry exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations and I am upholding the Ministry's exercise of discretion.

ORDER:

I uphold the Ministry's decision and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ August 31, 2010