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

ORDER PO-2976

Appeal PA10-217

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Attorney General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information regarding an incident that was reviewed by the Special Investigations Unit (the SIU). Specifically, the appellant sought access to:

> [N]otes and transcripts of interviews of witnesses to the events of August 5, 2009, any decision or decisions made by the Special Investigations Unit Director, any press releases issued by the Special Investigations Unit in respect of this case, and any other documents or information you are able to furnish.

The Ministry denied access to the requested information pursuant to section 65(5.2) of the *Act* due to an ongoing prosecution. However, it advised that the requester could reapply for access to the records once all proceedings in relation to the prosecution had been completed.

Once the related prosecution had terminated, the appellant resubmitted his request to the Ministry.

The Ministry identified a large number of responsive records and granted partial access to them, denying access to records or portions of records pursuant to the discretionary exemption at section 14(2)(a) (law enforcement) and the mandatory exemption at section 21(1) (personal privacy) taking into account the presumption at section 21(3)(b) (investigation into a possible violation of law) of the *Act*.

The appellant appealed the Ministry's decision.

During mediation, the appellant advised that he wished to pursue access to all of the records that were withheld. Also during mediation, it was noted that the records at issue appear to contain the appellant's personal information, together with that of other identifiable individuals. As a result, the possible application of the discretionary exemptions at sections 49(a) (discretion to refuse a requester's own personal information) and (b) (personal privacy) of the *Act* were included as issues in this appeal.

I decided to conduct my inquiry into this appeal by sending a Notice of Inquiry to the Ministry, initially. In its representations, the Ministry indicated that it was withdrawing its reliance on the discretionary exemption at section 14(2)(a) of the *Act*. As, in the circumstances of this appeal, the discretionary exemption at section 49(a), was to be read in conjunction with section 14(2)(a), both section 14(2)(a) and section 49(a) of the *Act* were removed from the scope of the appeal.

I then sent a copy of the Notice of Inquiry to the appellant, together with a complete copy of the Ministry's representations. In the appellant's representations he advised that he has decided to contest only the Ministry's refusal to disclose record 101 which is a Toronto Police Service videotape of his arrest. Accordingly, the appellant's representations addressed only the application of the discretionary exemption at section 49(b) to the record.

As the appellant's representations raised issues to which I believed the Ministry should have an opportunity to reply, I provided it with a copy of the appellant's representations and invited it to submit further representations. The Ministry submitted reply representations in response.

RECORD:

The only record that remains at issue in this appeal is a video taken by the Toronto Police Service during the incident.

DISCUSSION:

A. BACKGROUND

The SIU is described on the Ministry's website, as follows:

> The SIU is a civilian law enforcement agency, independent of the police, that investigates circumstances involving police and civilians which have resulted in serious injury, including sexual assault, or death. Part VII of the *Police Services Act* creates the SIU and defines its powers.
>
> The SIU is independent of any police service. The Unit reports to the Attorney General, however the SIU's investigations and decisions are also independent of the government. The Director of the SIU is empowered under the *Police Services Act* with causing criminal charges to be laid against police officers where warranted on the basis of the evidence gathered during an investigation.

The Ministry submits in its representations that the videotape is part of the SIU's investigative brief, which is a compilation of the information obtained by the SIU from third parties or generated by the SIU during the course of the investigation of an incident that falls within its statutory jurisdiction.

The Ministry submits that the investigative brief for the SIU investigation was reviewed with a view to determining whether there were reasonable grounds to believe that one of the officers present at the appellant's arrest had committed a criminal offence in connection with the incident in question and, consequently, whether a criminal charge should be laid. The Ministry submits that following the SIU investigation the subject officer was charged with assault and subsequently convicted of the offence.

B. DO THE RECORDS CONTAIN "PERSONAL INFORMATION"?

Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.[1] Where records contain the requester's own personal information, either alone or together with the personal information of other individuals, access to the records is addressed under Part III of the *Act* and the exemptions

[1] Order M-352

at section 49 may apply. Where the records contain the personal information belonging to individuals other than the appellant, access to the records is addressed under Part II of the *Act* and the exemptions found at sections 12 to 22 may apply. In order to determine which sections of the *Act* apply, it is necessary to decide whether the record contains "personal information" as defined in section 2(1) of the *Act* and, if so, to whom it relates.

The Ministry has withheld information in this appeal on the basis that its disclosure would constitute an unjustified invasion of various individuals' personal privacy under section 49(b). However, as the exemptions in section 49 only apply if the records contain the "personal information" of the appellant, before reviewing the possible application of section 49(b), I must first determine if the record contains "personal information" and, if so, to whom it relates.

To satisfy the requirements of the definition in section 2(1) of the *Act*, the information must be "recorded information about an identifiable individual," and it must be reasonable to expect that an individual may be identified if the information is disclosed.[2] The definition of personal information in section 2(1) contemplates inclusion of the following types of information:

> (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 where 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 if 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;

[2] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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) of the definition of the term in section 2(1) may still qualify as personal information.[3]

Older orders of this office established that information associated with an individual in a professional, official or business capacity will not necessarily be considered to be "about" the individual.[4] On April 1, 2007, amendments relating to the definition of personal information in the *Act* came into effect. To some extent, the amendments formalized the distinction made in previous orders between personal and professional (or business) information for the purposes of the *Act*. Sections 2(3) and (4) state:

> (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.

However, it remains true that 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.[5]

Representations

The Ministry submits that the record contains the personal information of individuals other than the appellant, specifically, police officers involved in the incident including the officer who was the subject of the subsequent investigation. The Ministry submits that although previous decisions of this office have drawn a distinction between an individual's personal, official or business capacity, they have also found that, in some circumstances, information associated with a person in his or her professional, official or business capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of personal information.

The Ministry points to Orders PO-2414 and PO-2524 and submits that in both of those orders it was found that SIU records contained "personal information" within the meaning of section 2(1) of the *Act*. The Ministry submits that in keeping with those orders, given that the record is related to an SIU investigation, the information that it contains is "more appropriately characterized as being associated with individuals in their personal capacity" rather than their employment or professional capacity and, therefore, falls within the meaning of the term "personal information" in section 2(1) of the *Act*.

The appellant takes the position that the videotape does not contain the personal information of the police officers involved in the incident (including the officer who was subject to the SIU

[3] Order 11
[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225
[5] Orders P-1409, R-980015, PO-2225 and MO-2344

investigation), because they were acting in the course of their employment. Specifically, he submits:

> The [videotape] does not contain the personal information of the subject officer whose conduct was the focus of the SIU investigation or other officers as "information about normal activities undertaken by an individual in his or her employment, professional or official government capacity, including opinions developed or expressed in that capacity, is not information "about" that individual and is therefore not "personal information." [Order P-1621] For that reason, information about police officers acting in their official capacity, such as the conduct of an arrest, would not be considered personal information. [See Order P-257; Order P-427; Order P-1412; Order P-1621; and Order PO-2821]
>
> It may be true that information relating to any individual in a professional, official or business capacity can still qualify as personal information if the information reveals something of a personal nature about the individual. [Order P-1409] Witness statements of officers may be considered personal information as the officers would be supplying their own personal recollections, views and opinions with respect to the incident in question. Nevertheless, the claims of privacy of civilian witnesses and of witness officers do not similarly apply to the video footage of the apprehension of the appellant.
>
> Although the subject officer did not act in accordance with the law by assaulting the appellant, he was still in the course of his employment. The information pertaining to the officer(s) captured on the video cannot be viewed as personal information as the video footage is of an official act, the apprehension of the appellant.

On reply, the Ministry take the position that the appellant's position runs contrary to previous orders of this office and points specifically to Order PO-2524. In Order PO-2524 the requester sought access to records held by the SIU, including police booking and cell videotapes as well as the police communications tape. The Ministry submits that like the videotape at issue in the current appeal, the videos in those orders "contain video and audio information related to the conduct of officers, and those they may be engaged with, in the course of their employment." It states that in Order PO-2524, Adjudicator Steven Faughnan found that these records contained the "personal information" of the officers captured on the videos and went on to deny the requester access to them. The Ministry points to the following passage taken from Order PO-2524 that sets out Adjudicator Faughnan's reasoning:

> The Ministry submits that some records also contain the personal information of the police officers who were the subject of the SIU investigation. It argues that because that information pertains to an examination of the conduct of the officers, it falls within the ambit of the definition of personal information as it relates to the officers in their personal, rather than their professional, capacities. I agree.

> Although the information in certain records relates to an examination into the conduct of the subject officers while at their work, in my view, because they were the focus of an investigation into whether their conduct in dealing with the appellant was appropriate, it takes on a different, more personal quality. As such, I find that disclosure of this information would reveal something personal about the individual officers. I find, therefore, that those records which include an examination of the manner in which the subject officers conducted themselves also contain the personal information of those officers under paragraph (h) of section 2(1).

The Ministry submits that the reasoning applied in Order PO-2524 is applicable to the videotape at issue in the present appeal:

> As with the police communications, booking and cell tapes in PO-2524, the videotape is an electronic recording of the conduct of certain officers, engaged in the course of their employment, and the appellant. Just as the records in PO-2524, the videotape was acquired by the SIU for purposes of its criminal investigation into the very conduct of the officers depicted in the videotape. For the same reasons, it is submitted, the videotape ought to be seen to contain the personal information of persons other than the appellant, the disclosure of which would constitute an unjustified invasion of personal privacy pursuant to section 21(3)(b) of the *Act*.

The Ministry also submits that the officer who was the subject of the SIU investigation was convicted in May, 2010, of the offence of assault under the *Criminal Code* in relation to the conduct depicted in the video and that this is further information that the video contains the subject officer's personal information within the meaning of section 2(1) of the *Act*.

On sur-reply, the appellant submits that to deny access to information that would qualify as professional information but for the fact that the individual was accused of wrongdoing and is subject to an investigation defies logic. He submits that if the individual were performing his or her professional duties correctly and there were no investigation, the information relating to the performance of these very same duties would not be considered personal but professional, and therefore accessible. The appellant submits:

> The nature of an act as being part of the public or private sphere should be dependant on the actors themselves and whether the action relates to their employment. The fact that the police are investigating the act does not change its nature.

The appellant also submits that there have been other orders issued by this office where it has been found that the information belonging to an individual acting in their professional capacity does not become personal merely because there is an investigation into the activity. The appellant points to Order P-576 in which access was granted to information relating to an investigation into mortgage transactions involving the requester. In that order, Adjudicator

Donald Hale found that the information relating to individuals under investigation did not qualify as personal information.

The appellant also points to Order P-597 in which Adjudicator Hale found that a report of an internal investigation into an incident where a member of the management staff of a correctional facility was found to have used excessive force to subdue an inmate was not considered to be personal information.

The appellant concludes;

> Merely because an investigation is taking place does not render the action of the individual any more personal and any less an action conducted in their professional capacity. An arrest was captured on video, which is an action conducted by the police officer in a professional capacity regardless of an investigation that may have followed.

Analysis and finding

I have reviewed the contents of the videotape and I find that it contains the personal information of the appellant, as well as that of other identifiable individuals, specifically, that of the subject officer. I find, however, that it does not contain the personal information of other police officers who were present during the incident but rather, their professional information.

Given that the focus of the SIU investigation was an incident involving the appellant and that he is depicted in the videotape, I find that it clearly contains information that qualifies as his "personal information" within the meaning of the definition of "personal information" at section 2(1) of the *Act*.

With respect to the information concerning the police officer who was the subject of the SIU investigation, I agree with the Ministry and find that this information qualifies as his personal information as opposed to his professional information. In making this determination I have considered previous decisions of this office which have held that where information about an individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct as an employee, then this information is considered to be the individual's personal information.[6] For example, in Order PO-1912, former Assistant Commissioner Tom Mitchinson found that information about Ontario Provincial Police and other police officers in records originally created in the course of these officers' professional duties constituted their personal information where the conduct of those officers was later called into question by a lawsuit.

In making my determination I have also considered the line of orders issued by this office that have found that information pertaining to an examination of the conduct of a police officer by the SIU falls within the ambit of the definition of personal information.[7] In particular, I agree with

[6] Orders P-721, P-939, P-1318 and PO-1772
[7] Orders PO-2215, PO-2414, PO-2524 and PO-2633

the reasoning expressed by Adjudicator Faughnan in Order PO-2524 that was quoted by the Ministry in its representations:

> Although the information in certain records relates to an examination into the conduct of the subject officers while at their work, in my view, because they were the focus of an investigation into whether their conduct in dealing with the appellant was appropriate, it has taken on a different, more personal quality. As such, I find that disclosure of this information would reveal something personal about the individual officers. I find, therefore, that those records which include an examination of the manner in which the subject officers conducted themselves also contain the personal information of those officers under paragraph (h) of section 2(1).

In keeping with the reasoning expressed in Order PO-2524 and other identified orders issued by this office, in my view, although the videotape at issue depicts the conduct of an officer while at his work, given that the SIU conducted an investigation into whether that officer's conduct during the course of the particular incident was appropriate, the information takes on a different, more personal quality. Accordingly, I find that the videotape at issue in this appeal also contains the personal information of the subject officer within the meaning of the definition of "personal information" set out in section 2(1) of the *Act*.

I acknowledge that the appellant has raised Orders P-576 and P-597 in support of his position that the information about the subject officer is professional rather than personal information. I would first point out that the Commissioner is not bound by the principle of *stare decisis*, and thus is entitled to depart from earlier interpretations [*Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 D.L.R. (3d) 388 (Man. C.A.)]. To the extent that these previous orders may conflict with my decision in this case, I decline to follow them. In my view, the reasoning expressed in the line of more recent orders that have found that information pertaining to an examination of a police officer by the SIU qualifies as personal information is more relevant in the circumstances of this appeal.

Finally, with respect to the information on the videotape that relates to the other officers present at the incident, I find that it does not qualify as their personal information. The information in the videotape depicts them in the course of performing their professional duties as police officers apprehending a suspect. In the circumstances of the present appeal, there is no indication that the conduct of any of these officers in responding to this incident was ever called into question or investigated by the SIU or any other body. I find, therefore, that the information as it appears on the videotape relates to them in a professional rather than personal capacity. Accordingly, I find that the information related to the other officers contained in the videotape does not qualify as "personal information" as that term is defined in section 2(1) of the *Act*.

C. IS THE VIDEOTAPE EXEMPT PURSUANT TO THE DISCRETIONARY EXEMPTION AT SECTION 49(b) AS ITS DISCLOSURE WOULD AMOUNT TO AN UNJUSTIFIED INVASION OF THE PERSONAL PRIVACY OF INDIVIDUALS OTHER THAN THE APPELLANT?

I have found that the record at issue in this appeal contains the personal information of the appellant together with that of another individual, specifically, the subject officer. As noted above, where a record contains both the personal information of the appellant and other individuals, the relevant personal privacy exemption is section 49(b) of the *Act*. Under section 49(b), the Ministry has the discretion to deny the appellant access to his own personal information in that record if the Ministry determines that the disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy. Conversely, upon weighing the appellant's right of access to his own personal information against another individual's right to protection of their privacy, the Ministry may choose to disclose a record with mixed personal information.

When the analysis takes place under section 49(b), sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of the personal privacy of another individual. When one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or if the "public interest override" at section 23 applies.[8] In my view, none of the exceptions in section 21(4) applies in the circumstances. However, I will address the possible application of the "public interest override" in section 23 below.

If none of the presumptions against disclosure in section 21(3) apply, the Ministry is obliged to consider and weigh the possible application of the factors listed in section 21(2) of the *Act*, as well as all other considerations which are relevant in the circumstances of the case.[9]

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Representations

As noted above, at the beginning of its representations, the Ministry submits that the videotape forms part of the investigative brief that was compiled for the SIU investigation that is at issue in this appeal. It submits that this investigative brief was reviewed by the SIU Director with a view to determining whether there were reasonable grounds to believe the subject officer had

[8] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[9] Order P-99

committed a criminal offence in connection with the incident in question and, consequently, whether criminal charges should be laid.

The Ministry submits that disclosure of the videotape to the appellant would constitute an unjustified invasion of personal privacy under section 21(1) of the *Act*. It relies on the presumption at section 21(3)(b). That section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The Ministry states that the statutory provision that gives rise to the SIU, outlining its jurisdiction and responsibilities, is section 113 of the *Police Services Act*. It explains that section 113 of that act:

> … establishes that the SIU is a law enforcement agency that conducts criminal investigations surrounding the circumstances of incidents which fall within its jurisdiction in order to determine whether there are reasonable ground[s] to believe a criminal offence has been committed by the involved officers and to lay criminal charges in cases where such evidence is found to exist.

The Ministry submits that the personal information in question was compiled and is clearly identifiable as "part of an investigation into a possible violation of law," specifically, the criminal law as set out in the *Criminal Code of Canada* (*Criminal Code*), and the presumption at section 21(3)(b) applies.

In his representations, the appellant submits:

> [T]he formation contained in the video cannot be considered the personal information of the officers. Even if the information is found to be personal information, the appellant contends that the video should not be exempt pursuant to section 21 of the *Act* and is subject to disclosure.

On reply, the Ministry points to Order PO-2524 which, as noted above, addressed booking and cell videotapes that recorded the conduct of certain officers engaged in the course of their employment, and the appellant in that appeal. In that appeal, Adjudicator Faughnan found that section 21(3)(b) applied to exempt the videotapes from disclosure. The Ministry submits that, as in that appeal, the videotape in the current appeal was acquired by the SIU for its criminal investigation into the conduct of the officers depicted in it, therefore, in keeping with the reasoning in Order PO-2524, the presumption at section 21(3)(b) should also apply to it.

The Ministry also makes a brief reference to Orders PO-2215 and PO-2414, which found that records that were compiled and identifiable as part of the SIU's investigation into a possible violation of the *Criminal Code* fell within the scope of the section 21(3)(b) presumption.

Analysis and finding

A number of previous orders of this office have established that the presumption at section 21(3)(b) applies to records compiled by the SIU in the course of an investigation.[10] Having considered these previous orders, the record itself and the representations of the parties, I find that, in the circumstances of the present appeal, the presumption at section 21(3)(b) applies. The videotape at issue, which depicts the appellant's arrest, was clearly compiled and is identifiable as part of an investigation undertaken by the SIU into a possible violation of the *Criminal Code* by the subject officer. Specifically, an investigation conducted by the SIU into whether the subject officer's conduct during the appellant's arrest gave rise to the criminal offence of assault.

As noted above, it is not required that criminal proceedings be commenced for section 21(3)(b) to apply. However, it should be noted that in this case, not only was the matter investigated by the SIU but charges were laid and the subject officer was convicted.

Accordingly, in the circumstances, I find that disclosure of the videotape would constitute a presumed unjustified invasion of privacy under section 21(3)(b) of the *Act*. Because the presumption applies, in accordance with the ruling in *John Doe*, cited above, I am precluded from considering the possible application of any of the factors or circumstances under section 21(2).

As I have found that the information contained in the videotape falls within the section 21(3)(b) presumption, subject to the Ministry's exercise of discretion and the potential application of the public interest override provision at section 23, both discussed below, the information is exempt from disclosure under section 49(b) of the *Act*.

D. DID THE MINISTRY EXERCISE ITS DISCRETION IN A PROPER MANNER?

As I have upheld the Ministry's application of the discretionary exemption at section 49(b), I must now determine whether the Ministry exercised its discretion in a proper manner in applying the discretionary exemption at section 49(b) to deny access to the videotape.

The exemption at section 49(b) 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

[10] Orders PO-1959, PO-2215, PO-2414, PO-2524, PO-2633

In any of these cases, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] However, pursuant to section 54(2) of the *Act*, this office may not substitute its own discretion for that of the institution.

In its representations, the Ministry states that it acknowledges that the records also contain the personal information of the appellant but submits that "strong policy reasons militate for the protection of the personal information contained in the records at issue" as information gathered in the context of a criminal investigation involving the potential criminal liability on the part of police officers is of a sensitive nature. It submits that information provided to the SIU by the police service for use in the SIU investigation is provided with the expectation that it will be used exclusively for purposes of the SIU's investigation and held in confidence except where disclosure is compelled by legal process.

In light of my review of the videotape and the circumstances under which it was provided to the SIU, I find that the Ministry has properly exercise its discretion not to disclose this information to the appellant. In my view, the Ministry did not do so in bad faith or for an improper purpose or fail to take into account relevant considerations. Accordingly, subject to my determination of whether the public interest override provision at section 23 of the *Act* applies, I find that the Ministry properly applied section 49(b) to deny access the videotape at issue and that the record is exempt from disclosure under the *Act*.

E. IS THERE A COMPELLING PUBLIC INTEREST IN THE DISCLOSURE OF THE VIDEOTAPE?

In his representations the appellant submits that section 23 of the *Act* applies as there is compelling public interest in the disclosure of the video and that interest clearly outweighs the purpose of the personal information exemption.

Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [my emphasis]

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether

[11] Order MO-1573

there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[12]

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.[13] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices. [14]

A public interest does not exist where the interests being advanced are essentially private in nature.[15] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[16]

A public interest is not automatically established where the requester is a member of the media.[17]

The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[18]

Any public interest in *non*-disclosure that may exist also must be considered.[19] If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply.[20]

A compelling public interest has been found *not* to exist where, for example:

- Another public process or forum has been established to address public interest considerations.[21]

- A significant amount of information has already been disclosed and this is adequate to address any public interest considerations.[22]

- A court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding.[23]

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[12] Order P-244
[13] Orders P-984 and PO-2607
[14] Orders P-984 and PO-2556
[15] Orders P-12, P-347 and P-1439
[16] Order MO-1564
[17] Orders M-773 and M-1074
[18] Order P-984
[19] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[20] Orders PO-2072-F and PO-2098-R
[21] Orders P-123/124, P-391 and M-539
[22] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614

- There has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter.[24]

- The records do not respond to the applicable public interest raised by appellant.[25]

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[26]

Representations

The appellant submits that there is a compelling public interest in the disclosure of the video:

> [T]he conduct of the police in the arrest of [the appellant] calls into question the integrity of the criminal justice system. It is in the public interest that such behaviour be brought forward and the Toronto Police Service be held to account. The gratuitous assault of the helpless appellant, beaten as he was trapped in the vehicle, was recognized as such by the SIU in its investigation and subsequent prosecution of the officer. There is a compelling public interest in the public being informed about incidents of abuse of power by the police.

The appellant further submits that this compelling public interest clearly outweighs the purpose of the exemption:

> The purpose of the exemption, as stated repeatedly, is to protect witnesses and ensure that officers and civilians will come forward to testify. This purpose does not apply to the video evidence. In contrast to the compelling public interest in having police brutality exposed to the public, the interest of the officers in having their information exempt is minimal.

On reply, the Ministry submits that it agrees with the appellant's position that it "is in the public interest that such behaviour be brought forward and the Toronto Police Service be held to account" and that there is a compelling public interest in "the public being informed about incidents of abuse of power by the police." However, it submits that the appellant has not given

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[23] Orders M-249, M-317
[24] Order P-613
[25] Orders MO-1994 and PO-2607
[26] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)

sufficient weight to the public institutions that have responded to the "impugned police conduct in this case." It submits:

> [T]he SIU, an agency of the Attorney General created to foster public confidence by ensuring independent investigations of serious incidents involving the police, did in fact investigate the incident in question and laid a charge. That charge, in turn, was referred to Crown counsel for prosecution. The Crown's foremost duty in any criminal prosecution is to act in the public interest. Finally, the officer was convicted of assault by a court of law. A criminal conviction represents society's highest sanction in the name of public accountability for wrongs committed by its citizens. The court process is open to the public. In these circumstances, it is difficult to conceive that there remains a public interest in the appellant's access to the videotape sufficiently compelling to warrant its production.

The Ministry points to Order PO-2215, mentioned above, in which former Assistant Commissioner Mitchinson found that a compelling public interest did not exist in the disclosure of SIU records. In that order he stated:

> In my view, the SIU investigation process is itself put in place in order to address public interest considerations involving police conduct, including issues specifically related to police pursuits. I have not been provided with any evidence to substantiate a compelling public interest in the manner in which the SIU investigation was conducted or the conclusions that it reached. At no time was the SIU investigation itself the subject of public interest and, in my view, any public interest consideration relating to police pursuits is adequately addressed by other means such as the SIU investigation itself, without the disclosure of the records at issue in this appeal.

The Ministry submits that unlike the present appeal, in the facts that gave rise to Order PO-2215, there had been no charge laid or conviction imposed.

Also in its reply representations, the Ministry submits that even if a compelling public interest in the disclosure of the videotape is found to exist, that interest does not clearly outweigh the purpose of the exemption at section 49(b), which is to protect personal privacy. It submits that this purpose echoes one of the central purposes of the *Act*, outlined in section 1, which is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

The Ministry further submits:

> It is also the case that the personal information contained in the record was gathered during a law enforcement investigation of police conduct…. [T]he Ministry submits that this renders the particular information herin questioned at the high-end of the sensitivity scale. In this regard, the *Williams Commission Report* recommended that "as the personal information subject to the request

> becomes more sensitive in nature … the effect of the proposed exemption is to tip the scale in favour of non-disclosure."

For these reasons, the Ministry submits that any compelling public interest that might be found to exist in the disclosure of the videotape does not clearly outweigh the purpose of the exemption.

In his sur-reply representations, the appellant points to Order P-984. Specifically, he points to the following statement made by Inquiry Officer Holly Big Canoe:

> In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

The appellant submits that the videotape depicting his arrest is such a record as it is in the public interest that "the gratuitous assault" be brought forward.

The appellant also submits that although the officer was subject to an investigation by the SIU and ultimately prosecuted, the public interest consideration relating to police treatment has not been adequately addressed. He submits that this is not a case of him seeking only to fulfill his own private interests but rather the incident raises the broader issue of the abuse of power by the police and there is a compelling public interest in the public being informed of such incident and the Toronto Police Service be held to account. He submits that this speaks to one of the central purposes of the *Act* of providing a right of access to information under the control of government institutions in accordance with the principle that information should be available to the public. He submits: "The public has the right to information relating to instances of abuse by government institutions."

The appellant also submits that this compelling public interest clearly outweighs the purpose of the personal privacy exemption at section 49(b). He submits that in contrast to the compelling public interest in having police brutality exposed to the public, the interest of the subject officer in having his information exempt from disclosure is minimal.

Analysis and finding

Having reviewed the record at issue as well as the representations submitted by the parties, I agree with the appellant that a compelling public interest exists in informing the citizenry of the conduct of police, especially in circumstances such as the one depicted in the videotape, where there are incidents of abuse of power. The Ministry does not dispute this claim. However, given the particular circumstances of this appeal I am not persuaded that there is a compelling interest in the disclosure of the videotape itself in order to address those public interest concerns.

In keeping with the reasoning expressed in prior orders (such as Order PO-2215, addressed by the Ministry in its representations), I accept that the SIU investigation process is itself put in place in order to address public interest considerations involving police conduct, including issues involving incidents of abuse of power. I have not been provided with any evidence to suggest that either the manner in which the particular SIU investigation into the incident involving the appellant was conducted or the conclusion that it reached substantiates a compelling public interest in the disclosure of the record. In my view, any public interest consideration relating to the incident of police misconduct in this case was adequately addressed by another public process or forum, the SIU investigation itself, without the disclosure of the videotape.

Additionally, the fact that the officer who was subject to the SIU investigation was convicted in May 2010 of the offence of assault under the *Criminal Code* in relation to the conduct depicted in the videotape, further supports a finding that public interest considerations have been addressed by another public process or forum. The officer's conduct was subject to a trial that was open to the public and he was sanctioned criminally for his behaviour, which, as submitted by the Ministry and I agree, represents society's highest sanction in the name of public accountability for wrongs committed by its citizens. Accordingly, I do not accept the argument that the disclosure of the videotape at issue is required to address the more general compelling public interest of informing the public of incidents of abuse of power by the police.

For these reasons, I find that no public interest exists, compelling or otherwise, in the disclosure of the specific videotape at issue and section 23 has no application in the present appeal.

F. IS IT PRACTICABLE TO SEVER THE VIDEOTAPE?

Section 10(2) of the *Act* obliges the institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Pursuant to sections 10(2), 54(1), and 54(3) of the *Act* the decision maker may order the disclosure of any portions of records which are not found to be subject to an exemption.

Earlier in this order I found that the information contained on the videotape about the police officers (other than the subject officer) present at the incident amounts to their professional information and not their personal information. As a result, that information is not exempt under the *Act* and ordinarily I would order that it be disclosed to the appellant. However, having reviewed the record carefully, I accept that in the circumstances of this appeal, this information is so intertwined with the personal information of the subject officer that it is impracticable to order it disclosed without also disclosing information that is properly exempt under the *Act*.

Accordingly, I will not order the Ministry to disclose the professional information of the other police officers present at the incident to the appellant.

ORDER:

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

Original signed by: June 7, 2011
Catherine Corban
Adjudicator