

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2709

Appeal MA11-91

Ottawa Police Services Board

March 29, 2012

**Summary:** The appellant sought access to a DVD from the Ottawa Police Services Board which contained surveillance footage of the front entrance of the police station. In their decision letter, the police denied access to the DVD, in its entirety, under section 8(1)(i) and section 38(b), in conjunction with section 14(1). In this order, the adjudicator finds that the DVD contains the personal information of the appellant and other individuals. The adjudicator upholds the police's decision, in part, and orders the police to disclose as much of the appellant's personal information on the DVD as can be reasonably severed from the personal information of other individuals.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 4(2), 8(1)(i), 14(1), 38(a), 38(b), 42.

**Orders:** HO-005, PO-2477.

### OVERVIEW:

[1] This order disposes of the issues raised in an appeal of an access decision made by the Ottawa Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) following a request for access to:

Video surveillance records – video recorded in front of 474 Elgin Street – the Ottawa Police Station. Video recordings from all cameras viewing the

front parking semi-circle from 4:55 pm – 5:15 pm on January 9, 2011.

[2] The police denied access to the responsive record (a DVD) in its entirety, claiming the application of sections 8(1)(i) (law enforcement)<sup>1</sup> and section 38(b), in conjunction with section 14(1) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the decision to this office. During the mediation of the appeal, the police advised the mediator that they did not take issue with disclosing the portions of the DVD that depict only the appellant. However, the police advised the mediator that some of the images of the appellant include other individuals and the police are unable to sever those parts.

[4] The appellant advised the mediator that she wished to pursue access to all of the responsive record and argued that other individuals appearing in the record could be edited out. Accordingly, the appeal was transferred to adjudication.

[5] The adjudicator assigned to the appeal sought representations from the police. The police advised staff of this office that they would not be providing representations. The adjudicator did not seek representations from the appellant. However, the appellant's appeal letter sets out her arguments on the exemptions claimed by the police, which I will refer to in this order.

[6] The appeal was then transferred to me for final disposition. For the reasons that follow, I uphold the police's decision, in part, and order the police to disclose portions of the DVD to the appellant.

## **RECORD:**

[7] The sole record at issue is a DVD containing images of the location and time frame specified in the request.

## **ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?
- C. Does the discretionary exemption at section 38(a), in conjunction with the section 8(1)(i) exemption, apply to the information at issue?

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<sup>1</sup> Section 38(a) was not referred to in the decision letter.

- D. Did the institution exercise its discretion under section 38(a), in conjunction with section 8, and section 38(b), in conjunction with section 14(1)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[8] In order to determine if the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) may apply, it is necessary to decide whether the records contain "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;

[9] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>2</sup>

[10] As previously stated, the police did not provide representations in this appeal. The appellant does not dispute that the DVD contains the personal information of both herself and other individuals.

[11] Based on my review, I am satisfied that the DVD, which constitutes a surveillance tape, contains images of identifiable individuals. Consistent with past orders of this office,<sup>3</sup> I find that the images contained in the tape fall within the ambit of paragraph (h) of the definition of personal information in section 2(1) of the *Act*. Accordingly, the DVD includes the personal information of the individuals depicted, including the appellant.

**B. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?**

[12] In their decision letter, the police denied access to the DVD, relying on the mandatory exemption in section 14(1) or the discretionary exemption in section 38(b). I have found that the DVD contains the personal information of the appellant and other identifiable individuals.

[13] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains personal information of both the requester and another individual. In this case, the police must look at the information and weigh the appellant's right of access to her own personal information against the other individuals' right to the protection of their privacy. If the police determine that release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the police the discretion to deny access to the appellant's personal information.

[14] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's

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

<sup>3</sup> Orders HO-005 and PO-2477.

personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

[15] Where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

[16] As previously stated, the police did not provide representations in this appeal, but their decision letter states that disclosure of the DVD would constitute an unjustified invasion of the privacy of other individuals and, therefore, the mandatory exemption at section 14(1) applies. The decision letter also states that section 38(b) applies.

[17] The appellant submits that she is entitled to view her personal information that is captured on the DVD. The appellant refers to this office's *"Guidelines for the Use of Video Surveillance Cameras in Public Places,"* which states:

An individual whose personal information has been collected by a video surveillance system has a right of access to his or her personal information under . . . section 36 of the municipal *Act*. All policies and procedures must recognize this right. Access may be granted to one's own personal information in whole or in part, unless an exemption applies under . . . section 38 of the municipal *Act*, such as where disclosure would constitute an unjustifiable invasion of another individual's privacy. Access to an individual's own personal information in these circumstances may also depend on whether any exempt information can be reasonably severed from the record. One way in which this may be achieved is through digitally "blacking out" the images of other individuals whose images appear on the videotapes.<sup>4</sup>

[18] The appellant submits that the other individuals in the DVD are entitled to their privacy, but that she is entitled to her own personal information. She is of the view that steps should be taken by the police, through the use of technology, to conceal the images of the other individuals in the DVD.

[19] The DVD consists of four views of the main entrance to the police station. During the time period specified in the request, the DVD depicts images of other

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<sup>4</sup> See page 9.

individuals in which the appellant does not appear on screen. In addition, the DVD depicts images of the appellant alone, and with other individuals.

[20] With respect to the personal information of individuals other than the appellant, I am satisfied that the disclosure of their personal information would constitute an unjustified invasion of their privacy. Therefore, I uphold the police's decision under section 14(1) to withhold those images from the appellant.

[21] However, with respect to the appellant's personal information in the DVD, which was withheld by the police under the discretionary exemption at section 38(b), in conjunction with section 14(1) of the *Act*, I find that in the absence of any representations from the police in regard to: the factors and presumptions at sections 14(2) and (3); the issue of the severability<sup>5</sup> of the DVD; and the police's exercise of discretion, I am unable to uphold this discretionary exemption with respect to those portions of the DVD which include the appellant's own image, along with that of others.

[22] The police are also relying on section 38(a), in conjunction with section 8(1)(i), in denying access to the DVD, which I will consider, below.

**C. Does the discretionary exemption at section 38(a) in conjunction with the section 8 exemption apply to the information at issue?**

[23] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right, including section 38(a), which states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[24] In this case, the police's decision letter indicates that they are relying on section 8(1)(i) to deny access to the record.

[25] Section 8(1)(i) states:

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

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<sup>5</sup> Section 4(2) of the *Act* obliges the police to disclose as much of any responsive record as can reasonably be severed without disclosing material that is exempt. The police were specifically asked to provide representations on severance.

- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

[26] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[27] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>6</sup>

[28] Except in the case of section 8(1)(e), where section 8 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.<sup>7</sup>

[29] The appellant submits that the area that is videotaped is the main entrance to the police station, which is a very public place. The appellant states that directly in front of the police station is a busy four lane street and directly across the street is a bus stop, stores, and a high rise apartment complex. The area being videotaped, the appellant states, is not impeded in any way by security barriers, and could easily be videotaped by any individual walking by, driving by, and/or sitting or standing in front of the building.

[30] Lastly, the appellant submits that the police frequently host televised press conferences at this very location, which are then publicly broadcast. The appellant wonders why the media are able to videotape this part of the police station, if section 8(1)(i) of the *Act* applies.

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<sup>6</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>7</sup> 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.).

[31] As previously stated, the police did not provide representations in this appeal. With respect to this exemption, not only have the police not provided "detailed and convincing" evidence that disclosure of these records may reasonably be expected to endanger the security of a building, vehicle or of a system or procedure established for the protection of items, they have not provided any evidence at all.

[32] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

[33] The police have not met the burden of proof with respect to their decision to deny access to the DVD on the basis of section 8(1)(i). Therefore, I do not uphold this exemption.

[34] As I have not upheld the two discretionary exemptions claimed by the police, it is not necessary to determine whether they exercised their discretion properly.

[35] In conclusion, I will order the police to disclose as much of the appellant's personal information as possible contained in the DVD, as set out, below.

**ORDER:**

1. I order the police to disclose, by **May 7, 2012** but not before **April 30, 2012**, as much of the appellant's personal information depicted in the DVD as can reasonably be severed without disclosing the other individuals' personal information, by way of obscuring the images of the other individuals depicted in the DVD.
2. In order to verify compliance with order provision 1, I reserve the right to require that the police provide me with a copy of the DVD sent to the appellant.

Original Signed by: \_\_\_\_\_  
Cathy Hamilton  
Adjudicator

\_\_\_\_\_ March 29, 2012