

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-2691

Appeal MA11-87

Guelph Police Services Board

February 8, 2012

**Summary:** The appellant made a request to the police for a video recording of a confrontation that occurred during the torch relay in downtown Guelph on December 28, 2009. The police denied access to the video on the basis of the discretionary law enforcement exemptions in sections 8(1)(a), (c), (e) and (g), and the mandatory personal privacy provision in section 14(1). The appellant appealed the police's decision to this office and raised the possible application of the public interest override in section 16. In this order, the police's decision is upheld as disclosure of the record would reveal law enforcement intelligence information which is exempt under section 8(1)(g).

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 8(1)(g).

### OVERVIEW:

[1] The appellant made a request to the Guelph Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...the Olympic torch relay videos, taken on Dec. 28, 2009 that shows footage of a confrontation in downtown Guelph.

[2] The police located the responsive record and denied access to it, pursuant to the mandatory personal privacy exemption in section 14(1) with reference to the presumption in section 14(3)(b).

[3] The police issued a subsequent decision after the appellant had filed an appeal with this office. In this decision, the police advised that they are also relying on the discretionary law enforcement exemptions in sections 8(1)(a), (c), (e) and (g) to withhold the responsive record, in addition to section 14(1).

[4] During mediation, the appellant raised the possible application of the public interest override in section 16 of the *Act*. As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During my inquiry, I sought and received representations from the appellant and the police. Representations were exchanged in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[5] In this decision, I uphold the police's decision that the record is exempt under section 8(1)(g) of the *Act*.

## **RECORDS:**

[6] The record at issue consists of one DVD.

## **ISSUES:**

- A. Is there another record responsive to the appellant's request?
- B. Do the discretionary law enforcements exemptions in sections 8(1)(a), (c), (e) and/or (g) apply to the record?
- C. Was the police's exercise of discretion proper?

## **DISCUSSION:**

### **A. Is there another record responsive to the appellant's request?**

[7] In the appellant's representations, he raises the issue of a possible responsive record that was not identified by the police in their decision. In particular, the appellant submits that there is a video of the event that was taken by the Vancouver Organizing Committee for the 2010 Olympic Games (VANOC). The appellant submits that this record may be responsive and also may be accessible to him under the *Act*, as it is not, arguably, an intelligence record.

[8] I note that this issue was not raised prior to the start of my inquiry, but the police were asked to respond to this issue in its reply representations. The police submit that that they possess a copy of the videotape of the event that was taken by

VANOC and it was provided by VANOC to the police for court purposes only. The police submit that they do not have control over the VANOC video and that it was VANOC's decision to determine whether the appellant could have a copy of its recording.

[9] Section 4(1) reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[10] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. It is not apparent from the appeal file whether the appellant or the police sought to clarify this issue at the request stage or during mediation. As this issue was not squarely before me in this appeal, I am not in a position to render a decision on whether the police have control of the VANOC recording. If the appellant wishes to pursue access to this record, he can make that request to the police. The rest of the decision relates to the appeal arising from the request for the recording of the event taken by the police.

**B. Do the discretionary law enforcement exemptions in sections 8(1)(a), (c), (e) and/or (g) apply to the record?**

[11] The police submit that the discretionary law enforcement exemptions in sections 8(1)(a), (c), (e) and/or (g) apply to the record. In this case, I find that section 8(1)(g) is particularly relevant and it reads:

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

interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

[12] Generally, 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.)].

[13] 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 [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.)].

[14] Past decisions of this office have determined that the term "intelligence information" means:

Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence [Orders M-202, MO-1261, MO-1583, PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.)].

[15] The police provided detailed representations in support of their position that section 8(1)(g) applies to the record at issue. Portions of the police's representations were not shared due to confidentiality concerns. However, the police submit that the record is a "surveillance video" that was taken by the Guelph Police Service intelligence unit in order to gather information on individuals and to monitor the protest against the Olympics as the Olympic torch relay made its way through Guelph. The police submit that the video was taken by the Guelph Police Intelligence Unit to monitor the actions of individuals known to be involved in civil disobedience and it had a twofold purpose. The first purpose was to document any criminal activity, should it occur, during the Olympic torch run. Secondly, the video would be retained and used by the police and the larger intelligence community.

[16] The police submit that disclosure of the record would have an effect on how, when, where and if the surveillance technique is used in the future and the police state:

These individuals would no doubt take further steps to conceal their identities making the gathering of intelligence information that much more difficult.

[17] The appellant submits that the investigative technique of covertly video recording the actions of certain individuals is generally "known" to those who engage in criminal or activist activities. Thus, the appellant argues that withholding access to the record to protect "covert video surveillance" from becoming known to criminal or activists has little merit.

[18] As stated above, the police provided confidential representations which I am unable to set out in greater detail here. The police's confidential representations relate to the storage of the record and the individuals recorded on the video recording. Based on my review of the record and the parties' representations, I find that disclosure of the record could reasonably be expected to reveal law enforcement intelligence information respecting persons. I accept the police's representations that the record is a surveillance video of individuals taken by the police's Intelligence unit during the

Olympic torch run through Guelph. I further accept that disclosure of this information could reasonably be expected to reveal intelligence information relating to the persons on the recording. Accordingly, I find that section 8(1)(g) of the *Act* applies to the record and it is exempt subject to my review of the police's exercise of discretion.

[19] As I have found the record exempt under section 8(1) and section 8(1) is not an exemption subject to the public interest override in section 16, I will not be considering its application in this decision.

### **C. Was the police's exercise of discretion proper?**

[20] The section 8(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.

[21] 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.

[22] 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 43(2)].

[23] The police submit that it considered the following in exercising its discretion to withhold the record under section 8(1):

- The request was for general records and not for the requester's own personal information.
- The nature of the exemption and the rights it serves to protect, namely police intelligence information.
- The privacy rights of those individuals whose information is on the record.

[24] The appellant submits that there are unresolved issues surrounding the incident around the Olympic torch run through Guelph which could be resolved through a viewing of the record at issue. The appellant argues that the police should exercise their discretion to disclose the record and resolve these issues.

[25] Based on my review of the police's decision, the record and the parties' representations, I find the police's exercise of discretion to be proper. The police properly considered the nature of the law enforcement exemption and the type of record at issue. The police also properly considered the potential privacy interests of those individuals who may be identified on the recording. I uphold the police's exercise of discretion.

**ORDER:**

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

Original signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ February 8, 2012