

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3476

Appeal PA14-26

Landlord and Tenant Board

April 8, 2015

Summary: The appellant made a request to the Landlord and Tenant Board for access to security video footage containing his own image as well as the images of the affected party and other individuals, taken by security cameras in the waiting area of a board office. The board denied access to the footage on the basis that disclosure would constitute an unjustified invasion of the personal privacy of the affected party and the other individuals whose images appear in the footage. In this order, the adjudicator finds that the records contain the personal information of the appellant and other individuals, but not that of the affected party. The adjudicator upholds the application of the personal privacy exemption in section 49(b), in part, and orders the board to issue a revised access decision including a fee estimate for disclosing as much of the appellant's personal information in the footage as can be reasonably severed from the personal information of other individuals.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 49(b), 10(2).

BACKGROUND

[1] The appellant submitted a request to the Landlord and Tenant Board (the board) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Security camera footage of physical interaction between myself and representative of landlord occurring on .. 6 Sept. 2012 at approx 2 p.m. at

first three chairs (furthest from camera) in waiting area... Incident happened in front of security camera "WAITING 2". Incident involved inappropriate touching by the landlord's rep placing an index finger on documents on my lap – and holding finger for 4-5 seconds. I am wearing red, long sleeve top. Rep is tall, dark hair, glasses in white suit.

[2] The board identified approximately one hour of video footage from the security camera in question. It issued a decision denying access to the footage, in its entirety, on the basis that it includes images of numerous individuals, and the mandatory personal privacy exemption at section 21(1) of the *Act* applies. The appellant made a second request for the same information. The board again issued a decision denying access on the same basis as its prior decision. The appellant appealed the board's second decision to this office.

[3] A mediator was appointed to clarify the issues under appeal and attempt a resolution. The mediator provided notice to the landlord's representative, a paralegal (the affected party). The appellant advised the mediator that he seeks access to as much of the video footage as possible, particularly the interaction between him and his landlord's representative. He asserted that the footage should be edited with face-blurring or obscuring technology to provide him with this information without identifying other individuals. The board advised the mediator that it does not have the capability to edit the video in such a manner.

[4] Because the appellant is seeking access to his own personal information as well as potentially that of other individuals, the mediator raised the possible application of the discretionary personal privacy exemption at section 49(b) of the *Act*, which applies when an individual seeks access to his or her own personal information. The board agreed that section 49(b) should have been claimed for the record at issue, but maintained its decision to deny access to the record.

[5] As no mediated resolution was reached, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations from the board and the affected party. The appellant provided responding representations, following which the board provided reply and the appellant provided sur-reply. Copies of the parties' representations were shared in accordance with this office's *Practice Direction 7*, with some portions being withheld in accordance with the confidentiality criteria set out in that practice direction.

[6] In this order, I find that the video footage contains the personal information of the appellant and other individuals. Images of the affected party and a concierge who appears in the footage do not constitute their personal information. As a result, I uphold the board's decision, in part, and order it to issue a revised decision to the appellant with a fee estimate for disclosing a severed copy of the video footage with the

images of individuals other than the appellant, the affected party and a concierge obscured.

RECORDS

[7] The record at issue consists of video footage of about one hour in length.

ISSUES

- A. Does the record contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?
- B. Does the discretionary personal privacy exemption at section 49(b) of the *Act* apply to the information at issue?
- C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION

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

[8] 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), which provides in part 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,
...
- (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] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[10] Sections 2(3) and (4) also relate to the definition of personal information. These sections 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.

[11] 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.² However, 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.³

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

Representations

[13] The video footage, which has no audio component, is approximately one hour in length, and depicts a waiting area of about a dozen chairs at the board’s offices. The appellant and the affected party⁵ do not appear until fifty minutes or so into the footage. Before then, individuals come and go from the waiting room, sit and talk with others, or speak on their telephones. Some individuals are dressed casually; others are in business attire. There are also individuals in the background by the door who never enter the waiting area.

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁵ The board submits that it is not possible for it to definitively identify that portion of the footage which depicts the interaction between the appellant and the affected party. However, as set out below, I am satisfied that the interaction that I describe here is the interaction that took place between the appellant and the affected party.

[14] About fifty minutes into the footage, a man wearing a red shirt (whom I find below to be the appellant) enters the waiting area with a man in a grey suit (whom I find below to be the affected party). They sit down side by side in the two chairs farthest from the security camera, in a shadowed part of the waiting area. They each put their bags down and the appellant retrieves some papers, puts them on his lap, and passes some to the affected party, who leafs through the papers. At one point, the affected party appears to point to the papers on the appellant's lap, but it is not clear whether he touches them or not. The video footage is blurry and it is not possible to see these individuals' hands clearly at all times. After about five minutes, they pick up their respective belongings and leave the waiting area.

[15] During the period that the appellant and the affected party are in the waiting area together, there are three other individuals seated closer to the security camera, and at one point several people walk through the waiting area together. There are also other individuals in the background who are for the most part unidentifiable, except that the concierge is identifiable from her clothing.

[16] The board submits that the images captured on the video footage would include those of a mix of individuals such as board staff, landlords, tenants, legal representatives, witnesses for hearings, clients seeking information from customer service officers, and delivery persons. The board submits that some of these individuals would have visited the board in their personal capacity, and others in their professional capacity. It submits that tenants whose images are captured in the video footage were attending the board office in a personal capacity, and that their images recorded by the board security cameras meet the definition of personal information.

[17] The board further submits that landlords and legal representatives who attended the board office were doing so in a professional or business capacity. It submits, however, that the video footage may contain information that relates to them in a personal capacity; for example, the footage may show the individuals engaging in personal conversations. It submits, however, that as there is no audio component to the video, it cannot be determined whether the conversations related to business or personal matters, or a mix of both.

[18] The board also submits that, even if it were possible to isolate the interaction between the appellant and the affected party (which the board states it does not have the technology to do), to do so would reveal personal information about the affected party. The board points out that the appellant has alleged that the affected party inappropriately touched the appellant during their interaction. The board submits that this reveals "other personal information" about the landlord's representative under paragraph (h) of the definition in section 2(1) of the *Act*. It submits that the appellant could show the video to others, who would then be able to identify the landlord's representative as the person whom the appellant alleges touched him inappropriately.

[19] The board also submits that it is not clear how to identify that portion of the footage that depicts the interaction between the appellant and the affected party.⁶

[20] The affected party submits that the video contains his personal information. The appellant's representations do not specifically address this issue. However, the appellant provided descriptive information to assist me in identifying which portion of the video footage shows the interaction between himself and the affected party.

[21] In its reply representations, the board submits:

The man in the red shirt in the video recording meets the appellant's description of himself. The man in the grey suit seated next to the man in the red shirt does not match the appellant's description, but may be the landlord's representative ... It appears as though the man in the grey suit pointed towards papers in the man in the red shirt's lap, but it isn't clear from the recording whether he actually touched the papers let alone held his hand on the papers for any length of time....

Analysis and findings

[22] As a preliminary matter, I find that the portion of the video footage containing the interaction between the appellant and the affected party is readily identifiable. The appellant provided a detailed description of himself and the affected party, and of their location in the waiting room relative to the security camera. These descriptions match the footage that I reviewed. I find it immaterial that the appellant recalled the affected party as wearing a "white suit" whereas the video shows a person in a light grey suit. The footage contains no other interactions between two individuals resembling the descriptions provided by the appellant and the board.

[23] For the following reasons, I find that the video footage contains the personal information of the appellant and other individuals, but not that of the affected party nor of the concierge.

[24] I agree with the submission of the board that the appellant, other tenants and witnesses who attended the board's offices and whose images are captured in the video footage did so in their personal capacities. Accordingly, the images of these individuals constitute "recorded information about an identifiable individual" within the definition of "personal information" in section 2(1) of the *Act*. However, with the exception of a concierge, who is clearly (because of her uniform) depicted in her professional capacity, it is not possible to distinguish between those individuals who are depicted in their personal capacities, and others (such as landlords, lawyers and paralegals) who are

⁶ Although the board made this argument in the context of its submissions on Issue B and the severability of the record, I mention it here, because the identifiability of the appellant and the affected party is an important consideration in determining whether the record includes their personal information.

depicted in their professional capacities. In the circumstances, I find it appropriate to treat all images of individuals other than the affected party and the concierge as their personal information.⁷

[25] I find, however, that the images of the affected party do not constitute his personal information, because it is undisputed that he was at the board's offices in his professional capacity as the landlord's representative. Moreover, his image on the video footage does not reveal anything of a personal nature about him. I acknowledge that, as noted above, 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.⁸ Previous orders of this office⁹ have found that, where a record contains allegations of wrongdoing, this information is personal to the individual in question and therefore qualifies as "personal information".

[26] However, I have carefully reviewed the video footage of the interaction between the appellant and the affected party and conclude that it does not contain any indication of wrongdoing on the part of the affected party. Given the quality of the video and the affected party's location in a poorly lit corner of the waiting room, some distance from the camera, it is simply not possible to determine whether or not he touched the appellant in the manner the appellant alleges. The video shows the appellant and the affected party reviewing documents while seated beside one another in the waiting area. The quality of the video does not allow the viewer to make out where the affected party's hands are at all times. I agree with the submission of the board that, while it appears as though the man in the grey suit pointed towards papers in the man in the red shirt's lap, it isn't clear from the recording whether he actually touched the papers, let alone held his hand on the papers for any length of time.

[27] I conclude that the video footage contains the appellant's personal information as well as that of other identifiable individuals, but not that of the affected party and the concierge.

B. Does the discretionary exemption at section 49(b) apply to the information at issue?

[28] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

⁷ See *Vaughan (City) v. Ontario (Information & Privacy Commissioner)*, 2011 ONSC 7082 at para. 9 (Div. Ct.).

⁸ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁹ See, for example, Order PO-2728.

[29] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.¹⁰

[30] For records claimed to be exempt under section 49(b) (ie., records that contain the requester’s personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹¹

Representations

[31] Given my conclusion, above, that the video footage does not contain the affected party’s personal information, I do not need to consider the arguments of the board and the affected party that his personal information is exempt from disclosure under section 49(b) because disclosure would be an unjustified invasion of the affected party’s personal privacy. However, I wish to briefly acknowledge the board’s submissions to the effect that the appellant’s allegation of inappropriate touching is highly sensitive, and that disclosure of the video could cause unfair damage to the affected party’s reputation. The board submits that the appellant could disseminate the video widely, and invite others to draw the conclusion that the affected party touched him inappropriately. The board submits that this could cause the affected party distress and damage his reputation unfairly.

[32] As I noted above, however, the footage of the affected party does not allow the viewer to draw any conclusions with respect to the allegation that the affected party touched the appellant in an inappropriate manner. While it is possible that the appellant may make his allegations known to others (though I have no reason to believe that he will do so), the video itself is inconclusive. Any distress experienced by the affected party, or damage to his reputation, would not be a result of the disclosure of the video. I also note that, in the appellant’s request for information, he did not ask for a copy of the video footage; he asked to review it at the board’s offices.

[33] I turn now to the parties’ representations on the question of whether the other individuals’ personal information is exempt under section 49(b). As noted above, for records claimed to be exempt under section 49(b) (ie., records that contain the requester’s personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in

¹⁰ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 49(b).

¹¹ Order MO-2954.

determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹²

[34] The board submits that the presumption at section 21(3)(h) applies to the personal information of the other individuals on the video, because the images can potentially indicate the racial or ethnic origin of these individuals.

[35] With respect to the factors in section 21(2), the board originally submitted that none of the factors favouring disclosure apply. In particular, with respect to section 21(2)(d) (fair determination of rights), the board submitted that the proceeding at the board had been long resolved at the time of the appellant's request for the video, and that it was not aware of any other proceeding which will determine the appellant's rights.

[36] However, in response, the appellant advised that he has made a complaint about the affected party's conduct to the Law Society of Upper Canada. He provided a copy of a letter he received from the Law Society informing him that it was closing its file pertaining to the appellant's complaint against the affected party, but that if he receives the video footage, he can provide it to the Law Society and it will decide whether or not to re-investigate the matter. The appellant, therefore, submitted that he requires the video footage to support his complaint, such that the factor at section 21(2)(d) applies.¹³

[37] In reply, the board submitted that although section 21(2)(d) might apply, this factor does not outweigh the factors in section 21(2) favouring non-disclosure. The board also pointed out that, if the Law Society had determined that there was sufficient evidence of misconduct to proceed, it could have requested that the board disclose the video to it pursuant to section 42(1)(g) of the *Act*.¹⁴ The board also submitted that it was willing to provide the video footage to the Law Society under section 42(1)(g). I do not have any information indicating whether or not the board has done so, but in any event, the appellant subsequently informed this office that he continues to seek access to the video footage irrespective of the board's offer to provide it to the Law Society.

¹² Order MO-2954.

¹³ The criteria for the application of this factor are set out in Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

¹⁴ Section 42(1)(g) provides:

An institution shall not disclose personal information in its custody or under its control except,

Where disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceedings or from which a law enforcement proceeding is likely to result;

Analysis and findings

[38] For the reasons that follow, I find that disclosure of the images of individuals other than the appellant, the concierge and the affected party would be an unjustified invasion of their personal privacy. In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. The appellant raises the factor at section 21(2)(d) (fair determination of rights). However, he does not explain how footage other than that of the interaction between the appellant and the affected party is relevant to a fair determination of his rights, and I find that it is not.¹⁵ Therefore, subject to my findings on the board's exercise of discretion, below, I uphold the board's finding that disclosure of the video footage of individuals other than the appellant, the concierge and the affected party would be an unjustified invasion of their personal privacy, and their images are therefore exempt from disclosure pursuant to section 49(b).

[39] However, section 10(2) of the *Act* requires an institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. The board states that, given the format in which the footage was recorded, the board does not have the technology or expertise to edit it in such a way as to sever out or obscure the images of individuals other than the appellant and the affected party. While I accept that the board itself may not have such technology and/or expertise, it is not limited to finding such expertise in-house; it can, indeed must, seek outside professional technical assistance if necessary in order to respond appropriately to the appellant's request. In accordance with the *Act's* user-pay principle, the cost associated with this may be passed on to the appellant pursuant to section 57(1) of the *Act* and sections 6, 6.1, 7 and 9 of Regulation 460.

[40] Therefore, subject to my discussion of the board's exercise of discretion, below, I find that the appellant is entitled to access to a severed copy of the video footage, with the images of individuals other than the appellant, the affected party and the concierge obscured. However, the board is to be given the opportunity to issue a revised decision with a fee estimate, and the appellant must determine whether to proceed with his request after reviewing same.

C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[41] The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must

¹⁵ The appellant raised two additional factors in his sur-reply representations: section 21(2)(a) (public scrutiny) and 21(2)(b) (public health and safety). However, he related these factors only to the footage of the interaction between himself and the affected party.

exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[42] 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; or
- it fails to take into account relevant considerations.

[43] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ This office may not, however, substitute its own discretion for that of the institution.¹⁷

[44] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁸

- 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

¹⁶ Order MO-1573.

¹⁷ Section 54(2).

¹⁸ Orders P-344, MO-1573.

- 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.

Representations and findings

[45] The board submits that it balanced the principle that individuals should have access to their own personal information with the privacy interests of individuals other than the appellant who are depicted on the video footage. The board submits that it considered the following factors:

- the appellant has not demonstrated a sympathetic or compelling need to receive the video footage
- the individuals depicted on the video footage have a reasonable expectation that the board will not disclose their images to the public
- in terms of the board's historical practice, it has denied all previous requests for access to video footage from its security cameras.

[46] The appellant did not make representations on the board's exercise of discretion.

[47] I am satisfied that in withholding the images of the individuals other than the appellant, the concierge and the affected party, the board took into account relevant considerations and did not take into account irrelevant ones. Further, I have no reason to believe that the board exercised its discretion in bad faith or for an improper purpose. In the circumstances, I uphold the board's exercise of discretion with respect to its decision not to disclose the images of individuals other than the appellant, the affected party and the concierge.

ORDER

1. I uphold the board's decision in part, and order it to issue a revised decision to the appellant, including a fee estimate for disclosing a severed copy of the video footage, with the images of individuals other than the appellant, the affected party

and the concierge obscured. For the purposes of that decision, the date of this order is to be treated as the date of the appellant's request for access.

2. In order to verify compliance with order provision 1, I reserve the right to require that the board provide me with a copy of the revised decision letter sent to the appellant.

Original Signed By: _____ April 8, 2015 _____
Gillian Shaw
Adjudicator