

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3497

Appeal PA10-151-3

Ministry of Community Safety and Correctional Services

May 29, 2015

Summary: In Order PO-3335, the ministry was ordered to issue an access decision on a video that was found to be in its custody or control. The ministry issued a decision denying access to the video relying on the discretionary exemptions in sections 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(d) (law enforcement), 14(1)(e) (endanger life or safety), 14(1)(i) (security) and 14(1)(l) (facilitate commission of unlawful act), and in section 49(b) (invasion of privacy), with reference to the factors in sections 21(2)(f) and (h). The appellants appealed the ministry's decision. The ministry's decision is not upheld. The record is found to contain the personal information of one of the appellants and is ordered disclosed under the absurd result principle.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 14(1)(d),(e), (i) and (l), 21(3)(b), and 49(a) and (b).

Orders and Investigation Reports Considered: Orders 23, MO-2053, MO-2081, MO-2695, MO-2969, MO-2994, MO-3066, MO-3069, PO-1847, PO-2003 and PO-3335.

Cases Considered: *Ontario (Attorney General) v. Pascoe*, 2001 CanLII 32755 (ON SCDC).

OVERVIEW:

[1] This appeal relates to Appeal PA10-151-2 and Order PO-3335, in which I ordered the Ministry of Community Safety and Correctional Services (the ministry) to issue an access decision regarding a video sought by the appellants. In accordance with Order

PO-3335, the ministry issued a decision. The ministry denied access to the video relying on the discretionary exemptions in section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(d) (law enforcement), 14(1)(e) (endanger life or safety), 14(1)(i) (security) and 14(1)(l) (facilitate commission of unlawful act), and in section 49(b) (invasion of privacy), with reference to the factors in sections 21(2)(f) and (h). The appellants appealed the ministry's decision to this office and the appeal was streamed directly to the adjudication stage of the appeal process for an inquiry under the *Act*.

[2] I began my inquiry by repeating important background facts that I set out in Order PO-3335 that frame this appeal and therefore, must be considered. First, the Ontario Provincial Police (OPP) obtained the video from third parties (the affected parties). Second, the OPP received and reviewed the video in connection with a law enforcement purpose relating to the appellants. Third, the OPP showed the video to the appellants at its Huntsville detachment. Finally, the appellants and the affected parties know each other's identities. With these undisputed facts laid out for the parties' consideration, I invited the representations of the affected parties and the ministry on the exemptions relied on by the ministry in its decision as they relate to the record at issue.

[3] I received representations from the ministry and the affected parties. The affected parties provided extensive representations which they asked me to keep confidential in their entirety. They also explained their reasons for requesting that their representations not be shared with the appellants. The ministry also provided representations and asked that portions be kept confidential from the appellants. After reviewing the representations of the affected parties and the ministry, I determined it was not necessary to invite representations from the appellants. Accordingly, it was also not necessary for me to determine which parts of the affected parties' and the ministry's representations satisfied the confidentiality criteria in this office's *Code of Procedure* and *Practice Direction Number 7* and could be shared with the appellants. Although I did not make a determination on the confidentiality of the representations I received, I will nonetheless maintain their confidentiality to the extent possible in setting out the reasons for my decision below.

[4] In this order, I do not uphold the ministry's decision to deny access to the video at issue. In making this decision, I have considered all of the representations before me, including those that the affected parties and the ministry have characterized as confidential.

RECORDS:

The sole record at issue is a 25 second video which has an audio component to it.

ISSUES:

- A. Does the video contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(b) apply to the withheld video?
- C. Does the discretionary exemption at section 49(a) in conjunction with the exemptions in sections 14(1)(d), (e), (i) and (l) apply to the withheld video?

DISCUSSION:

A. Does the video contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[5] 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. “Personal information” is defined in section 2(1) of the *Act* as “recorded information about an identifiable individual” and a list of examples is included as part of this definition. 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 may still qualify as personal information.¹ Section 2(3) also relates to the definition of personal information and states:

(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.

[6] 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 To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[7] The ministry submits that the record contains the personal information of a number of individuals, but not that of the appellants. It asserts that the personal information of the affected parties is contained in the record because the appellants know who the record belongs to, the record contains images of the affected parties’ property, and the record links the affected parties to an OPP law enforcement

¹ Order 11.

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

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

investigation. The affected parties also submit that the record contains their personal information because it shows part of their property and their personal possessions which they claim are identifiable.

Analysis and findings

[8] I have reviewed the video at issue in detail. The video depicts images of certain exterior areas of the land forming the affected parties' property. Neither the property address nor the affected parties are identified in the video. The recorded images of specific parts of the affected parties' property are all outdoors and do not include any images of the inside of the affected parties' home. The outdoor views of the affected parties' property that appear in the video are views that are visible to anyone in the vicinity of the location in which the video was recorded, including individuals viewing the property from an adjacent property or neighbouring area.

[9] This office has consistently found that information about a property does not qualify as personal information.⁴ The distinction between "personal information" and information concerning residential properties was first addressed by this office in Order 23 as follows:

In considering whether or not particular information qualifies as "personal information" I must also consider the introductory wording of subsection 2(1) of the *Act*, which defines "personal information" as ". . . any recorded information about an identifiable individual...". In my view, the operative word in this definition is "about". The *Concise Oxford Dictionary* defines "about" as "in connection with or on the subject of". Is the information in question . . . **about** an identifiable individual? In my view, the answer is "no"; the information is **about a property** and not **about an identifiable individual**. [emphasis in original]

[10] I agree with the reasoning set out in Order 23 and find that it is applicable to the circumstances of this appeal. I find that the information in the video is "about" the affected parties' property and not "about" them as identifiable individuals. I further find that this property information does not qualify as the affected parties' personal information under the definition in section 2(1) of the *Act*.

[11] In coming to this conclusion, I have considered the possible application of Order MO-3069, where photographs of the interior of a home depicting the personal possessions and lifestyle of the residents were at issue and were found to contain personal information. Because the exterior areas of the affected parties' property and the possessions of the affected parties that are depicted in the video are all located

⁴ See for example, MO-3066, MO-2994, MO-2969, MO-2695, MO-2081, MO-2053 and PO-1847.

outside in plain, public view, the circumstances of this appeal are distinguishable from those in Order MO-3069. I find that Order MO-3069 has no application to this appeal.

[12] However, the ministry takes the position that the video contains the affected parties' personal information because the appellants know who the record belongs to and the record links the affected parties to an OPP law enforcement investigation. This submission requires me to determine whether the video contains the affected parties' personal information because it reveals something of a personal nature about them in the circumstances of this appeal. The Divisional Court has explained the relationship between "personal information" and identification in the following terms:

The test then for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identifiable from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the records. See Order P-316, [1992] O.I.P.C. No. 74; and Order P-651, [1994] O.I.P.C. No. 104.⁵

[13] As I note above, the video depicts the affected parties' property. An individual viewing the video would not be able to identify either the property or the affected parties from the video, and therefore, the video cannot be said to depict information that connects the affected parties to an OPP law enforcement investigation.

[14] As regards the appellants who are familiar with the particular circumstances, it is not the video that reveals a connection between the affected parties and an OPP investigation; the appellants are already aware of this connection through their interaction with the OPP regarding the events depicted in the video. What the video does reveal to the appellants is the content and extent of the information provided by the affected parties in respect of this specific incident to the OPP. On this basis, I accept that the affected parties have a privacy interest in the record. Applying the Divisional Court's analysis to the circumstances of this appeal, I am satisfied that disclosure of the video would reveal exactly what information the affected parties provided to the OPP in confidence in respect of a specific incident, which was an action taken by the affected parties in their personal capacity. Accordingly, I find that disclosure of the record in the circumstances of this appeal would reveal something personal about the affected parties, despite the fact that the record itself does not contain their personal information.

[15] I disagree with the ministry that the record does not contain the appellants' personal information. The record depicts one of the appellants at a particular time, on a particular day, in a specific place speaking and carrying out certain activities. I find that

⁵ *Ontario (Attorney General) v. Pascoe*, 2001 CanLII 32755 (ON SCDC).

this depiction of the appellant, who is identifiable in the video to individuals who are familiar with her and with the incident and location depicted, qualifies as this appellant's personal information.

[16] Finally, I find that the record does not contain the personal information of the other individuals depicted in the record. These individuals were present at the location depicted in the video at the official request of the appellant and they can be seen in the video carrying out activities in their professional capacity for the appellant's benefit. I find that the record does not therefore reveal something of a personal nature about these individuals and does not contain their personal information.

[17] Having found that the records contains the personal information of one of the appellants and that its disclosure would reveal personal information about the affected parties, I will consider the appellant's right to access the record under sections 49(a) and (b) and the affected parties' right to have the privacy of their personal information protected.

B. Does the discretionary exemption at section 49(b) apply to the withheld video?

[18] Section 49 provides a number of exemptions from individuals' general right of access under section 47(1) to their own personal information held by an institution. Section 49(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. 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 her own personal information against the other individual's right to protection of their privacy.

[19] In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 21(2) provides some criteria to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[20] In its representations, the ministry asserts that the presumption in section 21(3)(b) applies. That section of the *Act* states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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;

[21] I note that the ministry's submission that there was an OPP law enforcement investigation related to this video contradicts its submissions to me in related Appeal PA10-151-2, which I set out in Order PO-3335. In that appeal, the ministry stated that no law enforcement investigation was conducted by the OPP upon receipt of the video from the affected parties. Leaving this inconsistency aside, I accept that the video was compiled by the OPP in the course of its investigation of the specified incident at issue. As a result, the personal information contained in the video was compiled and is identifiable as part of the OPP investigation into a possible violation of law under section 21(3)(b), and its disclosure is presumed to constitute an unjustified invasion of privacy under this same section. However, as a result of my finding on the application of the absurd result principle below, it is not necessary for me to review any other factors favouring disclosure or non-disclosure.

Absurd result

[22] This office has found that where the requester is aware of the personal information at issue, the personal information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.⁶

[23] The absurd result principle has been applied in appeals where:

- the requester sought access to her own witness statement⁷
- the requester was present when the information was provided to the institution⁸
- the information is clearly within the requester's knowledge.⁹

[24] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.¹⁰

⁶ Orders M-444 and MO-1323.

⁷ Orders M-444 and M-451.

⁸ Orders M-444 and P-1414.

⁹ Orders MO-1196, PO-1679 and MO-1755.

¹⁰ Orders M-757, MO-1323 and MO-1378.

[25] The reasoning in these past orders applies to the video at issue in this appeal. As noted above, the appellants and the affected parties have been involved in a protracted neighbour dispute. As a result of their involvement in the dispute with the affected parties and their attendance at an OPP detachment to view the video, the appellants are aware of the circumstances surrounding the video including what it depicts and the fact that the OPP received it from the affected parties. As also described above, the video contains primarily the personal information of one of the appellants who is depicted in it while engaged in an activity. The video does not portray the personal information of any other identifiable individual. To the extent that disclosure of the video would reveal personal information about the affected parties, it would only reveal the extent of the information the affected parties provided by way of the video to the OPP in respect of a particular incident. The appellants are already aware of this information as they have viewed the video and are aware of exactly what it depicts. I find that the information in the video is within the appellants' knowledge and in these circumstances, applying the section 49(b) exemption to deny them access to the video would lead to an "absurd" result. Accordingly, I am satisfied that that section 49(b) does not apply to the record at issue and that the video should be disclosed, subject to my consideration of the application of the discretionary exemption in section 49(a).

C. Does the discretionary exemption at section 49(a) in conjunction with the exemptions in sections 14(1)(d), (e), (i) and (l) apply to the information at issue?

[26] Section 49(a) reads:

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

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[27] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.¹¹ The ministry relied on section 49(a), in conjunction with sections 14(1)(d), (e), (i) and (l) in its decision, although in its representations, it argues that the record does not contain the personal information of the appellant and on this basis, section 49(a) should not be considered. I find that in accordance with my finding above that the record contains the appellant's personal information, the ministry was correct in its access decision to rely on section 49(a) in conjunction with its claims of the law enforcement exemptions in section 14.

¹¹ Order M-352.

[28] Also in its representations, the ministry states that it no longer relies on the exemption in section 14(1)(d). However, the affected parties provide representations on the application of the section 14(1)(d) exemption. The exemptions in section 14 that the ministry and the affected parties rely on are the following:

- (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
 - (e) endanger the life or physical safety of a law enforcement officer or any other person;
 - (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure
 - (l) facilitate the commission of an unlawful act or hamper the control of crime.

[29] The term "law enforcement" is used in several parts of section 14, 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).

[30] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.¹²
- a police investigation into a possible violation of the *Criminal Code*.¹³

¹² Orders M-16 and MO-1245.

¹³ Orders M-202 and PO-2085.

[31] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁴ Except in the case of section 14(1)(e), where section 14 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.¹⁵

[32] In respect of section 14(1)(d), the institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.¹⁶

[33] In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.¹⁷ It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.¹⁸ In addition, a person’s subjective fear, while relevant, may not be sufficient to establish the application of the exemption.¹⁹

Analysis and findings

[34] As noted above, the affected parties have asked that I keep their representations confidential and I will therefore only refer to them generally and to the extent necessary to address the requirements in the *Act*. However, I have considered them in their entirety. In making my decision, I have also considered the nature of the affected parties’ and the appellants’ relationship as described in the affected parties’ and the ministry’s representations. I find that the evidence provided by the affected parties and the ministry for all of the law enforcement exemptions they have relied on is not adequately detailed and convincing to establish a reasonable expectation that any of the harms in section 14(1)(d), (e), (i) and/or (l) could reasonably be expected to occur.

[35] Dealing first with section 14(1)(d) which protects information whose disclosure could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, I note that the ministry relied on this exemption in its decision but withdrew its reliance on the exemption in its

¹⁴ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹⁵ Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), and *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

¹⁶ Order MO-1416.

¹⁷ *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

¹⁸ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹⁹ Order PO-2003.

representations. Accordingly, the only representations I received on the possible application of this exemption were from the affected parties. I do not accept the affected parties' submissions on this exemption as tenable because section 14(1)(d) can only apply to individual informants who act as a confidential source in a law enforcement matter. I agree with the ministry's decision to abandon its claim of section 14(1)(d) and I find that this exemption has no application in the circumstances of this appeal.

[36] Turning to section 14(1)(e), I am not persuaded by the representations that the ministry and the affected parties have established a reasonable basis for believing that endangerment will result from disclosure. I adopt the reasoning in Order PO-2003 that while a person's subjective fear is relevant, it is not determinative on its own of the application of the section 14(1)(e) exemption. While I understand the affected parties' position on why they feel this exemption should apply to the record, their submissions are not convincing nor are they sufficient to establish its application. The appellants, who seek access to the video, have already seen it once; a fact that I set out in related Order PO-3335. There is no evidence put forth by the ministry or the affected parties that this one-time disclosure of the video resulted in a threat to the life or physical safety of a law enforcement officer or any other person. While I accept that the relationship between the affected parties and the appellants is unpleasant, I find the ministry's and the affected parties' submissions on the application of this exemption unconvincing.

[37] For similar reasons to those I have listed above, I am not satisfied that the affected parties and the ministry have established a reasonable basis for believing that disclosure of the video could be expected to endanger the security of a building or system as contemplated by section 14(1)(i), or that it could be expected to facilitate the commission of an unlawful act or hamper the control of crime as set out in section 14(1)(l) of the *Act*. The submissions of the ministry and the affected parties on these exemptions are speculative and do not establish that disclosure of the record could reasonably be expected to result in the harms addressed by sections 14(1)(i) and (l).

[38] Overall, I find there is nothing in the ministry's and the affected parties' representations that satisfies the requirement that they provide detailed and convincing evidence establishing that any of the harms in sections 14(1)(d), (e), (i) and/or (l) could reasonably be expected to occur as a result of disclosure of the record. The evidence contained in the affected parties' representations amounts to speculation of possible harm and I do not accept that it establishes a reasonable expectation of harm as required to engage the application of section 14(1). Accordingly, I find that none of the exemptions in section 14(1)(d), (e), (i) or (l) of the *Act* applies to the record. Having found that the ministry and the affected parties have not provided me with the required detailed and convincing evidence to establish that disclosure could reasonably be expected to bring about any of the situations contemplated by sections 14(1)(d), (e), (i) or (l) of the *Act*, I will order the record disclosed.

[39] Finally, I note that the affected parties include representations on the discretionary solicitor-client privilege exemption in section 19. This discretionary exemption was not relied on by the ministry in its decision, nor was it raised by the ministry in its representations. This exemption has no application in this appeal.

ORDER:

1. I do not uphold the ministry's decision to deny access to the video.
2. I order the ministry to provide the appellants with a copy of the video by **June 29, 2015** but not before **July 6, 2015**.
3. In order to verify compliance with order provision 2, I reserve the right to require the board to provide me with a copy of the record sent to the appellants.

Original Signed By:
Stella Ball
Adjudicator

May 29, 2015