

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3510

Appeal PA13-315

Joseph Brant Memorial Hospital

July 16, 2015

Summary: The appellant made a request to Joseph Brant Memorial Hospital under the *Freedom of Information and Protection of Privacy Act* for a copy of surveillance video footage taken at the hospital during the time he was taken there by the police. The hospital denied access to the video in its entirety, claiming the application of the discretionary exemption in section 49(b), in conjunction with section 21(1) (personal privacy). During the mediation of the appeal, the appellant raised the possible application of the public interest override in section 23. In this order, the adjudicator finds that the video contains the personal information of the appellant, certain police officers and another individual. She finds the video exempt from disclosure under section 49(b), in conjunction with section 21(1). The hospital's exercise of discretion is upheld. The adjudicator also finds that the public interest override in section 23 does not apply in this instance.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 21(1), 23 and 49(b).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of a decision made by Joseph Brant Memorial Hospital (the hospital) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) in response to an access request. The request was for copies of a surveillance video taken on the date when the

requester was taken to the hospital by police officers from the Halton Police Service (the police).

[2] After locating the responsive surveillance video, the hospital wrote to the requester advising that there were two options to proceed with the request:

- the requester could agree to the hospital notifying the other individuals appearing in the video footage and seek representations from them; or
- the requester could view the video with the images of the individuals in the video blurred at a cost of approximately \$1200.¹

[3] The requester (now the appellant) subsequently declined both options and appealed the hospital's decision to this office.

[4] During the mediation of the appeal, the appellant agreed that the hospital may contact the police officers in order to obtain their consent to disclose their images captured in the video. After consulting with the Police Association (the police association), the hospital issued a supplemental decision to the appellant. The hospital denied access to the video, claiming the application of the mandatory exemption in section 21(1) (personal privacy) of the *Act*. The hospital also provided the appellant with the option to proceed with the blurred version of the video. The appellant advised the mediator that he wished to appeal the hospital's supplemental decision.

[5] Also during the mediation of the appeal, the mediator raised the possible application of section 49(b) to the video because it contains images of the appellant. The hospital then confirmed that it relied on section 49(b), in conjunction with section 21(1) of the *Act* to deny access to the video. In addition, the appellant raised the possible application of the "public interest override" in section 23 of the *Act*, which was added as an issue in the appeal.

[6] The file was then transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the appeal sought and received representations from the hospital, the police association and the appellant, which were shared in accordance with this office's *Practice Direction 7*. Portions of the representations from the hospital and the police association were not shared with the appellant because they met this office's confidentiality criteria.

[7] In its representations, the hospital submits that it is unable to apply section 10(2) of the *Act* to the record because of the nature of the request (which is for the entire video) and the nature of the record, which cannot be severed. The hospital reiterates that it has offered to provide a de-identified copy of the record, requiring the blurring of the images by an external service provider.

¹ The estimate was obtained from a production services company based on an indication of the length of the footage and an approximation of the number of faces requiring anonymization.

[8] The appeal was then transferred to me for final disposition. For the reasons that follow, I find that the video contains the personal information of the appellant, certain police officers and another individual. I find that the video is exempt from disclosure under section 49(b), in conjunction with section 21(1). I uphold the hospital's exercise of discretion and I find that the public interest override in section 23 does not apply in this instance. The appeal is dismissed.

RECORDS:

[9] The record consists of a DVD (video) containing several clips of surveillance footage on a specified date. The video footage is saved in several files, which are themselves housed in three folders, described as follows:

- Ambulance Bay Outside – these are still shots of the appellant and police officers;
- Ambulance Entrance – these are live action shots of the appellant and police officers; and
- Emergency Hallway – these are still shots of the appellant, police officers, two health care providers and two other individuals. One of these individuals appears to be a patient and the other may be a staff member in the emergency department of the hospital.

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 mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?
- C: Did the hospital exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?
- D: Is there a compelling public interest in disclosure of the video that clearly outweighs the purpose of the section 49(b)/21(1) exemption?

DISCUSSION:

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

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the video contains “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;

[11] 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) may still qualify as personal information.² 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.³ 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.⁴ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

Representations

[12] The hospital submits that the video contains images of identifiable individuals, including:

- footage of an incident involving the appellant and the police; and
- footage of at least one other patient in the hospital’s emergency department, as well as health care professionals providing health care.

[13] The hospital goes on to argue that all of the images of individuals in the video constitute their personal information. In particular, the hospital submits that the images depict the “personal characteristics” of all of the individuals, falling within paragraph (a) of the definition of “personal information.”

[14] In addition, the hospital submits that the images of the patient who is not the appellant also fall within paragraph (b) of the definition of “personal information” of the *Act* because they reveal that this individual was receiving health care. The hospital further argues that the images of the patient also constitute “personal health information” as defined in the *Personal Health Information Protection Act, 2004*.

[15] With respect to the police officers depicted in the video, the hospital submits that their images are of a personal nature because the Office of the Independent Police Review Director (OIPRD) conducted an investigation of the incident captured in the video involving the police and the appellant in response to a complaint it received. The hospital states:

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Although the investigation was completed, the hospital recognizes that the personal images of the officers viewable on the DVD are potentially more sensitive because of the OIPRD involvement. Given the appellant's personal history with Halton Police Services and his potential knowledge of the officers involved, it is reasonable to assume that the individuals could in fact be identified.

[16] The police association, representing the six police officers depicted in the video, submits that the video contains the personal information of the police officers and the appellant. In particular, the police association argues that the images of the appellant reveal information relating to his medical, psychiatric and/or psychological health, falling within paragraph (b) of the definition of personal information in section 2(1) of the *Act*.

[17] With respect to the police officers, the police association submits that the video depicts the officers' names and badge numbers and is a recording of their conduct. In addition, the police association argues that the video was compiled as part of an investigation into the police officers' conduct, which has been considered by this office to constitute "personal information."⁶

[18] The police association also argues that civil litigation regarding the incident is expected and that where the conduct of an officer is the subject of civil litigation against the Crown or the police service, the information has been held to constitute the officer's personal information,⁷ including circumstances where a statement of claim has not yet been issued.⁸

[19] The appellant states that he has already commenced civil litigation against the police and that he knows the names of the officers, as they have been named in his lawsuit.

Analysis and findings

[20] Having reviewed the video, I find that it contains the personal information of the appellant and another individual in the emergency department at the hospital. In particular, the video reveals that these individuals were at the hospital receiving health care, which qualifies as personal information set out in paragraph (b) of the definition of personal information in the *Act* as it relates to the medical history of the individuals. I also find that it is possible to identify who the individuals are by viewing the video.

[21] Turning to the police officers depicted in the video, although they were acting in their professional capacity, I find that because they were the focus of a subsequent complaint and investigation into whether their conduct was appropriate, the video has

⁶ Orders M-757, PO-1912, PO-2524 and PO-2976.

⁷ Order PO-1912.

⁸ Order PO-1772.

taken on a different and more personal quality with respect to them. As such, I find that disclosure of the video would reveal something personal about the police officers and that it also qualifies as their personal information within the meaning of that term in section 2(1). In that regard, I am following a long line of orders of this office that have held that information in records relating to an investigation into alleged improper conduct of individuals in their professional capacity becomes and is characterized as the personal information of those individuals.⁹ I also find that it is possible to identify who the police officers are by viewing the video.

[22] I also note that the hospital claims that all of the images of individuals in the video constitute their personal information. With the exception of the appellant, the patient and the police officers, I disagree with the hospital's position. Based on the evidence provided to me, I find that the health care professionals depicted in the video were performing their duties in a professional capacity and were not the subject of a complaint and subsequent investigation. Therefore, I find that the images of the health care professionals in the video do not constitute their personal information as defined in section 2(1) of the *Act*. Because the images of the health care professionals are not their personal information, the personal privacy exemption in section 21(1) cannot apply to these specific images.

Issue B: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

[23] 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.

[24] 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.

[25] In applying either of the section 49(b) or 21(1) exemptions, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

[26] For records claimed to be exempt under section 21(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception

⁹ Orders P-165, P-448, P-1117, P-1180 and PO-2525.

or the “public interest override” at section 23 applies.¹⁰ If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.¹¹

[27] Conversely, for records claimed to be exempt under section 49(b) (i.e., 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.¹²

Representations

[28] The hospital submits that disclosure of the video would constitute an unjustified invasion of personal privacy under section 49(b), taking into consideration two of the presumptions in section 21(3) and two of the factors in section 21(2). In particular, the hospital cites the presumption in section 21(3)(a) with respect to the depiction of treatment being provided to a patient (other than the appellant) at the hospital. The hospital goes on to argue that the presumption in section 21(3)(b) applies as well because the video was compiled and is identifiable as part of an investigation into a possible violation of law. The video, the hospital states, was retained and provided to the OIPRD as part of its investigation conducted under the *Police Services Act* into the actions of the police officers involved in the incident with the appellant.

[29] Turning to the factors in section 21(2) of the *Act*, the hospital submits that the factors in section 21(2)(f) and (h) apply. With respect to section 21(2)(f), the hospital argues that the footage of the patient and the police officers is highly sensitive, and that there would be a reasonable expectation of significant personal distress on the part of the police officers if the information was disclosed. Concerning section 21(2)(h), the hospital takes the position that there was a reasonable expectation that the personal information in the video would be confidential. The hospital states “[p]atients and staff members providing health care to patients have the right to expect that their confidential information will be protected by the hospital.”

[30] Lastly, the hospital submits that the presumptions and factors set out above weigh in favour of privacy protection, and that the appellant’s right of access to his own personal information does not outweigh the privacy rights of the other individuals who appear in the video.

¹⁰ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

¹¹ Order P-239.

¹² Order MO-2954.

[31] The police association submits that the weighing of interests in section 49(b) must be viewed in light of the appellant's request for access to not only his own personal information, but also that of the police officers. The police association contends that considerable weight should be given to the presumption in section 21(3)(b) because the video was "compiled and is identifiable as part of an investigation into a possible violation of law." The police association states that the video was compiled by the OIPRD investigator assigned to the complaint and, although not created by this investigator, it was "at some point in time, assembled or gathered together as part of the investigation."¹³ The police association goes on to argue that the fact that the investigation found no wrongdoing does not remove the privacy protection afforded by section 21(3)(b). The police association also submits that the Legislature's intent that disclosure of personal information that has been compiled as part of an investigation is presumed to constitute an unjustified invasion of privacy is to be given considerable weight in balancing the interests under section 49(b).

[32] The police association also submits that the following further considerations should weigh against disclosure of the video:

- the appellant's interest in addressing alleged police misconduct was already dealt with through the OIPRD complaints process, which was independent and conducted fairly;
- the appellant is seeking access to the video in order to assist in commencing legal action (civil) against the police and/or the officers depicted in the video; and
- the availability of the video to the appellant by way of a subpoena through the civil litigation process.

[33] The appellant submits that the video contains evidence of the police mistreating him and is required as evidence in the civil action he has launched against them. The appellant states that the police's actions caused him injuries to the extent that he required hospitalization in the intensive care unit. The appellant argues that he should have access to the video in a "pure and unaltered state" for the following reasons:

- his lawyer requires the video to be used as evidence in his civil action;
- the *Act* should not be used as a shield to protect those doing something wrong or questionable; and
- because all of the police officers have been named in the civil action, he is not seeking the video to identify the officers, but rather to have an account of their actions.

¹³ Order P-892.

Analysis and findings

[34] As previously stated, for records claimed to be exempt under section 49(b) (i.e., 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.¹⁴

[35] With respect to the image of the individual other than the appellant who the hospital states was a patient in the emergency department, section 21(3)(a) creates the presumption of an unjustified invasion of personal privacy with respect to an individual's medical history. As previously stated, the image in the video reveals that this individual was receiving health care in the hospital's emergency department. I find that the presumption in section 21(3)(a) applies and weighs in favour of a finding that disclosure of this individual's personal information would constitute an unjustified invasion of their privacy. Therefore, this portion of the video is exempt from disclosure under section 49(b), in conjunction with section 21(1). I note that the file containing this portion of the video did not contain any images of the appellant or the police.

[36] The remaining personal information in the video consists of the images of the appellant and the police officers. I note that there are no images of the appellant by himself. Because all of the images of the appellant are intertwined with images of various police officers, I find that it would be impossible to sever the video such that only the images of the appellant remain.

[37] The hospital and the police association argue that the presumption in section 21(3)(b) applies to these images as a result of the complaint and subsequent investigation by the OIPRD into the actions of the police officers. The presumption in section 21(3)(b) only requires that there be an investigation into a possible violation of law,¹⁵ and can apply to a variety of investigations. I am satisfied that the presumption applies in this case, given that an investigation was conducted by the OIPRD concerning the police officers' involvement with the appellant during the incident that was captured, in part, in the video.

[38] Turning to the factors in section 21(2), I am not persuaded by any of the parties that there are relevant factors either favouring disclosure or weighing against disclosure in this appeal. In particular, I have not been provided with sufficient evidence by any of the parties to determine whether:

- the disclosure is desirable for the purpose of subjecting the activities of the police to public scrutiny;¹⁶

¹⁴ Order MO-2954.

¹⁵ Orders P-242 and MO-2235.

¹⁶ Section 21(2)(a).

- the information is “highly sensitive” and its disclosure would cause the police officers significant personal distress;¹⁷
- the personal information in the video was supplied in confidence to the hospital;¹⁸ and/or
- the personal information is relevant to a fair determination of rights affecting the appellant.¹⁹

[39] Therefore, I find that none of the factors in section 21(2) either weighing in favour or against disclosure apply to the remaining personal information at issue. Consequently, having weighed the presumption in section 21(3)(b), which favours non-disclosure, against the appellant’s interests in disclosure, I find that the remaining images in the video are exempt from disclosure under section 49(b), in conjunction with section 21(1).

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

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

[41] 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.

[42] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁰ This office may not, however, substitute its own discretion for that of the institution.²¹

¹⁷ Section 21(2)(f).

¹⁸ With the exception of the patient who is not the appellant.

¹⁹ Section 21(2)(d).

²⁰ Order MO-1573.

²¹ Section 54(2) of the *Act*.

[43] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²²

- 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; and the privacy of individuals should be protected.

[44] The hospital submits that it properly exercised its discretion in good faith, taking into account relevant considerations and not taking into account irrelevant considerations. It also submits that it did not act in bad faith or for an improper purpose. It submits that it took into consideration the purpose of the *Act* and the underlying principle of an individual's right of access to their own personal information. The hospital states that it weighed this consideration against the reasons for applying the personal privacy exemption, namely that disclosure of the personal information at issue is presumed to constitute an unjustified invasion of another individual's personal privacy. Concerning the video itself, the hospital states that it cannot reasonably sever the personal information relating to other individuals, but that it did offer to engage the services of an external provider to assist with de-identifying it, should the appellant wish to proceed in this manner.

[45] The appellant's representations do not address the hospital's exercise of discretion.

[46] I find that the hospital properly exercised its discretion to not disclose the video. In particular, I find that the hospital took into account relevant factors in weighing both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. In my view, the hospital's representations reveal that they considered the appellant's position and circumstances, balanced against the privacy rights of other individuals in the context of a complaint and investigation, and also in the context of the provision of health care to one individual, in exercising their discretion not to disclose the information at issue.

[47] Under all the circumstances, therefore, I am satisfied that the hospital has appropriately exercised its discretion under section 49(b).

Issue D: Is there a compelling public interest in disclosure of the video that clearly outweighs the purpose of the section 49(b)/21(1) exemption?

²² Orders P-344 and MO-1573.

[48] Section 23 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.

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

[50] 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 there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.²³

[51] The hospital submits that there is no compelling public interest in the disclosure of the video and that even if there was, this interest would not clearly outweigh the purpose of the personal privacy exemptions in sections 49(b)/21(1). The hospital further submits that it carefully weighed the appellant's right of access against the privacy rights of the other individuals and found that the presumption applied in favour of privacy protection. The hospital goes on to argue that the interests being advanced by the appellant are private in nature and relate to the complaint made to the OIPRD. Lastly, the hospital notes that as part of that complaint process, the appellant's legal counsel was given the opportunity to view the video.

[52] Neither the appellant's nor the police association's representations addressed the possible application of the public interest override.

[53] Based on the evidence provided by the hospital, and the absence of representations from the appellant on this issue, I find that there is no public interest in the disclosure of the video. As noted earlier, the video for which section 49(b), in conjunction with section 21(1) was claimed consists not only of the appellant's personal information, but also that of the police officers and another individual.

[54] Although there may be curiosity by members of the public about the contents of the video, and its release may potentially be newsworthy, that does not automatically lead to the application of the public interest override, which must assess whether the broader public interest would actually be served by disclosure. That is the purpose of weighing a compelling public interest, where one is found to exist, against the purpose

²³ Order P-244.

of applicable exemptions. In this instance, I conclude that this interest does not clearly outweigh the purpose of the personal privacy exemption in section 21(1). I have found in my discussion of section 21(1) that the personal information in the video contains images of individuals whose actions were investigated, as well as about another individual receiving health care, and that this disclosure is presumed to constitute an unjustified invasion of personal privacy under section 21(3)(a) and (b). Privacy protection is one of the enumerated purposes set out in section 1(b) of the *Act*. I find that the appellant has not provided sufficient evidence that any public interest, compelling or otherwise, that may exist in the disclosure of this personal information sufficiently outweighs the privacy protection purpose extant in the section 21(1) exemption. Therefore, I find that the public interest override provision in section 23 has no application in the present appeal.

ORDER:

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

Original Signed By: _____
Cathy Hamilton
Adjudicator

_____ July 16, 2015