

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-3238

Appeal MA13-620

Toronto Transit Commission

September 1, 2015

**Summary:** The appellant sought access to TTC bus surveillance tape pertaining to an incident that occurred on a TTC bus on a specified date. Although not stated explicitly in the request, the appellant asserted that he was requesting a copy of the tape to establish that he was assaulted by a TTC bus Operator. The TTC identified a surveillance tape, and relying on section 38(b) of the *Act* (invasion of privacy) denied access to it, in full. In its representations in the appeal, the TTC claimed the application of the exemption at section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(b) (law enforcement) as well as the exclusion at section 52(3)1 (labour relations and employment records) to deny access to the surveillance tape. This order finds that the bus surveillance tape is not excluded from the *Act* and that section 38(a), in conjunction with section 8(1)(b), does not apply. It also finds that although the personal information of the bus Operator is not exempt under section 38(b) the personal information of other identifiable individuals, including bus passengers, is exempt, and that the surveillance tape can be disclosed after severing the personal information of other identifiable individuals from the surveillance tape.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 8(1)(b), 38(a), 14(2)(a), 14(2)(d), 38(b), 45 and 52(3)1.

**Orders and Investigation Reports Considered:** Orders M-927, MO-1570, MO-2131, MO-2556, P-721, P-939, P-1318, PO-1772, PO-2976, PO-3248 and PO-3510; *Privacy and Video Surveillance in Mass Transit Systems: A Special Investigation Report* - Privacy Investigation Report MC07-68, Privacy Complaint Reports MC10-2, MC13-46 and MC13-60.

**Case Considered:** *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

**Other considerations:** IPC Code of Procedure, sections 11.01 and 11.02; *Guidelines for the Use of Video Surveillance Cameras in Public Places*, October 2001 (updated September 2007).

## **BACKGROUND:**

[1] The Toronto Transit Commission (TTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to the surveillance tape recording pertaining to an incident that occurred on a TTC bus on a specified date. After identifying the bus number and approximate time, the request provided that:

There was an incident in the bus which I was involved in where I was assaulted, and will be used for legal purposes.

[2] The TTC identified a bus surveillance tape (at four camera angles) as being responsive to the request, and relying on section 14(1) of the *Act* (invasion of privacy), denied access to it, in full.

[3] The requester (now the appellant) appealed the decision denying access.

[4] At mediation, because the surveillance tape appeared to contain the appellant's personal information, the possible application of section 38(b) (invasion of privacy) of the *Act* was added as an issue in the appeal. As well, in discussions with the mediator, the TTC advised that it did not possess the equipment necessary to blur or edit out the images of the other individuals that appear on the surveillance tape. The TTC further advised that it did not have the names or contact information of the other passengers on the bus that appear on the surveillance tape (with the exception of the driver). The TTC maintained its position that the surveillance tape is subject to exemption under the *Act*.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the TTC and two other affected parties, being the Bus Operator (the operator) and a specified affected party who the appellant advised would likely appear in the surveillance video. Only the TTC provided responding representations.

[6] In its representations, the TTC advised that it also wished to rely on the exclusion at section 52(3)1 (labour relations or employment), as well as the discretionary exemption at section 8(1)(b) (law enforcement) to deny access to the requested information. I am treating the surveillance tape as being one record for the purposes of this appeal. Accordingly, as the surveillance tape contains images of the

appellant, section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(b), are at issue in this appeal.

[7] I then sent a Notice of Inquiry, along with the TTC's representations, to the appellant. I sought representations from the appellant on sections 38(b) and 14(1) as well as whether the TTC should be permitted to raise the application of the new discretionary exemption at section 38(a), in conjunction with section 8(1)(b) at this stage of the appeal. I also asked the appellant to address the discretionary exemption, in the event that I determined that the TTC was permitted to raise it. As section 52(3)1 of the *Act* is jurisdictional in nature, I sought submissions from the appellant on whether that section applied.

[8] The appellant provided representations in response to the Notice of Inquiry.

[9] I decided that the appellant's representations raised issues to which the TTC and the operator should be given an opportunity to reply. Accordingly, I sent non-confidential versions of the appellant's representations to the TTC and the operator. Only the TTC provided reply representations. The TTC's representations were shared with the appellant who provided sur-reply representations in response.

## **RECORDS:**

[10] At issue in this appeal is a TTC bus surveillance tape (at four camera angles).

## **ISSUES:**

- A. Does section 52(3)1 exclude the surveillance tape from the *Act*?
- B. Should the TTC be permitted to raise the application of the discretionary exemption at section 38(a) in conjunction with section 8(1)(b)?
- C. Does the surveillance tape contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does section 38(a) in conjunction with section 8(1)(b), apply to the information at issue?
- E. Does the discretionary exemption at section 38(b) apply to the information at issue?
- F. Can the surveillance tape be severed without revealing information that is subject to exemption under section 38(b) of the *Act*?

## **DISCUSSION:**

### **LABOUR RELATIONS AND EMPLOYMENT RECORDS**

#### ***Issue A: Does section 52(3)1 exclude the surveillance tape from the Act?***

##### *General Principles*

[11] Section 52(3) states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[12] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[13] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.<sup>1</sup>

[14] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.<sup>2</sup>

[15] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human

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<sup>1</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

<sup>2</sup> *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.<sup>3</sup>

[16] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.<sup>4</sup>

[17] Section 52(3) may apply where the institution that received the request is not the same institution that originally “collected, prepared, maintained or used” the records, even where the original institution is an institution under the *Freedom of Information and Protection of Privacy Act*.<sup>5</sup>

[18] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.<sup>6</sup>

[19] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.<sup>7</sup>

*Section 52(3)1: court or tribunal proceedings*

[20] For section 52(3)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[21] The word “proceedings” means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue.<sup>8</sup>

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<sup>3</sup> Order PO-2157.

<sup>4</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

<sup>5</sup> Orders P-1560 and PO-2106.

<sup>6</sup> *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

<sup>7</sup> *Ministry of Correctional Services*, cited above.

<sup>8</sup> Orders P-1223 and PO-2105-F.

[22] For proceedings to be “anticipated”, they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used.<sup>9</sup>

[23] The word “court” means a judicial body presided over by a judge.<sup>10</sup>

[24] A “tribunal” is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties’ legal rights or obligations.<sup>11</sup>

[25] “Other entity” means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an “other entity”, the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue.<sup>12</sup>

[26] The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations per se – that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the institution is sued by a third party in relation to actions taken by government employees.<sup>13</sup>

### *The representations*

[27] The TTC submits that:

The video recording in this specific instance was downloaded at the request of the [Toronto Police Services Board (the police)] and in all likelihood for the purpose of investigating a report of an assault.

As we now know, the allegation of assault relates to the employee during the performance of duties. This could potentially involve criminal charges against the individual and subsequent disciplinary action by TTC management against the employee.

[28] With respect to Parts 1 and 2 of the test, the TTC submits that the record was collected, prepared, maintained and used by the TTC or on its behalf and that when the police requested the video download, “there became a reasonable prospect of an anticipated proceeding before a court, tribunal or other entity”.

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<sup>9</sup> Orders P-1223 and PO-2105-F.

<sup>10</sup> Order M-815.

<sup>11</sup> Order M-815.

<sup>12</sup> Order M-815.

<sup>13</sup> *Ministry of Correctional Services*, cited above.

[29] In regards to part 3 of the test, The TTC submits that the anticipated proceedings relate to:

... the TTC's own internal employee disciplinary program. While video recordings are not typically used to monitor employee performance, that is not the case with matters of a potential criminal nature such as an assault which can result in the employee being disciplined, or possibly dismissed, through a formal TTC employee relations process.

[30] The appellant submits that the TTC has failed to satisfy parts 2 and 3 of the section 52(3)1 test:

There was no reasonable prospect of proceeding to occur because as [the appellant's] affidavit indicates, the police did not take an official statement from him or from other victims or witnesses of the assault that took place. Without any statements from victims and witnesses at the scene, the appellant submits that there was no reasonable prospect of proceedings to occur.

Further, the proceedings or anticipated proceedings did not relate to labour relations or employment of a person by the TTC. The TTC has not submitted any evidence that at any time there were proceedings or anticipated proceedings against the TTC driver who committed the alleged assault.

The TTC has not provided any evidence that it initiated or is planning to initiate employee disciplinary actions against the TTC driver.

[31] In reply, the TTC submits:

... the [appellant] in clearly indicating that the operator of the TTC vehicle was involved in improper activity during the course of his employment. Thus, any information relating to the operator's improper activity during the performance of his employment becomes a labour relations matter in which proceedings have or are likely to occur.

[32] In sur-reply, the appellant submits:

... the TTC have not provided any evidence to substantiate this claim. The appellant has also not been contacted to provide information to the TTC with respect to the incident that took place.

[33] The appellant states that the police advised him that "the investigation into the matter was closed on the day of the incident."

[34] The appellant submits that:

... given all the facts, it is unreasonable to suggest that proceedings have or are likely to occur. This incident took place a year and a half ago and there is no evidence to suggest that there was a proceeding, nor is there any evidence to suggest one is likely. The TTC had the opportunity to provide this evidence, however they did not.

*Analysis and finding*

[35] In my view, section 52(3)1 does not apply in the circumstances of this appeal.

[36] In Order MO-2556, Adjudicator Frank DeVries reviewed in detail the jurisprudence relating to the distinction that has been made between records that document what he described as "the initial, day-to-day police investigation into circumstances involving the appellant" and those which find their way into files relating to "subsequent complaint investigations and/or other proceedings." Specifically, Adjudicator DeVries articulates the distinction that has been made in previous orders and the decision of the Divisional Court in *Ontario (Ministry of Correctional Services) v. Goodis*<sup>14</sup> as follows:

... As the records at issue in this appeal relate to the initial, day-to-day police investigation into circumstances involving the appellant, which occurred within the jurisdiction of the Police, they do not fall within the exclusionary provision in section 52(3). Although it may well be that subsequent complaints about the actions of the investigating officer resulted in further investigations and/or the creation of additional files (of which I have very little evidence), the original records that relate to the original investigations into the appellant's actions are not removed from the scope of the *Act* simply because they were reviewed or considered as part of a review of the officer's conduct under other legislation. Any such review does not alter the character of the original records, which were prepared for the purposes of the investigations conducted by the officer (see also Order MO-2504). Accordingly, I find that the original incident sheet and general occurrence report that form the records at issue in this appeal are not excluded from the operation of the *Act* simply because of their possible inclusion or review in subsequent complaint investigations and/or other proceedings.

[37] In my view, although the context is different, this rationale is equally applicable to the case before me. This is a request for a record that documents the events of that evening as captured contemporaneously by a security camera in a bus. The record is an originating record. It is not a request for a copy of a record that is found in an employee's file or in a file relating to a disciplinary proceeding. The fact that the tape

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<sup>14</sup> Cited above.



was created in response to a police request or may find its way into another file related to complaints about what is alleged to have transpired is of no moment and does not alter its original nature. Again, this is not a request to the police for their copy of the tape. It is a request to the TTC for the originating record.

[38] Because the request is to the TTC for a copy of an originating record that served to document the events as they transpired, I find that it is not excluded from the scope of the *Act* under section 52(3)1. Based on the statements of the Divisional Court in *Goodis* and other decisions of this office, including Orders M-927, MO-2131 and MO-2556, I conclude that the exclusionary provision does not apply to the surveillance tape. Accordingly, I find that the surveillance tape falls within the scope of the *Act*.

***Issue B: Should the TTC be permitted to raise the application of the discretionary exemption at section 38(a), in conjunction with section 8(1)(b)?***

[39] This office's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Sections 11.01 and 11.02 state:

In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[40] The objective of the 35-day policy established by this office is to provide institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced. These principles have been discussed at length in a number of orders.<sup>15</sup>

*The representations*

[41] The TTC submits:

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<sup>15</sup> See Orders P-658, PO-1858, PO-1880, PO-2500, PO-3098, MO-2226 and MO-2308. The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

Upon review of the Notice of Inquiry, this office has just learned that the request involves an allegation of assault made against the operator (a TTC employee) This information was not disclosed to us during our initial handling of the access request or during the mediation stage of the appeal. ...

[42] The TTC then refers to the appellant's original request, as set out in the Background section above, which was worded as follows:

There was an incident in the bus which I was involved in where I was assaulted, and will be used for legal purposes.

[43] The TTC submits:

As a result, the TTC proceeded on the basis that the altercation/alleged assault involved two passengers on the bus, and not the operator. We only now have discovered that the Mediator included a reference in the last page of the Mediator's Report to the operator being the alleged assaulter, but this was the first such reference and one which we unfortunately missed and never responded to during the 10-day period provided to us after receipt of the mediator's report.

We regret and apologize for the oversight in missing that reference in the Mediator's Report, but we respectfully submit that this new information does change the issues in the appeal. ...

[44] The appellant submits that the TTC "has known or ought reasonably to have known" that this request for information relates solely to "an incident of assault perpetrated by a TTC driver".

[45] The appellant submits:

... The TTC personnel who appeared on scene on the date of the incident were fully apprised of the fact that the alleged assaulter was the TTC driver, the police were apprised of this fact, [the appellant] stated this fact in his [submissions] to the Mediator at the Information and Privacy Commissioner's [office], the Mediator specifically stated this fact in the Mediator's Report and [the appellant's] lawyer also communicated this fact to the TTC claims adjuster ....

The appellant is surely prejudiced by this late raising of discretionary exemptions as it is now impossible to seek a mediated settlement of this matter, in whole or in part.

The integrity of the appeals process has also been compromised because despite having known or ought reasonably known that the incident

involves the TTC driver being the alleged assaulter, the TTC has acknowledged this fact very late in the appeals process and has raised new discretionary exemptions very late in the process as well.

[46] In reply, the TTC submits that with respect to the actual or imputed knowledge alleged by the appellant:

To clarify, the above mentioned activities and any associated records of those activities were not part of the access request. In addition, the TTC's Co-ordinator – Records Management/FOI who was managing this request has submitted that all communications during mediation (until the Mediator's Report) solely focused on Section 14(1), 38(b) and the camera technology issue.

As a matter of TTC process, any request for other TTC individuals to search for relevant records is provided to the other individuals in a redacted form so that no personal information arising from the request is known. In other words, notwithstanding the involvement of TTC personnel and the police, the individuals searching for records would have no knowledge of who was making the FOI request.

...

In relation to the record at issue (the video), it is not the TTC's practice to make assumptions or determinations of allegations of assault when viewing such records. Until the actual reference appeared in the Mediator's Report to the operator being the alleged perpetrator of an assault, the TTC was not treating the request in that context. As noted above, the wording of the request did not indicate that the operator was allegedly involved in the assault.

It is our belief that the appeal process allows some level of flexibility to all parties to an appeal when new information comes to light, without compromising the integrity of the process as suggested by the appellant. In this case, the new information, that being the Mediator's Report reference to the operator being the alleged assaulter does in fact affect the context of the request and ultimately the TTC's decision in the matter.

[47] In sur-reply, the appellant reiterates his position and submits:

Ultimately, this delay has caused prejudice to the appellant and the integrity of the process has been compromised. It is now impossible to seek a mediated settlement in this matter, in whole or in part, and discretionary exemptions have been raised very late in the process. Prompt identification of discretionary exemptions is necessary to maintain

the integrity of the appeal process and the appellant submits that this was not done in this case, despite the opportunity to do so.

*Analysis and finding*

[48] I have decided to permit the TTC to claim the additional discretionary exemption in section 38(a) in conjunction with section 8(1)(b), outside this office's 35-day policy. This finding is unrelated to the merits of the exemption claim.

[49] With consideration to the overall circumstances of this appeal, although the appellant takes issue with it, I am satisfied that the failure to claim the exemption at the earliest possible time was inadvertent. I am also not persuaded that the late raising of section 38(a) in conjunction with section 8(1)(b), delayed either the processing of this appeal or its completion. Furthermore, any possible prejudice that the appellant could suffer by the later raising of the exemption was addressed when the appellant was provided an opportunity to make representations on the application of section 38(a) in conjunction with section 8(1)(b). Accordingly, I am satisfied that the late raising of section 38(a), in conjunction with section 8(1)(b), has not compromised the integrity of the appeals process or significantly prejudiced the appellant.

[50] Accordingly, I will consider the possible application of section 38(a) in conjunction with section 8(1)(b), to the surveillance tape.

***Issue C: Does the surveillance tape contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?***

[51] 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) 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 if 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;

[52] 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.<sup>16</sup>

[53] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) 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.

(2.2) For greater certainty, subsection (2.1) 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.

[54] 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.<sup>17</sup>

[55] 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

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<sup>16</sup> Order 11.

<sup>17</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

of a personal nature about the individual.<sup>18</sup>

[56] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>19</sup>

[57] This office has previously held that information collected about identifiable individuals from video surveillance cameras qualifies as “personal information” under the *Act*.<sup>20</sup>

[58] Based on the above, my review of the surveillance tape, as well as the submissions of the TTC and the appellant, I find that the surveillance tape contains information which qualifies as “personal information” as that term is defined in section 2(1). In that regard, I find that the surveillance tape contains the personal information of the appellant, the operator<sup>21</sup> and other identifiable individuals.

[59] I also find that the surveillance tape contains the images of other TTC personal and police officers. In my view, the other TTC personnel and the police officers depicted in the video were performing their duties in a professional, rather than personal capacity. Therefore, I find the surveillance video does not contain their personal information.

***Issue D: Does section 38(a), in conjunction with section 8(1)(b), apply to the information at issue?***

[60] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[61] Section 38(a) reads:

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

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

[62] Section 38(a) of the *Act* recognizes the special nature of requests for one’s own

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<sup>18</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>19</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>20</sup> See *Privacy and Video Surveillance in Mass Transit Systems: A Special Investigation Report* - Privacy Investigation Report MC07-68; Privacy Complaint Reports MC10-2, MC13-46 and MC13-60 and Orders MO-1570 and PO-3510.

<sup>21</sup> Although his images appear in a professional capacity, as his conduct has been brought into question, I find that the information has crossed over to the personal sphere. See in this regard Orders P-721, P-939, PO-1772 and PO-2976.

personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.<sup>22</sup>

[63] In this case, the institution relies on section 38(a) in conjunction with section 8(1)(b).

[64] Section 8(1)(b) reads:

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

interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

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

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[66] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>23</sup>

[67] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.<sup>24</sup> The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the

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<sup>22</sup> Order M-352.

<sup>23</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>24</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

consequences.<sup>25</sup>

[68] The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with “potential” law enforcement investigations.<sup>26</sup> The investigation in question must be ongoing or in existence.<sup>27</sup>

[69] The institution holding the records need not be the institution conducting the law enforcement investigation for the exemption to apply.<sup>28</sup>

*The representations*

[70] The TTC submits that the personal information at issue:

... was collected (and therefore created) by the police and is identifiable as part of a law enforcement investigation to determine if an offence under the Criminal Code has taken place.

[71] The appellant submits:

The TTC has not advanced any evidence to indicate that the police investigation led or could lead to a proceeding in a court or a tribunal. This incident took place in April 2013, yet there have not been any proceedings in court, nor are there any proceedings anticipated or likely.

The law enforcement investigation in question is neither specific nor ongoing. The disclosure of the video will not in any way interfere with law enforcement, as there is no investigation or proceeding in existence or anticipated. Given the facts of this case to-date, there is no law enforcement proceeding that is likely to result from this incident.

[72] In reply, the TTC submits:

... Toronto Police Services were provided with the video download for the purpose of a law enforcement investigation and the TTC has no information that the investigation has been closed. In other words, from the TTC’s standpoint, the video that has been provided to law enforcement personnel is still subject to an on-going investigation.

[73] As set out above, in his sur-reply submissions the appellant stated that the police

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<sup>25</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>26</sup> Order PO-2085.

<sup>27</sup> Order PO-2657.

<sup>28</sup> Order PO-2085.



advised him that "the investigation into the matter was closed on the day of the incident."

*Analysis and finding*

[74] As set out above, for section 8(1)(b) to apply, the law enforcement investigation in question must be a specific, ongoing investigation. The investigation in question must be ongoing or in existence.<sup>29</sup> I find that the TTC has failed to provide me with sufficiently detailed and convincing evidence to establish that there is a specific ongoing law enforcement investigation or that disclosing the surveillance tape would cause harm under section 8(1)(b). Although it appears that a copy of the surveillance tape was requested by the police initially, the TTC did not provide me with any evidence that any police investigation was ongoing, instead arguing in the negative; that they have no information that the investigation has been closed. The appellant counters that position with a statement that the police have advised him that "the investigation into the matter was closed on the day of the incident." In any event, the TTC has failed to provide sufficient evidence that disclosing the surveillance video could reasonably be expected to interfere with any investigation.

[75] Accordingly, I find that section 38(a) in conjunction with section 8(1)(b) does not apply in the circumstances of this appeal.

***Issue E: Does the discretionary exemption at section 38(b) apply to the information at issue?***

[76] Section 38(b) reads:

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

if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[77] Under section 38(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 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[78] I found above that the surveillance tape does not contain the personal information of other TTC personnel and police officers. Accordingly, releasing the information pertaining to them to the appellant would not be an unjustified invasion of

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<sup>29</sup> Order PO-2657.

their personal information under section 38(b) of the *Act*.

[79] With respect to the personal information that is found on the surveillance tape, sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[80] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>30</sup>

[81] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>31</sup>

[82] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).<sup>32</sup>

[83] The TTC's submissions focused on the expectation of privacy of the bus passengers rather than the bus operator. The appellant's representations focused on the conduct of the bus operator rather than the passengers. The TTC and the appellant refer to or allude to the application of the factors at sections 14(2)(a) and 14(2)(d) of the *Act*. Those sections read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request.

### *The representations*

[84] In its initial representations, the TTC submitted that:

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<sup>30</sup> Order MO-2954.

<sup>31</sup> Order P-239.

<sup>32</sup> Order P-99.

TTC abides by strict video recording standards, wherein the collection and use of images containing personal information is very strict and limited. In accordance with the IPC's Guidelines for the Use of Video Surveillance Cameras in Public Places<sup>33</sup>, the TTC will only download video recording for law enforcement or public safety purposes. As such, the TTC holds that releasing the video would constitute an unjustified invasion of privacy for the passengers on-board the vehicle as set out in s. 38(b) and 14(1) of *MFIPPA*.

[85] In response, the appellant submits that:

Disclosure of the video should be required to subject the TTC to public scrutiny. As is stated in Order P-256, simple adherence to TTC internal procedures on video disclosure is not adequate in fully denying disclosure of the video, rather the TTC should consider the broader interest of public accountability.

[86] The appellant further submits that disclosure of the video is also relevant to a fair determination of his rights. He submits:

- the appellant's right to seek damages for torts committed by the TTC driver is a legal right.
- it is related to a proceeding which is contemplated.
- a video of the incident undoubtedly has bearing and is significant to the determination of the tort committed.
- This video is certainly required in order to prepare for the anticipated proceeding and ensure an impartial hearing, as there is nothing more impartial than a video of the incident.

[87] The appellant submits that he is suffering damages and harm as a result of the alleged assault and that he "has a right to seek damages against those responsible for the harm and the video is required to achieve this". The appellant submits:

It would be unfair to [the appellant] if he did not receive compensation for the harm he is currently suffering and he is likely to continue to suffer, based on an impartial and objective video of the incident".

[88] In reply, the TTC submits that disclosure of the personal information of other identifiable individuals on-board the bus would be inconsistent with the expectations set out in the IPC's Guidelines for the Use of Video Surveillance Cameras in Public Places.

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<sup>33</sup> October 2001 (updated September 2007).

*14(2)(a): public scrutiny*

[89] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.<sup>34</sup>

[90] The objective of section 14(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. After reviewing the representations and the record at issue, I conclude that disclosing the subject matter of the surveillance tape would not result in greater scrutiny of the TTC. In my view, this is more of a private matter than one which engages the application of section 14(2)(a). Additionally, in my view, the subject matter of the information sought does not suggest a public scrutiny interest.<sup>35</sup>

[91] Accordingly, in the circumstances, I find that the factor at section 14(2)(a) is not a relevant consideration.

*14(2)(d): fair determination of rights*

[92] For section 14(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing<sup>36</sup>

[93] The right the appellant is seeking to enforce is a legal, as opposed to a moral, right and is related to a contemplated proceeding for damages suffered as a result of the alleged assault. In my view, the disclosure of the contents of the surveillance tape

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<sup>34</sup> Order P-1134.

<sup>35</sup> See Order PO-2905 where then Assistant Commissioner Brian Beamish found that the subject matter of a record need not have been publicly called into question as a condition precedent for the factor in section 21(2)(a) of *FIPPA* (the provincial equivalent of section 14(2)(a) of *MFIPPA*) to apply, but rather that this fact would be one of several considerations leading to its application.

<sup>36</sup> 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.).

will assist the appellant in determining whether or not to proceed with these contemplated proceedings and may, ultimately, represent evidence of some significance in that litigation, should it be pursued. Accordingly, I find that section 14(2)(d) is a relevant consideration strongly favouring the disclosure of the personal information of the bus operator on the surveillance tape. That said, I am not satisfied that the appellant has established that disclosing the personal information of other identifiable individuals on the surveillance tape "has some bearing on or is significant to the determination of the right in question" or "is required in order to prepare for the proceeding or to ensure an impartial hearing". Accordingly, in the circumstances, I find that the factor at section 14(2)(d) is not a relevant consideration with respect to the personal information of other identifiable individuals on the surveillance tape.

*Unlisted Circumstance - Privacy Expectations of the Bus Passengers*

[94] In *Privacy and Video Surveillance in Mass Transit Systems: A Special Investigation Report - Privacy Investigation Report MC07-68*, former Commissioner Dr. Ann Cavoukian wrote:

It has been argued that individuals cannot have a reasonable expectation of privacy in public places, especially in the case of urban mass transit systems where large volumes of people may be concentrated in relatively restricted spaces. In addition, it has been argued that video surveillance in such places is an enhancement of a person's natural ability to observe what is happening in public. While the expectation of privacy in public spaces may be lower than in private spaces, it is not entirely eliminated. People do have a right to expect the following: that their personal information will only be collected for legitimate, limited and specific purposes; that the collection of their personal information will be limited to the minimum necessary for the specified purposes; and that their personal information will only be used and disclosed for the specified purposes. These general principles should apply to all video surveillance systems.

[95] In the body of the report, Dr. Cavoukian writes:

... it is incumbent upon the TTC to govern its video surveillance system in a manner that places a high regard on the privacy of its passengers. While TTC passengers may accept a certain degree of surveillance, they should not expect that their images or personal information will be improperly recorded or misused for purposes that are secondary to safety and security.

[96] Furthermore, as stated in this office's "Guidelines for Using Video Surveillance

Cameras in Public Places”<sup>37</sup>, “[p]ervasive, routine and random surveillance of ordinary, lawful public activities interferes with an individual’s privacy.”

[97] In my view, in the circumstances of this appeal, the passengers on the bus have a reasonable expectation that the surveillance recordings in which they appear will not be used for any purpose beyond bus safety and security. I accept that passengers may be aware of the existence of the cameras, and that they are located in areas passengers would consider “quasi-public”. Despite this, in my view, the bus passengers have a reasonable expectation that the surveillance recordings will only be used for the limited purpose for which they were installed. I do not accept that persons automatically waive or lose all their privacy rights upon entering a bus, even if they are aware of the existence of surveillance cameras. I also find that the same considerations apply to the personal information of identifiable individuals passing by that is contained on the surveillance tape.<sup>38</sup> I find that this is a significant factor weighing against disclosure of the personal information of identifiable individuals that that is contained on the surveillance tape.

[98] Given the application of the factor in section 14(2)(d) with respect to the personal information of the bus operator, and balancing the interests, I am satisfied that the disclosure of the personal information of the bus driver would not constitute an unjustified invasion of his personal privacy. Accordingly, I find that the portions of the surveillance tape containing the images of the bus driver, subject to my discussion on severance below, are not exempt from disclosure under section 38(b) of the *Act*.

[99] However, given the application of the unlisted circumstance of the privacy expectations of the bus passengers, the application of similar considerations to other identifiable individuals whose personal information appears on the surveillance tape, and there being no factors that favour disclosure, and balancing all the interests, subject to my discussion on severance below, I am satisfied that the disclosure of the personal information of identifiable individuals on the surveillance tape would constitute an unjustified invasion of their personal privacy. Accordingly, I find that the portions of the surveillance tape containing the personal information of identifiable individuals (other than the TTC operator and the appellant), subject to my discussion on severance, are exempt from disclosure under section 38(b) of the *Act*. I am also satisfied that, in the circumstances of this appeal, the TTC appropriately exercised its discretion not to disclose the personal information of other identifiable individuals to the appellant.

***Issue F: Can the surveillance tape be severed without revealing information that is subject to exemption under section 38(b) of the Act?***

[100] Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive

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<sup>37</sup> October 2001 (updated September 2007).

<sup>38</sup> See in this regard, Privacy Complaint Report MC13-60.

record as can reasonably be severed without disclosing material which is exempt. The key question raised by section 4(2) is one of reasonableness.

[101] This office has found that it is not reasonable to sever a record containing the personal information of both a requester and other individuals if this information is too closely intertwined. In addition, it is not reasonable to sever a record if doing so would result in the disclosure of only disconnected snippets of information or worthless, meaningless or misleading information.<sup>39</sup>

### *The representations*

[102] The appellant takes the position that personal information can be removed from the surveillance video through face-blurring or other obscuring technologies. The appellant submits:

In "Guidelines for the Use of Video Surveillance Cameras in Public Places", Commissioner Ann Cavoukian specifically states that digitally blacking out images of other individuals whose images appear on videotapes is a way in which an institution can allow access to one's personal information, while protecting information that may be exempt.

As there are four camera angles on the bus in question, it is likely that there are angles at which the video can be reasonably severed by applying face-blurring or other obscuring technology, if required. In achieving the purposes of the *Act*, the Information and Privacy Commissioner has previously ordered institutions to use this method to disclose video to a requester.

The TTC cannot be allowed to use the defence that they do not possess the technology to apply face-blurring or blacking out. If the *Act* requires disclosure and it is deemed that face-blurring should be applied, the onus should be on the institution to find the means to meet the requirements of disclosure. The appellant submits that whether the institution presently has the technology or not, is an irrelevant consideration in determining whether disclosure should occur.

[103] In reply, the TTC submits that it does not have the in-house ability to blur images but that, "[t]hird party vendors can be sought for this purpose if the TTC's decision to deny access in its entirety is not upheld".

[104] In sur-reply, the appellant states that, "a[s] there are four (4) camera angles on the bus in question, the appellant submits that there are likely angles at which the

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<sup>39</sup> Orders PO-2033-I, PO-1663 and PO-1735 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

video can be reasonable severed”.

*Analysis and finding*

[105] In this office’s Guidelines for the Use of Video Surveillance Cameras in Public Places<sup>40</sup>, the following is found:

An individual whose personal information has been collected by a video surveillance system has a right of access to his or her personal information under section 47 of the provincial Act and section 36 of the municipal Act. All policies and procedures must recognize this right. Access may be granted to one’s own personal information in whole or in part, unless an exemption applies under section 49 of the provincial Act or section 38 of the municipal Act, such as where disclosure would constitute an unjustified invasion of another individual’s privacy. Access to an individual’s personal information in these circumstances may also depend upon whether any exempt information can be reasonably severed from the record. One way in which this may be achieved is through digitally “blacking out” the images of the other individuals whose images appear on the videotapes.

[106] In Order PO-3248, in the course of determining whether video footage that simultaneously showed images of the appellant in that appeal as well as other identifiable individuals, should be disclosed in severed form, Adjudicator Colin Bhattacharjee<sup>41</sup> wrote:

Section 10(2) of the *Act* requires the university to disclose as much of a record as can reasonably be severed without disclosing the information that falls under one of the exemptions. As noted above, the video contains footage of various students who were in the FAAS office. However, the video appears to simultaneously show the appellant in an area outside the office.

Consequently, it must be determined whether the video can reasonably be severed in a manner that provides the appellant with his own personal information without disclosing the personal information of other individuals that is exempt under section 49(b).

The IPC has found that it is not reasonable to sever a record containing the personal information of both a requester and other individuals if this information is too closely intertwined. In addition, it is not reasonable to

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<sup>40</sup> October 2001 (updated September 2007).

<sup>41</sup> Adjudicator Bhattacharjee was dealing with the equivalent provisions in the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.



sever a record if doing so would result in the disclosure of only disconnected snippets of information or worthless, meaningless or misleading information. [footnote omitted]

In my view, the video can reasonably be severed by applying face-blurring or other obscuring technology to protect the identity of those individuals who were in the FAAS office. Severing the video in this manner would provide the appellant with the part of the video that shows him outside the office while protecting the privacy of those individuals who were inside the office. Consequently, I will order the university to disclose a severed version of the video to the appellant.

[107] I make a similar determination in this appeal. In my view, the surveillance tape can reasonably be severed by applying blurring or other obscuring technology to protect the identity of those identifiable individuals who appear on the surveillance tape. Severing the surveillance tape in this manner would provide the appellant with the parts of the tape surveillance that shows his interactions with the bus driver while protecting the privacy of the identifiable individuals. Consequently, I will order the TTC to disclose a severed version of the surveillance tape to the appellant. In that regard, the TTC can consider whether a fee for severing the surveillance tape is permitted under section 45 of the *Act*.

## **ORDER:**

1. I uphold the TTC's decision to deny access to the personal information of individuals other than the bus operator and the appellant that appear on the surveillance tape.
2. Subject to section 45 of the *Act*, I order the TTC to disclose to the appellant the remaining severed portions of the surveillance tape by **October 7, 2015**, but not before **October 2, 2015**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the TTC to provide me with a copy of the surveillance tape that it sends to the appellant.

Original Signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

September 1, 2015 \_\_\_\_\_