

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3905

Appeal PA18-28

Ministry of Community Safety and Correctional Services

November 28, 2018

Summary: A former inmate of a specified correctional facility made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for access to records of personal information from his stay at the correctional facility, including certain video footage of himself as an inmate there. The ministry granted partial access to responsive records. The requester appealed the ministry's decision. At adjudication, two video records remain at issue, which the ministry withheld based on several law enforcement exemptions at section 14 of the *Act*. This order partially upholds the ministry's access decision on the basis of section 49(a) (discretion to refuse requester's own information) in conjunction with the law enforcement exemption at section 14(1)(k) (security). The ministry is ordered to sever the video footage and disclose the non-exempt portions to the appellant, depicting only the appellant and facility officers.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1(a)(ii), 10(2), 4(1)(k), 49(a) and 57.

Orders Considered: Orders PO-2332, PO-2911, PO-2461, PO-3248, PO-3405 and PO-3611.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records of personal information relating to the requester's stay at a specified correctional facility. The request stated the following:

I am requesting personal information regarding my stay while at [the specified Correctional Centre]. I am requesting medical reports and any other reports generated about myself while in custody...I am also requesting the reason for my [segregation] and the reason for its continued use. Also pictures after my restraint and video.

[2] In response to the request, the ministry located several paper records and six video clips.

[3] The ministry issued an access decision granting partial access to the responsive (paper) records and withheld access to the remaining responsive information on the basis of certain discretionary exemptions. The ministry also withheld some information because it was not responsive to the request.

[4] The requester, now the appellant, appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] Some issues were narrowed at mediation. The appellant confirmed that the only portions of the video he seeks are those that show his restraint through to his placement in a cell. As a result, the remaining video footage is not at issue. However, what could not be resolved was access to two specific video clips showing the appellant from the time of restraint to placement in a cell. The ministry continued to withhold these records on the basis of section 49(a) (discretion to refuse requester's own information) in conjunction with the law enforcement exemptions at sections 14(1)(i), (j), and (k) (security), and 14(1)(l) (facilitate commission of an unlawful act), and the application of the personal privacy exemption at section 49(b) of the *Act*. Therefore, the file moved to the adjudication stage of the appeal.

[6] At adjudication, I sought and received written representations from both parties in response to a Notice of Inquiry setting out the facts and issues on appeal. I shared the parties' initial representations between them with their consent, and determined that it was not necessary to seek representations beyond the ministry's reply to the appellant's representations.

[7] For the reasons that follow, I find that section 49(a), in conjunction with the law enforcement exemption at section 14(1)(k), applies to the information I am ordering withheld, which shows the layout of the correctional facility, and the ministry's access decision is upheld in that regard. However, this order also requires the ministry, for reasons explained below, to sever and disclose only those portions of the video which show the appellant and facility officers but not any of the layout of the facility, pursuant to section 10(2) of the *Act*.

RECORDS:

[8] The records at issue are two video clips recorded by video monitoring cameras at a correctional facility showing the appellant from the time of restraint through to

placement in a cell. I will refer to them as Video 1 (which is three minutes and 29 seconds long) and Video 2 (which is 56 seconds long).

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(a) in conjunction with the law enforcement exemption(s) at section(s) 14(i), (j), (k), and/or (l) apply to the information at issue?
- C. Can the records be severed in such a way so as to disclose the appellant's personal information without disclosing information that is exempt?
- D. Did the ministry exercise its discretion under section 49(a), and if so, should that exercise be upheld?

DISCUSSION:

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

[9] 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.

[10] The term "personal information" is defined in section 2(1), in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (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,

[11] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under that list may still qualify as personal

information.¹

[12] To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that the individual may be identified if the information is disclosed.²

[13] It is undisputed that both videos were created by the ministry's video monitoring cameras at the specified correctional facility where the appellant was an inmate. As the ministry argues, the IPC *Guidelines for the Use of Video Surveillance* regarding video monitoring equipment indicate that such equipment is set up to "collect images of individuals from which they may be identified".³

[14] Based on my review of Video 1, I find that it contains the personal information of the appellant and other identifiable individuals (inmates) in their personal capacities. I find that the images of the appellant and the other inmates is the personal information of each of these individuals, as defined under paragraphs (a) and (b) of the definition of "personal information" at section 2(1), and in the introductory wording of the definition.

[15] Video 2 was identified as a responsive to the appellant's request, so I accept that his image, though not as clear as it is in Video 1, is his personal information. Based on my review of Video 2, it can be inferred that there is also another inmate in a neighbouring cell to the appellant's, despite a face not being clear. That individual's cell number might be inferable by the appellant because the ministry disclosed the appellant's own cell number to him. However, because of the way I dispose of the issues in this appeal, there is no need to determine whether the blurry image of an individual wearing orange in a neighbouring cell, along with the date on the video, is enough to find that it is that inmate's personal information. What is important here is that both videos include the appellant's personal information.

Issue B: Does the discretionary exemption at section 49(a) in conjunction with the law enforcement exemption(s) at section(s) 14(i), (j), (k), and/or (l) apply to the information at issue?

[16] As explained below, I find that the records at issue contain the personal information of the appellant and, subject to my findings on severance, are exempt from disclosure by section 49(a) (discretion to refuse requester's own information) in conjunction with the law enforcement exemption at section 14(1)(k) (security).

[17] Section 47(1) 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.

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

³ "Guidelines for the Use of Video Surveillance", (Information and Privacy Commissioner, October 2015, at page 4) - https://www.ipc.on.ca/wp-content/uploads/Resources/2015_Guidelines_Surveillance.pdf.

[18] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give the ministry the power to grant requesters access to their personal information.⁴

[19] Section 49(a) reads, in part:

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

where section . . . 14 . . . would apply to the disclosure of that personal information.

[20] This means that section 49(a) allows the ministry to withhold a requester's own personal information if the law enforcement exemption at section 14 applies.

[21] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b).

[22] The ministry argues that the appellant's personal information captured on videos monitoring a correctional facility is exempt from disclosure under the law enforcement exemptions at sections 14(1)(i), (j), (k), and (l).

[23] The law enforcement exemptions at sections 14(1)(i) to (l) say:

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

...

- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (j) facilitate the escape from custody of a person who is under lawful detention;
- (k) jeopardize the security of a centre for lawful detention; or

⁴ Order M-352.

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[24] Based on my review of the records and the submissions of the parties, and for the reasons set out below, I find that the law enforcement exemption at section 14(1)(k) applies to the videos (subject to my findings on severance). In light of this finding, there is no need for me to determine whether other exemptions apply to the records.

Section 14(1)(k): security of a centre for lawful detention

[25] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁵ However, it is not enough for a ministry to take the position that the harms under section 14 are self-evident from the record.⁶

[26] The ministry submits, and I find, that both videos show the layout of the correctional facility, the disclosure of which could reasonably be expected to jeopardize the security of the facility, its staff, and inmates. The ministry relies on the reasoning of Order PO-2332, which has been repeatedly followed at the IPC, to ask that a careful and cautious approach to the disclosure of correctional records be applied because of their inherent security features.

Specific layouts

[27] Video 1 captures the layout and configuration of a common area in the correctional facility where the appellant was an inmate. Based on my review of Video 1 and information disclosed to the appellant, I can describe the interior spaces visible on Video 1 as showing a clothing storage area, an administrative desk in an admission/discharge area, and strip search bays.

[28] What the mediator identified as the second video at issue does not appear to be the one described by the ministry. However, I find that similar considerations as those argued by the ministry apply to the second video at issue. Video 2 shows the placement of the appellant into a cell. The layout of a hallway leading to other areas and at least two cells is clearly visible.

How disclosing the layouts could reasonably be expected to jeopardize security of the correctional facility

[29] Because these records show aspects of the layout and configuration of this correctional facility, the ministry argues, and I find, that disclosure of the videos could reasonably be expected to bring the security of the correctional facility into jeopardy.

[30] The ministry submits, and I accept, that the video monitoring equipment at the

⁵ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

⁶ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

correctional facility is used for several important law enforcement purposes there:

- to maintain security and order;
- for investigative and evidentiary purposes if any unlawful act is committed, to confirm what has actually happened; and
- as a possible deterrent to unlawful activity because inmates know that their actions are being filmed.

[31] The ministry submits, and I find, that the frequently cited reasoning of Order PO-2332 is applicable in this case. Paraphrasing that reasoning and applying it here, I find that, although much of the information within the videos are matters of “common sense” (e.g., doors and cameras are in certain places), it can reasonably be expected that both routine and non-routine information can be exploited by a knowledgeable person in a way that can reasonably be expected to jeopardize the security of the correctional facility.⁷ Someone who knows enough about a correctional facility (having been to it), or about security measures, could also identify what is not observable in a correctional facility as a deficiency in correctional facility security that can be exploited (e.g., where cameras are not placed). Inferences that can be drawn about possible security weaknesses at the correctional facility could reasonably be expected to jeopardize the security of that correctional facility. This could be achieved by assisting “the planning or execution of an escape attempt, a hostage-taking incident, or another disturbance with the correctional facility”.⁸

[32] These reasonably expected uses of the information about the correctional facility could be made by anyone because disclosure under the *Act* is effectively disclosure to the world.⁹

[33] In this case, the ability to make such inferences about this correctional facility is particularly problematic because this correctional facility is a maximum security institution, housing high-risk inmates and other serious offenders, and other facilities share its design. These facts are clear from the ministry’s representations relying on another case at the same correctional facility (Order PO-2911).

[34] The ministry persuasively argued that the reasoning in Order PO-2332 applied in Order PO-2911, and should be applied in this case. The layouts in question are different as between Order PO-2911 (a day space area) and this case (an admissions/discharge desk, clothing storage area, strip search bays, and a hallway leading to other areas with cells to the side). However, I find that if the exact layouts of these interior spaces at this maximum security institution were disclosed, such disclosure could reasonably be expected to jeopardize the security of the staff, inmates, and the correctional facility itself by exposing potential, exploitable security vulnerabilities. That would be true at

⁷ Order PO-2332.

⁸ Ibid.

⁹ Order PO-2461.

least of the correctional facility in question, if not others with the same or similar layouts. These considerations are also compounded for Video 2 because the cell number of one of the cells in this record has been disclosed to the appellant. This could significantly assist in pinpointing this area within the overall layout of the facility, or as it relates to other parts of it, and could be combined with other information to risk security at the facility.

[35] The appellant's submissions do not sufficiently address the ministry's position that revealing the layouts in these two videos and the possible security vulnerabilities of those spaces could reasonably be expected to jeopardize the security of the correctional facility. His specific representations about the applicability of section 14(1)(k) are as follows: *"My request should have minimal if any impact on the security within the facility."* This assertion does not sufficiently address the inherent security concerns regarding disclosure of correctional records, and the reasoning highlighted by the ministry in its representations from Order PO-2332, which I paraphrased above. Nor does the appellant's assertion help distinguish this case from the similar situation cited by the ministry in Order PO-2911. I find that the ministry has met its burden of showing that the section 14(1)(k) exemption applies to the records.

[36] I also find that even "minimal" impact (as suggested by the appellant) on security within this facility would be sufficient to find that section 14(1)(k) applies because it is a maximum security institution, housing inmates that pose a high-risk to the community, other inmates, and correctional facility staff. The fact that other correctional facilities share its design only increases the reasonably expected harms from disclosing these aspects of its layout by revealing the recorded potential security weaknesses in similarly designed areas.

[37] For these reasons, I find that the ministry could withhold both records from the appellant, though they include his own personal information, on the basis of the section 49(a) in conjunction with section 14(1)(k), subject to my examination of the possibility of partial severance and the ministry's exercise of discretion.

Issue C: Can the records be severed in such a way so as to disclose the appellant's personal information without disclosing information that is exempt?

[38] As I will explain, I find that the records at issue can be severed in order to disclose information that would not be exempt under section 14(1)(k).

[39] The question of whether records containing exempt material can be severed is highly dependent on the particular circumstances of a case. Section 1(a)(ii) of the *Act* indicates that the purpose of the *Act* is to provide a right of access to information under the control of an institution in accordance with the principle that necessary exemptions from that right should be limited and specific. Section 10(2) of the *Act* requires the ministry to disclose as much of a record as can reasonably be severed without disclosing the information that falls under one of the exemptions. Whether a record can be severed under section 10(2) in a way that discloses information that is not exempt

depends on the content of the records in question and the circumstances surrounding the request.

[40] As discussed, the videos contain footage showing the layouts of two areas of the correctional facility in question. Therefore, I must consider whether the videos can reasonably be severed in a manner that provides the appellant with his own personal information without disclosing the footage revealing the layouts of the facility, which are exempt under section 49(a) in conjunction with section 14(1)(k).

[41] The ministry argues that the records cannot be severed without disclosing the information about the correctional facility that has properly been exempted.

[42] The appellant submits (albeit in response to the issues of whether there is personal information in the records and whether the ministry exercised its discretion) that the "structure" of the correctional facility could be made "indistinguishable."

[43] I have reviewed the records through and considered the fact that the appellant seeks video footage from the time of restraint to placement in his cell. I find that the ministry has not clearly explained why it cannot use obscuring technology to sever all portions of the videos that show the layout of the correctional facility in order to disclose only the portions of the videos that show the appellant and his interactions with the correctional officers.

[44] In my view, Video 1 can reasonably be severed in two ways, which together, would not disclose exempt portions of the video but would still provide the appellant the personal information he is seeking. The first three minutes and seventeen seconds of Video 1 can be completely withheld because that portion of the video does not show footage of the appellant's restraint, which is what he is seeking. Then, from 03:18 to the end of Video 1 at 03:29, I find that it is reasonable for the ministry to use obscuring technology to sever all the imagery of the layout visible in the video and simply disclose the footage of the appellant with the correctional officers at the time of his restraint. When the record is severed this way to this small area of the screen, none of the exempt layout is visible, and it would not be reasonable to believe that the harms contemplated by section 14(1)(k) could reasonably be expected to occur. Severing the video in this manner would provide the appellant with the part of the video that shows his restraint while protecting the exempt layout of the maximum correctional facility he was in.

[45] Similarly, in my view, Video 2 can reasonably be severed to withhold the exempt portions of it showing the layout visible in it to disclose only the bottom portion of the screen that shows the appellant being placed into a cell by correctional officers. I find that when Video 2 is severed in this manner, it would provide the appellant with the information he is seeking about his placement in a cell while protecting the exempt top portion of this record that clearly shows aspects of the layout of the correctional facility.

[46] I also find that disclosing only these discrete portions of the records could not reasonably be expected to result in the harms of any of the other law exemptions

claimed by the ministry, for the same reasons I have decided to order severances in consideration of the law enforcement exemption at section 14(1)(k). In my view, disclosing the footage as I have described could not reasonably be expected to result in any of the harms specified in sections 14(1)(i), (j), or (k).

[47] I am also satisfied that what I am ordering disclosed does not contain the personal information of any individual other than the appellant, so no consideration of the personal privacy exemptions is required.

[48] In light of my conclusions, I will order the ministry to disclose to the appellant a severed version of the two videos. In that respect, the ministry can consider whether a fee for severing the videos is permitted under section 57 of the *Act*.¹⁰

Issue D: Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

[49] The section 49(a) 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.

[50] 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.

[51] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[52] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[53] The ministry submits, and I accept, that it exercised its discretion appropriately by considering several relevant factors. The ministry was concerned about disclosure of images showing the interior space of a correctional facility, and the effect of that disclosure on the security of the correctional facility, and the ministry's belief that disclosure would be both contrary to the public interest and the public's expectations. The ministry also considered the ministry's historic practice of not disclosing video records of the nature involved in this appeal. While the ministry did not discuss whether

¹⁰ The ministry may wish to review Order PO-3611 in this regard.

¹¹ Order MO-1573.

it considered the fact that the records contain personal information in the exercise of its discretion, because I am ordering disclosure of a severed version of the records at issue that does not show identifiable individuals other than the appellant, I am satisfied that the considerations that the ministry did take into account were proper and relevant with respect to the exemption portion of the footage. I am also satisfied that these considerations were made in good faith and not in bad faith. There is no evidence before me that the ministry took into consideration any irrelevant factors.

ORDER:

1. I uphold the ministry's decision to the records under section 49(a) in conjunction with section 14(1)(k), in part.
2. I order the ministry to disclose to the appellant a severed version of Video 1 that is severed in the following manner:
 - a. Completely severing the footage from the beginning until 03:17; and
 - b. Severing all aspects of the footage showing the layout of the correctional facility surrounding the appellant and the correctional officers from 03:18 to the end of Video 1 at 03:29.
3. I order the ministry to disclose a severed version of Video 2 to the appellant that completely severs the top portion of the video showing the layout of that area of the correctional facility.
4. Subject to section 57 of the *Act*, I order the ministry to disclose these versions of the records to the appellant by **January 9, 2019**, but not before **January 4, 2019**, and to provide this office with a copy of these versions of the records.

Original Signed by: _____
Marian Sami
Adjudicator

November 28, 2018