

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-4146

Appeal MA20-00066

The Corporation of the City of Oshawa

January 11, 2022

**Summary:** The appellant submitted a request under the *Act* with the city for the video footage of an accident that took place in a parking lot. The city located the footage and denied the appellant access to it. The city claimed the personal privacy exemption in section 38(b) and the section 38(a), read with the law enforcement exemption in section 8(1)(i), of the *Act* to withhold the record. The appellant appealed the city's decision. In this order, the adjudicator upholds the city's decision, finding the record is exempt under section 38(b) of the *Act*. The appeal is dismissed.

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

**Orders and Investigation Reports Considered:** Order MO-3006, MO-3710 and MO-4119.

### OVERVIEW:

[1] The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the City of Oshawa (the city) for the video footage of an accident that occurred on December 9, 2019 at a specific parking lot.

[2] The city located the responsive record and issued an access decision to the appellant, denying him access to it in full. The city withheld the record under the

discretionary law enforcement exemption in section 8(1)(i) (security) and the mandatory personal privacy exemption under section 14(1) of the *Act*.

[3] The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the appellant confirmed his interest in pursuing access to the entire record. The mediator was unable to obtain the contact information of a third party, whose interests may be affected by the disclosure of the record (the affected party).

[5] The mediator noted the records may contain the personal information of the appellant and raised the possible application of the discretionary exemptions at section 38(a) and (b) of the *Act*. The city agreed and added these sections to its exemptions claim.

[6] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. The adjudicator originally assigned to the appeal began the inquiry by inviting the city and the affected party to submit representations in response to a Notice of Inquiry, which summarizes the facts and issued under appeal. The city submitted representations. The affected party did not submit representations. The adjudicator then sought and received the appellant's representations in response to the Notice of Inquiry and the city's representations, which were shared with the appellant pursuant to Practice Direction Number 7 of the IPC's *Code of Procedure*. The city then submitted reply representations in response to the appellant's representations and the appellant was invited to and submitted further sur-reply representations.

[7] The appeal was then transferred to me to continue the inquiry. I reviewed the file materials and parties' representations and determined I did not need to seek further representations from either party. In the discussion that follows, I uphold the city's decision and dismiss the appeal.

## **RECORD:**

[8] The record at issue contains video footage of the accident that is the subject of the appellant's request.

## **ISSUES:**

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

- B. Does the discretionary personal privacy exemption at section 38(b) apply to the video?
- C. Did the city exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **Issue A: Does the video 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 records contain *personal information* and, if so, to whom it relates. That term is defined in section 2(1) of the *Act* as “recorded information about an identifiable individual.”

[10] 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 *about* the individual.<sup>1</sup> However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>2</sup>

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

[12] The city submits the record, which is a surveillance video recording from a city-owned facility, contains images of identifiable individuals entering and leaving the facility. The city submits the video also contains images of vehicles in the parking lot and driveway area.

[13] The city refers to Order MO-3710, in which the adjudicator found that a vehicle’s make, model, plate number and registered ownership particulars constituted personal information within the meaning of section 2(1) of the *Act*. Additionally, the city refers to Order MO-3006, in which the adjudicator considered surveillance records withheld by the Toronto Transit Commission. In Order MO-3006, the adjudicator found that the footage that displays information relating to various individuals’ race, colour, sex and age, and the activities in which these identifiable individuals are engaged constitutes personal information within the meaning of section 2(1) of the *Act*.

[14] Relying on these decisions, the city submits that information such as the make

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<sup>1</sup> See sections 2(3) and (4) of the Act and Orders P-257, P-427, P-1621, R-98005, MO-1550-F and PO-2225.

<sup>2</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

and model of an individual's car, in conjunction with the whereabouts and actions of that same individual at a specific time and place, constitute personal information within the meaning of section 2(1) of the *Act*.

[15] The appellant did not directly address whether the record contains personal information in his representations.

[16] I have reviewed the city's representations and the video. The footage in the video is taken from a distance and not every vehicle is clearly captured. In any case, I still find that the record contains *personal information* belonging to the appellant and other individuals who may be identifiable to him, specifically the other individual involved in the accident (the affected party). While the images of the individuals are indistinct, the footage contained qualifies as the appellant's personal information given his knowledge of the incident and the fact that the city identified this footage as responsive to his request.<sup>3</sup> Similarly, I accept that the appellant's involvement in the incident may allow him to identify the affected party and/or other identifiable individuals captured in the video footage.

[17] Since the record contains the personal information of the appellant and other identifiable individuals, the appropriate exemptions to consider are at section 38(a) (discretion to refuse the requester's own personal information), read with section 8(1)(i), and section 38(b) (personal privacy).

**Issue B: Does the discretionary personal privacy exemption at section 38(b) apply to the video?**

[18] Section 36(1) of the Act 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.

[19] 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.

[20] Under section 38(b), if any of the exceptions in sections 14(1)(a) to (e) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). None of the section 14(1)(a) to (e) exceptions is applicable here.

[21] In determining whether the disclosure of the personal information in the records

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<sup>3</sup> See Order MO-4119, in which the adjudicator found that video surveillance footage, while unclear, contained personal information relating to identifiable individuals.

would be an unjustified invasion of personal privacy under section 38(b), sections 14(2) to (4) offer guidance. Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). None of the circumstances in section 14(4) are present here.

[22] The city submits the disclosure of the record would be an unjustified invasion of personal privacy for the identifiable individuals in the video. These individuals were not notified and did not provide their consent to the disclosure of the record. The city also refers to the presumption in section 14(3)(h) that applies if the information at issue "indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations." The city submits that the foreground of the footage contains more detailed images of individuals not involved in the accident, including their racial and/or ethnic origins.

[23] I have reviewed the record before me and find the presumption in section 14(3)(h) does not apply to the record. The video is shot at quite a distance and it is difficult to clearly identify individuals and their racial or ethnic origin, sexual orientation or religious or political beliefs or associations. Therefore, I find section 14(3)(h) has no application in this case. I have also considered the other presumptions listed in section 14(3) of the *Act* and find none apply.

[24] The city considered the application of the factors in section 14(2), but submits that none of the listed factors apply. However, the city submits that the original intent of the surveillance system is a relevant factor to consider. The city states the video surveillance exists to ensure the safety and security of city staff, property and facilities. The city states it is not meant to assist private citizens and their insurance investigations. The city refers to its Video Surveillance Policy which describes the types of situations in which the disclosure of video surveillance would be permitted; in this case, the city submits the policy would not permit the disclosure of the video to the appellant.

[25] The appellant does not address the personal privacy exemption in his representations. However, he states he seeks access to the video in order to prove who is at fault in the accident. Upon review of the appellant's representations, it appears he raises the factor favouring disclosure in section 14(2)(d), which considers whether the personal information at issue is relevant to a fair determination of rights affecting the appellant.

[26] Section 14(2) of the *Act* supports the disclosure of another individual's personal information where the information is needed to allow them to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor in section 14(2)(d) to apply, all four parts of the test must be met. The four-part test is as follows:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information significant to the determination of the right in question?
4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?<sup>4</sup>

[27] As mentioned, the appellant did not explicitly raise this factor in his representations nor did he make formal representations on the personal privacy exemption. Nonetheless, in the circumstances, I have considered whether section 14(2)(d) might be relevant because the appellant claims he requires the footage at issue to support his insurance claim. However, the appellant did not provide me with sufficient evidence to suggest that the information in the record is required in order to prepare for a court or tribunal proceeding or to ensure an impartial hearing. In the absence of evidence to support the application of the factor in section 14(2)(d), I find it does not apply. However, I am prepared to accept the appellant's need for the footage to support his insurance claim as an unlisted factor weighing in favour of disclosure of the personal information.

[28] I have considered the remainder of the factors listed in section 14(2) of the *Act* and find that none apply. I find that section 38(b) applies to the record based on my review of the record and upon consideration of the fact that the other identifiable individuals whose personal information is contained in the record did not provide their consent to the disclosure of their personal information. As discussed above, I find the appellant's need for the footage to support his insurance claim is an unlisted factor weighing in favour of disclosure of the personal information. However, I find the footage is not sufficiently clear to justify assigning this factor more than a little weight in my consideration. Furthermore, I find this unlisted factor does not outweigh the privacy interests of the other identifiable individuals who did not provide their consent to the disclosure of their personal information. Accordingly, I find the record at issue qualifies for exemption under section 38(b) of the *Act*. I note I have also considered the city's representations regarding the purpose of its video surveillance system and policy, but find it is not necessary to consider the intent of the video surveillance system as an unlisted factor under section 14(2).

[29] Finally, I find the absurd result principle does not apply in the circumstances of this appeal. The absurd result principle may apply to require disclosure of the personal

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<sup>4</sup> See 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.).

information found to qualify for exemption where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the personal information at issue might be absurd and inconsistent with the purpose of the exemption.<sup>5</sup>

[30] In its representations, the city submits the absurd result principle has no application in this appeal. The city acknowledges the appellant is aware of some of the information that would be revealed in the video, but not the entirety of the information contained in the video. In his representations, the appellant described the accident he was involved in, thereby demonstrating he is aware of some of the information that was captured by the video surveillance system, but did not offer any further details to demonstrate that he either supplied the information at issue or is otherwise aware of the actual footage contained in the record.

[31] I confirm the video footage captures an accident the appellant was involved in, suggesting the appellant is knowledgeable about the contents of the footage that involves him personally. However, this is not sufficient to conclude that all of the events and individuals' images captured within the record are within the appellant's knowledge. In any event, given the nature of the footage, which I found contains the personal information of other identifiable individuals, it is my view that releasing it to the appellant would be inconsistent with the purpose of the personal privacy exemption.<sup>6</sup> Therefore, I find it would not be absurd to withhold the record in the circumstances.

[32] In conclusion, I find the record is exempt under section 38(b) of the *Act*, subject to my consideration of the city's exercise of discretion below. Because I found the entire record is exempt under section 38(b), I do not need to consider whether the record is also exempt under section 38(a), read with section 8(1)(i).

**Issue C: Did the city exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?**

[33] The section 38(b) exemption is discretionary (the institution *may* refuse to disclose), meaning the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. The IPC may also find the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>7</sup> The IPC may not, however, substitute its own discretion for that of the

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<sup>5</sup> Orders M-444 and MO-1323.

<sup>6</sup> See Order MO-4119 for similar analysis.

<sup>7</sup> Order MO-1573.

institution.<sup>8</sup>

[34] The city submits it exercised its discretion appropriately and considered the following factors:

- The purposes of the *Act*,
- Whether the requester is seeking his own personal information;
- The relationship between the requester and any affected persons;
- The nature of the information and the extent to which it is significant and/or sensitive to the city, the requester or any affected person,
- Whether disclosure will increase public confidence in the city's operation,
- Whether the requester has a sympathetic or compelling need for the information,
- In this case, the city was informed by the appellant that the information was required for insurance purposes, but the city states the appellant did not provide the city with evidence of a compelling need to receive the information that would outweigh the intent of the personal privacy exemption, and
- The historic practice of the city regarding similar information, which is that the city generally only releases this type of video footage to law enforcement agencies.

The city submits it considered all the relevant factors in exercising its discretion and did not take any irrelevant factors into account.

[35] The appellant did not address the city's exercise of discretion in his representations.

[36] I have reviewed the parties' representations and the information that I have found to be exempt under section 38(b). Based on this review, I am satisfied the city considered relevant factors in exercising its discretion and did not take into account irrelevant factors. Specifically, I am satisfied that in exercising its discretion under section 38(b), the city considered the purpose of the personal privacy exemption, whether the appellant had a compelling need for disclosure of the information at issue, the nature of the information, and balanced the appellant's right of access to his own personal information with the privacy interests of other identifiable individuals. There is no evidence before me to suggest the city took into account irrelevant considerations or that it exercised its discretion in bad faith or for an improper purpose.

[37] Accordingly, I am satisfied the city did not err in exercising its discretion to

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<sup>8</sup> Section 43(2).



withhold the record under section 38(b) and I will not interfere with it on appeal.

**ORDER:**

The appeal is dismissed.

Original Signed by: \_\_\_\_\_  
Justine Wai  
Adjudicator

January 11, 2022 \_\_\_\_\_