

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## INTERIM ORDER PO-3478-I

Appeal PA14-28

Waypoint Centre for Mental Health Care

April 10, 2015

**Summary:** The appellant made a request to the Waypoint Centre for Mental Health Care (Waypoint) for access to two video security tapes. Waypoint denied access to the videos, claiming the discretionary exemptions in section 49(a) (discretion to refuse requester's personal information), in conjunction with section 14(1) (law enforcement) and section 49(b) (personal privacy), in conjunction with section 21(1). In this order, the adjudicator finds that the videos contain the personal information of the appellant, other patients and visitors to Waypoint. The application of the exemption in section 49(b), in conjunction with section 21(1) is upheld. However, the adjudicator does not uphold Waypoint's exercise of discretion and orders it to re-exercise its discretion.

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

### OVERVIEW:

[1] This interim order disposes of most of the issues raised as a result of an appeal from a decision made by the Waypoint Centre for Mental Health Care (Waypoint) in response to a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to two video security tapes taken at Waypoint on a particular date.

[2] Waypoint issued a decision denying access to the security videos it identified as being responsive to the request, claiming the application of the discretionary exemptions in section 49(b) (personal privacy), in conjunction with section 21(1) and

section 49(a) (discretion to refuse requester's personal information), in conjunction with sections 14(1)(e),(k) and (l) (law enforcement), of the *Act*.

[3] The requester (now the appellant) appealed Waypoint's access decision to this office.

[4] During the mediation of the appeal, Waypoint advised the mediator that it was of the view that disclosure of the videos may jeopardize the security of the centre, facilitate the commission of an unlawful act, and endanger the safety of a person. Waypoint also took the position that disclosure of the videos would result in an unjustified invasion of the privacy of the individuals appearing in them. In response, the appellant advised the mediator that disclosure of the records would not jeopardize the security of the facility since it is slated to be closed in the near future. The appellant also indicated that he believes that most of the individuals in the surveillance recordings would consent to the disclosure of their images to him.

[5] It was not possible to resolve this appeal through further mediation and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator originally assigned to this appeal sought and received representations from Waypoint and the appellant, which were shared in accordance with this office's *Practice Direction 7*. The appeal was then transferred to me for final disposition.

[6] For the reasons that follow, I find that the videos are exempt from disclosure under section 49(b), in conjunction with section 21(1). However, I do not uphold Waypoint's exercise of discretion and order it to re-exercise its discretion.

## **RECORDS:**

[7] The record consists of one CD-ROM containing two separate video security recordings.

## **ISSUES:**

- A: Do the videos contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B: Does the discretionary exemption at section 49(b), in conjunction with section 21(1) apply to the videos?
- C: Did Waypoint exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

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

[8] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the videos contain “personal information” and, if so, to whom it relates. This determination is important since the personal privacy exemption cannot apply to information that does not fall within the definition in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and

- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[9] 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>1</sup> Section 2(3) also relates to the definition of personal information, and states:

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.

[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 to be "about" the individual.<sup>2</sup> 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>3</sup> To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

### *Representations*

[11] Waypoint submits that the record contains "personal information" as defined in section 2(1) of the *Act*. In particular, Waypoint states, the videos contain recorded information which enables patients and staff to be identified and to identify their race, colour and sex, within the meaning of paragraph (a) of the definition of personal information in the *Act*. In addition, Waypoint submits that the videos also contain information about the psychiatric history of the patients within the meaning of paragraph (b) of the definition because it is apparent that some of the individuals in the videos are patients in a psychiatric facility.

[12] The appellant submits that the record does not contain any specific personal information, despite the fact that one can identify the colour and gender of the individuals depicted in them. However, the appellant argues, the ethnic origin, religion,

---

<sup>1</sup> Order 11.

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

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Order PO-

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

age, sexual orientation, marital or family status of these individuals is not evident by viewing the videos. In addition, the appellant submits that the individuals in the videos who are Waypoint's staff members are depicted in their professional capacity, not in their personal capacity.

*Analysis and findings*

[13] I am satisfied that the videos contain the personal information of identifiable individuals, including the appellant, other patients and visitors to Waypoint. Although the individuals are not named in the videos, I am persuaded that they would be easily identifiable from the images in the videos. With respect to the type of personal information that would be revealed by the disclosure of the videos, I find that they reveal the colour and sex of the all of the individuals depicted, falling within paragraph (a) of the definition of "personal information" in section 2(1) of the *Act*. Further, the videos show that the appellant and other patients of Waypoint are indeed, patients of Waypoint, a psychiatric facility. I accept that disclosure of the videos would reveal information about their psychiatric history, which falls within paragraph (b) of the definition in section 2(1).

[14] Conversely, I find that the images depicting Waypoint's staff members do not constitute their personal information. As previously stated, 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. The videos were taken while the applicable Waypoint staff members were at work, doing their respective jobs. In addition, I find that there is nothing in the videos that would reveal something of a personal nature about the staff members. Therefore, I find that the depiction of the staff members does not constitute their personal information for the purpose of section 2(1) and, therefore, cannot be exempt from disclosure under section 21(1).

**Issue B: Does the discretionary exemption at section 49(b), in conjunction with section 21(1) apply to the videos?**

[15] I have found that the videos contain the personal information of the appellant, other patients and visitors to Waypoint. Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[16] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[17] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

[18] If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[19] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.<sup>5</sup> If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b).

[20] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>6</sup> The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).<sup>7</sup>

[21] If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[22] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.<sup>8</sup> However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.<sup>9</sup>

### *Representations*

[23] Waypoint submits that the videos depict staff together with patients throughout and that the portions depicting staff cannot be severed from those depicting patients. Waypoint goes on to state that the patients who appear in the video have not been asked if they would consent to its release because it has not considered that the video should be released. In addition, it argues, any consent provided might well be the

---

<sup>5</sup> Order MO-2954.

<sup>6</sup> Order P-239.

<sup>7</sup> Order P-99.

<sup>8</sup> Orders M-444 and MO-1323.

<sup>9</sup> Orders M-757, MO-1323 and MO-1378.

result of intimidation by the appellant, and that he would also know which patients did not provide consent, and might retaliate against them.

[24] Also in its representations, Waypoint identified the presumption against disclosure in section 21(3)(a), as well as the factor in section 21(2)(h), as being relevant. It submits that disclosure of the videos is presumed to constitute an unjustified invasion of personal privacy within the meaning of section 21(3)(a) because the personal information relates to the psychiatric condition of the patients depicted in the video. Regarding the factor in section 21(2)(h), Waypoint submits that it applies because the personal information has been supplied by the individuals to whom the information relates in confidence. Waypoint states:

Persons who are the subject of video surveillance are entitled to trust that the information collected will be used for the limited purpose of ensuring the security of the facility and will not enter the public domain. In this case, there is every reason to expect that the Appellant will circulate the information widely, possibly for some nefarious purpose.

[25] Waypoint also argues that the appellant has not established that the factor in section 21(2)(d), which favours disclosure, applies. Waypoint acknowledges that the appellant was the victim of an attack, which is depicted in the video. It states that the video was not entered as evidence at the appellant's most recent Ontario Review Board hearing, and that it has no intention of introducing the video at any subsequent hearings.

[26] The appellant submits that two of the factors in section 21(2) that favour disclosure apply in the circumstances of this appeal. First, he submits that section 21(2)(b) applies because disclosure of the videos would promote public health and safety. In particular, the appellant states that the videos show that another patient at the facility intervened when he was attacked, thus proving evidence of negligence on the part of the staff at Waypoint. The appellant also submits that the video should be part of the public record, by showing that staff exposed "civilian" visitors to a patient undergoing an acute psychotic disorder, thus putting them in harm's way.

[27] Second, the appellant argues that section 21(2)(d) applies, as he ought to be able to review the factual evidence in the videos while contemplating a civil court action. In addition, the appellant states that contrary to Waypoint's assertions, he has a justifiable reason for requesting the video, namely, so that a lawyer can view it and provide an opinion as to whether there is evidence of the tort of negligence.

[28] The appellant also submits that the videos were not supplied in confidence as contemplated by section 21(2)(h).

[29] Lastly, the appellant provided signed consents of two patients to disclose their images in the videos, so long as they are only used in the Ontario Superior Court of Justice or the Ontario Review Board, and not for public broadcast.

[30] In reply, Waypoint submits that the consent of all of the individuals who appear in the videos was not provided, and that because there were many witnesses to the incident depicted in the videos, the appellant does not need to see the videos to determine if he has a cause of action. Waypoint provided further reply representations which will not be reproduced in this order for confidentiality reasons, but which were taken into consideration.

*Analysis and findings*

[31] I find that disclosure of the portions of the videos containing the personal information of the patients (other than the appellant) and visitors at Waypoint would constitute an unjustified invasion of their personal privacy under section 49(b) of the *Act*. I am satisfied that the presumption against disclosure in section 21(3)(a) applies to those portions of the videos depicting the patients at Waypoint because disclosure of the videos would reveal that they are patients at the facility. This disclosure would reveal their personal information and is presumed to constitute an unjustified invasion of their personal privacy because it relates to their psychiatric condition, treatment or evaluation. I also find that in the circumstance of this appeal, none of the exceptions in section 21(4) apply.

[32] Both parties have raised the application of some of the factors in section 21(2) which a head shall consider in determining whether a disclosure of personal information constitutes an unjustified invasion of privacy. Waypoint raised the possible application of section 21(2)(h), which states the head shall consider whether the personal information has been supplied by the individual to whom the information relates in confidence. I find that this factor, which does not favour the disclosure of personal information, is not applicable in this appeal. The personal information in the video images was not "supplied in confidence" to Waypoint by the individuals depicted in them. These videos were initiated by and taken as part of the day to day operations of Waypoint, and were not provided to Waypoint by the individuals who are the subject matter of them.

[33] The appellant has raised the possible application of section 21(2)(b), which is a factor that favours disclosure of personal information. It states that the head shall consider whether access to the personal information may promote public health and safety. I also find that this factor is not applicable in the circumstances of this appeal. I am not persuaded that disclosure of videos of an incident that took place at Waypoint would promote the health and safety of the public at large.



[34] Turning to the factor in section 21(2)(d), which the appellant has also raised, it states that the head shall consider whether the personal information is relevant to a fair determination of rights affecting the person who made the request. The appellant must satisfy four requirements to establish the relevance of the factor in section 21(2)(d), which favours disclosure of the personal information at issue.<sup>10</sup> In the circumstances of this appeal, and with regard to the personal information at issue, even if I were to find that any of the elements of the test are established, I find that the presumption against disclosure in section 21(3)(a) outweighs the possible application of the factor in section 21(2)(d).

[35] In addition, I find that the personal information of the appellant is so intertwined with the personal information of other patients and visitors that it would be impossible to sever the appellant's personal information from that of other individuals who did not provide their consent to disclose their personal information.

[36] I find, therefore, that the disclosure of both videos would constitute an unjustified invasion of the personal privacy of the other patients and visitors. Consequently, I find that both videos are exempt, in their entirety, under section 49(b), in conjunction with section 21(1) of the *Act*.

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

[37] The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[38] 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; or
- it fails to take into account relevant considerations.

---

<sup>10</sup> For section 21(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; (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; (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 (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.)).

[39] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>11</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>12</sup>

[40] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>13</sup>

- the purposes of the *Act*, including the principles that: information should be available to the public; individuals should have a right of access to their own personal information; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

### *Representations*

[41] Waypoint submits that it properly exercised its discretion in not disclosing the videos. Waypoint states that it is of the view that the appellant does not have a sympathetic or compelling need to receive disclosure. Waypoint goes on to argue that

---

<sup>11</sup> Order MO-1573.

<sup>12</sup> Section 54(2) of the *Act*.

<sup>13</sup> Orders P-344 and MO-1573.

there is “no good reason”<sup>14</sup> for the appellant to have access to this video footage and states:

Finally, given that the appellant has no justifiable reason for seeing this video footage, it would set a bad precedent if it were made available. It would effectively mean that any patient could view any security footage taken at any time, which would result in an administrative nightmare.

[42] The appellant’s representations did not address this issue.

*Analysis and findings*

[43] An institution’s exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.<sup>15</sup> It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.<sup>16</sup>

[44] Based on Waypoint’s representations, I am not satisfied that it properly exercised its discretion because it failed to take into account relevant considerations and took into account irrelevant considerations. In particular, in its representations, Waypoint advised it took into consideration factors such as:

- the reason why the appellant seeks access to the videos; and
- possible implications of future access requests by other patients for similar types of videos.

[45] In taking these factors into consideration, Waypoint then concluded that the appellant has no “justifiable” or “good” reason for receiving access to the videos, and that future requests of a similar nature would result in an “administrative nightmare” for Waypoint. In my view, these are not relevant or proper considerations. First, a requester is not required to provide or “justify” the reason for an access request. If an institution receiving a request is of the view that the request is made for a purpose other than access, it can notify the requester that it has decided that the request is frivolous and vexatious. That decision can then be appealed to this office. In this case, Waypoint did not do so and did not raise it in its representations. For an institution to determine that a requester has no “good” reason for an access request is a conclusion based on irrelevant or improper considerations.

---

<sup>14</sup> Stated in an affidavit provided by Waypoint.

<sup>15</sup> Order MO-1287-I.

<sup>16</sup> Order 58.

[46] Second, whether or not the results of this access request and appeal may lead to further access requests is completely irrelevant. Given that Waypoint is subject to the access provisions of the *Act*, institutions such as Waypoint should be prepared to receive access requests on an ongoing basis without categorizing access requests as “administrative nightmares.”

[47] In addition, I find that Waypoint did not take into consideration the purposes of the *Act*, including the principles that:

- information should be available to the public;
- individuals should have a right of access to their own personal information;
- exemptions from the right of access should be limited and specific;
- and the privacy of individuals should be protected.

[48] Accordingly, I will order Waypoint to re-exercise its discretion.

**ORDER:**

1. I uphold Waypoint’s decision to apply the section 49(b) exemption to the videos.
2. I order Waypoint to re-exercise its discretion under section 49(b) of the *Act* and to provide me with representations on its exercise of discretion by **May 11, 2015**.
3. I may share Waypoint’s representations with the other party to this appeal unless they meet the confidentiality criteria identified in *Practice Direction 7*. If Waypoint believes that portions of its representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to the portions it seeks to withhold.
4. I remain seized of this appeal to deal with Waypoint’s exercise of discretion.

Original Signed by: \_\_\_\_\_  
Cathy Hamilton  
Adjudicator

\_\_\_\_\_ April 10, 2015