Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3374

Appeal MA14-582

The Corporation of the City of London

November 7, 2016

Summary: The appellant filed a request to the City of London for a copy of the surveillance videos taken as he attended a customer service window at a courthouse. The city withheld the video recording on the basis that disclosure would constitute an unjustified invasion of other individuals' personal privacy under section 38(b). The appellant appealed the city's decision to this office. During mediation the city granted the appellant partial access to portions of the videos. This order upholds the city's decision to deny access to the remaining portions of the records. The appeal is dismissed.

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

OVERVIEW:

[1] The appellant submitted a request to the Corporation of the City of London (the city) under the *Municipal Freedom of Information and Protection Act* (the *Act*) for a copy of video surveillance taken at a specified courthouse at a specified time and date.

[2] The city located two DVD recordings and issued a decision denying the requester access to the videos. The city claims that disclosure of the records would constitute an unjustified invasion of personal privacy under section 14(1). The appellant appealed the city's decision to this office and a mediator was assigned to the appeal file.

[3] During mediation, the city revised its decision and provided the appellant with 6 still screen shots taken from surveillance videos showing him attending the specified

courthouse at the specified time and date identified in his request. The city clarified that it was denying access to the remaining footage on the videotapes on the basis that they also contain images of other members of the public.

[4] Also during mediation, the city indicated that it did not have the capability of redacting the images of these individuals from the videotape recording. However, the city advised that it could obtain a quote from an external service provider to redact the information it claims contains the personal information of other members of the public.

[5] The appellant responded that he was not interested in obtaining a redacted copy of the videos and that he seeks access to the records in their entirety.

[6] At the end of mediation, the city confirmed that it was now relying on section 38(b) to deny the appellant access to the records. Section 38(b) recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their own personal information.[1]

[7] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry, the parties provided representations to this office and consented to their representations being shared in their entirety.

[8] In this order, I find that disclosure of the withheld portions of the records would constitute an unjustified invasion of personal privacy under section 38(b). I also find that the city properly exercised its discretion under section 38(b). As a result, the city's decision is upheld and the appeal is dismissed.

RECORDS:

[9] The records at issue consist of a DVD containing two videos. One video captures footage from the main entrance and the other captures footage from the customer service area.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?

B. Would disclosure of the records constitute an unjustified invasion of personal privacy under section 38(b)?

C. Did the city properly exercise its discretion in applying the discretionary exemption under section 38(b)?

[1] Order M-352.

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[10] The city submits that the records contains the personal information of the appellant and the members of the public. In support of its position, the city states:

> [T]he recording security video files clearly show identifiable individuals entering the court building, lining up for customer service, sitting at a customer service payment window and then leaving the building.

[11] The appellant does not dispute that the records contain the personal information of himself and other identifiable individuals.

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

[13] I have reviewed the records and am satisfied that it contains the personal information of the appellant and other identifiable individuals. Previous decisions from this office have found that footage from video surveillance cameras contains the "personal information" of the individuals appearing in the videos.[3] The video footage in this appeal shows individuals, including the appellant, entering the courthouse and then waiting and proceeding to a customer service window. The portions of the records disclosed to the appellant contain images of the appellant and individuals working at the courthouse. The surveillance videos do not record audio.

[14] The city does not claim that video surveillance images of its employees constitutes "personal information", and still images containing the appellant and employee were released to the appellant.

[15] As I have found that the records contain the "personal information" of the appellant along with other identifiable individuals, I will determine whether disclosure of the withheld portions of the records to the appellant would constitute an unjustified invasion of personal privacy under section 38(b).

B. Would disclosure of the records constitute an unjustified invasion of personal privacy under section 38(b)?

[16] Section 38(b) states:

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

[3] 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, PO-3510, MO-3238, and MO-3349.

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if disclosure would constitute an unjustified invasion of another individual's personal privacy.

[17] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the requester's personal information.[4]

[18] In other words, where a record contains personal information of both the requester and another individual, and the disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[19] In the circumstances of this appeal, I must determine whether disclosing the personal information of other individuals to the appellant would constitute an unjustified invasion of their personal privacy under section 38(b).

[20] Sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Section 14(2) provides some criteria for the city to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

[21] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

[22] The city claims that the presumption against disclosure at section 14(3)(f) applies and that the factors favouring non-disclosure at sections 14(2)(f) and (i) apply in the circumstances of this appeal. Though the appellant did not specifically raise the possible application of the factor favouring disclosure in section 14(2)(d), I am satisfied that the concerns raised by the appellant in his appeal letter give rise to this factor. These sections state:

> 14(2) 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,
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> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;

[4] Order M-352.

> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

> 14(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness

14(3)(f): finances

[23] The city takes the position that disclosure of the video recording to the appellant would reveal information about other identifiable individual's "finances, income, assets, liabilities, net worth, bank balances, financial history or activities". In support of its position, the city states:

> The security video clearly shows people other than the appellant attending at the customer service windows to make payments. For example, at approximately 11:25:19 there is a customer making a cash payment at the customer service window and at approximately 11:28:00 there is another customer making a payment by debit or credit card. These people can be seen entering the lineup, waiting and then attending at the customer service window. Only payments for parking fines and POA fines are taken at these customer service windows.

[24] The appellant's submissions question the city's evidence that every individual who enters the lineup at this customer service wicket at the court house are there to make a financial payment.

[25] I have reviewed the video recordings along with the submissions of the parties and am not satisfied that disclosure of the records would reveal information describing an individual's financial history or activities. Previous orders have determined that one-time payments generally do not fall within section 14(3)(f).[5] Though I acknowledge that disclosure of the records would reveal that other identifiable individuals made a single financial transaction around the same time the appellant attended the courthouse, this lacks the specificity or history required to be described as forming part of an individual's financial history or activities. Accordingly, I find that the presumption at section 14(3)(f) does not apply in the circumstances of this appeal.

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

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

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[5] See Orders M-173, MO-1184 and MO-1469.

> (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
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> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
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> (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
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> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[6]

[27] In his appeal letter, the appellant appears to suggest that disclosure of the videos would substantiate his claim of receiving discriminatory treatment by staff when he attended the customer service counter at the courthouse.

[28] In order for the factor at section 14(2)(d) to be given any consideration in this appeal, the appellant must establish that all four parts of the test have been met. Accordingly, any rights the appellant claims he has to the recording must relate to an existing or contemplated proceeding and there must be evidence that disclosure of the information at issue has some bearing on or is significant to the rights in question and is required to prepare for the proceeding or to ensure an impartial hearing. Even if I had found that there is an existing or contemplated legal proceeding relating to alleged infringement, I find that section 14(2)(d) would have no application in this appeal as there is insufficient evidence to support a finding that disclosure of the recording, which relates to the customer service other individuals received the day the appellant attended the court office has some bearing or is significant to determine the appellant's claim that he was discriminated against. In making my decision, I took into consideration that the video recording captures brief non-physical interactions, and that no audio recording relating to the interactions between staff and individuals are available.

[29] Accordingly, I find that this factor has no application in this appeal.

14(2)(f): highly sensitive and 14(2)(i): unfair damage to reputation

[30] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[7]

[31] The applicability of section 14(2)(i) is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or

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[6] 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.).

[7] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

harm would be "unfair" to the individual involved.[8]

[32] In support of its position that the factors favouring non-disclosure at sections 14(2)(f) and (i) applies, the city states:

> The security video files clearly show identifiable individuals entering and leaving the court building. The average person is unlikely to ever have cause to visit the court facility at [specified location] unless they are required to attend a court session or to pay a Provincial Offences fine. Should these video records be publicly disclosed without consent, these identifiable individuals would have cause to complain of a breach of their privacy …

[33] The appellant responded that the city's claim that the average person is unlikely to visit the court facility is "outrageous". The appellant also argues that persons entering a court house have a diminished expectation of privacy. In support of this position, the appellant states:

> [N]o one can enter into the public space and place such as a Court House with reasonable expectation of privacy.

[34] The appellant also states that "99.9 percent of all individuals who attend Court, whether [as] a witness or defendant [are identified] on a docket". However, the appellant also argues that the city's evidence does not take into consideration that individuals attending the customer service wicket in question could be paying fines on behalf of other individuals.

[35] Having regard to the parties' submissions and the records, I am satisfied that disclosure of the video in the circumstances of this appeal could reasonably be expected to cause the affected individuals' significant personal distress. In making my decision, I took into consideration the city's evidence that the video shows individuals, other than the appellant, making payments for fines levied under the *Provincial Offences Act* [*POA*]. The city's website states:

> The POA is a statute which provides for a procedure for the prosecution of provincial offences including those under the *Highway Traffic Act*, the *Compulsory Automobile Insurance Act*, the *Trespass to Property Act*, the *Liquor Licence Act* and other provincial legislation and municipal by-laws.
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> Examples of provincial offences include but are not limited to:
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> • Speeding, careless driving, or not wearing a seat belt (*Highway Traffic Act*)
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> • Entering premises or engaging in activity on premises when entry or the activity is prohibited (*Trespass to Property Act*)

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[8] Order P-256.

- Driving without insurance or failing to surrender your insurance card for inspection (*Compulsory Automobile Insurance Act*)

- Municipal by-law offences (noise, zoning, parking)

- Having open liquor in a vehicle or being in an intoxicated condition in a public place (*Liquor Licence Act*)

- Occupational health and safety offences (*Occupational Health and Safety Act)*

- Ministry of Environment, Transportation, Natural Resources, Labour, or Finance offences

- Smoking where prohibited or selling or selling tobacco to a person under 19 (*Smoke Free Ontario Act*)

[36] In my view, disclosure of the video recordings could reasonably be expected to reveal that the individuals paying fines the day in question plea guilty or were found guilty of one of the offences listed above. Though offenses under the *POA* are non-criminal, I am satisfied that disclosure to the appellant could reasonably be expected to cause significant personal distress to the individuals paying the fines or any other individuals whose image is captured on the videos while they entered the courthouse and joined the line to pay fines. In my view, disclosure of this information could reveal personal information relating these individuals.

[37] I also took into consideration the appellant's submission that individuals entering public court houses have a diminished expectation of privacy. Though I note that individuals entering public court houses are routinely subject to searches of their private property for security purposes and at times their names are identified on docket lists, there is no evidence before me to conclude that this extends to the circumstances of this appeal.

[38] Accordingly, I find that the factor favouring non-disclosure at sections 14(2)(f) applies in the circumstances of this appeal.

Summary

[39] I find that the factor favouring non-disclosure at section 14(2)(f) applies in the circumstances of this appeal. Given that the factor at section 14(2)(d) does not apply and no other factors favouring disclosure have been established, I find that disclosure of the personal information at issue to the appellant would constitute an unjustified invasion of personal privacy under section 38(b). Having regard to the above, it is not necessary that I also determine whether the factor favouring non-disclosure at section 14(2)(i) also applies.

[40] However, in making my decision I also considered whether the absurd result principle could apply.

[41] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 14(1) or 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[9]

[42] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[10]
- the requester was present when the information was provided to the institution[11]
- the information is clearly within the requester's knowledge[12]

[43] Though the appellant was present when other identifiable individuals also attended the courthouse, I was not presented with evidence establishing that the withheld information is clearly within the appellant's knowledge. Accordingly, I find that the absurd result principle has no application in the circumstances of this appeal.

[44] Lastly, I have considered the severance requirements in section 4(1). I note that the city has disclosed to the appellant some still shots from the videos, which only record him and staff. I also note that during mediation, the city investigated its ability to blur out the faces of identifiable individuals from the records but determined that its technology team did not have the capabilities. The city indicated that it was prepared to retain the services of an external video editing company to complete this work but that related fees allowable under the *Act* would be charged to the appellant. The appellant responded that he was not interested in obtaining access to videos with blurred images but continued to seek access to an unedited copy. In its representations, the city also advises that it may be possible to convert the format of the videos with the result of its technicians having the ability to "strip" out the portions of the videos which contain the images of the other individuals. The appellant's representations did not address whether he would be interested in obtaining an edited version of the videos. Given the appellant's request for a complete copy of the video, I will not review the possible application of the severance provision in section 4(1) further.

[45] Having regard to the above, I find that the records are exempt from disclosure under section 38(b), subject to my assessment of whether the city exercised its discretion properly.

C. Did the city properly exercise its discretion under section 38(b)?

[46] The section 38(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

[9] Orders M-444 and MO-1323.
[10] Orders M-444 and M-451.
[11] Orders M-444 and P-1414.
[12] Orders MO-1196, PO-1679 and MO-1755.

institution failed to do so.

[47] 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.

[48] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[13]This office may not, however, substitute its own discretion for that of the institution.[14]

[49] The parties' representations did not specifically address the issue of whether the city properly exercised its discretion under section 38(b). However, I am satisfied that the city's submissions in support of the application of the personal privacy exemption under section 38(b) reflect the manner in which discretion was exercised. In particular, I note that the city granted the appellant with partial access to the records by disclosing several still shots taken from the video recordings. In addition, the city has offered to investigate blurring the images of other individuals or "stripping" the personal information of other individuals from the videos in other ways.

[50] Having regard to the circumstances of this appeal and the nature of the personal information at issue, I am satisfied that the city properly exercised its discretion and in doing so took into account relevant considerations. I am also satisfied that the city did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that they took into account irrelevant considerations.

[51] Accordingly, I find that the city properly exercised its discretion to withhold the information I found exempt under section 38(b).

ORDER:

I uphold the city's decision to deny the appellant access to the withheld portions of the records.

Original Signed by: November 7, 2016
Jennifer James
Adjudicator

[13] Order MO-1573.
[14] Section 43(2).