

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3671

Appeal PA14-131

Ministry of Community Safety and Correctional Services

November 30, 2016

Summary: The appellants were evicted from the building in which they had been living, which was located on a resort property. The OPP videotaped the eviction and the appellants made requests to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the DVD footage. The ministry granted access, with some information that it deemed to be personal information withheld pursuant to the discretionary personal privacy exemption at section 49(b) of the *Act*. The ministry issued a fee decision setting out a fee estimate of \$290. The appellants requested a waiver of the fee, which was denied. The appellants appealed the access decision, the fee estimate and the denial of a fee waiver. In this order, the adjudicator upholds the access decision, in part. She reduces the fee to \$10 and upholds the ministry's denial of a fee waiver.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2 (definition of "personal information"), 49(b) and 57.

Orders Considered: Orders MO-3310, MO-1285 and MO-3136.

BACKGROUND:

[1] The appellants, two individuals, were living in and subsequently evicted from the main lodge located on a resort property. Present at the eviction were several OPP officers as well as other individuals, some of whom assisted with removing the appellants' belongings from the premises and loading them into a truck. The OPP videotaped the eviction.

[2] Each of the appellants then made a request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to this incident and other incidents involving the same address.

[3] The ministry located responsive records, including a DVD of the video footage that the OPP had taken of the eviction. In response to both requests, the ministry issued decisions granting partial access to the responsive records, with portions of the records withheld on the basis of the discretionary law enforcement exemption at section 14 of the *Act* in conjunction with section 49(a), the discretionary solicitor-client privilege exemption at section 19 in conjunction with section 49(a), and the discretionary personal privacy exemption at section 49(b). In addition, the ministry indicated that it had removed some information that it deemed to be non-responsive to the requests.

[4] The appellants filed a joint appeal of the two decisions. During mediation, they narrowed their request to only one record, the DVD containing the video footage of their eviction, which the ministry had decided to withhold in full. As a result, the remaining records and sections 49(a), 14 and 19 of the *Act* are no longer at issue in this appeal.

[5] Also during mediation, the ministry looked into the possibility of producing a redacted copy of the DVD footage with a view to granting partial access to it. The ministry subsequently issued a supplementary decision advising that the estimated fee for producing a redacted copy of the video is \$290. The fee estimate was broken down as follows:

Hardware costs

32 GB USB key	\$50.00
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Production Costs

Total estimated hours required to produce document	4 hours
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Production time charge per hour per the Act	\$60.00
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Total charge to produce document	\$240.00
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<u>Total fee estimate</u>	\$290.00
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TOTAL DEPOSIT REQUIRED

(Based on 50% of fee estimate)	<u>\$145.00</u>
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[6] The ministry requested a 50% deposit and indicated that the final fee may be higher or lower than the estimated fee. It also confirmed that part of the information would likely be exempt from disclosure in accordance with the personal privacy

exemptions at sections 49(b) and 21(1) of the *Act*.

[7] The appellants then submitted a fee waiver request to the ministry on the basis that the payment of the fee will cause them financial hardship, and that the dissemination of the record will benefit public health or safety (sections 57(4)(b) and (d) of the *Act* respectively). The ministry issued a decision denying the fee waiver request.

[8] The ministry subsequently clarified that its access decision in relation to the DVD was a final decision, and that it was granting partial access to the DVD with portions containing images of certain individuals withheld on the basis of the discretionary personal privacy exemption at section 49(b). The ministry also confirmed that the fee estimate in relation to the severing of the video is its final fee estimate decision.

[9] The appellants objected to the ministry's decision to withhold portions of the DVD and indicated that they were seeking access to the entire DVD. In the alternative, they advised the mediator that, in the event that ministry's decision on severances is upheld, they object to the ministry's fee and fee waiver decisions.

[10] No further mediation was possible, and the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[11] I invited representations from the ministry and eight affected parties whose images appear in the DVD footage, initially. I received representations and supplementary representations from the ministry, and representations from six affected parties. I then invited and received representations from the appellants. I invited reply representations from three affected parties and received reply representations from one of them.¹

[12] In this order, I uphold the ministry's access decision, in part. I reduce the fee to \$10 and uphold the ministry's denial of a fee waiver.

RECORDS:

[13] The record at issue is a DVD containing approximately 5½ hours of video footage of the appellants' eviction.

¹ I did not consider it necessary to invite reply representations from the ministry, as the appellants did not raise any issues in their representations that the ministry needed to be given an opportunity to reply to.

ISSUES:

- A. Does the record 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 49(b) apply to the information at issue?
- C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?
- D. Should the fee estimate be upheld?
- E. Should the fee be waived?

DISCUSSION:

Further background:

[14] Prior to the appellants' eviction, the Landlord and Tenant Board found that the *Residential Tenancies Act* did not apply to the appellants' occupation of the lodge. As a result, the eviction of the appellants was dealt with as a trespass matter and not an ejection under the *Residential Tenancies Act*.

[15] This background is relevant because it is clear from the material before me that the appellants take issue with the Landlord and Tenant Board's ruling and their subsequent eviction. This relates to the appellants' reasons for their request for the DVD, which are explored further under Issue B below.

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

[16] The personal privacy exemptions in the *Act* can only apply if the record contains "personal information". Therefore, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

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

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

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name 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;

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

[18] The list of examples of personal information under paragraphs (a) to (h) of section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.³

[19] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(3) 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.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their

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

³ Order 11.

dwelling and the contact information for the individual relates to that dwelling.

[20] 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.⁴ 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.⁵

Representations

[21] The ministry submits that the DVD footage identifies the affected parties and links them to an eviction. It submits that this constitutes their personal information as it is recorded information about an identifiable individual. It submits that all of the affected parties were acting in their personal capacities in assisting the appellants with moving their belongings, and that none of them were professional movers.

[22] The ministry argues, further, that the property owners are in the business of providing housing to tenants, and that they were not acting in a professional capacity when they were captured in the OPP’s video footage, which is a law enforcement record. The ministry submits that the OPP were present at the eviction to preserve the peace, and that this is something that does not ordinarily occur, so the video reveals something inherently personal about the property owners and their representative. The property owners rely on Order PO-2225, where Assistant Commissioner Tom Mitchinson set out the following approach to the distinction between personal information and business information:

[T]he first question to ask in a case such as this is: “in what context do the names of the individuals appear”? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? In my view, when someone rents premises to a tenant in return for payment of rent, that person is operating in a business arena...

...

The analysis does not end here. I must go on to ask: “is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual”? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

[23] The ministry submits that the information of the property owners and their representative appears in an inherently personal context because their images are contained in a law enforcement record. It submits that the footage is not a business or professional record which would remove it from the personal sphere. It also submits that disclosure of the record would reveal something inherently personal about the property owners and their representative, namely that they have been involved in a law enforcement dispute.

[24] The property owners initially submitted that they do not believe they appear in the DVD footage, but the ministry subsequently confirmed my understanding that they do. The remaining affected parties did not make representations specifically on the issue of whether they were acting in their personal or professional capacities.

[25] The appellants state that the property owners testified at the Landlord and Tenant Board hearing to the effect that the police have come numerous times to remove tenants who have rented their cabins. The inference is that this is a regular part of the property owners' business activities.

[26] Following receipt of the above representations, I wrote to the property owners and an affected party, inviting reply representations on the issue of whether the video contains their personal information. I also advised the property owners that they do in fact appear in the footage. The property owners did not file reply representations, while the affected party's reply representations did not address whether he was acting in a professional or personal capacity.

Analysis and findings

[27] Having reviewed the DVD footage and the parties' representations, I make the following findings.

[28] First, I find that the DVD footage, taken as a whole, contains the personal information of the appellants. Although they are not depicted in all of the footage, the footage, taken as a whole, reveals that they were evicted from where they were living. It also reveals some information about the lifestyle they led while they were living there. I find that this is recorded information about the appellants, and is therefore their personal information.

[29] I find that that images and voices of the individuals depicted in the DVD footage, other than the police officers and the property owners, constitute the personal information of those individuals, as this is information about identifiable individuals. I accept the ministry's submission that these individuals were not professional movers and were assisting with the move in their personal capacities;⁶ they were not acting in a professional, official or business capacity. My finding in this regard also extends to an

⁶ See Orders M-886, M-8 and M-7162.

affected party to whom the ministry refers as the property owners' "representative". Although it appears from the parties' representations that this individual attended the premises to relay the fact that the appellants were being evicted that day, this does not, in the circumstances, mean that the individual was acting in any official or business capacity. In my view, in the particular circumstances of this appeal, the individual was acting as a volunteer in relaying a message from the property owners, and as such, he was acting in a personal capacity, not an official or professional one.

[30] However, for the following reasons, I find that the video images of the property owners do not constitute their personal information.

[31] In coming to my conclusion, I have applied the two-step approach articulated in Order PO-2225. Following that approach, the first question to consider is in what context the names of the individuals appear. I have reviewed the DVD footage and find that the images of the property owners are consistent with them acting as the owners of the property in question. In other words, they appear in a business context.

[32] Applying the second part of the two-step approach, I also find that the disclosure of the images of the property owners would not reveal information that is inherently personal in nature. Again, their images appear in the context of them carrying out their business, and do not reveal anything of a personal nature about them. I cannot be more specific without revealing the content of the footage in which the property owners appear.

[33] I have considered the ministry's argument that the property owners' information is their personal information because it appears in the context of law enforcement. In the circumstances of this appeal, however, the fact that the footage depicts a law enforcement matter does not alter the fact that the property owners' information is business related, not personal. The property owners' actions depicted in the footage are entirely consistent with their roles as the owners of the resort property. Whether the property owners had evicted individuals previously (as alleged by the appellants) or not is immaterial. Even if an eviction was something that did not ordinarily occur, as submitted by the ministry, the actions of the property owners depicted in the DVD footage are consistent with their roles as owners of the resort property.

[34] I note that in Order MO-3310, Adjudicator Hamish Flanagan found that the identity of an individual who made a complaint to the police was not the personal information of that individual, because the complaint to the police fell within and was carried out as part of that individual's employment responsibilities. That reasoning applies equally here. As a result, I will order that the portions of the DVD footage depicting the images of the property owners be disclosed, since information that is not personal information cannot qualify for an exemption under section 49(b).

[35] I find, however, that the audio of the footage of the property owners constitutes their personal information, because it reveals information about them in their personal

capacities. While some of the owners' commentary is related to their roles as the property owners, other comments are personal in nature and I find that all the commentary is intermingled so as to make it unreasonable to attempt to sever the personal information from the professional information.

[36] The ministry does not seek to withhold the footage of the police officers. The footage of these individuals is not personal information, because the police were acting in their professional capacities and the record does not reveal anything of a personal nature about them.

[37] To conclude, I find that the record, as a whole, contains the personal information of the appellants. Portions of the record contain the personal information of other individuals. I will now consider whether the personal privacy exemption applies to the personal information.

B. Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue?

[38] 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.

[39] 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.⁷

[40] Sections 21(1) to (4) of the *Act* provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. These sections are elaborated on below.

Representations

[41] The ministry submits that all of the personal information is highly sensitive within the meaning of section 21(2)(f), because its disclosure would be expected to cause affected individuals significant personal distress.⁸ The ministry notes that the affected parties have not consented to the disclosure of their personal information and that, once the information is disclosed, it ceases to be protected and can be publicized without any regard to the wishes of the affected parties.

⁷ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).

⁸ See Order PO-3279.

[42] The ministry also makes reference to the online publication entitled "Guidance for the Use of Body-Worn Cameras by Law Enforcement Authorities" developed by the Office of the Privacy Commissioner of Canada in consultation with provincial privacy regulators. The document states that when providing access to records created using body-worn cameras, "care should be taken to ensure that the personal information of individuals other than the requester, such as their image and/or voice, whenever possible is protected". The ministry submits that this same statement is equally applicable to the DVD footage at issue in this appeal.

[43] The affected parties submit that the appellants took their own footage of the eviction, so the purpose of them wanting the footage at issue unclear. They question the motives of the appellant, and in particular, whether they will use the DVD footage to harass the affected parties, noting that the appellants have posted unflattering and inaccurate information online about the resort property and their eviction, resulting in considerable stress for the affected parties.

[44] The appellants submit that they require the DVD footage for their protection in order to establish proof of events in court. The appellants attached to their representations a partial copy of a statement of defence filed in an action they have brought against the property owners and the OPP following their eviction. The appellants submit that they need the footage to:

- Accurately demonstrate that they told the police that they had no knowledge of the Landlord and Tenant Board hearing or ruling;
- Show that the police saw that all of the furnishings belonged to the appellants. In the appellants' view, this is evidence that the ruling of the Landlord and Tenant Board was wrong;
- Show the condition of their belongings prior to them being removed and retrieved, to assist with proof of damages and missing items;
- Show that beer was being consumed by some affected parties, resulting in damage to the appellants' property; and
- Determine if there was footage taken en route to the storage facility and during unloading, to assess the manner in which the belongings were handled.

[45] The appellants note, further, that their own video footage is incomplete due to the fact that their video camera was turned off by one of the affected parties.

[46] The appellants also deny that they post false information online.

[47] The appellants state that the police violated their privacy during the eviction. They also suggest that the Landlord and Tenant Board's decision that the *Residential Tenancies Act* did not apply to them was wrong and that, as a result, their eviction was

unlawful. They suggest that the video incriminates the police and the property owners. The appellants attached to their representations a transcript, apparently prepared by them, of the first twelve minutes of their eviction.⁹

[48] The appellants also submit that some of the affected parties' images are already online from the appellants' own video, and that this negates any privacy concerns.

Analysis and findings

[49] As noted above, sections 21(1) to (4) of the *Act* provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. 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). Furthermore, 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). None of the parties argued the application of any of these provisions, and I find that none of them apply, with the exception of section 21(1)(a): consent. Each of the appellants has consented to the disclosure of their information to the other appellant. As a result, disclosure of each of the appellants' images and voices to the other appellant is not an unjustified invasion of personal privacy. None of the affected parties consented to the disclosure of their information to the appellants, however.

[50] 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 also considers, and weighs, the factors and presumptions in sections 21(2) and (3) and balances the interests of the parties.¹⁰ I will now consider those factors and presumptions.

[51] The ministry and the affected parties did not argue the application of any of the presumptions contained in paragraphs (a) to (h) of section 21(3), and I find that none apply.¹¹

[52] 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.¹² Some of the factors, if present, weigh in favour of disclosure, while other factors, if present, weigh in favour of non-disclosure. The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are

⁹ As noted below, the appellants themselves took a partial video recording of their eviction.

¹⁰ Order MO-2954.

¹¹ The ministry initially relied on the presumption at section 21(3)(b) (investigation into a possible violation of law), but subsequently abandoned its reliance on this exemption. I agree that the eviction of the appellants did not constitute an investigation into a possible violation of law within the meaning of section 21(3)(b).

¹² Order P-239.

relevant, even if they are not listed under section 21(2).¹³

[53] From my review of the appellants' representations, I find that they are raising the factor listed at section 21(2)(d): fair determination of rights. I will now consider whether this factor applies and whether any additional unlisted circumstances weighing in favour of disclosure apply.

Factors weighing in favour of disclosure

21(2)(d): fair determination of rights

[54] Section 21(2)(d) provides:

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,

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

[55] For section 21(2)(d) to apply, the appellants 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.¹⁴

[56] The appellants provided me with a partial copy of a statement of defence filed by the property owners in a civil action that the appellants commenced against the property owners and the OPP in 2015. While the appellants did not specify the nature of this action in their representations, it appears to be, in part, an action for breach of contract. I find, therefore, that the first criterion listed above is satisfied. I am also

¹³ Order P-99.

¹⁴ 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.).

prepared to accept that the proceeding has not been completed. Therefore, the second criterion has been met.

[57] I find, however, that the personal information at issue in the DVD footage does not have any bearing on the determination of the appellants' rights in that action. The appellants have stated various reasons, listed above, for their wanting the DVD footage. For example, they state that they require the footage in order to demonstrate the condition of their belongings before they were moved by the affected parties. However, the severance of the personal information from the footage through blurring technology will not alter the depiction of the appellants' belongings. Similarly, if beer was being consumed as alleged by the appellants, this will still be evident notwithstanding the blurring of the images of the affected parties and the redaction of their voices.

[58] I find, therefore, that the personal information in the footage is not relevant to a fair determination of the appellants' rights. As a result, the factor at section 21(2)(d) does not apply.

Unlisted factor: some of the affected parties' images are on the appellants' own video which is posted online

[59] The appellants argue that the images of some of the affected parties are on the appellants' own video of the eviction which is posted online, so concealing their faces in the DVD footage at issue affords them no privacy.

[60] Under the circumstances, I am not prepared to find that this is a factor weighing in favour of disclosure. Not all of the affected parties are depicted on the appellants' footage. Moreover, although the appellants state that the affected parties knew that the appellants were taping them, it is not evident that the affected parties were aware that the appellants' video would be posted online.

[61] I find, therefore, that the fact that video footage of some of the affected parties is already online is not a relevant factor weighing in favour of disclosure of the DVD footage at issue.

Factors weighing in favour of non-disclosure

21(2)(f): highly sensitive

[62] The ministry argues that the factor at section 21(2)(f) is relevant here, and the representations made by the affected parties also implicitly raise the potential application of this factor. Section 21(2)(f) provides:

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,

(f) the personal information is highly sensitive;

[63] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁵ From my review of the representations of the affected parties, I find that it is reasonable to expect that they will experience significant personal distress if their personal information is disclosed. In addition to commencing a lawsuit against the property owners, the appellants have posted several items online, taking issue with the actions of the property owners and the affected parties. From my review of the affected parties' representations and the nature and tone of the various items posted online by the appellants, I find it reasonable to expect that, if unredacted footage of the affected parties is released to the appellants, the affected parties will experience significant personal distress.

[64] Weighing the various factors in section 21(2), and balancing the interests of the parties, I conclude that the disclosure of the personal information in the DVD footage would be an unjustified invasion of the personal privacy of the individuals in question.

[65] This office has also developed a principle known as the "absurd result" principle, which may apply where the requester originally supplied the information, or the requester is otherwise aware of it. In such cases, 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.¹⁶

[66] The absurd result principle has been applied where, for example, the requester sought access to his or her own witness statement¹⁷; the requester was present when the information was provided to the institution¹⁸; and where the information is clearly within the requester's knowledge.¹⁹

[67] 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.²⁰ In this appeal, notwithstanding that the appellants were present during the eviction and likely saw some or all of the affected parties, I find that disclosure of the footage would be inconsistent with the purpose of the section 49(b) exemption. The section 49(b) exemption is designed to protect personal privacy. In my view, there is a distinction between the affected parties being seen by the appellants at the eviction, as opposed to footage of them being provided to the appellants and potentially posted on the internet along with the appellants' commentary. I find, therefore, that applying the section 49(b) exemption in

¹⁵ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁶ Orders M-444 and MO-1323.

¹⁷ Orders M-444 and M-451.

¹⁸ Orders M-444 and P-1414.

¹⁹ Orders MO-1196, PO-1679 and MO-1755.

²⁰ Orders M-757, MO-1323 and MO-1378.

the circumstances before me does not result in an absurdity.

[68] I conclude that the personal information in the DVD footage is exempt from disclosure pursuant to section 49(b) of the *Act*.

C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[69] 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.

[70] 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. In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ This office may not, however, substitute its own discretion for that of the institution.²²

[71] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²³

- 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
 - 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

²¹ Order MO-1573.

²² Section 54(2) of the *Act*.

²³ Orders P-344 and MO-1573.

- 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
- the historic practice of the institution with respect to similar information.

[72] The ministry submits that, in exercising its discretion to withhold the personal information, it took into account the following factors:

- the inherent sensitivity of the personal information belonging to the affected parties captured in a law enforcement record;
- the fact that the affected parties have not consented to the disclosure of their personal information; and
- the ministry's usual practice, which is to exempt records of this type.

[73] The appellants' representations do not specifically address the ministry's exercise of discretion.

[74] Having reviewed the ministry's representations, I am satisfied that its exercise of discretion should be upheld. While the ministry does not explicitly refer to the fact that the record contains the appellants' own personal information, the ministry's decision was to disclose all of the record with the exception of what it viewed to be other individuals' personal information. I am satisfied that the ministry took into account the fact that the appellants were seeking to access their own personal information. The other factors that the ministry considered were appropriate factors to consider, and there is no evidence that the ministry exercised its discretion in bad faith or for an improper purpose, or that it took into account irrelevant considerations.

[75] I uphold the ministry's exercise of discretion.

D. Should the fee estimate be upheld?

[76] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[77] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460. Those sections read:

6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:

- 1. For photocopies and computer printouts, 20 cents per page.
- 2. For records provided on CD-ROMs, \$10 for each CD-ROM.
- 3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
- 4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
- 5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
- 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

6.1 The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to personal information about the individual making the request for access:

- 1. For photocopies and computer printouts, 20 cents per page.
- 2. For records provided on CD-ROMs, \$10 for each CD-ROM.

3. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.

4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[78] Where the fee for access to a record exceeds \$25, an institution must provide the requester with a fee estimate.²⁴ Where the fee is \$100 or more, the fee estimate may be based on either the actual work done by the institution to respond to the request, or a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.²⁵

[79] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.²⁶ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.²⁷

[80] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.²⁸

[81] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

²⁴ See section 57(3) of the *Act*.

²⁵ Order MO-1699.

²⁶ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

²⁷ Order MO-1520-I.

²⁸ Orders P-81 and MO-1614.

Analysis and findings

[82] The ministry submits that the authority for charging \$50 for the USB key on which the footage is stored, is set out in paragraph 6 of section 6 of Regulation 460. It submits that the actual cost of the USB key is set out in an invoice.

[83] Since I have found that the appellants' requests were for their own personal information, the applicable section of Regulation 460 is section 6.1. I find that paragraph 4 (computer costs) allows the ministry to charge a fee for the medium used to provide the record to the appellants. However, I note that no invoice for the USB key was submitted; moreover, the footage was provided to this office on a DVD. I find, therefore, that the ministry's allowable fee in this regard is the cost of a DVD and not a USB key. While DVDs are not specifically mentioned in Regulation 460, section 2 provides for a fee of \$10 for records provided on a CD. By analogy, I find that \$10 is an appropriate fee for a DVD.

[84] With respect to the \$240 fee, the ministry submits as follows:

The second part of the fee is 240 dollars to produce the record, using a method whereby the personal information was severed. This amount is based on the 4 hour time period it took for Ministry employees to produce the record. The authority for charging this fee is set out in paragraph 5 of section 6 of Regulation 460.

The Ministry submits that the 4 hours it took to produce the record is reasonable. The fee is based on the actual work of Ministry employees. The fee takes into account the duration of the footage, and the fact that there is a significant amount of personal information, which had to be carefully redacted to produce the video record.

[85] As noted above, section 6.1 set out fees for access to personal information about the individual making the request for access and is, therefore, the relevant section for the purposes of this appeal. However, paragraph 5 of section 6, relied on by the ministry, has an equivalent paragraph in paragraph 3 of section 6.1. That paragraph provides that a fee shall be charged for "developing a computer program or other method of producing a record from machine readable record".

[86] I find, however, that the work performed by ministry employees in this case does not constitute "developing a computer program or other method of producing a record from machine readable record".

[87] In coming to my conclusion, I am guided by comments made by Adjudicator Laurel Cropley in Order MO-1285. In that order, Adjudicator Cropley had to decide whether to apply section 6 or 6.1 of the regulation, where the records were a mix of records containing the appellant's personal information and general records. In deciding that she should apply section 6.1, Adjudicator Cropley stated:

The inclusion of section 6.1 of [the regulation] recognizes the higher right to access to one's own personal information in the custody or control of government institutions as set out in section 1 of the *Act*. Where there is doubt as to how the fees should be applied, in my view, the balance must weigh in favour of the appellant.

[88] While I accept that ministry employees took 4 hours to produce the severed record, the ministry's representations indicate that this time relates to preparing the record for disclosure, including severing the footage. Section 6 of Regulation 460 contains a fee provision for preparing a record for disclosure, but section 6.1 does not. From my review of the ministry's representations, it does not appear that ministry personnel developed a computer program or other method of producing a record from a machine readable format. Rather, they prepared an existing record, the DVD, for disclosure by making severances to it. There is no mention of having to develop a method to do so. In my view, to allow a fee in these circumstances would be to circumvent the intention of Regulation 460 that fees for preparing a record for disclosure are not recoverable where an access request is for an individual's own personal information.

[89] I note the ministry's submission that, by preparing the record in-house, it saved money, as it would have been more expensive to hire a third party to sever the record. It is evident, however, that the ministry had the necessary tools to perform the editing in-house; in these circumstances, it would not have been appropriate to assign the work to a third party. I do not need to decide whether more complex manipulation of the record for which the ministry does not already have the computer capability could attract a fee under paragraph 3 or 4 of section 6.1. As noted by Assistant Commissioner Sherry Liang in Order MO-3136, each case must be decided on its own merits and one cannot be compared directly with another.

[90] In conclusion, I reduce the fee for the DVD to \$10 and I do not allow a fee for preparing the record for disclosure.

[91] On a final note, the fee estimate that I have considered is the ministry's fee estimate for access to the record in accordance with the severances applied by the ministry. Since this Order requires further manipulation of the record (in particular, deletion of portions of the audio), it may open to the ministry to issue a revised fee estimate to the appellants following receipt of this order, if paragraphs 3 or 4 of section 6.1 of the regulation are engaged.

E. Should the fee be waived?

[92] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

57. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

(b) whether the payment will cause a financial hardship for the person requesting the record;

(c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed by the regulations.

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.

2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment.

[93] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 6.1 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees.²⁹

[94] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.³⁰ The institution or this office may decide that only a portion of the fee should be waived.³¹

²⁹ Order PO-2726.

³⁰ Orders M-914, P-474, P-1393 and PO-1953-F.

³¹ Order MO-1243.

[95] The appellants in this case submit that the fee should be waived on the basis that the fee will cause them financial hardship, and that the dissemination of the record will benefit public health or safety.

Section 57(4)(b): financial hardship

[96] For section 57(4)(b) to apply, a requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities.³² The fact that a fee is large does not necessarily mean that payment of the fee will cause financial hardship.³³

[97] In their representations, the appellants submit that paying the fee will result in financial hardship to them. They submit that if the police are aware that costs are passed on to innocent people seeking evidence, they can use this to their advantage and act illegally; the rich will be able to pay but the poor will have to work weekends, take a second job, and go without food to get their video. The appellants submit, further, that their savings have been exhausted through lawyers, appeals and moving expenses, and that they cannot afford further expenses.

[98] In the Notice of Inquiry that I sent to the appellants, I noted that in order to establish financial hardship, some evidence of their financial situation must be provided, including information about income, expenses, assets and liabilities. The appellants have not provided such information. The appellants' initial letter requesting a fee waiver also does not contain this information. As a result, I find that the appellants have not established that payment of the fee will result in financial hardship to them.

Section 57(4)(c): public health or safety

[99] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
 - a. disclosing a public health or safety concern, or
 - b. contributing meaningfully to the development of understanding of an important public health or safety issue

³² Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

³³ Order P-1402.

- the probability that the requester will disseminate the contents of the record.³⁴

[100] The focus of section 57(4)(c) is “public health or safety”. It is not sufficient that there be only a “public interest” in the records or that the public has a “right to know”. There must be some connection between the public interest and a public health and safety issue.³⁵

[101] In the Notice of Inquiry, I asked the appellants if the dissemination of the record will benefit public health or safety, with reference to the above. The appellants submit in this regard:

If fees are going to be charged to innocent parties wishing to obtain evidence for their defence, it deters justice by placing undue financial hardship on the innocent party. All parties were aware they were being recorded but chose to remain and be filmed while they carried out an illegal act. To protect such criminals by placing fees on the innocent parties, obstructs justice...The rich will be able to pay but the poor will have to work weekends, take a second job, and go without food to get their video.

[102] In my view, the concerns raised by the appellants do not raise a public health or safety issue within the meaning of section 57(4)(c). Even if there is some public interest in dissemination of information regarding the handling of an eviction, this is not sufficient; there must be some connection between the public interest and a public health or safety issue. In this case, the appellants have not identified any public health or safety issue. I find, therefore, that section 57(4)(c) does not apply.

Fair and equitable

[103] For a fee waiver to be granted under section 57(4), it must be “fair and equitable” in the circumstances. In addition to the factors that must be considered under section 57(4), other relevant factors in deciding whether or not a fee waiver is “fair and equitable” may include various factors including:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;

³⁴ Orders P-2, P-474, PO-1953-F and PO-1962.

³⁵ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.³⁶

[104] The ministry submits that it would not be fair and equitable to waive the fee. It submits that the appellants have not produced any evidence that the fee will cause them financial hardship or that waiving it would benefit public health or safety. It submits that the fee is moderate, and that it assigned internal ministry staff to produce the record, instead of using external resources, which could be expected to cost significantly more. The ministry submits that it would be unfair to shift the cost of producing the video recording to the ministry. It submits that as video recordings are used more and more by law enforcement, these types of requests are likely to become more common. It submits that it is important to affirm the user pay principle, instead of requiring the ministry and by extension taxpayers to shoulder these kinds of costs.³⁷

[105] I have found above that the appellants have not established financial hardship or public health and safety. Moreover, I agree with the ministry that to waive the fee would shift an unreasonable burden of the cost from the appellants to the institution. I conclude, therefore, that it would not be fair and equitable to grant a fee waiver in the circumstances.

[106] My decision with respect to a fee waiver applies to the ministry's stated fee of \$290. Since I have found that the correct fee is \$10, it follows that there should also be no waiver of that fee.

ORDER:

1. I uphold the ministry's access decision, in part. I order the ministry to disclose to the appellants a copy of the DVD footage, with the following redactions:
 - a. the images of all individuals other than the appellants, police officers and the property owners are to be obscured using blurring technology;

³⁶ Orders M-166, M-408 and PO-1953-F.

³⁷ The ministry also submits that if the appellants had wanted, they could have recorded the eviction using their own video camera. In fact, the appellants did so, but it appears that the camera was turned off a few minutes into the eviction by one of the affected parties. Therefore, I have not given any effect to this submission.

- b. the audio of all individuals other than the appellants and the police officers is to be redacted.

For further clarity, the images of the property owners are not to be obscured, but the audio of them is to be redacted.

- 2. The above-noted disclosure is to take place by **January 9, 2017** but no earlier than **January 3, 2017** and subject to payment of the appropriate fee.
- 3. I do not uphold the production fee of \$240 and I reduce the fee for the DVD to \$10.
- 4. I uphold the ministry's denial of a fee waiver.
- 5. In order to ensure compliance with provisions 1 and 2 of this order, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the appellants.

Original Signed by: _____
Gillian Shaw
Adjudicator

_____ November 30, 2016