Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4119

Appeal MA19-00668

Waterloo Regional Police Services Board

October 19, 2021

Summary: The Waterloo Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for video surveillance related to the arrest of the requester. The police located one surveillance video in response to the request, which a transit company had voluntarily provided the police, without the police having to obtain a warrant, and denied access to the video, relying on certain exemptions. On appeal to the IPC, the police claimed section 52(3), as well as the discretionary personal privacy exemption at section 38(b), and the discretionary exemption at section 38(a) (discretion to refuse an individual's own personal information), read with the discretionary law enforcement exemption at section 8(1)(h) (record confiscated by a peace officer) of the *Act*.

In this order, the adjudicator finds that the record is not excluded under section 52(3) of the *Act* or exempt under section 38(a) read with section 8(1)(h), but is exempt from disclosure, in part, under section 38(b). The adjudicator orders the police to sever and withhold the *personal information* belonging to individuals other than the appellant, and to disclose the portion of the record showing the appellant's arrest.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56, as amended, sections 1(a)(ii), 2(1) (definition of "personal information"), 4(2), 8(1)(h), 38(a), 38(b), 52(3)1, and 52(3)3.

Orders Considered: Orders PO-2556, M-927, MO-1433-F, MO-1551, MO-2504, and MO-3466.

OVERVIEW:

[1] The Waterloo Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*) for video surveillance related to an arrest regarding a specific police occurrence number.

[2] The police located one surveillance video and denied access to the video in its entirety, relying on the discretionary exemption at section 8(1)(h) (record confiscated by a peace officer) and the mandatory exemption at section 14 (personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the police's access decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore resolution.

[4] During the mediation process, the mediator contacted the appellant and the police. During discussions with the police, the police advised that since the video contained the personal information of the appellant, the discretionary exemptions at sections 38(a) (discretion to refuse requester's own information) and 38(b) (personal privacy) of the *Act* should apply when denying access to the records. As a result, the police added section 38(a) and 38(b) to the issues on appeal.

[5] The appellant asked that the appeal proceed to the next stage of the appeal process. Accordingly, the file moved to the adjudication stage, where an adjudicator may conduct a written inquiry.

[6] The adjudicator originally assigned this appeal began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the police. The police provided written representations in response, and in doing so, the police also raised the application of the exclusion at section 52(3) (labour relations and employment-related matters) of the *Act*. The adjudicator then provided the appellant with an opportunity to submit written representations in response to the Notice of Inquiry and the representations of the police. The appellant sent information to the IPC which did not address the issues of the appeal directly. The police then provided further representations, in response to the adjudicator's invitation to further consider the issue of severance. The appeal was later transferred to me to continue with the adjudication of the appeal.

[7] For the reasons that follow, I find that the record is not excluded from the scope of the *Act* under section 52(3) or exempt under section 38(a) read with section 8(1)(h). However, I find that it is exempt, in part, under the personal privacy exemption at section 38(b), and I uphold the police's exercise of discretion under section 38(b). I find that the record should be severed such that the police only disclose the portion of it showing the appellant's arrest without any *personal information* of any individual other

than the appellant, and dismiss the appeal.

RECORD:

[8] The record at issue is a surveillance video on a CD.

ISSUES:

A. Does section 52(3) exclude the record from the *Act*?

B. Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

C. Does the discretionary law enforcement exemption at section 38(a), read with section 8(1)(h), apply to the information at issue?

D. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

E. Can the record be severed in such a way so as to disclose the appellant's personal information without disclosing information that is exempt?

F. Did the police exercise their discretion under section 38(b)? If so, should the IPC uphold that exercise of discretion?

DISCUSSION:

Issue A: Does section 52(3) exclude the record from the *Act*?

[9] As I will explain below, I find that section 52(3) does not exclude the record from the *Act*, in the circumstances of this appeal.

Background information provided by the police

[10] To better understand the reasons for my decision that are set out in this order, it is helpful to understand the factual background that the police provided to the IPC.

[11] The record at issue is video surveillance footage retrieved from the camera of a transit company in the Region of Waterloo. The police state that this footage captures the appellant assaulting and injuring patrons of a store, and being arrested by police. The transit company voluntarily provided the police with this footage, which the police wanted as evidence that a criminal act had occurred. The transit authority provided it without the police needing to obtain a warrant to access it. The police say that the transit company would normally have deleted the video footage at issue within 72 hours

(unless access is required for longer periods, by law), but was voluntarily given to the police. The police say that the record was "confiscated in accordance with the *Criminal Code* [of *Canada*]."[1]

[12] The police say that during the appellant's arrest, the appellant "continued his assaultive behaviour," and was eventually "tasered" by police. The police say that the appellant was later charged with Assault, Assault with Intent to Resist Arrest, and Escape Lawful Custody, all offences under the *Criminal Code of Canada*. The police also state that the appellant was convicted of two counts of Assault and one count of Assault with Intent to Resist Arrest in relation to the incident.

[13] After his conviction, the appellant complained to the police's Professional Standards Branch about the conduct of the police officers involved in his arrest. The police's Professional Standards Branch investigated the allegations, and issued a decision finding that the officers' actions were lawful and appropriate to the circumstances, and the complaint was deemed unfounded. The appellant then requested a review of that decision by the Office of the Independent Police Review Director (OIPRD). On the same day, he made his access request under *MFIPPA* to the police, which led to the access decision that is the subject matter of this appeal.

[14] The police say that a few weeks later, the OIPRD confirmed the police's decision, and dismissed the appellant's complaint. Within a few weeks, the appellant's appeal at the IPC had moved to the adjudication stage, and the adjudicator initially assigned to the appeal sent the police a Notice of Inquiry.

[15] The police say that ten days after the Notice of Inquiry was issued, they received an unissued application for judicial review of the OIPRD's decision; the appellant was seeking an order from the court, to have his matter heard again by the OIPRD. In light of this information, the police then took the position that the record is excluded from the scope of the *Act*, under section 52(3).

The police's representations regarding section 52(3)

[16] The police state that the OIPRD has the authority to recommend charges under the *Police Services Act*[2](the *PSA)*, and point to IPC Order MO-1433-F as an example of the phrase "labour relations or employment related matters" in section 52(3)3 having been applied in the context of disciplinary hearings under the *PSA*.

[17] The police submit that the record at issue captured the arrest of the appellant, which is the subject of his complaint regarding the officers' conduct. The police argue

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[1] R.S.C., 1985, c. C-46.
[2] 2018, SO 2018, c 3, Sch 1.

that in the context of the appellant's application for judicial review, it is excluded from the *Act* pursuant to section 52(3) because of the "potential for disciplinary action against the officers." They argue that as the employer of the officers, the police have an interest in the subject matter of the record, as it relates to a complaint filed about its employees. The police also say that they have an interest in the outcome of any future OIPRD investigation into the matter, and any potential sanctions against its employees.

[18] As mentioned, the police also state that "[o]n being notified of" the appellant's application for judicial review, the police "concluded that the record falls within the provisions set out in [s]ection 52(3) and as such is excluded from the scope of MFIPPA."

[19] Based on my review of the police's representations, I understand the police to be relying on section(s) 52(3)1 and/or 52(3)3.

Section 52(3)

[20] Sections 52(3)1 and 52(3)3 say:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[21] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[3]

[22] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[23] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-

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[3] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

related matters are separate and distinct from matters related to employees' actions.[4]

[24] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.[5]

[25] As I discuss in more detail below, previous IPC orders have drawn a distinction between records created in the normal course of an institution's operations, and records that were collected, prepared, maintained and used by others who subsequently investigate complaints or other matters involving the original investigating officer's activities.[6] The IPC has held that records created for one purpose, such as an accident investigation, and in advance of a complaint, do not fall within the ambit of section 52(3) simply because the records also reside in a complaint file.[7]

Analysis/findings

[26] Having considered the police's representations, I find that the record is not excluded from the scope of the *Act* under section 52(3), for the reasons set out below.

[27] While the police point to Order MO-1433-F as an example of the phrase "labour relations or employment related matters" in section 52(3)3 having been applied in the context of disciplinary hearings under the *PSA*, it is important to note the nature of the request here, and the context in which the police obtained and stored the footage. The access request was not for records relating to any investigation or defense of the officers involved in the appellant's arrest, though the record at issue would, or could, have later been used in such a proceeding. Here, the request was for video surveillance related to an arrest regarding a specific police occurrence number. It was not a request for records that the police maintained or used in addressing the allegations made against the officers. I find support for making this distinction in the fact that the police only claimed the exclusion over the record when they learned that the appellant applied for judicial review of the OIPRD's decision, not when the appellant initially made the request.

[28] In Order M-927, the IPC identified an important distinction between two categories of records that can be found with police: records[8] relating to day-to-day police investigations of incidents within their basic mandate (to protect peace and

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[4] *Ministry of Correctional Services*, cited above.
[5] *Ontario* (*Ministry of Correctional Services*) *v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[6] See, for example, Orders M-927, MO-2131, and MO-2556.
[7] Order MO-2131.
[8] Or copies of records.

investigate possible criminal activity), and copies of those same records that may be found in a file relating to an investigation of a police officer's conduct. It was recognized that, while the first category may be prepared by police employees, such records are not "in essence" about employment or labour relations matters (which is what section 52(3) excludes from the scope of the *Act*). The request in Order M-927 was found to be in that first category, relating to day-to-day police investigations, not an investigation into police conduct. The IPC held that applying the exclusion at section 52(3) in those circumstances would lead to a "manifestly absurd result," which was not intended by the Legislature: the permanent removal of certain information maintained by the police regarding their basic mandate from the scope of the *Act* simply because they "happen to have been reviewed in connection with an investigation of an employee's conduct."

[29] In Order PO-2556, the adjudicator applied the approach in Order M-927 and observed that any review of a police employee's conduct "does not alter the character of the original records, which were prepared for the purposes of the investigations conducted by the officer (see also Order MO-2504)." As a result, he found that the original records (an incident sheet and general occurrence report) were "not excluded from the operation of the *Act* simply because of their possible inclusion or review in subsequent complaint investigations and/or other proceedings."

[30] I agree with the approach taken in these orders, and adopt it here as I find it relevant to the circumstances of this appeal. As mentioned, the request was for the video surveillance footage of the arrest of the appellant, not for records related to the appellant's subsequent complaint into the police's conduct towards him during that arrest. Furthermore, based on the police's representations about the law enforcement exemption at section 8(1)(h) and the transit company's usual 72-hour retention period for the record, I can infer that the police received this record well before receiving the complaint about the officer's conduct (which was made several months after the arrest). Therefore, I find that the record relates to the police's initial interaction with the appellant (relating to a specific police occurrence number), and that its character does not change simply because it was and/or could later be *collected*, *maintained* or *used* by the police in relation to complaint investigations and/or other proceedings relating to the police's employees. Therefore, I find that the record does not relate to *labour relations or to the employment of a person by the institution*, under section 52(3)1 of the *Act*, or *labour relations or employment related matters in which the institution has an interest*, under section 52(3)3 of the *Act*. The words "labour relations or to the employment of a person by the institution" and "labour relations or employment related matters in which the institution has an interest" are found in the third part of the three-part test for section 52(3)1 and 52(3)3, respectively. As all three parts of the test must be met for the exclusion to apply, and the third part does not apply, the record does not qualify for either exclusion.

[31] Since the record in this appeal is not excluded under section 52(3), and no other exclusions have been claimed or are relevant here, the record is subject to the *Act*. Therefore, I will now turn to the exemptions that the police claimed over the record,

below.

Issue B: Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[32] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. As I will explain below, although I found the video footage to be unclear, I accept that the record contains *personal information*, as that term is defined under section 2(1) of the *Act*, belonging to the appellant, given his knowledge of the incident and the fact that the police identified this footage in relation to the appellant's request for information about himself. I also find that, due to the appellant's knowledge of the incident, other individuals depicted in the record may be identifiable to him.

What is "personal information"?

[33] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

Recorded information

[34] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.[9]

About

[35] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[10] See also sections 2(2.1) and (2.2), which state:

> (2.1) 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.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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[9] See the definition of "record" in section 2(1).
[10] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[36] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[11]

Identifiable individual

[37] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[12]

[38] The IPC has held that images of individuals contained in photographs and video footage may qualify as the *personal information* of identifiable individuals.[13] What are some examples of "personal information"?

[39] Examples of personal information that are listed in the *Act* include information about an identifiable individual's telephone number,[14] identifying number,[15] or information relating to the criminal history of the individual.[16]

[40] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[17]

Statutory exclusions from the definition of "personal information"

[41] Sections 2(2.1) and (2.2) of the *Act* exclude some information from the definition of *personal information*. Sections 2(2.1) and (2.2) are described above.

Whose personal information is in the record?

[42] It is important to know whose *personal information* is in the record. If the record contains the requester's own *personal information*, their access rights are greater than if it does not.[18] Also, if the record contains the *personal information* of other individuals,

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[11] Orders P-1409, R-980015, PO-2225 and MO-2344.
[12] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[13] Orders PO-2477, MO-1570, and PO-3172.
[14] Definition of "personal information," at section 2(1) of the *Act*, paragraph (d).
[15] Definition of "personal information," at section 2(1) of the *Act*, paragraph (c).
[16] Definition of "personal information," at section 2(1) of the *Act*, paragraph (b).
[17] Order 11.
[18] Under sections 36(1) and 38 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

one of the personal privacy exemptions might apply.[19]

Analysis/findings

[43] For the following reasons, I find that the record contains the *personal information* of the appellant and several identifiable individuals.

[44] In this appeal, the police submit that the record contains *personal information* as defined under section 2(1) relating to the appellant, "several victims of a crime perpetuated by [him], as well as various other individuals, bystanders, and witnesses." The police also provide examples of instances in the footage showing individuals that may be identifiable, and submit that even if an individual is not visible on the video, "quasi-identifiers" cannot be dismissed (and gave an example of that in the record).

[45] Based on my review of the police's representations and the record, while I find the footage to be unclear, I still find that the record contains *personal information* belonging to the appellant and other individuals who may be identifiable to him. I accept that although the appellant's image is indistinct, the footage contains his *personal information*, given his knowledge of the events and the fact that the police identified this footage as responsive to his access request. I also find this to be the case despite the fact that the appellant's name and the police occurrence number[20] do not appear on the record. Similarly, I accept that the appellant's involvement in the incident and arrest may allow him to identify one or more other individuals in the footage. The images of these individuals, depicting them as "victims, ... bystanders, [or] witnesses," as referenced by the police, is the *personal information* of these individuals.

[46] There has been no claim that the police officers' images in the footage is their *personal information*, and I find that the images of the respective police officers does not constitute their *personal information* under the *Act*. Their images are associated with them in their respective professional or official capacities, and do not reveal something of a personal nature about them.

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

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[19] See sections 14(1) and 38(b).
[20] Under section 2(1) of the *Act*, "'personal information' means recorded information about an identifiable individual, including, . . . any identifying number, symbol or other particular assigned to the individual" (paragraph c).

Issue C: Does the discretionary law enforcement exemption at section 38(a) read with section 8(1)(h), apply to the information at issue?

[48] Section 36(1) of the *Act* gives individuals a general right of access to their own *personal information* held by an institution. Section 38 provides some exemptions from this general right of access to one's own personal information. For the reasons that follow, I do not uphold the police's reliance on the discretionary law enforcement exemption at section 38(a), read with section 8(1)(h) (record confiscated by a peace officer).

[49] Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[50] The discretionary nature of section 38(a) ("may" refuse to disclose) 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.[21]

[51] If the institution refuses to give an individual access to their own *personal information* under section 38(a), the institution must show that it considered whether a record should be released to the requester because the record contains their *personal information*.

[52] In this case, the police rely on section 38(a) read with section 8(1)(h). Section 8(1)(h) says:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation[.]

[53] The purpose of section 8(1)(h) is to exempt records that have been confiscated or "seized" by search warrant.[22]

[54] The police acknowledge that the record at issue was not obtained by a warrant. As discussed, the record at issue is video surveillance footage retrieved from the camera of a transit company, and the police state that this footage captures the

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[21] Order M-352.
[22] Order PO-2095.

appellant assaulting and injuring patrons of a store, and being arrested by police. The transit authority voluntarily provided the footage to the police, without the police needing to obtain a warrant to access it.

[55] However, the police submit that the record is still exempt under section 8(1)(h) as a record that has been "confiscated" from a person by a peace officer, arguing that:

- the IPC *Guidelines for the Use of Video Surveillance*[23] say that video footage may be disclosed to law enforcement if the law enforcement agency approaches without a warrant and asks that the information be disclosed to aid an investigation;
- the term "confiscated" means "taken or seized with authority";
- the police have the authority under the *Police Services Act* to allow for the collection of the record to investigate a specific criminal offence, and for evidence in subsequent court proceedings and that due to the record owner's cooperation, a warrant was not required in this case, but the police did have the authority to apply for one to obtain the record; and
- the record was confiscated as evidence, and it is therefore of "utmost importance to protect the record from further release".

[56] In addition, the police appear to make harms-related arguments, submitting that if organizations become aware that the police may further distribute records that organizations provide to the police, these organizations may be less likely to cooperate without a warrant. The police submit that this, in turn, could have a detrimental impact on the way that offences are investigated, and a significant impact on police resources.

[57] In response to a request for further representations on the issue of severance by the adjudicator initially assigned to this appeal,[24] the police assert that section 8(1)(h) applies to the whole record, and essentially repeat submissions previously made regarding section 8(1)(h). The police also state that, since the incident involving the appellant was captured on video, "police officers attended the location of the transit company and confiscated the video as evidence of the criminal act that had occurred." The police also cite IPC Orders MO-1551 and MO-3466 in support of their position. Finally, the police argue that all that is required for section 8(1)(h) to apply is that disclosure would reveal a record confiscated "in the manner stipulated."

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[23] *"Guidelines for the Use of Video Surveillance"*, (Information and Privacy Commissioner, October 2015, at page 4) - https://www.ipc.on.ca/wp-content/uploads/Resources/2015_Guidelines_Surveillance.pdf.
[23] Order M-610.
[24] As section 4(2) of the *Act* obliges an institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

Analysis/findings

[58] Having considered the police's representations, while I accept that the record was used by the police in a *law enforcement* context, as that term is defined in the *Act*,[25] I cannot agree that the record at issue qualifies for the discretionary law enforcement exemption at section 8(1)(h).

[59] It is well-established that the purpose of section 8(1)(h) is to exempt records that have been confiscated or "seized" by search warrant.[26]

[60] Here, the police state that the record was "confiscated" in accordance with the *Criminal Code of Canada*, but acknowledge that they did not obtain the record by a search warrant. Therefore, the past orders cited by the police are not helpful to them. Order MO-1551 involved police obtaining the records by search warrant, unlike the situation before me. Similarly, in Order MO-3466 the adjudicator referred to the purpose of the exemption and the fact that she received sufficiently detailed evidence that it applied. However, in this appeal, I have clear evidence that the record was *not* obtained by way of a search warrant.

[61] I am not persuaded that it is appropriate to depart from the well-established principle that the purpose of section 8(1)(h) is to exempt records confiscated or seized by warrant on the basis of the meanings of the words "confiscate" or "seize," or the police's authority to obtain search warrants. The police may well have had the right to obtain a warrant in the circumstances, but the purpose of the exemption that they claimed is to exempt records confiscated or seized under a warrant, and they did not have such a warrant here. Nor are the police's brief harms-related arguments[27] about

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[25] The term *law enforcement* is defined in section 2(1) of the *Act* as meaning policing, investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or the conduct of such proceedings. As mentioned, the police say that the record owner voluntarily provided a copy of the video to the police, to assist in the law enforcement investigation into a possible violation of the *Criminal Code of Canada*. The police state that the record was confiscated in accordance with the *Criminal Code of Canada*.

[26] Order PO-2095.

[27] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario* (*Attorney General*) *v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)]. However, it is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter (Order PO-2040 and *Ontario* (*Attorney General*) *v. Fineberg*, cited above). The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences [*Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4].

the possible impact on police investigations and resources persuasive that section 8(1)(h) can apply when the record was not confiscated or obtained by warrant, in light of the long line of IPC cases upholding the application of the exemption to records obtained by a warrant. There are two categories of records relating to law enforcement that an institution may exempt under section 8(1): those records where disclosure could reasonably be expected to cause certain specified types of *harm*, and those records of a specified *type*. Section 8(1)(h) is not a harms-based exemption. Rather, it is an exemption where the police must establish that the record is of the *type* set out in section 8(1)(h). Since the record at issue was not confiscated by a warrant, it is not the type of record that can be exempt under section 8(1)(h).

[62] I am also not persuaded that the IPC's *Guidelines for the Use of Video Surveillance* (the *Guidelines*) are helpful to the police's argument. The *Guidelines* mention that video footage may be disclosed to law enforcement if the law enforcement agency approaches without a warrant and asks that the information be disclosed to aid an investigation.[28] The *Guidelines* do not stand for the proposition that section 8(1)(h) applies to such information.

[63] In conclusion, since the record was not confiscated or seized through a warrant, it does not qualify for the exemption at section 38(a), read with section 8(1)(h) of the *Act*.

Issue D: Does the discretionary exemption at section 38(b) apply to the information at issue?

[64] For the following reasons, I uphold the police's decision that the record is exempt under the discretionary personal privacy exemption at section 38(b).

[65] As mentioned, section 36(1) of the *Act* gives individuals a general right of access to their own *personal information* held by an institution, and section 38 provides a number of exemptions from this right.

[66] Under the section 38(b) exemption, if a record contains the *personal information* of both the requester and another individual, the institution may refuse to disclose the other individual's *personal information* to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.

[67] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's *personal information* to a requester even if doing

[28] This is a reference to section 32(g) of the *Act*.

so would result in an unjustified invasion of the other individual's personal privacy.[29]

[68] If disclosing another individual's *personal information* would not be an unjustified invasion of personal privacy, then the information is not exempt under section 38(b).

[69] Also, the requester's own *personal information*, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.[30]

Would disclosure be "an unjustified invasion of personal privacy" under section 38(b)?

[70] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy.

Section 14(1) – do any of the exceptions in sections 14(1)(a) to (e) apply?

[71] If any of the section 14(1)(a) to (e) exceptions apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

[72] Based on my review of the record and the representations before me, I find that none of the exceptions at sections 14(1)(a) to 14(1)(e), or at section 14(4), are relevant to the record at issue.

Sections 14(2), (3) and (4)

[73] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would *not* be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply.

[74] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the decision-maker[31] must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[32]

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[29] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 38(b).
[30] Order PO-2560.
[31] The institution or, on appeal, the IPC.
[32] Order MO-2954.

[75] Specifically with respect to whether section 38(b) applies, the police submit that the appellant was criminally charged with respect to some individuals in the record:

> In considering the balance between the appellant's right of access and affected parties' rights of privacy, the institution took into account the *personal nature* of the information of the affected parties. *The appellant was criminally charged with respect to some individuals in the record*.
>
> The institution has *no doubt* that the affected parties would consider the release of their personal information to be an unjustified invasion of their privacy. [Emphasis added.]

[76] Through these submissions, in the context of the background information provided by the police (discussed above) about the how and why the police obtained the record, it appears that the presumption at section 14(3)(b) (investigation into possible violation of law) and the factor at section 14(2)(f) (highly sensitive) may be relevant.

Section 14(3) - is disclosure presumed to be an unjustified invasion of personal privacy?

[77] Sections 14(3)(a) to (h) list several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 38(b).

14(3)(b): investigation into a possible violation of law

[78] This presumption requires only that there be an investigation into a *possible* violation of law.[33] So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.[34]

[79] The police state that the appellant was charged with Assault, Assault with Intent to Resist Arrest, and Escape Lawful Custody, under the *Criminal Code of Canada*. Therefore, I find that the *personal information* at issue in this appeal was compiled and is identifiable as part of an investigation into a possible violation of law, and the presumption at section 14(3)(b) applies.

Section 14(2): Do any factors in section 14(2) help in deciding if disclosure would be an unjustified invasion of personal privacy?

[80] Section 14(2) lists several factors that may be relevant to determining whether

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[33] Orders P-242 and MO-2235.

[34] The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).

disclosure of personal information would be an unjustified invasion of personal privacy.[35] Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[81] The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).[36]

[82] Each of the first four factors, found in sections 14(2)(a) to (d), if established, would tend to support disclosure of the personal information in question, while the remaining five factors found in sections 14(2) (e) to (i), if established, would tend to support non-disclosure of that information.

14(2)(a): public scrutiny

[83] This section supports disclosure when disclosure would subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[37] It promotes transparency of government actions.

[84] The issues addressed in the information that is being sought do not have to have been the subject of public debate in order for this section to apply, but the existence of public debate on the issues might support disclosure under section 14(2)(a).[38]

[85] An institution should consider the broader interests of public accountability when considering whether disclosure is "desirable" or appropriate to allow for public scrutiny of its activities.[39]

[86] I am considering the possible application of this factor because of the evidence that the appellant complained to various authorities about the police officers' conduct towards him at the time of his arrest, which is captured on the record. I accept that section 14(2)(a) is relevant and carries some weight in the circumstances.

14(2)(d): the personal information is relevant to the fair determination of requester's rights

[87] This section supports disclosure of someone else's *personal information* where the information is needed to allow them to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor to

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[35] Order P-239.
[36] Order P-99.
[37] Order P-1134.
[38] Order PO-2905.
[39] Order P-256.

apply, all four parts of the test must be met:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?

2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?

3. Is the personal information significant to the determination of the right in question?

4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?[40]

[88] As mentioned, the appellant did not provide representations that address the issues on appeal. Nevertheless, in the circumstances, I have considered whether section 14(2)(d) might be relevant because, according to the police, the appellant applied for judicial review of the OIPRD's decision. However, even if I accept that there is an ongoing proceeding (the judicial review application), I have insufficient evidence before me to suggest that the *personal information* in the record is required in order to prepare for that application or to ensure an impartial hearing (under part four of the four-part test). The appellant would have received the OIPRD's decision and filed an application for its judicial review, in respect of which new evidence is usually not permitted. Since there is insufficient evidence to show that part(s) two and/or four of the four-part test for section 14(2)(d) are relevant, I find that section 14(2)(d) does not apply.

14(2)(f): the personal information is highly sensitive

[89] This section is intended to weigh against disclosure when the evidence shows that the *personal information* is highly sensitive. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.[41] For example, *personal information* about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.[42]

[90] As mentioned, the police stated that the appellant was criminally charged in relation to his interactions with some of the individuals appearing in the record, and that he was convicted of two counts of Assault and one count of Assault with Intent to

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[40] See Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario* (*Minister of Government Services*) *v. Ontario* (*Information and Privacy Commissioner*) (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).
[41] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[42] Order MO-2980.

Resist Arrest in relation to the incident. In the circumstances, I find that the *personal information* of the other individuals in the record is highly sensitive, as there is a reasonable expectation that disclosure of the *personal information* that is captured on video would cause significant personal distress. Therefore, I find that section 14(2)(f) applies.

Weighing the factors for and against disclosure

[91] In determining whether disclosure of the affected parties' *personal information* would constitute an unjustified invasion of personal privacy, I have considered the factors and presumptions at sections 14(2) and (3) of the *Act* in the circumstances of this appeal. I have found that the public scrutiny factor has some weight in favour of disclosure (section 14(2)(a)). However, I am not persuaded that significant weight should be placed on this factor. As I explain below, I am satisfied that the record can be severed so that the appellant will receive the footage depicting himself and his interactions with the officers. I am not persuaded that section 14(2)(a) applies to the remainder of the information, which depicts other individuals. With respect to the footage of these other individuals, the presumption at section 14(3)(b) and the factor listed at section 14(2)(f) weigh against disclosure. Weighing the factors and presumptions, and the interests of the parties, I find that disclosure of the record at issue would be an unjustified invasion of personal privacy of the other individuals depicted in the footage. Therefore, I find that the responsive record is exempt from disclosure under the personal privacy exemption at section 38(b), subject to my review of the absurd result principle, reasonable severance and the exercise of the discretion of the police.

Are any of the situations listed in section 14(4) present?

[92] If any of the paragraphs in section 14(4) of the *Act* apply, disclosure of personal information is *not* an unjustified invasion of personal privacy under section 38(b), even if one of the section 14(3) presumptions exists.

[93] Based on my review of the record and the representations before me, I find that none of the exceptions at section 14(4) are relevant to the record at issue.

Absurd result – the section 38(b) exemption may not apply

[94] An institution might not be able to rely on the section 38(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the

information might be absurd and inconsistent with the purpose of the exemption.[43]

[95] For example, the "absurd result" principle has been applied when:

- the requester sought access to their own witness statement,[44]
- the requester was present when the information was provided to the institution,[45] and
- the information was or is clearly within the requester's knowledge.[46]

[96] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.[47]

[97] Since the police identified the record as responsive to the appellant's request, I accept that the video footage captures the appellant, and this would suggest that he is knowledgeable about the contents of that footage involving him personally. However, I find this to be insufficient to conclude that all of the events and individuals' images captured in the record are within the appellant's knowledge. In any event, given the sensitive nature of the footage, which contains the *personal information* of victims, bystanders and/or witnesses, it is my view that releasing it to the appellant would be inconsistent with the purpose of the personal privacy exemption. Therefore, I find that it would not be absurd to withhold the information at issue in the circumstances.

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

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

[99] The question of whether records containing exempt material can reasonably be severed is highly dependent on the particular circumstances of a case.

[100] Section 1(a)(ii) of the *Act* indicates that the purpose of the *Act* is to provide a right of access to information under the control of an institution in accordance with the principle that necessary exemptions from that right should be limited and specific.

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[43] Orders M-444 and MO-1323.
[44] Orders M-444 and M-451.
[45] Orders M-444 and P-1414.
[46] Orders MO-1196, PO-1679 and MO-1755.
[47] Orders M-757, MO-1323 and MO-1378.

[101] Section 4(2) of the *Act* requires the police to disclose as much of a record as can reasonably be severed without disclosing the information that falls under one of the exemptions. Whether a record can be severed under section 4(2) in a way that discloses information that is not exempt depends on the content of the record in question and the circumstances surrounding the request.

[102] As discussed, in my view, the quality of the footage is not clear. However, near the end of the footage, several police officers can be seen arresting an individual, which must be the appellant, given the police's identification of this record as being responsive to a request mentioning the arrest and a police occurrence number. The police also say that the video contains footage showing the appellant assaulting others. From my review of the video, there appears to be some footage of a fall or physical interaction, but it is not clear at all, in my view.

[103] In any event, I must consider whether the video can reasonably be severed in a manner that provides the appellant with his own *personal information* without disclosing the footage revealing the *personal information* of victims, bystanders, witnesses, or other individuals (other than the police officers), which is exempt under section 38(b).

[104] The police submit the following about severance, in part: "The Institution will not consider severing portions of the record that contain personal information. The Institution asserts that the record is exempt in its entirety pursuant to Section 8(1)(h)." The rest of the police's submissions about severance relate to why they believe that exemption applies.

[105] I have considered severance and whether it is reasonably possible to release non-exempt information to the appellant (his own images and those of the police), but given the quality of the video, I am satisfied that severance is not reasonably possible until the portion of the video relating to the arrest, starting at about 9:38:47 until the end, about a minute later. Given my review of the record, the request itself (which mentions the arrest), and my finding on section 8(1)(h), I find that the police have not clearly explained why they cannot disclose the portion of the video showing the appellant's arrest, and use obscuring technology to sever everything else, including the *personal information* of individuals other than the appellant. When the record is severed in this way, I find that the police would not be disclosing portions of the record that are exempt under section 38(b) because all that would remain would be images of the appellant himself and the police officers involved. As what I am ordering disclosed does not contain the *personal information* of any individual other than the appellant (since the images of the police officers do not constitute their *personal information* in the circumstances), no consideration of the personal privacy exemptions is required.

[106] In light of my conclusion about severance, I will order the police to disclose to the appellant a severed version of the video.

Issue F: Did the institution exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

[107] The section 38(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[108] In addition, the IPC 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.

[109] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[48] The IPC may not, however, substitute its own discretion for that of the institution.[49]

What considerations are relevant to the exercise of discretion?

[110] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:[50]

- 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 their own personal information,

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[48] Order MO-1573.
[49] Section 43(2).
[50] Orders P-344 and MO-1573.

- 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.

[111] In explaining their exercise of discretion, the police say that the record contains the *personal information* of the appellant and various affected parties, and that they considered the totality of the *personal information* in the record in deciding to deny access to the record. The police say that they sought to protect the privacy of individuals going about their everyday activities whose information was collected on the surveillance video.

[112] In addition, the police considered the IPC's *Guidelines for the Use of Video Surveillance*. The police point out that the IPC recognizes that surveillance video may be subject to an access request, but that all or portions of the footage may be exempt from disclosure for a number of reasons under the *Act*, including the fact that disclosure may result in an unjustified invasion of someone else's privacy. The police further submit that the *Guidelines* recognize that surveillance technology captures sensory information about activities and events in a given area over time, and that use of this introduces a substantial risk to the privacy of individuals whose *personal information* may be collected, used, or disclosed if footage is captured. In addition, the police submit that the IPC has determined that the risk to privacy is particularly acute because video surveillance often captures the *personal information* of law-abiding individuals going about their everyday activities. The police go on to provide examples of how individuals captured in the six-minute video footage may be identified. As mentioned, the police also submit that even if an individual's face is not visible, the possibility of "quasi-identifiers" cannot be discounted (and provided an example of such an individual depicted in the footage).

[113] The police submit that the part of the footage that is of particular concern is the part that shows the appellant assaulting his victims. The police submit that since the appellant was charged criminally, the identities of the victims were revealed during a court proceeding and now form part of the public record. The police further submit that the crime perpetrated by the appellant was very traumatic for the victims and to release

the video surveillance of the incident would re-victimize those individuals. Given the sensitivity of the information captured, the police submit that protecting the privacy of the victims is of utmost importance.

[114] I did not receive representations from the appellant on the issue of the police's exercise of discretion.

[115] Based on my review of the police's representations and the record, I find that the police exercised their discretion under section 38(b) of the *Act*, and that they did so in good faith and for a proper, and not improper, purpose.

[116] I find that the police considered the following factors:

- the purposes of the *Act*, including the principle that the privacy of individuals should be protected,
- the wording of the exemption at section 38(b) and the interests it seeks to protect,
- that the requester is seeking his own *personal information*,
- the relationship between the requester and any affected persons, and
- the nature of the information and the extent to which it is significant and/or sensitive to the affected parties.

[117] In the circumstances, I find that these are relevant considerations, and that the police did not take into consideration any irrelevant factors.

[118] For these reasons, I uphold the exercise of discretion of the police under section 38(b), and dismiss the appeal.

ORDER:

1. I uphold the police's access decision, in part.
2. I do not uphold the police's access decision with respect to the exclusion at section 52(3), or the exemption at section 38(a), read with the section 8(1)(h) exemption.
3. I uphold the police's access decision with respect to section 38(b), in part, and their exercise of discretion.
4. I order the police to disclose a severed version of the record, as set out in Issue E of this order.

5. I order the police to disclose this version of the record to the appellant by **December 2, 2021**, but not before **November 27, 2021**.

6. I reserve the right to require the police to provide the IPC with a copy of the record as disclosed to the appellant.

Original Signed by: October 27, 2021

Marian Sami
Adjudicator