

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4153

Appeal MA19-00687

The Regional Municipality of York

January 25, 2022

Summary: The appellant sought access to the withheld portions of two surveillance videos containing footage of him attending the region's office. The region denied the appellant access to the portions of the videos containing images of other individuals, claiming that disclosure would constitute an unjustified invasion of their personal privacy under section 38(b).

The appellant appealed the region's decision to withhold portions of the videos to the IPC. In this order, the adjudicator finds that the videos contain the personal information of the appellant and other individuals and that the withheld portions are exempt under section 38(b). As a result, the region's access decision is upheld and the appeal is dismissed.

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

Orders and Investigation Reports Considered: Orders MO-1570, MO-3135, MO-3374, MO-3816-I and PO-3248.

OVERVIEW:

[1] This order determines the issue of access to the withheld portions of two records containing video surveillance footage (videos) of the appellant at the region's premises. As background, the appellant filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the Regional Municipality of York (the region) for a copy of his Ontario Works file. In Interim Order

MO-3816-I, given the unique circumstances of that appeal, I ordered the region to issue an access decision in response to the appellant's verbal request for videos relating to his attendance at the region's office to pick up records. I also ordered the region to issue an access decision to the appellant in response to his request for the names of the security guard and receptionist on duty the day he attended the region's office to pick up records.

[2] As required by Interim Order MO-3816-I, the region subsequently issued an access decision to the appellant. In its decision, the region identified the security guard and receptionist on duty when the appellant attended the region's office. The region also granted the appellant partial access to the videos capturing footage of him when he attended the region's office to pick up records. As the region had issued an access decision, I closed the appeal file.¹

[3] This decision addresses the appellant's appeal of the region's decision to withhold portions of the videos. The region claims that disclosure of the withheld portions would constitute an unjustified invasion of personal privacy under the discretionary exemption in section 38(b). The region stated in its decision letter that the videos show:

... the interaction of the requester at the York Region Administrative Centre on [specified date]. It also captures members of the public who were attending the Centre for other purposes. As such, we redacted the passersby under section 14 of *MFIPPA*.

Releasing the image of the individuals in the main hall would result in an unjustified invasion of their personal privacy under section 14 of the *Act*, taking into consideration [sections] 14(3)(c) and (d)...

The main hall is a thoroughfare for the public who are likely on their way to or from York Region's Human Resources Department for an interview or meeting a caseworker to complete their social assistance applications for Ontario Works or other social benefit programs.

[4] A mediator was appointed to the file to explore mediation with the parties. During mediation, the appellant requested confirmation from the region that it would retain the relevant videos in accordance with its record retention by-laws. The appellant made this request as he was concerned that the records would be destroyed before he had an opportunity to view them. During mediation, the appellant indicated that he had not received the severed copy of the records the region said it sent to him and the region agreed to send him an USB flash drive (USB drive) containing the severed videos, which it did. However, the appellant indicated that the USB drive sent to him was blank.

¹ The region waived its fee in preparing the video records for disclosure to the appellant.

[5] Mediation did not settle the appeal and the file was moved to the adjudication stage where an adjudicator may conduct an inquiry. During the inquiry, I sought and received written representations from the region, which were shared in their entirety with the appellant. The region also printed and sent five screen shots (still images) of the videos to the appellant in an effort to address the appellant's concerns that the USB drive sent to him during mediation was blank.

[6] The appellant did not make submissions in response to the region's representations but confirmed with the IPC that he continues to seek access to the withheld portions of the records. Recently, the appellant confirmed that he had been able to check the contents of the USB drive sent to him during mediation, and he remains of the view that it is blank.²

[7] In this order, I find that disclosure of the withheld portions of the videos would constitute an unjustified invasion of the personal privacy of individuals other than the appellant under section 38(b). I uphold the region's access decision and dismiss the appeal.

RECORDS:

[8] The records at issue were described by the region in its representations, as follows:

- Video 1 (runtime 10:04) contains approximately 33 individuals with whom the appellant did not interact and whose images were blurred.
- Video 2 (runtime 9:53) contains approximately 37 individuals with whom the appellant did not interact and whose images were blurred.

[9] The videos are in colour and capture individuals walking through the region's main entrance in which its receptionist and security desks are located. The videos do not contain audio.

PRELIMINARY ISSUE:

The region's submission that the appellant filed his appeal in bad faith

[10] In its representations, the region requests that I dismiss this appeal, arguing that the appellant submitted it to the IPC in bad faith. In support of its position, the region states:

² The appellant said that the USB drive sent to him during mediation appeared not to contain the requested videos, based on his view that its packaging did not seem to have been opened and re-sealed. At the time, the appellant also indicated that he had difficulty accessing a computer to check if the USB drive contained the severed videos.

.. how can someone reasonably claim that the blurring was not justified if they never saw how it was applied. It could be further interpreted that the appeal was filed for a purpose other than to obtain access to these records, given that over a year had passed since the records were provided and they were never viewed. This would raise the question of whether the subject appeal should be considered frivolous or vexatious.

[11] In support of its position, the region refers to section 4(1)(b) of the *Act* along with Section 5.1 of Regulation 823. Section 4(1)(b) states:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[12] I have considered the region's submissions and find that section 4(1)(b) does not apply in the circumstances of this appeal. Section 4(1)(b) contemplates the head of an institution forming reasonable grounds to believe that an access request is frivolous or vexatious upon receipt of the access request. That is not what occurred here. The region has never issued an access decision to the appellant citing section 4(1)(b). Instead, the region has raised concerns about the appellant's conduct after the appeal was filed with the IPC.

[13] Accordingly, I find that the region cannot rely on section 4(1)(b) to advance its argument that the access request was frivolous or vexatious and that on that basis, this appeal should be dismissed.

[14] However, the region is also suggesting that the appellant's appeal is itself an abuse of process. The IPC has the authority to dismiss an appeal based on a finding that allowing it to proceed would be an abuse of process.³ I accept that appealing a decision for a reason other than to gain access to the record at issue could be seen as an abuse of the IPC's processes.

[15] The region argues that the "appeal was filed for a purpose other than to obtain access to these records, given that over a year had passed since the records were provided and they were never viewed."

[16] In my view, the region's speculation falls well short of establishing "bad faith".

³ See footnote 17 in Order PO-3738-I which states: "Orders PO-2906, PO-2490 and MO-2635. All refer to Order M-618, where former Commissioner Tom Wright concluded that the authority of the IPC, as an administrative tribunal, to prevent abuses of its own process was supported by *Sawatsky v. Norris* (1992), 10 O.R. (3d) 67, where, "even absent the express power to deal with abuses of process granted by section 23 of the *Statutory Powers Procedure Act* ... a review board under the *Mental Health Act* 'has the common law right to prevent abuse of its process, absent an express statutory abrogation of that right' (at p. 77). See also section 52(2) *FIPPA* [the provincial equivalent of section 41(1) of the *Act*]."

There is insufficient evidence to support a finding that the appellant's conduct amounts to a calculated effort to mislead the region or to misuse the IPC's appeal process. The appellant asked for an additional copy of the records and in doing so provided an explanation as to why he thought another copy was required. In addition, had the appellant not appealed the region's access decision to the IPC when he did he may have lost his right to appeal.⁴ Finally, I am not aware of any precedent from the IPC that suggests that a party who files an appeal without first viewing the severed record prepared for disclosure has acted improperly.

Summary

[17] Having regard to the above, I am not persuaded that the appellant's appeal amounts to an abuse of process.

[18] Given my conclusion on this preliminary issue, I will now consider the main issue in this appeal, which is whether the withheld portions of the videos qualify for exemption under section 38(b), as the region claimed in its access decision.

[19] However, I recommend that the region send another copy of the videos to the appellant within 30 days of its receipt of this order, and the region specifically check the USB before it is sent to ensure that it is not blank. This recommendation is made taking into consideration the current COVID-19 restrictions, which include the region's physical office being closed to visitors.⁵

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the withheld portions of the records?
- C. Did the region properly exercise its discretion under section 38(b)?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[20] The region does not claim that the portions of the records which capture images

⁴ Section 39(2) of the *Act* provides that an appeal "shall be made within thirty days after the notice was given of the decision appealed..."

⁵ Sections 23(1) and (2) of the *Act* provide that requesters may request to "examine the [original] record" under certain circumstances, but this option may not be feasible currently.

of the receptionist, three security guards and an access and privacy officer constitute "personal information" and released their images in the copy of videos disclosed to the appellant. However, it withheld the images of the remaining individuals other than the appellant, on the basis that the mandatory personal privacy exemption in section 14 applies.

[21] In order to decide which sections of the *Act* may apply to a specific case, including which personal privacy exemption might apply, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates.

[22] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.⁶

[23] 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.⁷

[24] 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.⁸

[25] The region takes the position that the records contain the personal information of the appellant and other individuals, whose images are captured in the videos alongside the appellant's image. In support of its position, the region states, in its representations:

With respect to the bystanders in the video, it is not possible to definitively distinguish York Regional employees [from] members of the public. While some of the individuals noted above may be employed by York Region (the Region), it is most likely that they were not acting in a business or professional capacity when they are seen in the video. The disclosure of the unblurred video would result in an unjustified invasion of personal privacy of the bystanders as it would reveal their racial or ethnic origins, age, and sex. Taken within the context of the services provided by the Region, it could also reveal an individual on their way to an interview or applying for Ontario Works social assistance.

⁶ See the definition of "record" in section 2(1).

⁷ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁸ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[26] The appellant's submissions did not specifically address this issue.

[27] I have reviewed the records and am satisfied that the records contain the personal information of the appellant and other identifiable individuals who are bystanders in this context. Previous IPC decisions have found that footage from video surveillance cameras contains the "personal information" of individual bystanders appearing in the videos.⁹ I agree with these decisions and, in this appeal, I find that the videos contain recorded information about identifiable individuals because the videos depict these individuals in the region's main hall on the day in question. The images of these individuals clearly show the facial features of the individuals, thus rendering them identifiable as they walk through the main hall. Also captured in the videos are the individuals' interactions with other individuals. I am satisfied that the videos contain the personal information of the bystanders, as well as the appellant.

[28] I will now determine whether disclosure of the withheld portions of the videos would constitute an unjustified invasion of the personal privacy of those other individuals under section 38(b).

B. Does the discretionary personal privacy exemption at section 38(b) apply to the withheld portions of the records?

[29] 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 right.

[30] 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.

[31] 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 so would result in an unjustified invasion of the other individual's personal privacy. This is in contrast to the personal privacy exemption relied on by the region, section 14(1), which is a mandatory exemption. The section 14(1) exemption is only available where the record does not contain the requester's own personal information. Here, the records contain the appellant's personal information, so the correct personal privacy exemption to consider is section 38(b).

[32] 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).

⁹ See Privacy and Video Surveillance in Mass Transit Systems: A Special Investigation Report - Privacy Investigation Report MC07-68; Privacy Complaint Reports MC10-2, MC13-46 and MC13-60 and Orders MO-1570, PO-3510, MO-3238, and MO-3349.

[33] 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.¹⁰

[34] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy under section 38(b). 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). In this case, the region has not claimed that any of these exceptions apply and I am satisfied that none apply.

[35] 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. No party has claimed that section 14(4) applies and I am satisfied that none of the situations in section 14(4) apply to the circumstances of this appeal.

[36] Accordingly, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.¹¹

Representations

The region claims that the presumptions at sections 14(3)(c), (d) and (h) apply in the circumstances of this appeal. These sections read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(d) relates to employment or educational history;

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[37] The region states the following in support of its position:

¹⁰ Order PO-2560.

¹¹ Order MO-2954.

The main hall of the Administrative Centre is a thoroughfare for the public who are likely on their way to or from York Region's Human Resources Department for an interview or meeting a caseworker to complete their social assistance applications for Ontario Works or other social benefit programs. Therefore, the Region redacted the images of those individuals [under section 14(3)(c) and (d)].

Upon further consideration, [section] 14(3)(h) also applies, as the disclosure of the unredacted images clearly show[s] individuals' racial or ethnic origins as well as gender and age.

Analysis and findings

The eligibility for social service or welfare benefits presumption at section 14(3)(c) does not apply

[38] This presumption covers information related to an individual's eligibility for social service or welfare benefits or a determination of their benefit level. Previous IPC decisions have found that this presumption applied to:

- Information revealing the identity of an individual involved in a workfare program,¹²
- Information revealing the individual's eligibility for social service benefits related to rental subsidies¹³ or rent-geared-to-income housing,¹⁴ and
- The individual's name combined with information that the individual has been in receipt of social assistance benefits.¹⁵

[39] I find that the withheld images in the videos do not directly reveal information about an individual's eligibility for social service or welfare benefits. I reject the region's argument that the records capture the images of individuals "likely on their way to or from ... meeting a caseworker to complete their social assistance applications for Ontario Works or other social benefit programs." In my view, the region's argument is too speculative and not sufficiently connected to the images captured in the videos. I have reviewed the records and am satisfied that a viewer could not reasonably be expected to discern the purpose of any individual present in the main hall during the time in question.

[40] Having regard to the above, I find that the presumption at section 14(3)(c) does not apply to the personal information in the withheld portions of the videos.

¹² Order MO-1254.

¹³ Order MO-1584-F.

¹⁴ Order MO-2594.

¹⁵ Order MO-2126-I.

The employment or educational history presumption at section 14(3)(d) does not apply

[41] The region submits that the presumption at section 14(3)(d) applies on the basis that some of the individuals whose images are captured in the records are “likely on their way to or from York Region’s Human Resources Department for an interview.”

[42] This presumption covers several types of information connected to employment or education history, including:

- dates on which former employees are eligible for early retirement,
- start and end dates of employment,
- number of years of service,
- the last day worked,
- the dates upon which the notice period commenced and terminated,
- the date of earliest retirement,
- entitlement to sick leave and annual leave,
- the number of sick leave and annual leave days used, and
- restrictive covenants in which individuals agree not to engage in certain work for a specified duration.¹⁶

[43] Information contained in resumes¹⁷ and work histories¹⁸ also falls within the scope of section 14(3)(d).

[44] Based on my review of the videos along with the region’s submissions, I again find that the region’s evidence is speculative and does not connect the withheld images with the presumption against disclosure in section 14(3)(d).

[45] Accordingly, I find that the presumption at section 14(3)(d) does not apply to the withheld portions of the videos.

The racial or ethnic origin, sexual orientation, religious or political beliefs presumption at section 14(3)(h) does not apply

[46] This presumption covers information that reveals an individual’s racial or ethnic origin, sexual orientation or religion or political beliefs or associations.

¹⁶ Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050; see also Orders PO-2598, MO-2174 and MO-2344.

¹⁷ Orders M-7, M-319 and M-1084.

¹⁸ Orders M-1084 and MO-1257.

[47] As noted above, in support of its position that the presumption at section 14(3)(h) applies, the region states that “the disclosure of the unredacted images clearly show[s] individuals’ racial or ethnic origins as well as gender and age.”

[48] However, previous IPC decisions have found that, for the presumption in section 14(3)(h) to apply, there has to be a degree of specificity indicating an individual’s racial or ethnic origin. For instance, in Order MO-1570, the IPC found that the presumption at section 14(3)(h) did not apply to the videotaped images of students recorded in the halls and common areas of a secondary school.¹⁹ In that decision, the adjudicator stated:

I do not accept the position taken by the [institution] with respect to the application of section 14(3)(h) to the personal information contained in the videotape. While some of the physical characteristics of some of the affected persons are evident, I find that the presumption in section 14(3)(h) requires something more. In order to satisfy the requirements of the presumption, the record must “indicate the individual’s racial or ethnic origin”. In the present situation, the videotape does not convey this type of specific information. Rather, it simply displays a photographic image of the individual without any accompanying indication as to the racial or ethnic origin of the person. While it may be possible to draw certain assumptions about the racial or ethnic origin of the people who appear on the videotape, I find that the tape itself does not “indicate” such information with the requisite degree of specificity.

[49] I agree with and adopt the reasoning in Order MO-1570 and find that the presumption at section 14(3)(h) does not apply in this appeal. I have reviewed the videos and find that the images of individuals do not reveal their racial or ethnic origins with any specificity. At best, a viewer may be able to draw certain assumptions about the racial or ethnic origins of the individual’s ancestors.

[50] Accordingly, I find that the presumption at section 14(3)(d) does not apply to the withheld portions of the videos.

[51] As I have found that the presumptions at section 14(3)(c), (d) and (h) do not apply, my next step in determining whether disclosure of the withheld information would be an unjustified invasion of personal privacy of other individuals under section 38(b) is to decide whether any of the factors under section 14(2) weighing in favour of or against disclosure apply.

The privacy interests of individual bystanders in a public setting is an unlisted factor under section 14(2) weighing in favour of privacy protection

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

¹⁹ See also Order MO-3135.

disclosure of personal information would be an unjustified invasion of personal privacy.²⁰ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[53] 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).²¹

[54] In this appeal, neither the region nor the appellant specifically raised any of the factors listed in section 14(2). In particular, the appellant did not provide submissions that raise the possible application of any factors in sections 14(2)(a) to (d) or any unlisted factor weighing in favour of disclosure, and I am satisfied that none apply. However, I am satisfied that the region's submissions raise an unlisted factor weighing in favour of privacy protection and, for the following reasons, I find that this factor applies and weigh against disclosure.

[55] In support of its position, that its decision to blur the images of individual bystanders in the videos should be upheld, the region referred to Order MO-3374. In that order, I upheld an institution's decision to sever and withhold the images of bystanders in video footage taken when the requester in that appeal stood in a line designated for individuals to pay parking fines or *Provincial Offences Act* fines. In that appeal, the institution raised the factor weighing in favour of privacy protection in section 14(2)(f) (highly sensitive), which I found applied because I was satisfied that disclosure of the video could reasonably be expected to cause the bystanders significant personal distress. In that order, I also rejected the requester's argument that no one can enter into public spaces, such as courthouses, with a reasonable expectation of privacy.

[56] Other IPC decisions have addressed the argument made by requesters that individual bystanders whose images are captured in video records should have a lesser expectation of privacy if cameras are visible and there is a notification that surveillance cameras are recording.²² To date, this type of argument has been consistently rejected by the IPC. For instance, in Order MO-1570, Adjudicator Donald Hale stated:

In my view, the affected persons have a reasonable expectation that the tape recordings in which they appear will not be used for any purpose beyond school safety and security. I accept that people may be aware of the existence of the cameras, and that they are located in areas people would consider "quasi-public". Despite this, in my view, people have a reasonable expectation that the tape recordings will only be used for the limited purpose for which they were installed. I do not accept that persons

²⁰ Order P-239.

²¹ Order P-99.

²² See for example Orders MO-1570 and Order MO-3135.

automatically waive or lose their privacy rights upon entering a public area, even if they are aware of the existence of surveillance cameras.

[57] I also note that in Order MO-3135, Adjudicator Justine Wai stated:

I agree with Adjudicator Hale's finding [in Order MO-1570] that individuals do not waive or lose their privacy rights when they enter areas under video surveillance. Moreover, this office has found that this type of surveillance of ordinary and lawful public activities may interfere with an individual's privacy, I find that the privacy expectations of the tenants and other individuals captured in the footage is a significant factor weighing against disclosure.

[58] I agree with, and adopt the reasoning in Orders MO-1570, MO-3135 and MO-3374 in this appeal, and find that the privacy expectations of the individual bystanders captured in the video records before me is a significant unlisted factor weighing against disclosure. As noted above, the withheld images of the bystanders in the videos at issue in this appeal were captured as they walked through the region's main hall in which its reception and security desks are placed. In my view, the bystanders, in walking through the region's main hall, might expect that their image, which has been captured on video surveillance, may be viewed by individuals acting in their professional or official capacity for limited security purposes. However, I do not think that the bystanders could reasonably have expected that their images would be disclosed to an individual making an access request for their own information under the *Act*.

[59] Accordingly, I find that the privacy expectations of the individual bystanders, whose images are captured in the requested videos, is a significant factor weighing in favour of privacy protection.²³

[60] In addition, and for completeness, I have considered the possible application of the absurd result principle in the circumstance of this appeal. The absurd result principle stands for the proposition that an institution may 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.

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

- the requester sought access to their own witness statement,²⁴

²³ The region also argued that in responding to the request it applied the best practices set out in the *IPC's Guidelines for the Use of Video Surveillance*. This guidance document acknowledges that in responding to requests under the Act, that images of identifiable individuals in video surveillance footage *may* need to be severed. However, given my finding I found it not necessary to address the region's argument in this order.

²⁴ Orders M-444 and M-451.

- the requester was present when the information was provided to the institution,²⁵ or
- the information was or is clearly within the requester's knowledge.²⁶

[62] Having reviewed the videos, I am satisfied that the absurd result principle does not apply in the circumstances of this appeal. Although the appellant was present when the images of the bystanders were recorded, he had no interaction with these individuals. Further, based on my review of the records, he would not even have been able to see many of the bystanders from his vantage point at the time the recordings were made.

[63] Finally, I am satisfied that the region's decision to withhold the information at issue is consistent with section 4(2),²⁷ which requires an institution to disclose as much of a record as can reasonably be severed without disclosing the information that qualifies for exemption.

Summary

[64] Above, I found that no section 14(2) factors favouring disclosure of the withheld images of other individuals apply and that their privacy expectations as bystanders constitute a significant factor weighing against disclosure. Accordingly, I find that disclosure of the withheld information would constitute an unjustified invasion of the personal privacy of individuals other than the appellant under section 38(b), subject to my finding on whether region properly exercised its discretion.

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

[65] The section 38(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the region could 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.

[66] 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;

²⁵ Orders M-444 and P-1414.

²⁶ Orders MO-1196, PO-1679 and MO-1755.

²⁷ Section 4(2) states:

If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[67] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁸ The IPC cannot, however, substitute its own discretion for that of the institution.²⁹

[68] The appellant did not make representations on this issue.

The region's representations

[69] In support of its position that it properly exercised its discretion, the region states that it:

... exercised its discretion under section 38(b) by granting partial access to the requested video footage. The Region acknowledges the right of the Appellant to his information but also follows the principles that the privacy of the bystanders should be protected. At all times the Appellant and the staff he interacts with are visible and the blurring was only applied to the bystanders. These bystanders did not interact with the Appellant and had no role in the collection of his records.

Analysis and findings

[70] Having regard to the region's representations, along with my review of the records, I am satisfied that the region considered relevant factors in exercising its discretion. Specifically, the purpose of the personal privacy exemption along with the region's historic practice with respect to similar information. In addition, I am satisfied that the region balanced the appellant's right of access to his personal information with the privacy interests of other identifiable individuals. I am also satisfied that there is no evidence before me to suggest that the region took irrelevant considerations into account or that it exercised its discretion in bad faith or for an improper purpose.

[71] For the reasons stated above, I find that the region properly exercised its discretion to withhold the images of individuals other than the appellant that are exempt under section 38(b).

ORDER:

I recommend that the region to send another copy of the severed videos to the appellant within 30 days of its receipt of this order.

²⁸ Order MO-1573.

²⁹ Section 43(2).

I uphold the region's access decision under section 38(b) and dismiss the appeal.

Original Signed by: _____
Jennifer James
Adjudicator

_____ January 25, 2022