

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4548

Appeal PA22-00159

Ministry of the Solicitor General

August 29, 2024

**Summary:** The appellant asked the ministry for records about a particular incident involving him. The ministry provided records but denied access to some information. The ministry said that it made this decision to protect another person's personal privacy, a reason set out in section 49(b) of the *Act*. The ministry also said that the information in the record was exempt under the discretionary exemption for personal information (section 49(a)) read with the law enforcement exemption at section 14(1).

The adjudicator does not uphold the ministry's decision and orders it to disclose the relevant information to the appellant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 49(b).

**Orders and Investigation Reports Considered:** Order P-1618 and MO-2954.

### OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry) received a request, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to all information, in various forms, relating to a particular incident involving the requester, including police notes, witness statements, and security video.

[2] The ministry responded granting partial access to the police records and denied

access to the security video. The ministry denied access to information and records under sections: 49(a) read with section 14(1) (law enforcement), section 49(b) and deemed certain information was not responsive to the request.

[3] The requester (now appellant) appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the appellant confirmed that he was only interested in pursuing a particular portion of the security video. The mediator worked with the appellant and the ministry to identify the portion of interest and confirmed this was the only record at issue in the appeal.

[5] The ministry confirmed it was relying on sections 49(a), read with 14(1)(i), and section 49(b) of the *Act* to deny access to the video portion. The ministry also confirmed it was no longer claiming non-responsive information for portions of the particular video file.

[6] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry under the *Act*. As the adjudicator in this appeal, I began this inquiry by seeking the representations of the ministry, the appellant and two affected parties.

[7] In this order, I find that section 49(a), read with section 14(1) and section 49(b) do not apply to the portion of the video that the appellant seeks. I order the ministry to provide this information to the appellant.

## **RECORDS:**

[8] A portion of a security video beginning at the 6:00 minute mark and ending at the 7:28 minute mark.

## **ISSUES:**

- A. Does the video contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue?
- C. Does the discretionary exemption at section 49(a), allowing an institution to refuse access to a requester's own personal information, read with the section 14(1)(i) and 14(1)(l) exemption, apply to the information at issue?

## DISCUSSION:

### **Issue A: Does the video contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?**

[9] 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 images in video portion to be blurry, I accept that the video contains *personal information*, as that term is defined under section 2(1) of the *Act*.

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

[11] “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.<sup>1</sup>

[12] 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.<sup>2</sup>

[13] The IPC has held that images of individuals contained in photographs and video footage may qualify as the personal information of identifiable individuals.<sup>3</sup>

[14] 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.”<sup>4</sup>

[15] 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.<sup>5</sup> Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.<sup>6</sup>

[16] The ministry submits that the relevant part of the record consists of recorded images of identifiable individuals. It acknowledges that the security video may not be clear, but it submits that it is clear enough to potentially identify individuals. The ministry refers to Order P-230, where the adjudicator held:

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<sup>1</sup> See the definition of “record” in section 2(1).

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

<sup>3</sup> Orders PO-2477, MO-1570, and PO-3172.

<sup>4</sup> Order 11.

<sup>5</sup> 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.

<sup>6</sup> See sections 14(1) and 38(b).

I believe that provisions of the *Act* relating to protection of personal privacy should not be read in a restrictive manner. If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

[17] The appellant provided his representations by way of a number of emails. In one email, the appellant confirmed that he was able to view the record after a meeting with the OPP. He submits that the video does not contain personal information and no person, thing, or object can be identified in the video to violate their privacy.

[18] As noted, two affected parties were notified about this appeal. One affected party provided representations stating that they did not consent to disclosure of their personal information.<sup>7</sup>

### ***Analysis and finding***

[19] I find that the video contains the personal information of the appellant and another identifiable individual.

[20] Based on my review of the record and the ministry's submissions, I find that the record contains personal information belonging to the appellant and another individual who may be identifiable to him. I accept that although the appellant and affected party's images are indistinct, the footage contains their personal information, given the appellant's knowledge of the events and the fact that the ministry identified this footage as responsive to his access request. Similarly, I accept that the appellant's involvement in and knowledge of the incident may allow him to identify another individual in the footage. The image of the affected party is the personal information of that individual.

[21] Although there are other individuals and vehicles in the relevant portion of the video, after my review of the record, I find that this does not constitute personal information given the blurriness of the video.

[22] Since the record contains the personal information of the appellant, the appropriate exemption to consider is section 49(b) (personal privacy).

### **Issue B: Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue?**

[23] For the following reasons, I do not uphold the ministry's decision that the record is exempt under the discretionary personal privacy exemption at section 49(b).

[24] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides some exemptions from

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<sup>7</sup> The other affected party was the store owner who provided the OPP with the security video who was contacted in this appeal relating to the ministry's section 14(1) claim.

this right.

[25] Under the section 49(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.

[26] The section 49(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.

[27] If disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 49(b).

[28] Sections 21(1) to (4) provide guidance in deciding whether the personal information is exempt under section 49(b). If any of the exceptions in section 21(1)(a) to (e) apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 49(b).

[29] Sections 21(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). Section 21(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 21(2) or (3) apply. In this appeal, the parties did not argue that section 21(4) applies and from my review of the record, I find that it does not.

[30] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), the decision-maker<sup>8</sup> must consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.<sup>9</sup>

[31] Sections 21(3)(a) to (h) list several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 49(b).

[32] Section 21(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.<sup>10</sup> Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[33] The list of factors under section 21(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are

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<sup>8</sup> The institution or, on appeal, the IPC.

<sup>9</sup> Order MO-2954.

<sup>10</sup> Order P-239.

not listed under section 21(2).<sup>11</sup>

### ***Representations***

[34] The ministry submits that the presumption at section 21(3)(b) (investigation into a possible violation of law) applies in this appeal as the video was collected from a business as part of an investigation conducted by the OPP.

[35] The ministry relies on Orders PO-3273 and PO-3301, which held that the presumption applies to records from an OPP law enforcement investigation. The ministry states that based on the contents of the record and the circumstances that led to the OPP collecting it, the personal information was clearly compiled by the OPP and is identifiable as part of its investigation of potential violations of the law.

[36] The ministry also claims that the factor at section 21(2)(f) (highly sensitive) applies in this appeal. It refers to Order P-1618 where the adjudicator found that the personal information of "*complainants, witnesses or suspects,*" as part of their contact with police is highly sensitive for the purpose of section 21(2)(f). The ministry suggests that this reasoning should be applied to the video, which, it points out, identifies affected third party individuals identified by implication as suspects or witnesses.

[37] The ministry refers to Order PO-3301 where it was held that due to the "OPP's police investigation of highly sensitive issues relating to the appellant" the disclosure of personal information could be expected to cause affected parties significant distress. The ministry submits that in this appeal, because the OPP was also investigating highly sensitive issues involving affected third-party individuals the factor should also apply.

[38] Finally, the ministry refers to Order MO-3649 where it was found that an affected party had a "reasonable expectation that their 9-1-1 call would 'only be shared with the appropriate services in order to provide assistance and not become a public record.'" The ministry notes that in that order the adjudicator concluded that it is reasonable to expect that significant distress would result if the personal information of affected third party individuals in that appeal was disclosed. The ministry submits that in this appeal the affected third parties have a reasonable expectation that their personal information contained in a security video would only be shared for a related law enforcement purpose, and not to be disclosed otherwise.

[39] The appellant does not specifically address which presumptions and factors apply to the personal information that support disclosure of the withheld information. Much of the appellant's representations focus on the inadequacy of the OPP investigation into the assault he reported that did not result in any charges. The appellant suggests that the entire reason he is not being shown the video is because it would prove that the police officer investigating the matter, failed to do his duty and intentionally prevented this matter from being properly addressed. I will therefore discuss whether the factor at

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<sup>11</sup> Order P-99.

section 21(2)(a) (public scrutiny) and an unlisted factor apply to the information.

[40] The appellant also submits that the few seconds of video where he was attacked is critical in identifying the person that assaulted him, however, he also states that the affected party's name is not a secret and that he was able to obtain the name in his own investigative work. I will therefore consider whether the factor at section 21(2)(d) (fair determination of rights) applies to the information.

[41] The appellant suggests that with modern technology the ministry is able to cover up the person or object whose personal information would be violated if the video was disclosed. The appellant queries how it is possible that a video of a crime exists, yet he is not allowed to see the video that captures the crime.

[42] As noted, an affected party was contacted during the inquiry and invited to provide representations. Although the affected party did not provide formal representations, he indicated that he does not consent to disclosure of his personal information.

### ***Analysis and findings***

[43] As stated above, at issue in this appeal is whether disclosure of the information of an affected individual would be an unjustified invasion of their personal privacy under section 49(b). For the following reasons, I find that the withheld personal information is not exempt under section 49(b).

[44] If the section 21(1)(a) to (e) exceptions exist, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 49(b). In this case, I find that none of the exceptions apply.

[45] Section 21(3)(b) (investigation into a possible violation of law)

[46] The ministry claims that section 21(3)(b) applies to all of the withheld personal information. If this presumption applies to the information, then disclosure is presumed to be an unjustified invasion of personal privacy. This section states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[47] This presumption requires only that there be an investigation into a *possible* violation of law,<sup>12</sup> so, even if criminal proceedings were never started against the

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<sup>12</sup> Orders P-242 and MO-2235.

individual, section 21(3)(b) may still apply.<sup>13</sup>

[48] It is clear that the information at issue was compiled by the OPP in the course of its investigation of the matters involving the identifiable individuals. I am satisfied that the personal information at issue for which the section 49(b) exemption is claimed was compiled and is identifiable as part of the police investigation into a possible violation of law and falls within the presumption in section 21(3)(b). While I find the presumption applies, I give it little weight. As noted by the ministry, the images on the video are not clear and, in my view, are only able to be ascertained by the appellant and the affected party because they were parties to the events that occurred on the video.

*Section 21(2) Factors*

[49] As noted, the parties' representations raise the possible application of paragraphs 21(2)(a), (d) and (f) as well as an unlisted factor. The factors at section 21(2)(a), (d) and the unlisted factor, if they apply, would weigh in favour of disclosure, while the factor at section 21(2)(f) would weigh in favour of non-disclosure. These sections state:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario to public scrutiny;

...

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

...

(f) the personal information is highly sensitive;

*Factors that weigh in favour of disclosure*

[50] Section 21(2)(a) supports disclosure of the personal information when it would subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.<sup>14</sup> It promotes transparency of government actions. In his representations, the appellant questions the adequacy of the OPP investigation into the assault he reported and suggests that the video was not disclosed because it would prove that the police officer investigating the matter failed to do his duty and intentionally

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<sup>13</sup> 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).

<sup>14</sup> Order P-1134.



prevented this matter from being properly addressed.

[51] I have reviewed the video footage in dispute and find that disclosure of the withheld information would not address the broader interest of public accountability. As confirmed by the ministry, the video, which was collected by the OPP from a business for the purpose of investigating an altercation, is not very clear and, in my view, does little to shed any light on the actions of the OPP. I give this factor no weight.

[52] Section 21(2)(d) weighs in favour of allowing requesters to obtain someone else's personal information where the information is needed to allow them to participate in a court or tribunal process. As noted, the appellant submits that the few seconds of video where he was attacked is critical in identifying the person that assaulted him. The appellant submits that he was not satisfied with the OPP investigation and wants justice. In his representations, the appellant does not refer to any court or tribunal proceedings and I give this factor no weight.

[53] Other considerations, besides the ones listed in sections 21(2)(a) to (i), must also be considered under section 21(2) if they are relevant. In my view, it is also relevant to consider that the appellant requires the withheld information to show that an altercation occurred. The ministry submits that the video documents a suspected altercation that allegedly took place in a shopping mall parking lot between two individuals. In my view, this unlisted factor applies and weighs in favour of disclosure of the withheld information. I give this factor significant weight.

*Factor that supports non-disclosure*

[54] Section 21(2)(f) weighs 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.<sup>15</sup>

[55] After reviewing the ministry's representations and considering that the affected party who was contacted only indicated that they did not consent to disclosure of his personal information without following up with further comment, I am not satisfied that the personal information contained in the withheld records is highly sensitive (section 21(2)(f)). In Orders P-1618, PO-3301 and MO-3649, referenced by the ministry, the information was found to be highly sensitive because it related to "complainants, witnesses or suspects" as part of their contact with the police. In this appeal, the personal information at issue was captured in a business' surveillance camera in a parking lot and was not information provided by a witness or suspect to the police. Further, since the affected party only indicated that their personal information should not be released and did not address this factor in their representations, I find that there is no reasonable expectation that disclosure of their personal information would result in significant

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<sup>15</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

personal distress. As a result, I do not give this factor any weight.

[56] As noted, when assessing the discretionary exemption at section 49(b), I must consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.<sup>16</sup> I have found that an unlisted factor supports disclosure of the withheld information and I have given that factor significant weight. I also found that the presumption at section 21(3)(b) applies, which weighs against disclosure. Balancing this competing factor and presumption and taking into account the parties' interests, I am satisfied that the disclosure of the withheld personal information would not constitute an unjustified invasion of the personal privacy of an identifiable individual and find that the relevant excerpt in the video does not qualify for exemption under section 49(b). I will next consider the ministry's claim that section 49(a), read with section 14(1), applies.

**Issue D: Does the discretionary exemption at section 49(a), allowing an institution to refuse access to a requester's own personal information, read with the section 14(1)(i) and 14(1)(l) law enforcement exemptions, apply to the information at issue?**

[57] As stated above, section 49 provides some exemptions from this general right of access to one's own personal information. Section 49(a) of the *Act* reads:

A head may refuse to disclose to the individual to whom the information relates personal information,  
where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22  
would apply to the disclosure of that personal information.

[58] The discretionary nature of section 49(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.<sup>17</sup>

[59] In this case, the ministry relies on section 49(a) read with section 14(1)(i) and (l).

[60] Sections 14(1)(i) and 14(1)(l) state:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,  
(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

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<sup>16</sup> Order MO-2954.

<sup>17</sup> Order M-352.

...

(l) facilitate the commission of an unlawful act or hamper the control of crime.

### ***Representations***

[61] The ministry submits that in applying section 14(1) it relies on the principle adopted in *Ontario (Attorney General) v. Fineberg*,<sup>18</sup> a case in which it was determined that the law enforcement exemption must “be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.” The ministry suggests that the difficulty of predicting future events is augmented by the following considerations:

- The security video was collected from a business with the implied understanding that it would be used solely for a law enforcement investigation. The ministry indicates its concern that disclosure of the withheld video may result in individuals and businesses being less forthright in surrendering evidence such as security videos to the police for investigation.
- Once a record is disclosed under the *Act* it may be disseminated widely and the ministry is concerned that such disclosure would harm the effectiveness of future law enforcement operations because it contradicts public expectations that law enforcement records are protected.

[62] The ministry submits that section 14(1)(i) applies because the record is a security video that was collected from a business for the purpose of protecting the security of a parking lot. It notes its concern that the disclosure of the record could endanger the security of the building and adjacent premises because it would reveal the existence of the security video, thereby alerting criminals of its existence. The ministry suggests that this might be used by criminal elements for the purpose of determining where crimes in the parking lot could be committed (such as car theft) so as to be less visible to the security camera.

[63] The ministry claims that section 14(1)(l) applies for the same reason as 14(1)(i). Additionally, it submits that it is concerned that disclosure of the record would discourage the public from cooperating with the police, if it was generally believed that the confidentiality of the information they share would not be safeguarded. The ministry submits that disclosure in this instance could facilitate the commission of crime or hamper its control and is therefore exempted under this provision.

[64] The appellant did not address the law enforcement exemption in his representations.

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<sup>18</sup> (1994), 19 O.R. (3d) 197 (Div. Ct.).

[65] The owner of the business from which the security video was collected was notified of this appeal and invited to provide representations. No representations were received.

***Analysis and finding***

[66] After reviewing the video footage at issue and the ministry's representations, I do not accept that section 14(1)(i) or 14(1)(l) apply to the withheld information. Accordingly, I find the withheld information not exempt under section 49(a).

[67] For section 14(1)(i) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required.

[68] Although this exemption is found in a section of the *Act* that deals primarily with law enforcement matters, it is not restricted to law enforcement situations. It can cover any building, vehicle, system or procedure that requires protection, even if those things are not connected to law enforcement.<sup>19</sup>

[69] For section 14(1)(l) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[70] The video, and particularly the portion that the appellant seeks, is not very clear (as admitted by the ministry) and does not divulge more than a non-descript part of a parking lot and the front of a store. It does not show the vicinity of any other nearby cameras nor is there any indication that this is the only camera. I am unconvinced that disclosure of this information would endanger the security of the building, facilitate the commission of an unlawful act or hamper the control of crime as submitted by the ministry.

[71] Further, although invited to do so, the owner of the business from which the security video was collected did not participate in this appeal. Without any such argument from the business, I am unable to conclude that it is concerned about disclosure of the video or that it would lead to the business not cooperating with the police in the future.

[72] As a result, I do not uphold the ministry's reliance on the exemptions at section 14(1)(i) and 14(1)(l). The ministry will be ordered to disclose this information to the appellant.

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<sup>19</sup> Orders P-900 and PO-2461.

**ORDER:**

1. I do not uphold the ministry's claim that section 49(b) applies to the relevant information in the record.
2. I do not uphold the ministry's claim that section 49(a) read with section 14(1) applies to the relevant information in the record.
3. I order the ministry to provide the appellant with a copy of the surveillance video from the 6:00 minute mark up to the 07:28 minute mark by **October 4, 2024** but not before **September 30, 2024**.
4. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the appellant pursuant to order provision 3.

Original Signed By: \_\_\_\_\_  
Alec Fadel  
Adjudicator

\_\_\_\_\_ August 29, 2024