Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4566

Appeal MA22-00646

Toronto Police Services Board

September 18, 2024

Summary: An individual who was involved in an incident with the Toronto Police asked for the video footage recorded by the body-worn cameras of the three officers who attended the incident. The police did not provide the video footage claiming it relates to labour relations or employment matters (section 52(3)) which are excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The police also claimed that if the video footage was not found to be excluded from the *Act*, it should not be disclosed, even though it contains information about the individual requesting the information, because disclosure would deprive another individual of the right to a fair trial or an impartial hearing under sections 38(a) and 8(1)(f) of the *Act*.

The adjudicator finds that the video footage is an operational record not related to labour relations or employment matters and is therefore subject to the *Act.* She also finds that the police have not shown that disclosure of the video footage would deprive another individual of the right to a fair trial or an impartial hearing. She orders the police to disclose the video footage to the appellant, with the personal information of other identifiable individuals withheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M. 56, sections 2(1) (definition of personal information), 8(1)(f), 16, 38(a), 52(3); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, as amended, sections 65(6).

Orders and Investigation Reports Considered: Orders 48, M-835, M-927, MO-4029, MO-4119, P-1223, P-1618, PO-2178, PO-2428, PO-2490, PO-2494, PO-4428.

Cases Considered: *Ontario* (*Ministry of Community and Social Services*) *v. Doe*, 2014 CanLII 239 (ONSC), appeal dismissed, *Ontario* (*Ministry of Community and Social Services*) *v. John Doe* 2015 CanLII 107 (ONCA); *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.); *Ontario* (*Ministry of Correctional Services*) *v. Goodis,* 2008 CanLII 2603 (ON SCDC); *Ministry of Attorney General and Toronto Star and Information and Privacy Commissioner,* 2010 ONSC 991; *Ontario* (*Attorney General*) *v. Ontario* (*Information and Privacy Commissioner*), 2009 CanLII 9740 (ON SCDC)

OVERVIEW:

[1] On his way to class, an individual was stopped, questioned, and then detained by police. This appeal addresses that individual's access to video footage of the incident recorded by the body-worn cameras of three officers of the Toronto Police.

[2] The individual made a request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records related to the incident, including video footage from the body-worn cameras of the three police officers involved in the incident, who the requester identified by name.

[3] The police granted partial access to the records.[1] They also advised that the body-worn camera video footage would be forwarded to him "as soon as practicable."

[4] The requester (now the appellant) appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to attempt to facilitate a resolution between the parties.

[5] During mediation, the police issued a revised decision stating that the video footage relates to labour relations and employment matters and is excluded from the scope of the *Act* under section 52(3). The police also advised that if it is determined that section 52(3) does not apply, the video footage is exempt even if it contains the appellant's own information because disclosure would deprive another individual of the right to a fair trial (section 38(a), read with section 8(1)(f)).

[6] The appellant confirmed that the only information he continues to seek access to is the body-worn camera video footage.

[7] As a mediated resolution was not reached, the appeal was transferred to the adjudication stage of the appeal process. As the adjudicator assigned to the appeal I decided to conduct an inquiry. I sought and received representations from both parties.

[1] The police withheld portions of the records based on the exemption that permits them to withhold an individual's own personal information because disclosure would deprive another individual of the right to a fair trial (section 38(a), read with section 8(1)(f)) and on the basis that disclosure would result in an unjustified invasion of another individual's personal privacy (section 38(b)).

[8] In this order, I find that the video footage from the body-worn cameras is not related to labour relations or employment matters and therefore is not excluded from the *Act* under section 52(3). I also find that the police have not established that disclosure of the video footage would deprive another individual of the right to a fair trial and therefore, it is not exempt from disclosure under section 38(a), read with section 8(1)(f) of the *Act*. I order the police to disclose the video footage to the appellant with the personal information of other identifiable individuals withheld.

RECORDS:

The records remaining at issue consist of the video footage from the body-worn cameras of three police officers (video footage).

ISSUES:

A. Does the exclusion at section 52(3) for records relating to labour relations or employment matters apply to the video footage?

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

C. Is the video footage exempt under section 38(a), read with section 8(1)(f) which considers whether disclosure would deprive an individual of the right to a fair trial or impartial adjudication?

D. Is there a compelling public interest in disclosure of the video footage that would allow for its disclosure, despite the application of the exclusion at section 52(3) or the exemption at section 38(a), read with section 8(1)(f)?

DISCUSSION:

A. Does the exclusion at section 52(3) for records relating to labour relations or employment matters apply to the video footage?

[9] Section 52(3) excludes certain records that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*.[2] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[3]

[10] The police claim that the video footage of the body-worn cameras of the officers

[2] Order PO-2639.
[3] *Ontario* (*Ministry of Community and Social Services*) *v. Doe*, 2014 ONSC 239 (*John Doe*). Leave to appeal dismissed, *Ontario* (*Ministry of Community and Social Services*) *v. John Doe* 2015 ONCA 107.

who attended the incident is not subject to the *Act* because it is excluded by section 52(3). They claim that all three parts of section 52(3) apply. Section 52(3) states:

> 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.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[11] Section 52(4) sets out four exceptions to section 52(3). None of those exceptions are relevant here.

[12] The type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and where terms and conditions of employment or human resource questions are at issue.[4]

Parties' representations

[13] The police submit that all three parts of section 52(3) apply to the video footage. They submit that the video footage was collected and maintained to be used in conduct investigations of officers, with a view to proceedings before their internal Disciplinary Hearings Office pursuant to Part V of the *Police Services Act* (*PSA*)[5]. In their representations, the police submit that the disciplinary proceedings are ongoing.

[14] The police submit that the video footage is directly related to labour relations matters involving its employees. The police concede that although the video footage was not originally created for a conduct investigation, it was subsequently collected, maintained and used as evidence in investigations into alleged officer misconduct under Part V of the *PSA* with a view to a proceeding before a court, tribunal or other entity.

[15] The police reference orders issued by the IPC where records relating to the

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[4] *Ontario* (*Ministry of Correctional Services*) *v. Goodis*, 2008 CanLII 2603 (ON SCDC) (*Goodis*).
[5] As of April 1, 2024, the *Community Safety and Policing Act, 2019 (*CPSA), 2019, S.O. 2019, c.1, Sched.1, came into force and the *Police Services Act,* R.S.O. 1990, c. P.15, is repealed.

conduct of police officers were found to be excluded from the *Act* under section 52(3).

[16] The appellant's representations do not specifically address whether the video footage is excluded from the scope of the *Act* under section 52(3).

Analysis and finding

[17] Although the police claim that all three parts of section 52(3) apply to the video footage, they do not make any specific representations on the application of section 52(3)2 or section 52(3)3.

[18] Even if the video footage has been collected, prepared, maintained or used by the police, the police do not explain how any of those actions would be "in relation to negotiations or anticipated negotiations relating to labour relations or employment between the police and a person, bargaining agent or a party to a proceeding or anticipated proceeding.". In the absence of specific representations on the application of that paragraph, I find that the police have not established that paragraph 2 of section 52(3) applies to the video footage. I will not consider this paragraph further in this order.

[19] The police also do not make any specific representations on the application of section 52(3)3. While section 52(3)1 applies to proceedings or anticipated proceedings regarding labour relations or employment matters about a person employed by an institution, section 52(3)3 is broader in scope and applies to "meetings, consultations, discussions or communications" about labour relations or employment matters in which the institution has an interest. The employment-related nexus is a requirement for both. For this reason, despite the police's failure to provide representations on section 52(3)3 I will consider its possible application to the video footage, taking into account the nature of the video footage and the police's representations on the application of section 52(3)1.

[20] Accordingly, below I will consider whether paragraphs 1 or 3 of section 52(3) apply. For the reasons that follow, I find that the video footage is not excluded under either of those paragraphs.

Interpretation of section 52(3)

[21] Previous court decisions have stated that section 52(3), and its provincial counterpart at section 65(6) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), must be read in context and in light of its legislative history and the purposes of the *Act*. These provisions should not be interpreted in a manner that has the effect of shielding government officials from public accountability.[6] The government's legitimate confidentiality interests in records created for the purposes of discharging a government institution's specific mandate may be protected under exemptions in the *Act,* without

[6] See *John Doe*, *supra* note 3. See also *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (*Brockville* (*City*)).

being excluded from the Act altogether. [7]

[22] I agree with and adopt the reasoning in these decisions, and I find it relevant to the circumstances of this appeal.

[23] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three situations mentioned in section 52(3), there must be "some connection" between them.[8] However, the "some connection" standard must involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context.[9] In my view, this would include applying the "some connection" standard in accordance with the principle established in *John Doe* that the exclusion should not be interpreted in a manner that has the effect of shielding government employees from public accountability contrary to the transparency purpose of the *Act*.

Section 52(3)1 - proceedings

[24] For section 52(3)1 to apply, the police must establish that the video footage was collected, prepared, maintained or used by the police in relation to proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person.

[25] The term "labour relations" in section 52(3)1 is not restricted to employer-employee relationships[10] but refers to the broader collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The term "employment of a person" refers to the relationship between an employer and an employee.[11]

[26] The police submit that due to ongoing disciplinary proceedings against the police officers, the video footage should not be disclosed.[12] To support their position, the police refer to Order M-835 and Order P-1223, where former Assistant Commissioner Tom Mitchinson found that disciplinary hearings conducted under Part V of the *PSA* are properly described as "proceedings" before an "other entity" for the purposes of section 52(3)1.[13] I agree with this reasoning and find that the disciplinary proceedings described by the police in relation to this appeal, are proceedings for the purposes of section 52(3)1.

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[7] *Ibid.* para. 9.
[8] Order MO-2589; see also *Ministry of Attorney General and Toronto Star and Information and Privacy Commissioner,* 2010 ONSC 991 (Div. Ct) (*Toronto Star*).
[9] Order MO-3664, *Brockville (City), supra* note 6.
[10] *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[11] Order PO-2157.
[12] Order PO-1618.
[13] The police note that this reasoning was also more recently applied in Order MO-4029, an appeal that considered records relating to a disciplinary hearing and criminal investigation into a police officer who was charged with offences under both the *PSA* (now the *CPSA*) and the *Criminal Code of Canada.*

[27] To support their position that the video footage was "collected, prepared, maintained or used" for the purpose of the proceeding, the police refer to Order MO-2428. In that order I found that even though recordings of 911 calls may have been initially recorded for reasons unrelated to the allegations of misconduct, because they were subsequently retrieved for the purposes of the investigation into that misconduct, they were "collected, prepared, maintained or used" by the police "in relation" to an anticipated disciplinary hearing.

[28] While I acknowledge the police's reference to Order MO-2428, the principle of binding precedent or *stare decisis* does not require administrative tribunals to follow their previous decisions.[14] Although I have considered the principles set out in Order MO-2428, I note that the IPC's reasoning with respect to the application of section 52(3) to operational records related to an institution's core mandate has evolved since Order MO-2428 was decided, most notably in Order PO-4428.

[29] For the purposes of this appeal, I agree with and adopt the reasoning set out in Order PO-4428 and the more recent orders that the adjudicator references in that decision. I find that approach to be more applicable to my consideration of the application of section 52(3)1 to the video footage before me in this appeal.

[30] In Order PO-4428, the adjudicator considered the equivalent exclusion clause at section 65(6)1 of *FIPPA.* That case involved use of force occurrence reports and surveillance videos of correctional officers taken in the course of their duties, which the Ministry of the Solicitor-General (the ministry) claimed were being used for anticipated disciplinary proceedings. The adjudicator found that the use of force occurrence reports and the surveillance videos were operational records "created" by the ministry in connection with their core mandate, "collected," and then subsequently "maintained or used" in relation to anticipated disciplinary proceedings. He noted that had the appellant requested the correctional officers' discipline files, the copies of the records might have been excluded under section 65(6)1, but it did not mean that the original records were excluded under that section. He found that the original records were operational records that would be expected to be maintained in the correctional service's record holdings, irrespective of any anticipated disciplinary proceedings.

[31] In Order PO-4428, the adjudicator further noted that to interpret section 65(6) broadly to apply to surveillance videos of correctional officers in a correctional facility would run contrary to *John Doe*. He found that to exclude records, created for a completely non-employment purpose but subsequently used for one of the purposes listed in the exclusion, would shield those correctional officers from public accountability with respect to their actions. He noted that this outcome is contrary to the transparency purpose of the *Act* and is inconsistent with IPC orders and court decisions that have drawn a distinction between operational records created and kept by an institution in connection with its core mandate, and copies of the records that are collected in a

[14] Orders MO-3760 and PO-3669.

different file or location and used for a different purpose.[15]

[32] The adjudicator in Order PO-4428 noted that the distinction between records created and maintained in connection with an institution's core mandate, and copies of those records, collected and then used by that institution for another purpose, has been applied by the IPC in other cases. Namely, with respect to investigation records inserted into a Crown brief[16] and records in a police investigation file subsequently collected and used in relation to labour relations or employment related proceedings, including those under the *PSA* (now *CPSA*).[17] He noted that the IPC has also held that an exemption may apply to a document in one location but not to a copy in another location.[18] He further noted that courts have made findings of this nature.[19]

[33] In many of these orders, the IPC has commented that the practical effect of interpreting the exclusion for labour relations and employment-related information as removing from the scope of the *Act* records integral to the day-to-day mandate of a police force[20] would result in an inconsistency. Specifically, that some records maintained by the police with respect to their basic mandate would be subject to the *Act*, while others would be permanently removed from the scope of the *Act* because they happen to have been reviewed in connection with an investigation into an employee's conduct.[21]

[34] Order MO-4119 is particularly relevant as it considered video surveillance footage that the Waterloo Regional Police Service obtained from a transit company that showed the appellant being arrested by police. In assessing whether this record was excluded under section 52(3) of *MFIPPA*, the adjudicator noted that 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. As a result, the adjudicator found that the record relates to the police's initial interaction with the appellant and that its character does not change simply because it was later collected, maintained or used by the police in relation to the complaint investigations resulting from the appellant's arrest. The adjudicator therefore found that the exclusion at section 52(3) did not apply.

[35] I agree with the reasoning applied in these orders and adopt it here.

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[15] Order PO-4428, paragraph 59.
[16] Order PO-2494, upheld on judicial review in *Ontario* (*Attorney General*) *v. Ontario* (*Information and Privacy Commissioner*) 2009 CanLII 9740 (ON SCDC).
[17] See for example, Orders M-927, MO-2556, MO-3238 and MO-4119.
[18] see, for example, Orders MO-1316, MO-1616, MO-1923
[19] *Hodgkinson v. Simms* (1989), 55 D.L.R. (4th) 577 at 589 (B.C.C.A.), *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 at 360-361, 370 (C.A.), *R. v. CIBC Mellon Trust Co.* [2000] O.J. No. 4584 (S.C.).
[20] See for example Orders M-927 and PO-4428. In Order M-927, the records before the adjudicator included officer's notes and other records related to the day-to-day mandate of the police force to investigate incidents occurring within the force's boundaries. He
[21] Order M-927.

[36] The police have publicly released their internal guidelines on the use of body-worn cameras; procedure "15-20 Body Worn Camera" is available on its website. [22]That procedure states:

> The BWC [Body Worn Camera] is an audio video recording device that will document officers' interactions with members of the public during the execution of their duties. BWCs are intended to capture specific incidents. They are not intended for 24-hour recording.
>
> …
>
> Frontline uniform officers will be equipped with the BWC technology and shall record all investigative and enforcement activities in compliance with this procedure….

[37] According to the police's policy on "Body Worn Cameras"[23] , body worn cameras are generally to be activated prior to the beginning of all direct interactions with the public that are undertaken in whole or in part to further a valid law enforcement purpose. [24]

[38] In my view, the procedure and policy on body-worn cameras are operational directives that demonstrate that body-worn cameras are routinely used as part of the police's operational mandate, and the video footage obtained from these cameras is collected during an officer's day-to-day duties and responsibilities when interacting with members of the public.

[39] Despite the police's characterization of the records, the video footage from the body-worn cameras of the police officers who attended at the scene of the incident are, in their original form, operational records created by the police in connection with its core mandate. It is only once it was determined that proceedings under the *PSA* might be initiated against any of the officers, that the police "collected" or "maintained" this video footage to be subsequently considered for the purposes of those anticipated disciplinary hearings initiated under the *PSA*.

[40] While copies of the video footage may be found within the police officers' discipline or human resources files, the appellant did not request information from such files. Had he requested this type of human resources or disciplinary information, the video footage may have been found to be excluded under section 52(3) as part of those types of files that arguably relate to labour relations and employment related matters. Here, the appellant requested the video footage. The original footage cannot be said to be excluded

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[22] Search Results - Toronto Police Service (tps.ca).
[23] Toronto Police Service Board - Body Worn Cameras (tpsb.ca).
[24] An exception is made when an unexpected an immediate threat to the life or safety of the Service Member or of a member of the public makes it impossible or dangerous to activate a body-worn camera prior to that interaction, in which case the Service Member is required to activate the boy-worn camera at the earliest opportunity thereafter.

from the *Act* from the moment of their creation, as they are operational records that are expected to be maintained in the police officer's records holdings, irrespective of any anticipated disciplinary proceedings relating to the employment of an officer.

[41] As indicated above, for the collection, preparation, maintenance or use of a record to be "in relation to" the disciplinary proceeding, there must be "some connection" between them.[25] To find that the video footage is collected prepared, maintained or used in relation to the disciplinary proceedings when they are effectively operational records related to the police's core mandate would, in my view, run contrary to the principle established in *John Doe.* That is, the exclusion should not be interpreted in a manner that has the effect of shielding government employees from public accountability, contrary to the transparency purpose of the *Act*.

[42] Accordingly, I find that the video footage, found in operational records created in connection with the police's core mandate, is not excluded from the *Act* by section 52(3)1, because it was not collected, prepared, maintained or used by the police in relation to proceedings or anticipated proceedings relating to the employment of a person by the police. The fact that the police may have subsequently collected and used copies of the video footage in relation to the anticipated disciplinary proceedings is not sufficient for the section 52(3)1 exclusion to apply to the original video footage.

Section 52(3)3 – matters in which an institution has an interest

[43] For section 52(3)3 to apply, the police must establish that the video footage was collected, prepared, maintained or used by the police itself in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which it has an interest.

[44] As mentioned above, for the collection, preparation, maintenance or use of a record to be "in relation to" one of the three situations mentioned in section 52(3), there must be "some connection" between them.[26] For section 52(3)3, this means that the police's collection, preparation, maintenance and use of a record must have "some connection" to meetings, consultations, discussions or communications about labour relations or employment related matters in which the police have an interest.

[45] Above, in my discussion on the application of section 52(3)1, I determined that the video footage is best described as operational records originally created for a purpose related to the police's core mandate. For similar reasons, to accept that the video footage was collected, prepared, maintained or used "in relation to" or has "some connection" to meetings, consultations, communications or discussions about employment related matters in which the police have an interest under section 53(3)3, would also run contrary to the principle established in *John Doe.* As I found above with respect to section 52(3)1, to find the video footage excluded under section 52(3)3 would be a broad interpretation

[25] Order MO-2589; see also *Toronto Star, supra* note 8.
[26] Order MO-2589; see also *Toronto Star, supra* note 8.

that runs contrary to the transparency purpose of the *Act*.

[46] In *John Doe*, the Divisional Court found that the dictionary definition of the word "about" in section 65(6)3 of *FIPPA* requires that the record do more than have some connection to, or some relationship with, a labour relations or employment related matter. It stated that "about" means "on the subject of" or "concerning".[27] Therefore, to be excluded from the *Act* under section 52(3)3, the subject matter of the record must be a labour relations or employment-related matter.[28] The Court further stated that the term "about" should not be interpreted in a broad manner that would mean that a routine operational record or portion of a record connected with the core mandate of a government institution could be excluded from the scope of the *Act* because such a record could potentially be connected to an employment-related concern, is touched upon in a collective agreement, or could become the subject of a grievance. Such an interpretation would subvert the principles of openness and public accountability that the *Act* is designed to foster.[29]

[47] In light of this interpretation of the term "about", I do not accept that the video footage is "about" labour relations or employment related matters in which the police have an interest. The subject matter of the video footage is the incident involving the appellant which arose as a result of and during the course of the police officers' performance of their day-to-day duties and responsibilities. The video footage is not "on the subject of" or "concerning" labour relations or employment related matters.

[48] The term "employment related matters" in section 52(3)3 of the *Act* refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[30] Although this term has been found to apply in a number of contexts, including disciplinary proceedings under the *Police Services Act*,[31] both the IPC and the courts have found that that not all records documenting the actions or conduct of employees are in relation to meetings, consultations, discussions or communications about "employment related matters" for the purpose of section 52(3)3 of the *Act* or 65(6)3 of *FIPPA*.[32] Previous orders have stated that such a determination turns on examining the particular record at issue.[33]

[49] In accordance with *Goodis*, a distinction must be drawn between records that simply document the actions or conduct of the police officers as they go about their daily duties which, would not necessarily be about "employment related matters", and records that go beyond simply documenting that conduct and are about "employment related matters" because they relate to the employer-employee relationship between the ministry

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[27] *Concise Oxford English Dictionary*, 11th ed., 2004 *s.v.* "about."
[28] *Supra* note 2.
[29] *Ibid.*
[30] Order PO-2157.
[31] Order MO-1433-F.
[32] *Goodis, supra,* note 4.
[33] *Ibid.,* note 4, paras. 23 and 29.

and that employee.

[50] Keeping in mind this distinction, the fact that the video footage of the day-to-day duties of police officers was later used by the police in a disciplinary process to assess their conduct, which is an "employment related matter," does not change the fact that the video footage are operational records originally created in connection with the police's core mandate and for a purpose that is not "employment related." This is also consistent with the Divisional Court's reasoning in *John Doe*.[34]

[51] Accordingly, I find that the video footage is not excluded from the *Act* by section 52(3)3, because they are operational records that cannot be said to have been collected, prepared, maintained or used by the police in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the police have an interest.

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

[52] Even if the video footage is not excluded from the *Act*, it could still be exempted from access under an applicable exemption. The police claim that the exemption at section 38(a), read with section 8(1)(f), applies to the video footage.

[53] 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. 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, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. [Emphasis added]

[54] For section 38(a) to apply, the video footage must contain the personal information of the appellant.

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

[56] 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

[34] *Ibid.*

capacity is not considered to be "about" the individual.[35]

[57] 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.[36]

[58] Section 2(1) of the *Act* gives a non-complete list of examples of personal information.

[59] 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.[37] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[38]

[60] In this case, the parties agree that the video footage contains the appellant's personal information. The police submit that because the video footage captures voice and image, it is reasonable that the appellant will be identified from the footage. The appellant agrees that the video footage would contain his personal information.

[61] Neither party specifically addresses whether the video footage contains the personal information of any identifiable individuals, other than the appellant.

[62] From my review of the video footage, I agree that the appellant can be both seen and heard on the video footage. I accept that this audio and video footage consists of recorded information about the appellant, an identifiable individual as contemplated by the definition of personal information in section 2(1) of the *Act.*

[63] I also note that in addition to images of the appellant and the three police officers, it contains the images of several bystanders. The video footage from one of the officer's body-worn camera also contains the image of an individual on a screen inside the police car. I accept that these images of others are of identifiable individuals and are their personal information as it is reasonable to expect that they could be identified from the disclosure of these images themselves. These images should not be disclosed as they may be subject to the personal privacy exemption in section 38(b).[39]

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[35] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. See also section 2(2.1) which states: 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.

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

[37] 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.

[38] See sections 14(1) and 38(b).

[39] The appellant did not set out whether he is interested in pursuing access to the personal information of other individuals included in the video recordings. As a result, it was not an issue before me in this appeal.

Issue C: Is the video footage exempt under section 38(a), read with section 8(1)(f) because disclosure would deprive an individual of a right to a fair trial or impartial adjudication?

[64] 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.[40]

[65] 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.

[66] In this case, the police rely on section 38(a), read with section 8(1)(f) to deny access to the video footage. Section 8(1)(f) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> deprive a person of the right to a fair trial or impartial adjudication.

[67] The harm contemplated in section 8(1)(f) is whether disclosure "could reasonably be expected" to deprive a person of the right to a fair trial or impartial adjudication.

[68] Parties resisting disclosure of a record cannot simply assert that the harm under section 8(1)(f) is obvious based on the record. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 8 are self-evident and can be proven simply by repeating the description of harms in the *Act.*[41]

[69] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[42] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[43]

If the appellant wishes to pursue access to this information, he should contact the police to make an access request for it.

[40] Order M-352.

[41] Orders MO-2363 and PO-2435.

[42] *Merck Frosst Canada Ltd.* v. *Canada* (*Health*), [2012] 1 S.C.R. 23.

[43] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc.* v. *Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.

[70] To establish that section 8(1)(f) applies, the institution must show that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. This exemption will not apply if there is only a remote chance or speculation that an individual's right to fair adjudication would be put in danger.[44]

Representations

[71] The police submit that given the ongoing nature of the disciplinary proceeding under the *PSA*, section 8(1)(f) applies to the video footage because its disclosure could reasonably be expected to deprive the police officer of the right to a fair hearing.

[72] The police submit that in hearings and trials of various courts and tribunal there are safeguards in place regarding the public release of records relied upon by the decision makers of those venues. The police note that there are statutory deemed undertakings in civil proceedings under rule 30.1 of the *Rules of Civil Procedure* and there are disclosure undertakings in both criminal proceedings and *PSA* disciplinary hearings. The police submit that these safeguards against public disclosure exist for multiple reasons, including to prevent jeopardy against the ongoing proceeding. The police further submit that these safeguards exist, at a minimum, until a record is made public as an exhibit (subject to any publication bans), but often continue until the conclusion of a matter including any appeal periods.

[73] The police submit that while they recognize that an individual's right of access under the *Act* is separate and apart from their right to obtain the same record in another venue, the need to protect the integrity of an ongoing proceeding and the fair trial rights of an individual exists across all venues.

[74] According to the police, the appellant has not been deprived of the right of access to the video recordings as he is a party to the *PSA* disciplinary hearing proceeding. The police submit that after the first appearance in that hearing, the prosecutor indicated that they would provide disclosure of the entire file, including the body worn camera footage, to all parties involved in the incident. They submit that this includes the appellant. They note that in order to receive the disclosure, all parties were required to sign an undertaking indicating the following:

- They will keep the disclosure materials provided to them in their secure possession and control;

- they will not permit any person, other than their client, and/or assistant(s) in [the] proceedings, to view the materials;

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[44] Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); and Order PO-2037, upheld on judicial review in *Ontario* (*Attorney General*) *v. Ontario* (*Information and Privacy Commissioner*), [2003] O.J. No. 2182 (Div. Ct.).

- they will not release, copy, or otherwise distribute in whole or in part any of the materials or any of the information contained therein to any person, agency or organization by any means;

- they will receive the materials with the understanding that they are not to be used for any purpose other than the *Police Services Act* matter for which they were prepared.

[75] The police submit that the appellant signed the undertaking and was provided the entirety of the police file associated with the incident.

[76] The police also submit that the application of section 8(1)(f) is time limited and concludes upon either the record being submitted as an exhibit or the conclusion of the proceedings. The police explain that "[w]ith either of these events happening, both the appellant and other members of the public will be entitled to access the record through various channels."

[77] The police further submit that the existence of publication bans during the life of a proceeding is to protect its integrity and the right of an individual to a fair trial. They submit that the trier of fact of a proceeding is best positioned to adjudicate on whether public disclosure of a record will jeopardize the fair trial rights of an individual. The police submit that for a record to be prematurely disclosed through the freedom of information process effectively bypasses the role of the trier of fact to protect the integrity of the proceedings and the potential use of safeguards such as publication bans.

[78] The police also note that body-worn camera video footage is relatively new technology that shows, in detail, what transpires during an interaction between the police and members of the public. The police submits that they are important pieces of evidence in matters heard in court, tribunals or other entities but need to be put into context. The police submit that, without context, publication of the video footage in isolation or by isolated parties, will impact the fair trial rights of the individuals currently before the *PSA* Disciplinary Tribunal. They submit that it is "paramount that the [video footage] be protected from public consumption until the [video footage] is made public at the tribunal or until the conclusion of the proceedings."

[79] The police also submit that if the videos are provided without the proper context as to the officers' roles, observations, thoughts etc. in the incident, the public's view of the events will be impacted before the evidence is presented to the trier of fact. They submit that this will impact the fairness of this proceeding, future proceedings, and the public's interactions with the police.

[80] The appellant does not make representations that specifically address whether the disclosure of the video footage could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication as contemplated by section 8(1)(f). However, he submits that the police have failed to provide any evidence to support their contention

that disclosure of the video footage will impact the adjudicator's decision-making capabilities in the disciplinary proceedings.

[81] The appellant also notes that 10 months after the disciplinary proceedings began, in response to his request the police granted partial access to 28 pages of incident specific information and reports including officers' notes and occurrence reports. The appellant submits that these written materials include the written accounts of the officers under investigation and that any potential impact on the disciplinary hearing underway was of no concern to the police.

[82] In reply, the police note that the other records that were released in response to the appellants' request were released erroneously before knowing that there were ongoing disciplinary proceedings. The police note that if it had been known that there were ongoing disciplinary proceedings, the information would have been denied under the same sections of the *Act* as applied to the video footage. The police submit that this inadvertent error cannot form the basis for further information to be disclosed.

[83] The police also state they are not opposing the release of the video based on their content but on the basis that there are ongoing disciplinary proceedings. They submit: "Any member of the public will have an opportunity to request the [video footage] once the records at issue have been made an Exhibit or upon the conclusion of the proceedings."

[84] Before rendering my decision, I sought an update from the police on the status of the disciplinary proceedings against the three officers whose body-worn camera video footage is at issue in this appeal. The police advised that two of the subject officers entered into a guilty plea, submissions were made and that no date for a decision on penalty has been established. For the third subject officer, the police advised that the matter was referred back to the unit for unit level penalty.

Analysis and finding

[85] For section 38(a), read with section 8(1)(f) to apply, I must determine whether the police have satisfied their burden in establishing that disclosure of the video footage could result in a real and substantial risk of depriving an individual the right to a fair trial or impartial adjudication. Before making that determination however, I will consider the police's representations on the existence of disciplinary proceedings and the related confidentiality undertakings of the parties, including the appellant. For the reasons set out below, I find neither the existence of the disciplinary proceedings nor the accompanying confidentiality undertakings interfere with the appellant's right of access to the video footage under the *Act*.

[86] Previous court decisions have established that the functioning of the *Act* is distinct and separate from other existing proceedings, including proceedings before the courts, even where access is requested to information that falls under a confidentiality

undertaking or a publication ban. In *Doe V. Metropolitan Toronto* (*Municipality*) *Commissioners of Police*,[45] Justice Lane stated, in respect to an earlier order he had made granting a publication ban:

> The order which I made on [an earlier date] was not intended to interfere in any way with the operation of the *Municipal Freedom of Information and Protection of Privacy Act* legislation, nor ban the publication of the contents of police files required to be produced under that Act.

[87] In that decision, Justice Lane also spoke to information that might be subject to a deemed confidentiality undertaking as set out in the Rules of Civil Procedure. He stated:

> …In my view, there is no inherent conflict between the *Act* and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosure made during discovery. The *Act* contains exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the *Act*; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

[88] In Order MO-2178, the IPC considered the disclosure of police records subject to a publication ban. In deciding to order disclosure of the records, the adjudicator followed Justice Lane's reasoning in *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* stating:

> …[I]n the event that an order of this office were to find that certain requested information is not exempt and ought to be disclosed, and as a consequence an individual chooses to publish that information, there is no remedy under the *Act*. Rather, the remedy is found within the context of the criminal law and, in particular in the mechanisms it provides for dealing with breaches of a publication ban.

[89] I find the reasoning set out by Justice Lane and followed by the IPC in Order MO-2178 to be relevant to the circumstances before me in this appeal and I adopt it for the purposes of my analysis.

[90] In this appeal, I acknowledge that disciplinary proceedings were initiated under the *PSA* against the officers whose body-worn video footage is at issue. I also acknowledge that information received by the parties to those proceedings, which includes the appellant, is subject to a confidentiality undertaking for the duration of those proceedings. However, in light of the reasoning expressed by Justice Lane in *Doe v.*

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[45] *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (June 3,1997) Toronto Doc. 21670/87Q (Ont. Gen. Div.).

Metropolitan Toronto (Municipality) Commissioners of Police, I do not accept that either the existence of the disciplinary proceedings or of the accompanying confidentiality undertakings interfere with the operation of the *Act* or prohibit the appellant from exercising his right of access to information through the Freedom of Information regime set out therein. While the appellant, as party to the proceedings, may be subject to a confidentiality undertaking with respect to information provided to him during the course of the disciplinary proceeding, that confidentiality undertaking does not prohibit the IPC from ordering disclosure of the video footage to him under the *Act* unless an exemption or exclusion is found to apply.

[91] Although, in their representations, the police also refer generally to a publication ban, they do not provide any evidence that a publication ban has been imposed with respect to any information relevant to any of the disciplinary proceedings involving the officers. However, even if a publication ban had been imposed in those proceedings, for the same reasons as I those I have set out above with respect to the impact of a confidentiality undertaking, I find that the existence of a publication ban would not interfere with the operation of the *Act*. This reasoning is in keeping with that of Justice Lane in *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*.

[92] Moreover, making information known to individual requesters under Part II of the *Act,* that is individuals seeking their own personal information, cannot be equated with making general information known to the public.[46] It cannot be assumed that the appellant, in seeking access to his own personal information, will necessarily make it known to the public. Should the appellant choose to use information disclosed under the *Act* in a way that is contrary to any confidentiality undertaking or other undertaking that they might have entered into in relation to the disciplinary proceedings, the remedy for that breach is found within the procedures set out under the *PSA* regarding the consequences of breaching that undertaking.

[93] Having established that neither the existence of the disciplinary proceedings nor the related confidentiality undertakings have the effect of interfering with the appellant's right of access under the *Act*, I will now consider whether the police have provided sufficient evidence to establish grounds for exemption under section 8(1)(f). That is, have they shown that disclosure of the video footage could result in a real and substantial risk of depriving an individual the right to a fair trial or impartial adjudication? For the reasons set out below, I find that they have not.

[94] Previous orders have considered section 8(1)(f) of the *Act* and the equivalent provision in *FIPPA,* section 14(1)(f) in circumstances relevant to this appeal.

[95] For example, in Order PO-2490, the adjudicator considered the impact of disclosure of records under section 14(1)(f) of *FIPPA* on a civil trial. While the circumstances in that appeal were quite different from those in this appeal, his comments

[46] Order MO-2178.

are instructive, and I find them to be relevant to my consideration of the application of section 8(1)(f) to the video footage. The adjudicator stated:

> It is far from self-evident, as the appellant appears to suggest, that the right to a fair trial in a civil proceeding is affected by the disclosure of the records at issue in this appeal even if they might not have been available to the requester under the Rules of Civil Procedure. Whether disclosure of records under [*FIPPA*] will have an impact on a party's right to a fair trial must be decided on the facts of each case.

[96] The adjudicator in Order PO-2490 went on to refer to Order 48, where former Commissioner Sidney Linden observed that the mere existence of procedures to obtain documents in other contexts such as a discovery procedure does not "necessarily imply" that obtaining documents under the *Act* is unfair in the context of section 8(1)(f). He found that because there is no automatic presumption or assumption, it is therefore up to the party claiming the harm to provide evidence of the unfairness.

[97] In Order MO-2178, the police argued that disclosure of records relating to an incident including videotaped interviews could impact an officer's right to a fair trial if charges were ultimately laid or impartial adjudication if the officer ultimately faced charges under the *PSA*.[47] In that appeal the police did not provide any additional information to support its claim that section 8(1)(f) applied. The adjudicator in that order found that given the police's brief representations that he described as being general in nature, he had not been provided with sufficient evidence to satisfy him that the disclosure of the relevant portions of the record could reasonably be expected to deprive the officer of the right to a fair trial or impartial adjudication.

[98] I agree with the reasoning applied in these prior IPC orders and find it relevant to my consideration of whether section 38(a), read section 8(1)(f), applies to the video footage being considered here.

[99] In this appeal, the police argue that because there is an ongoing disciplinary proceeding, the video footage would prejudice the right to a fair trial of the individual to whom that disciplinary proceeding relates. They submit that disclosure of the video footage without context will skew the public's perception of the events which will, in turn, affect the trier of fact's determination of the events surrounding the occurrence. However, the police do not explain how disclosure of the specific information contained in the video footage would cause the harm set out in section 8(1)(f).

[100] I agree that section 8(1)(f) deals with an important principle, an individual's right to a fair trial, or in this case, a fair disciplinary proceeding. However, I find the police has failed to provide sufficiently detailed evidence to demonstrate, in this case, how disclosure

[47] The police explained that these were both possible as a complaint against the officer had already been filed with the Ontario Civilian Commission on Policing (OCCPS) and where a OCCPS conducts a review, and charges are recommended the officer would face charges under the *PSA*.

of the video footage could deprive an individual of their right to a fair proceeding.

[101] The video footage at issue is raw footage that has not been edited. In my view, there is no evidence to suggest that disclosure of the video footage through the Freedom of Information process would impact the impartiality of the decision maker in either a trial or a disciplinary proceeding, particularly in a proceeding where the footage is already being considered by the decision-makers. I have also not been provided with evidence, let alone convincing evidence, that disclosure of the video footage could reasonably be expected to result in a "real and substantial risk" that the police officers would be deprived of the right to a fair trial or impartial adjudication even where the trial or adjudication is ongoing.

[102] In addition, the police's concern that the public's interaction with the police would be affected by disclosure of the unedited video footage does not support its position that disclosure would impact the fair trial of the officers involved. The connection between the public's viewing of the video and a determination at the disciplinary proceeding of the officers is too tenuous and does not establish the harm set out in section 8(1)(f). The police have not established that the "court of public opinion" is relevant to the fair trial to be given to the police officers at their disciplinary hearings. Additionally, I note that the liability phase of those hearings has since concluded and what remains to be determined is penalty.

[103] Consequently, I do not accept that the police have established that section 8(1)(f) applies, in the circumstances, and I find that it does not.

[104] As I find that section 8(1)(f) does not apply, the video footage is not exempt from disclosure under section 38(a), read with section 8(1)(f).

Issue D: Is there a compelling public interest in disclosure of the video footage that would allow for its disclosure, despite the application of the exclusion at section 52(3) or the exemption at section 38(a), read with section 8(1)(f)?

[105] The appellant's representations focus almost entirely on the possible application of the public interest override provision at section 16. Section 16 applies to require disclosure of information that is otherwise exempt if there is a compelling public interest in disclosure of the information at issue that clearly outweighs the purpose of the exemption, provided it was an exemption listed in section 16 that was found to apply.[48]

[106] As I have found that the video footage is not exempt from disclosure under any of the exemptions listed in section 16, it is not necessary for me to consider whether there

[48] Section 16 of the *Act* states:

> An exemption from disclosure of a record under section 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

is a compelling public interest in its disclosure. However, even if I had found the video footage excluded under section 52(3) or exempt under section 38(a), read with section 8(1)(f), as neither the exclusion nor the exemption is listed in section 16, I would have found that the public interest override has no application in this appeal.

SUMMARY CONCLUSION

[107] I have found that none of the paragraphs at section 52(3) apply to exclude the video footage from the scope of the *Act*. I have also found that the exemption at section 38(a), read with section 8(1)(f) does not apply to the video footage. Accordingly, I will order the police to disclose the video footage of the three police officers to the appellant.

[108] However, I have also found that the video footage contains the personal information of identifiable individuals other than the appellant that may be subject to the discretionary personal privacy exemption at section 38(b). As a result, I will order the police to obscure the images of all individuals other than the police officers and the appellant, prior to disclosing the video footage to the appellant. As previously noted, if the appellant seeks access to the personal information of other individuals in the video footage, he is to make a request under the *Act* to the police for that information.

ORDER:

1. I order the police to disclose the video footage to the appellant, with the personal information of individuals other than the appellant and the police officers withheld, by **October 21, 2024**.

2. In order to verify compliance with this order, I reserve the right to require the police to provide me with a copy of the video footage disclose to the appellant, pursuant to provision 1.

Original Signed by: September 18, 2024

Catherine Corban
Adjudicator