ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-10

April 6, 2016

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F8044

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Summary: An individual made an access request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for copies of video surveillance from the Calgary Remand Centre (CRC).

The Public Body located a responsive video, but withheld it in its entirety under sections 20(1)(a), (j), (k), and (m) (disclosure harmful to law enforcement). The Applicant requested a review of the Public Body's response.

The Adjudicator found that section 20(1)(m) applied to the video footage, and upheld the Public Body's decision to withhold it from the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 20, 72, **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 14.

Authorities Cited: AB: 96-003, F2010-036, **Ont:** PO-2911.

Cases Cited: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII).

I. BACKGROUND

[para 1] An individual made an access request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for copies of video surveillance from the Calgary Remand Centre (CRC) of three incidents: the first taking place on December 8, 2013, the second on January 3, 2014, and the third on February 2, 2014.

[para 2] The Public Body responded to the Applicant by letter dated February 26, 2014, informing the Applicant that as he had made a previous request for access to video footage related to incidents on December 8, 2013 and January 3, 2014, the Public Body had already processed that request and responded to the Applicant on February 24, 2014. The Public Body's decision reflected in the letter dated February 26, 2014 relates only to the Applicant's request for the video footage for February 2, 2014. This inquiry likewise relates only to that request.

[para 3] In that letter of February 26, 2014, the Public Body informed the Applicant that it had located a responsive video, but was withholding it from the Applicant under sections 20(1)(a), (j), (k) and (m) (disclosure harmful to law enforcement).

[para 4] The Applicant requested a review of the Public Body's response. An investigation was authorized but was not successful and an inquiry was requested by the Applicant.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of one video of approximately 3 minutes in length responsive to the Applicant's request.

III. ISSUE

[para 6] The issue as set out in the Notice of Inquiry, dated September 29, 2015, is as follows:

> Did the Public Body properly apply section 20(1)(a), (j), (k) and (m) to the information in the records?

[para 7] In the course of the inquiry, the Public Body decided not to rely on section 20(1)(a).

IV. DISCUSSION OF ISSUE

[para 8] The Public Body applied sections 20(1)(j), (k), and (m) to information in the records at issue. These sections state:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
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> *(j) facilitate the escape from custody of an individual who is being lawfully detained,*
>
> …
>
> *(k) facilitate the commission of an unlawful act or hamper the control of crime,*

> …
>
> *(m) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system,*
>
> …

Section 20(1)(m)

[para 9] In order for section 20(1)(m) to apply to information, the disclosure of that information must meet the harms test: there must be a clear cause and effect relationship between disclosure of the withheld information and the outcome or harm alleged; the outcome or harm that would be caused by the disclosure must constitute damage or detriment, and not simply hindrance or minimal interference; and the likelihood of the outcome or harm must be genuine and conceivable (Order 96-003 at p. 6 or para. 21).

[para 10] The third part of the test requires that the alleged harm from disclosure be reasonably expected. The Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 20(1)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

> Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:
>
> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(*c*) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]
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> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 11] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-

information legislation, regardless of the seriousness of the harm alleged. The Public Body must satisfy me that there is a reasonable expectation of probable harm that would result from the disclosure of the video.

Public Body's arguments

[para 12] The Public Body states that the video recording "captures an inmate (the Applicant) on the Max Unit at CRC during an incident between the Applicant and Correctional Officers on this unit." (Initial submission, at para. 12)

[para 13] With respect to the first part of the test for section 20(1)(m) to apply, which is the clear cause and effect relationship between disclosure and the harm alleged, the Public Body argues that the disclosure of the video would "expose CRC's security plans and mechanisms which would defeat the purpose of having them in the first place. The purpose of these plans and mechanisms is to ensure the safe custody of lawfully contained persons and maintain a facility that is safe for staff, inmates and visitors." (Initial submission, at para. 24)

[para 14] The Public Body argues that the second part of the test, that the harm would constitute damage or detriment and not simply hindrance or minimal interference, because disclosure of the video "would harm the ability of the Centre to ensure safe detainment of lawfully detained persons and compromise the safety of staff, inmates and visitors as well." (Initial submission, at para. 25)

[para 15] Regarding the third part of the test, reasonable expectation of harm, the Public Body argues that disclosing the video would reveal "the layout of CRC, staff ratios, internal security protocols and strategies used when responding to security incidents." (Initial submission at para. 26)

[para 16] In support of its arguments for the application of section 20(1), the Public Body cited Order PO-2911, from the Ontario Information and Privacy Commissioner's office, in which the adjudicator found that section 14(1)(k) of the Ontario *Freedom of Information and Protection of Privacy Act* applied to a surveillance video taken of an incident occurring in a correctional facility. Section 14(1)(k) of the Ontario Act states:

> *14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,*
>
> …
>
> *(k) jeopardize the security of a centre for lawful detention;*

[para 17] In Order PO-2911, the adjudicator stated:

> In determining whether section 14(1)(k) applies, I have considered the findings in Order PO-2332, where Adjudicator John Swaigen considered the application of section 14(1)(k) to a security audit undertaken of a maximum security detention centre. This audit contained detailed information about the operational security and procedures required in the day-to-day operation of a maximum security correctional facility. In Order PO-2332, Adjudicator Swaigen stated:

> In my view, much of the information in the security audit would be obvious to most people. It is a matter of common sense and common knowledge that certain kinds of security measures, such as locks, fences and cameras would be present in certain locations and would be checked periodically in certain ways and that other practices and procedures described in the OSAW would be routine. However, the Ministry points out that "to a knowledgeable individual, the absence of a particular topic, identified deficiencies, or the unavailability of certain security-enhancing measures at a given correctional facility could suggest a potential security vulnerability".
>
> I accept that even information that appears innocuous could reasonably be expected to be subject to use by some people in a manner that would jeopardize security. Knowledge of the matters dealt with in the security audit could permit a person to draw accurate inferences about the possible absence of other security precautions. Such inferences could reasonably be expected to jeopardize the security of the institution by aiding in the planning or execution of an escape attempt, a hostage-taking incident, or a disturbance within the detention centre. As the Ministry states, disclosure of the contents of the security audit to a requester can result in its dissemination to other members of the public as well.

I agree with and adopt this reasoning of Adjudicator Swaigen. The video at issue in this appeal shows how the interior space is configured in a day room in a specific correctional centre. The configuration of the day room and surrounding cells is also present in other correction centres in the province.

This video could be used to jeopardize the security of the correction centre where it was taken, as well as other correctional institutions that are designed the same way. The correction centre where the video was shot is a maximum security institution which houses individuals who have committed serious offences, including high-risk inmates. These inmates present a risk to staff, other inmates, and the community.

The video reveals the exact layout of the day space area. If the information was released to the general public, it could pose a security risk to the staff and the inmates of correction centres with the same layout. I find that the video could suggest potential security vulnerabilities by revealing the manner in which the day space is recorded by the video camera, thereby jeopardizing the security of the Correction Centre, as well as other centres for lawful detention which have the same or a similar layout. Taking into consideration that the law enforcement exemption must be approached in a sensitive manner (*Ontario (Attorney General) v. Fineberg*, cited above), I find that section 14(1)(k) applies to the record in this appeal, the video.

Applicant's arguments

[para 18] The Applicant argues that the standard operating procedures of correctional guards is already publicly available. He states that:

> … the fears of others studying and using countermeasures is unreasonable too, the layout of CRC is not a secret as countless inmates have seen it, nor is it reasonable to assume someone will have any advantage in studying the video to counter guard procedures – their procedures are no secret as countless inmates have also experienced their brutality (Request for Inquiry)

[para 19] He also states that:

> There is no security risk at all, the jail is not a top secret area, all one needs to do to view it is either get hired as a guard or get charged with a crime to become an inmate. There have been countless inmates who are intimately familiar with the jail areas who have been released into the public, so there's no point claiming [secrecy] is important. (Initial submission)

Conclusions regarding the application of section 20(1)(m)

[para 20] Regarding the Applicant's argument that anything the video would disclose is already known to inmates, I disagree. There were no inmates present (or visible) in the unit shown by the video recording; only guards and their movements were visible. The video suggests that the inmates were behind the closed, opaque doors in the unit, visible on the video. Further, the Applicant appears to have been disciplined for standing in a doorway with the door open, suggesting that inmates were not allowed to be moving around in the unit at that time. Therefore, the movements of the guards at that time would not have been observed by the inmates. The guards' response to the incident involving the Applicant was also not observed by inmates, as none were visible on the video recording. The guards' responses, including movement of guards from elsewhere, could reasonably reveal if other areas of the CRC were without guards for the duration of the incident.

[para 21] For this reason, I accept the Public Body's arguments that disclosing the video recording could reasonably be expected to harm the security of the CRC. As in the circumstances in Ontario Order PO-2911, the video recording reveals a maximum security unit in the CRC; the adjudicator in that Order found that "the video could suggest potential security vulnerabilities by revealing the manner in which the day space is recorded by the video camera, thereby jeopardizing the security of the Correction Centre" (cited above). Further, in this case, the video could suggest potential security vulnerabilities by revealing the guard movements during an incident with an inmate; movements that were not otherwise observable by inmates.

[para 22] I find that section 20(1)(m) applies to the information in the video.

Public Body's exercise of discretion to withhold the video

[para 23] Section 20(1) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 24] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations

- the decision failed to take into account relevant considerations

[para 25] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this office. She concluded:

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*. (At para. 104)

[para 26] The Applicant has argued that he requires the video footage to determine whether he wishes to proceed with any legal action regarding the incident, and that without the video he cannot accurately assess his legal options (Request for Review). In his initial submission, he stated:

> If the public body wanted to use the same information they've denied me, to use against me in court, they would give their lawyers access to it – so why can't my lawyers access the same information in the same way?

[para 27] The Public Body provided detailed reasons for exercising its discretion to withhold the video recording, including an analysis of whether there was a public interest in disclosing the video. It stated:

> If the applicant were to disseminate the contents of the record into the public domain, the security plans and mechanisms would damage the Public Body's ability to ensure safe detainment of lawfully detained persons and to ensure the safety of staff, inmates and visitors. Considerations of an open, transparent and accountable government does not compensate for the risks/harm associated with the disclosure of the video. The harm in releasing the video outweighs the consideration of public interest.
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> In the Applicant's Initial Submission, the Applicant indicated that he required this record to show his legal counsel to seek legal opinions. In this instance where an assault is alleged to have taken place, Calgary Police Service (CPS) would have been contacted to investigate the incident. The Applicant may wish to have his lawyer contact CPS regarding any investigation. As the applicant is a current inmate in an operating remand centre, the security risks are high in this case. CCTV is only shared with a police service during an investigation, through the disclosure process with the Crown Prosecution and an inmate's lawyer is that wished to request to view CCTV directly with the appropriate centre when they are defending their clients in an Internal Disciplinary Hearing. Copies are not provided. (Initial submission, at paras. 32-33).

[para 28] I accept that the Public Body considered the appropriate factors in determining to withhold the video recording from the Applicant. I uphold its exercise of discretion in this case.

[para 29] As I have found that section 20(1)(m) applies to the information in the video recording, I do not have to consider the Public Body's application of sections 20(1)(j) or (k).

V. ORDER

[para 30] I make this Order under section 72 of the Act.

[para 31] I find that section 20(1)(m) applies to the video recording at issue and that the Public Body properly exercised its discretion to withhold the recording.

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Amanda Swanek
Adjudicator