ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-55

June 29, 2017

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F8288

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Summary: The Applicant made an access request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act) for video surveillance of an incident that occurred on his unit at the Calgary Remand Centre (CRC).

The Public Body located 10 Closed Circuit Televised Videos (CCTV), but withheld them in their entirety by applying sections 17 (disclosure harmful to personal privacy) and 20 (disclosure harmful to public safety) of the Act.

The Adjudicator determined certain videos were properly withheld. She ordered the Public Body to provide the Applicant and his counsel access to view 5 CCTV recordings at the Public Body's premises.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 13, 17, 20, 40, 72

Authorities Cited: AB: Orders: F2012-24, F2015-02, F2016-10

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815

I. BACKGROUND

[para 1] The Applicant states that he was assaulted by another inmate on May 25, 2014 at the Calgary Remand Centre (CRC). He sought video surveillance relating to the assault so he may seek legal advice as to whether he has any recourse regarding the assault.

[para 2] The Public Body denied access to all the records by applying section 17(1) (disclosure harmful to personal privacy) and sections 20(1)(j), (k), and (m) (disclosure harmful to law enforcement) to the video surveillance records.

II. INFORMATION AT ISSUE

[para 3] The information at issue are closed circuit video recordings (CCTV).

[para 4] The Applicant, in his request for access for information, asked for "…unit 9 security video of May 25, 2014, 3p.m.- 4p.m. of me being assaulted on unit 9 and the unit 9 surveillance video too."

[para 5] The Public Body located 10 CCTV recordings and withheld all applying various sections of the Act to the information in the videos. I have numbered them as follows:

1. Video file entitled May 25, 2014 [Applicant's name] escort.
2. Video file entitled Weight Room Library.
3. Video file entitled Cell [number]. This is video of the interior of a cell in unit 9 that is not the Applicant's cell and does not contain any video of the Applicant being assaulted, nor is it the assailant's cell. It shows the occupant of the cell.
4. Video file entitled Outside Exercise Yard
5. Video file entitled Unit 9 Panorama Front
6. Video file entitled Unit 9 Panorama Back
7. Video file entitled VCam2
8. Video file entitled VCam3
9. Video file entitled Entrance Exterior
10. Video file entitled Entrance Interior

III. ISSUES

[para 6] The Notice of Inquiry set out the following issues:

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to any information in the records?

2. Did the Public Body properly apply sections 20(1)(j), (k), and (m) of the Act (disclosure harmful to law enforcement) to the information in the records?

3. If exceptions were properly applied to any of the information in the records, can this information reasonably be severed from the records, in accordance with section 6(2) of the Act, so that the Applicant may be given access to the remainder of the record?

IV. DISCUSSION OF ISSUES

[para 7] The Applicant makes clear the reason he is seeking to view the video of the assault is to consult with legal counsel to "properly explore all my legal avenues".

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to any information in the records?

[para 8] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *…*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *…*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party[…]*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
>
> *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 9] In Order F2015-02 the Adjudicator commented on the analysis required when applying section 17. At paras. 7-11 she states the following:

> Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.
>
> When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.
>
> In *University of Alberta v. Pylypiuk*, 2002 ABQB 22 (CanLII), the Court commented on the interpretation of what is now section 17. The Court said:
>
> > In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4).
> >
> > In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is [*sic*] met, the presumption

is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

Section 17(1) requires a public body to withhold information only once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head of the public body concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

Once the decision is made that a presumption set out in section 17(4) applies to information, then it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information. If the decision is made that it would be an unreasonable invasion of personal privacy to disclose the personal information of a third party, the Public Body must then consider whether it is possible to sever the personally identifying information from the record and to provide the remainder to the Applicant, as required by section 6(2) of the FOIP Act.

[para 10] In this case, the Public Body withheld video recordings by applying section 17(1). In submissions from the Public Body I am directed to sections 1(n) and (r) of the Act. Those sections are as follows:

1 In this Act,

…

(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

…

(r) "third party" means a person, a group of persons or an organization other than an applicant or a public body;

…

[para 11] Using those definitions, the Public Body informs me six of the CCTV recordings contained third party personal information, disclosure of which would, in its view, constitute an unreasonable invasion of a third party's personal privacy. The Public Body noted the Applicant has been incarcerated with some of the third parties it has identified. The Public Body submits therefore, it would not be unreasonable to believe the Applicant would be able to identify a number of third parties in the records at issue.

[para 12] In reviewing the CCTV videos, I note all videos display remanded individuals housed at the CRC. I am not sure why the Public Body only identified six videos as containing personal information of third parties.

[para 13] The videos that contain the personal information of individuals other than the alleged assaulter of the Applicant are as follows:

1. Video file entitled May 25, 2014 [Applicant's name] escort.
2. Video file entitled Weight Room Library.
3. Video file entitled Cell [number]. This is video of the interior of a cell in unit 9 that is not the Applicant's cell and does not contain any video of the Applicant being assaulted, nor is it the assailant's cell. It shows the occupant of the cell.

[para 14] The videos in this inquiry that show only one third party in the company of the Applicant are those in which the third party is the alleged assaulter of the Applicant. Those videos are as follows:

4. Video file entitled Outside Exercise Yard
5. Video file entitled Unit 9 Panorama Front
6. Video file entitled Unit 9 Panorama Back
7. Video file entitled VCam2
8. Video file entitled VCam3
9. Video file entitled Entrance Exterior
10. Video file entitled Entrance Interior

[para 15] Video 1 shows the Applicant being escorted through the CRC, presumably to the infirmary, to a shower and then to a holding cell. This video is not of unit 9, has nothing to do with the altercation and is non-responsive to the Applicant's request and will not be considered in this inquiry.

[para 16] Video 2 shows individuals in a weight room not in Unit 9 and who are not involved in the altercation between the Applicant and the alleged assaulter. There is nothing in this video that shows the individuals involved in the altercation or the chase the Applicant complains about. I find this video is not responsive to the Applicant's request and will not be considered in this inquiry.

[para 17] Video 3 shows the inside of a cell in Unit 9. The individual shown in the cell is not the Applicant nor the alleged assailant. There is nothing in the video that shows either the chase or assault of the Applicant. I find the Public Body correctly determined the presumption against disclosure applies to this video.

[para 18] Videos 4-8 show the alleged assaulter chasing the Applicant out of the unit and show both of them outside of the unit in the small exercise yard. Those videos do not show any other incarcerated individual in the videos. Videos 9-10 show the Applicant and the alleged assaulter being removed from the unit at separate times. I find the Public Body has correctly determined the presumption against disclosure applies to the third party's personal information in these videos.

[para 19] I must now determine whether the Public Body made the correct determination of all relevant circumstances to rebut the presumption against disclosure.

[para 20] It is clear the Applicant is submitting section 17(5)(c) (disclosure relevant to a fair determination of the Applicant's rights) rebuts the presumption.

[para 21] The Public Body tells me, in response to the Applicant's request, a review was conducted of the records and there was a consideration of all relevant circumstances, including those listed in section 17(5) of the Act. It was determined subsections 17(5)(a), (b), (d), (g), and (i) were not applicable to the records.

[para 22] In considering subsection 17(5)(c), the Public Body weighed effects of subsections 17(5)(e) (third party will be exposed unfairly to financial or other harm), (f) (the personal information has been supplied in confidence) and (h) (the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant).

a. Application of section 17(5)(e)

[para 23] The Public Body asserts the personal information collected in the CCTV recordings are that of other inmates and are used to maintain the security within the CRC and therefore, it is implied this information is supplied in confidence. The Public Body submits the following:

> Individuals have the implicit understanding that their personal information in correctional records will remain confidential and will not be released to a third party except as required

> by law. The images in these CCTV recordings are of other inmates residing in CRC. These individuals are remanded in custody and may be awaiting trial. These inmates may not have been convicted of any crime and may never be convicted. The release of their images could unfairly damage their reputation. It would be an unreasonable invasion of a third party's privacy if their images were released to the Public. Therefore, these subsections weigh in favour of not disclosing personal information of third parties.

[para 24] Similar arguments were put before the Adjudicator in Order F2015-02. Regarding the application of section 17(5)(e), at para. 46 and 47 she states the following:

> Section 17(5)(e), cited above, is a factor weighing in favor of withholding personal information. It applies when it can reasonably be expected that a third party will be exposed unfairly to financial or other harm if a public body were to disclose personal information to an applicant. The Public Body argues that if the CCTV recordings are given to the Applicant, the inmates in these recordings will be exposed unfairly to financial or other harm.
>
> It is unclear from the Public Body's arguments the linkage it sees between disclosing the "tank 5" CCTV recording to the Applicant and the inmates depicted in this recording experiencing unfair financial or other harms. If the Applicant and his counsel were to use the recording for the limited purpose of pursuing his legal rights in relation to the Public Body's use of force, it does not appear likely that this harmful outcome could result from disclosure. However, it may be that the Public Body's concern is that if it discloses the recording, there would be no safeguards to prevent the recording from becoming publicly available. If the "tank 5" recording were to be made public or to "go viral", persons such as the employers or prospective employers could view it, recognize the inmates as employees or prospective employees, and then end the inmate's employment or choose not to enter an employment relationship with the inmate because of negative impressions created by the inmate's apparent incarceration and by perceived associations with criminality. Such harm would be arguably unfair, given that the inmates may not ultimately be convicted of criminal offences. If that is the Public Body's concern, then it is a harm that could reasonably be expected to result from widespread publication of the recording, assuming that no restrictions are imposed on the use that the Applicant could make of it.

[para 25] I agree with this reasoning and adopt it in this case. This factor weighs against disclosure of the videos.

b. Application of section 17(5)(f)

[para 26] Regarding section 17(5)(f), the Adjudicator in Order F2015-02 wrote the following (at paras. 48-50):

> Section 17(5)(f) weighs against disclosure when it applies. Section 17(5)(f) applies to personal information that has been supplied to a public body in confidence. The Public Body argues that section 17(5)(f) applies to the CCTV recordings.

> The term "supply" typically means "to provide what is necessary or required." The phrase "supplied in confidence" appears to refer to information that is actively provided by a third party, and in those circumstances where the third party is in a position to impose terms of confidentiality. With regard to the "tank 5" CCTV recording, none of the inmates had any choice but to wait in the room referred to as "tank 5" and be the subject of CCTV recordings. Moreover, it does not appear that the inmates had any ability to impose restrictions as to the extent to which the Public Body could use, or disclose the information recorded by the CCTV cameras, provided the use or disclosure conformed to the requirements of Part 2 of the FOIP Act. In any event, even if I am wrong that the personal information of inmates captured on CCTV recordings cannot be said to be supplied in confidence, the Public Body has provided no evidence regarding the expectations of the inmates regarding confidentiality or the terms and conditions under which the inmates "supplied" their personal information to the Public Body. The Public Body states that inmates have an "implicit understanding" that their personal information will be held in confidence; however, no evidence to support this position has been put forward.
>
> For the reasons above, I am unable to find that section 17(5)(f) has any application to the personal information in the records.

[para 27] In this case, the Public Body has also not provided any evidence to support the position there is an "implicit understanding" the inmates' personal information will be held in confidence and I adopt the reasoning above and find section 17(5)(f) not to apply to the personal information in the videos.

c. Application of section 17(5)(h)

[para 28] Finally, at paras. 51 to 53 of Order F2015-02, the Adjudicator discusses the application of section 17(5)(h) to the information at issue:

> The Public Body argues that section 17(5)(h) applies and weighs in favor of withholding the personal information in the records. Section 17(5)(h) applies when the reputation of a third party referred to in a record could be damaged by disclosing the information to an applicant.
>
> If the Applicant were to use the information in the CCTV recording for the sole purpose of pursuing a claim against the Public Body, it is unclear how the reputation of inmates would be unfairly damaged through this use. However, if the contents of the recording were widely disseminated, for example, on the internet, it is conceivable that damage to the reputations of the remand centre inmates depicted in the CCTV recording could result. While some of the inmates may be, or may have been, convicted of criminal offences, it is not necessarily the case that all the inmates identifiable in the CCTV recording would be or would have been. If the CCTV recording were widely distributed, it is possible that the reputation of an inmate who was ultimately not found guilty of a criminal offence, would, by virtue of the third party being in a recording of inmates in a remand centre, suffer unfair damage.
>
> Section 17(5)(h) can be said to apply should the CCTV recording become widely available to the public.

[para 29] Again, I adopt this reasoning to the information at issue in this inquiry and find section 17(5)(h) can be said to apply should the videos become widely available to the public.

d. Other relevant circumstances

[para 30] The Adjudicator writing in Order F2015-02 then considered other relevant circumstances as required by section 17(5). She noted Order F2012-24 where the Director of Adjudication suggested provisions of section 40 reflect factors that may be relevant to the determination to be made under section 17(5). At paras. 61 and 62, the Adjudicator wrote about the application of 40(1)(dd):

> The Director of Adjudication held that the circumstances enumerated in provisions of section 40 could be considered as factors weighing in favor of granting access to personal information in circumstances where the provision would give a public body discretion to disclose the personal information in the absence of an access request.
>
> In the present case, I note that under section 40(1)(dd), cited above, the Public Body would have discretion to disclose the information requested by the Applicant to his counsel. Section 40(1)(dd) is not restricted to the personal information of an inmate, but applies to *any* personal information. While section 40(1)(dd) is not explicit as to the circumstances in which personal information may be disclosed, other than that it may be disclosed to legal counsel acting for an inmate. The reference to legal counsel "acting for an inmate" suggests that the personal information in question will be relevant to the purpose of acting for the inmate, or possibly, that the information will assist legal counsel in acting for the inmate.

[para 31] Section 40(1)(dd) reads as follows:

> *40(1) A public body may disclose personal information only*
> ...
> *(dd) to a lawyer or a student-at-law acting for an inmate under the control or supervision of a correction authority,*
> ...
> *(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.*

[para 32] The information in CCTV recordings 4-8 is highly relevant to any action the Applicant is considering. I find it is necessary for the Applicant's counsel to view the video in order to advise his client. I find this circumstance is relevant and weighs in favour of disclosure of video recordings 4-8.

[para 33] I do not find the same for videos 3, 9 and 10. Video 3 shows only the inside of a cell and its occupant. The occupant is not the Applicant or the alleged assailant. The video does not show any of the chase or the altercation. Videos 9 and 10 record the

separate escort of the Applicant and the alleged assailant from the unit after the altercation and are not relevant to the determination of the Applicants rights.

2. Did the Public Body properly apply sections 20(1)(j), (k), and (m) of the Act (disclosure harmful to law enforcement) to the information in the records?

[para 34] 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*
>
> *(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,*
>
> *…*

[para 35] As I have found only videos 4, 5, 6, 7 and 8 contain relevant information to rebut the presumption against disclosure of third party information, only those videos will be discussed further.

[para 36] In Order F2016-10, the Adjudicator was also considering an access request for video surveillance from the CRC. The Public Body applied sections 20(1)(j), (k) and (m) to the videos. The Adjudicator found the Public Body correctly applied section 20(m) to the information at issue and did not make any findings regarding the application of sections 20(1)(j) and (k).

[para 37] In her decision, the Adjudicator outlines how the Public Body must meet the "harms test" for the sections to be applied to the information. At paras. 9-11 she states:

> 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).
>
> 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.]
>
> 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.

> 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.

[para 38] It would appear the Public Body has made the same arguments for the application of section 20(1) to the information at issue to the Adjudicator in Order F2016-10 as it did to this inquiry.

[para 39] In that Order, the Adjudicator reviewed those submissions at paras. 16 and 17.

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;*

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.

[para 40] The Public Body argues the CCTV recordings at issue

> …display the layout of the Max Unit and a portion of the layout of CRC outside of the Max Unit. If disclosed, the footage would reveal blind spots, security mechanisms or the lack of security mechanisms, tactical procedures to respond to a specific type of event and the facility layout. Disclosure of the video could reveal the Centre's security strategies and tactics including strategies and tactics displayed in these videos. This would pose a security risk to staff, inmates and visitors. It is the Public Body's position that it is reasonable to expect disclosure would facilitate the escape by inmates, increase the risk of unauthorized contraband and increase the amount of violent altercations within CRC.

[para 41] In deciding whether section 20(1)(m) applied to the information at issue, the Adjudicator in Order F2016-10 rejected the applicant's argument the information was readily available to anyone either housed or employed at the remand centre. At paras. 20 - 22 she states the following:

> 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.
>
> 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.
>
> I find that section 20(1)(m) applies to the information in the video.

[para 42] In this case, the videos show inmates present during the entire length of the videos. The videos show the unit where the Applicant has been housed for a number of years. Not only the Applicant, but also other inmates observe the movement of the guards in the unit. The Applicant is outside of his cell for the duration of all of the video, apparently with the consent of the guards in the unit. The Applicant is clearly familiar with the unit because as he attempts to flee his alleged assailant, he immediately heads to the exercise yard. This distinguishes the videos in this inquiry from the inquiry resulting in Order F2016-10.

[para 43] The argument remains that the video could potentially reveal the manner in which the unit is recorded, thereby jeopardizing the security of the Correction Centre. I accept this argument and find section 20(1)(m) applies to videos 4-8.

[para 44] It is not necessary for me to therefore consider whether the remaining subsections of section 20(1) apply.

a. Exercise of Discretion

[para 45] Section 20(1) is a discretionary section and I must now consider how the Public Body exercised that discretion. The Public Body referred me to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. At paras. 45-51, the Court states the following:

> However, by stipulating that "[a] head may refuse to disclose" a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head.
>
> A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.
>
> By way of example, we consider s. 14(1)(a) where a head "may refuse to disclose a record where the disclosure could reasonably be expected to . . . interfere with a law enforcement matter". The main purpose of the exemption is clearly to protect the public interest in

effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word "may" which confers a discretion on the head to make the decision whether or not to disclose the information.

In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

The public interest override in s. 23 would add little to this process. Section 23 simply provides that exemptions from disclosure do not apply "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption". But a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists, the head would exercise the discretion conferred by the word "may" and order disclosure of the document.

The same rationale applies to the other exemptions under s. 14(1) as well as to those under s. 14(2). Section 14(2)(a) is particularly relevant in the case at bar. It provides that a head "may refuse to disclose a record . . . that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law". The main purpose of this section is to protect the public interest in getting full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice; an expectation of confidentiality may further the goal of getting at the truth of what really happened. At the same time, the discretion conferred by the word "may" recognizes that there may be other interests, whether public or private, that outweigh this public interest in confidentiality. Again, an additional review under s. 23 would add little, if anything, to this process.

This interpretation is confirmed by the established practice for review of s. 14 claims which proceeds on the basis that, even in the absence of the s. 23 public interest override, the head has a wide discretion. The proper review of discretion under s. 14 has been explained as follows:

> The absence of section 14 from the list of exemptions that can be overridden under section 23 does not change the fact that the exemption is discretionary, and discretion should be exercised on a case-by-case basis. The LCBO's submission suggests that it would never be appropriate to disclose such records in the public interest, or in order to promote transparency and accountability, in the context of the exercise of discretion. I disagree, and in

> my view, such a position would be inconsistent with the requirement to exercise discretion based on the facts and circumstances of every case.
>
> (IPC Order PO-2508-I/September 27, 2006, at p. 6, *per* Senior Adjudicator John Higgins)

[para 46] In this case, the Public Body considered whether the information would be a matter of public interest. In submissions the Public Body states:

> There have not been other requests for these records by any other individual other than the applicant, nor has there been any media attention or inquiries about these recordings. The interest lies with the applicant only and his motivation to view these recordings is for his private interests. If the applicant were to disseminate the contents of the records into the public domain (my emphasis), 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… Therefore the harm in releasing the CCTV recordings outweighs the considerations of public interest.

[para 47] In weighing the Applicant's interests the Public Body submits the following:

> In the Applicant's Initial Submission, the Applicant indicated that he required these records to show his legal counsel to seek legal opinions. In this instance where an assault or other illegal action may 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. CCTV is only shared with a police service during an investigation, through the disclosure process with Crown Prosecution and an inmate's lawyer 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 (my emphasis).

[para 48] In considering other options for the Applicant, the Public Body assumes the Applicant can take advantage of the disclosure process available to a person accused of committing an offence through either the Crown Prosecutor's office or when facing disciplinary hearings at the Remand Centre. Disclosure through the Crown Prosecutor's office is a right given to all accused persons, even those without legal representation. Presumably, the Public Body's concern regarding disclosure being harmful to public safety is alleviated if the Applicant is only allowed to view the video, rather than have the video disclosed to him.

[para 49] However, the Applicant is neither an accused person in this matter, nor have I been given any evidence to suggest he is facing any disciplinary hearings as a result of the assault he alleges occurred. Therefore, the options to view the videos are not ones he can exercise. If an applicant can view the videos as a person facing criminal charges or disciplinary punishment, it does not make sense that he cannot view the videos as an aggrieved person.

[para 50] The Public Body has mechanisms in place to allow video recordings within the CRC to be viewed by various individuals. Those mechanisms, presumably, take into consideration all of the safety concerns the Public Body posits would weigh against disclosure of the video to this Applicant. I find the Public Body misdirected itself when exercising its discretion in this matter when it did not consider alternate methods to allow the Applicant access to the video recordings in order to obtain legal advice.

3. If exceptions were properly applied to any of the information in the records, can this information reasonably be severed from the records, in accordance with section 6(2) of the Act, so that the Applicant may be given access to the remainder of the record?

[para 51] I have found the Public Body properly applied section 20 exceptions to video 3. I have also found section 17 applies to this video which shows the inside of a cell in unit 9. The video also shows the occupant of the cell who is presumably a remanded prisoner at CRC.

[para 52] I have also found the Public Body properly applied sections 17 and 20 exceptions to videos 9 and 10. These videos show the separate escorts of the Applicant and the alleged assaulter to the entrance of unit 9.

[para 53] The Public Body states information that would be severed under section 20 would potentially reveal the information needed to be protected.

[para 54] The videos regarding the entrance and exit of unit 9 show various locks and procedures used with respect to security. I agree the act of severing those images would potentially reveal information likely to cause harm to the security of the CRC. I find the information cannot be reasonably severed from those records so the Applicant may be given access to the remainder of the record.

Conclusion regarding the information at issue

[para 55] I have found the Public Body has legitimate concerns regarding the harm that could be occasioned to third parties and to public safety if the Applicant were to be given complete access to the information. I have also found that access to the information is of significant importance to the Applicant for the limited purpose of seeking advice and instructing counsel and outweighs the other factors against disclosure.

[para 56] The submissions of the Public Body in determining factors weighing against disclosure appear to be relevant if the video recordings become widely available. As the Public Body has pointed out, the videos may be available to the Applicant in other ways which do not concern the Public Body in terms of the harm that may be caused.

[para 57] In Order F2015-02, the Adjudicator, when dealing with how to order the Public Body to provide the Applicant access to the video, made the following comments at paras. 69-71:

> If I were to order the Public Body to give access to the records without restriction, then the order would not reflect my decision in relation to section 17, which is that it would not be an unreasonable invasion of third party personal privacy if the Applicant uses or discloses the personal information for the limited purposes of instructing counsel and pursuing a legal case. However, I am unable to order the Applicant to confine his use or disclosure of the personal information in the records to those purposes that weigh in favor of disclosure or to take measures to safeguard the information from unauthorized access or disclosure. This is because section 72 limits me to making orders applying only to public bodies.
>
> However, under section 72(4) of the FOIP Act, the Commissioner may specify any terms and conditions in an order disposing of the issues for inquiry. This provision states:
>
> > *72(4) The Commissioner may specify any terms or conditions in an order made under this section.*
>
> In my view, this provision authorizes me, as the Commissioner's delegate, to specify terms or conditions in an order as to how a public body is to give an applicant access to records, once I have decided that access must be given.

[para 58] The Public Body is not limited in the means of providing access to information requested by the Applicant. Section 13 of the Act provides various methods of providing access to information. In part, the section reads as follows:

> *13(1) If an applicant is told under section 12(1) that access will be granted, the head of the public body must comply with this section.*
> *…*
>
> *(4) If the applicant has asked to examine a record or for a copy of a record that cannot reasonably be reproduced, the applicant*
>
> > *(a) must be permitted to examine the record or part of it, or*
> >
> > *(c) must be given access in accordance with the regulations.*

[para 59] After reviewing this section, the Adjudicator in Order F2015-02 determined she would order the Public Body to allow the Applicant and his legal counsel to examine CCTV recordings at the Public Body's premises. I will follow that example in this matter with respect to videos 4, 5, 6, 7, and 8.

V. ORDER

[para 60] I make this Order under section 72 of the Act.

[para 61] I order the Public Body to give access to CCTV recordings 4, 5, 6, 7, and 8 as described in para. 14. The Public Body must give access to these recordings by permitting the Applicant and his legal counsel to examine them at its premises.

[para 62] I confirm the decisions of the Public Body to refuse to disclose the remaining videos.

[para 63] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Neena Ahluwalia Q.C.
Adjudicator