

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-42

November 3, 2021

JUSTICE AND SOLICITOR GENERAL

Case File Number 005195

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Summary: The Applicant requested CCTV footage of an incident that took place on November 29, 2015 at the Calgary Remand Centre. The Applicant expressly requested that the footage contain time stamps. The Public Body located footage that did not contain time stamps. The Public Body withheld this video in its entirety under section 20 (disclosure harmful to law enforcement).

In its submissions, the Public Body explained that it had saved CCTV footage and then used the footage to make the video. The Adjudicator asked the Public Body to conduct a new search that would include the saved source footage to which it referred, as the Applicant had requested a copy of the source CCTV footage with time stamps and the video the Public Body created lacked time stamps.

The Adjudicator was unable to find that section 20 applied on the evidence before her. However, as it was uncertain that the Applicant was seeking the video the Public Body had provided for the inquiry, the Adjudicator decided to postpone making a decision in relation to the Public Body's application of section 20 until the Public Body conducted a new search for the CCTV footage with time stamps. She decided that once the new search was conducted, and either new records located, or an explanation of the Public Body's new search for responsive records provided, the inquiry would resume.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 c. F-25, ss. 6, 10, 13, 20, 72

Authorities Cited: **AB:** Order F2007-029 **ON:** Order PO-2332

I. BACKGROUND

[para 1] The Applicant made an access request to Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

[para 2] The Applicant requested CCTV video, as follows:

Video from November 29, 2015 in regards to the brutal unsolicited assault I was subjected to at the hands of CRC [Calgary Remand Centre] staff at around 9:37 the incident has been well documented and all charge against me has been disapproved I specifically ask for the footage from the camera behind the camera that was used in my wardens court hearing as well as any other angles that may be available as well as any and all cameras that show my supposed escort to A&D. I would kindly ask for the exact times to also be provided as this is all in question as to the actual facts of the matter at hand and I would like to remove any discrepancies.

[para 3] The Public Body located a video that contained information about the relevant incident. It applied section 20(1)(j), (k), and (m) (disclosure harmful to law enforcement) to withhold the video from the Applicant.

[para 4] The Applicant requested review by the Commissioner of the Public Body's response to his access request. In particular, he questioned the adequacy of the Public Body's search for responsive records and its decisions to withhold the record it did locate from him under section 20.

[para 5] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry.

II. ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by conducting a reasonable search for responsive records as required by section 10(1) of the Act (duty to assist applicants)?

ISSUE B: Did the Public Body properly apply section 20 of the Act (disclosure harmful to law enforcement) to the records it located?

III. DISCUSSION OF ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by conducting a reasonable search for responsive records as required by section 10(1) of the Act (duty to assist applicants)?

[para 6] Section 10(1) of the Act states:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 7] In Order F2007-029, the Commissioner made the following statements about a public body's duty to assist under section 10(1):

The Public Body has the onus to establish that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1).

...

Previous orders of my office have established that the duty to assist includes the duty to conduct an adequate search for records. In Order 2001-016, I said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) (now 10(1)) of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) (now 10(1)).

Previous orders . . . say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) of the Act [now section 10(1)]. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion what has been done.

...

In general, evidence as to the adequacy of search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

In the foregoing order, former Commissioner Work set out the evidence that assists in assessing whether a public body has conducted a reasonable search for responsive records.

[para 8] In his request for review, the Applicant questioned whether the Public Body had searched for all responsive records. In particular, he expressed concern as to whether the Public Body had searched for the original CCTV footage he was seeking with time stamps, given that it had located only one video without time stamps. The Applicant believes that this video was used at a hearing he had attended, and which he had been shown with his then counsel. The Applicant also noted that his former counsel had had a forensic analysis done of the video, which revealed inconsistencies in the video that made it potentially inadmissible as evidence. The Applicant submitted a copy of this report for the inquiry.

[para 9] The Public Body states:

A FOIP Advisor reviewed the scope of the request and determined that the search request was to be sent to the Calgary Remand Center (CRC) program area. The Applicant was an inmate at the CRC and as such, the CRC would be the only program area that could have records specific to the Applicant's request. Furthermore, the CRC was specifically mentioned by the Applicant as being the source of the records which was being sought.

On October 13, 2016, the FOIP Office sent a records search request to the CRC FOIP contacts requesting the video. The CRC FOIP contacts included the Deputy Director of the CRC, as well as to the Director's administrative assistant. The Applicant's original request wording was provided to CRC. The records search was also sent to a Correctional Peace Officer responsible for CCTV footage to locate and secure the records. The location and times of the CCTV footage requested would have been confirmed after reviewing the incident report and the inmate's institutional charge documents and the search for the video footage would have proceeded. The applicant was requesting multiple video angles from numerous cameras throughout the Unit of the incident, including those of him being escorted to a holding cell at Admissions and Discharge. The CCTV footage of the incident was pulled from the live system and compiled to show the progression of the Applicant throughout the Unit as was requested by the Applicant. Every camera angle that the inmate was visible in was saved and then added together to make one fluid clip of the incident from start to finish. [my emphasis]

On October 18, 2016, the CRC provided the JSG FOIP Office with 1 video file in relation to an incident that occurred on November 29, 2015 at the CRC as per the records search request. As indicated previously, the footage revealed the whole incident from beginning to end.

Based on the review of the video footage the Public Body maintains that a complete search was conducted and all records were provided in response to the Applicant's request.

[para 10] The Public Body documents a reasonable search for responsive records in the foregoing excerpt. The Public Body also acknowledges that it saved live footage and then used that saved footage to make one video file. However, the Applicant's access request is not for the "one fluid clip" that the Public Body created, and which lacks time stamps, but for the original CCTV footage of the incident that includes time stamps, from which the single file was created. The Public Body has confirmed in its submissions that it saved the CCTV footage with which it made the video. The Public Body has not explained why it did not produce this CCTV footage in its response to the Applicant's access request, despite noting that it saved it. If it is the case that the Public Body used or uses CCTV systems without time stamps, it would be helpful if the Public Body submitted affidavit evidence to establish this practice. I take notice that it would be unusual for a CCTV system not to use time stamps, particularly if the CCTV footage is to

be used as evidence, as one might expect CCTV footage to be used at a detention centre. I find that the source CCTV footage the Public Body states was saved is likely to have the time stamp information the Applicant requested and which the video it has submitted for the inquiry lacks.

[para 11] As the Public Body confirmed that it saved the CCTV footage from which the video it located was made, I must require it to search for this footage, given that this footage is the subject of the access request. The video the Public Body located may contain information responsive to the access request, but it does not contain all the information the Applicant requested, as it lacks time stamps. As noted above, a public body must conduct a reasonable search for responsive records in order to meet the duty to assist. In this case, the Public Body identified records that are potentially responsive – the saved source CCTV footage—but has not produced these records, nor has it provided an explanation as to why these records were not produced, as required by the last of the points cited by former Commissioner Work in Order F2007-029, cited above.

[para 12] For the reasons above, I find that the Public Body has not established that it conducted a reasonable search for responsive records or met its duty to assist the Applicant. I will order it to conduct a new search for the saved CCTV footage the Applicant requested. If it is unable to locate the saved CCTV footage to which it refers in its submissions, I require it to inform me and the Applicant how it searched for these records, with reference to the factors set out in Order F2007-029.

ISSUE B: Did the Public Body properly apply section 20 of the Act (disclosure harmful to law enforcement) to the records it located?

[para 13] The Public Body applied sections 20(1)(j), (k), and (m) to withhold the record it located from the Applicant. Section 20 states, in part:

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 14] The Public Body argues the following:

In Ontario Order, PO-2911 [page 7], Adjudicator Smith considers the findings in Order PO- 2332, by which Adjudicator John Swaigen responds to concerns relating to a security audit undertaken of a maximum security detention centre. 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.”

[...]

It is important to note that CCTV video contain surveillance footage within a currently active correctional centre. CCTV is a security measure and is not meant for public consumption. This CCTV recording captures an inmate (the Applicant) on a Unit at CRC during an incident between the Applicant and Correctional Peace officers.

The video at issue shows how the interior space is configured in a day room (where the Applicant was placed after he was handled by the Correctional Peace officers) in a specific correctional center in this case CRC. If disclosed, the video would reveal the camera angles, potential blind spots, security mechanisms, tactical procedures used 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 this video. This would pose a security risk to staff, inmates and visitors. Disclosure would facilitate the escape by inmates, increase the risk of unauthorized contraband and increase the amount of violent altercations within CRC.

[para 15] While I agree with the analysis in Order PO-2332, I find that this case is not strictly on point. The Adjudicator in Order PO-2332 was speaking of security audits, rather than CCTV footage. A security audit is intended to review security measures and to review the strengths and vulnerabilities of a system and to convey information about how a security system works. It is conceivable that disclosing information from a security audit may render the audited system even more vulnerable to attack if its vulnerabilities or structure becomes widely known. Less evidence is required from a public body to establish the likelihood of interference with security when the information in the records speaks to the risk.

[para 16] The video footage before me does not contain an analysis of security vulnerabilities or speak to the harms the Public Body argues could result from disclosure.

[para 17] I note that the Adjudicator also stated in Order PO-2332:

Section 14(1)(k) states:

(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;

Except in the case of section 14(1)(e), where section 14 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 1998 CanLII 7154 (ON CA), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg* (1994), 1994 CanLII 10563 (ON SC), 19 O.R. (3d) 197 (Div. Ct.)].

From the foregoing excerpt, I conclude that the Adjudicator in Order PO-2332 did not intend to suggest that the disclosure of information regarding detention centres is presumptively harmful.

[para 18] It is unclear from the Public Body’s submissions how the harms it projects would result from granting the Applicant access to the video. I agree that videos of detention centres may reveal the way in which rooms are arranged, the layout of the facility, or the manner in which locking mechanisms operate; however, such information was likely visible to the Applicant on a daily basis in greater detail than the CCTV footage would permit when he was at the Calgary Remand Centre. It should also be noted that the Applicant is no longer at the Calgary Remand Centre. The Public Body has not provided any evidence to support its assertions that harm would result if the Applicant were granted access, either by being permitted to view the video or by being provided a copy.

[para 19] I am also unable to say that the video contains information about “tactical procedures” as the Public Body has not provided any evidence that would enable me to characterize the activities in the video in such terms. The Public Body also asserts that the footage reveals camera positioning and blind spots; however, the Public Body has not explained the location of the blind spots with respect to the CCTV video. I am unable to evaluate the likelihood that any camera blind spots would be disclosed or that harm would result if any such information were disclosed. The Public Body has also not turned its mind to the issue of whether information regarding camera blind spots or other information it identifies as giving rise to security risk could be severed from the record so that the remaining information could be provided to the Applicant. Section 6 of the FOIP Act requires the Public Body to consider whether information subject to an exception can be severed.

[para 20] The Public Body also states:

As per the Adult Centre Operations Branch (ACOB) policies and procedures, a digital copy of the recording(s) will not be provided to the requesting party but the requesting party may be able to view the video upon request to the Director of the Centre. If approved, ACOB head office will schedule a viewing appointment of the CCTV footage with the requesting party or direct them to the correctional facility of their choice. Disclosure of the CCTV footage would be harmful if released to the public as individuals would be able to study the video to find vulnerabilities that would reveal the security strategies of CRC. The video provides images of the layout of a cell, numerous corridors, a Unit and camera angles. The consequences of disclosure would undoubtedly amount to damage as well as detriment to security of CRC and its inhabitants and not mere inconvenience.

From the foregoing, I understand that the Public Body's primary concern regarding disclosure to the Applicant is the concern that the Applicant would publish the video on the internet. The Public Body discloses information to parties by permitting them to view CCTV footage on its premises. Section 13 of the FOIP Act permits a public body to provide access in the same way. Given that the Applicant likely does not have access to the software that would be required to view the footage, it appears that it would be necessary for the Applicant to view any responsive footage in that manner. However, as the Public Body's arguments have not addressed the particular content of the records, such that I could find that there is a reasonable likelihood that harm to law enforcement could result from disclosure, it is unclear that providing the Applicant the opportunity to view the footage rather than providing a copy would be necessary to mitigate a risk of harm to law enforcement.

[para 21] If I were to decide whether the Public Body properly applied section 20 to the video on the basis of the evidence presently before me, I would be unable to find that section 20 applies. However, the Public Body has not yet completed a search for responsive records, and it is unclear that the video the Public Body has located is what the Applicant sought when he made the access request, given that it lacks time stamps. In addition, the Applicant stipulated that he was seeking the CCTV footage used to make the video. On the evidence before me, I am unable to find that the CCTV footage the Applicant is seeking and the contents of the video the Public Body produced are identical. I find that the issue of the application of section 20 is premature.

[para 22] Once the Public Body has conducted the new search for the records it saved from CCTV footage, and provided those records for my review and an explanation of the search it has conducted, I will determine whether section 20 applies. If the Applicant is dissatisfied with the new search that has been conducted, he may request review of the new search and I will add this issue to the inquiry. If the Public Body determines that section 20 applies to the new records, it should support its position with evidence as to how disclosure of the information in the CCTV footage could reasonably be expected to result in the harms it projects. If the Public Body is unable to locate any additional records, I will consider its application of section 20 to the video it located for the inquiry along with any evidence it submits to support its position.

IV. ORDER

[para 23] I make this Order under section 72 of the Act.

[para 24] I order the Public Body to conduct a new search for responsive records; specifically, I order it to search for responsive CCTV footage with time stamps.

[para 25] I order the Public Body to provide any new records located for my review in the inquiry. If it is unable to locate responsive CCTV footage with time stamps, I require it to provide an explanation of the search it conducted for the responsive CCTV footage with time stamps that touches on all points listed by former Commissioner Work in Order F2007-029.

[para 26] Once the Public Body has conducted the new search and provided either the records for the inquiry or an explanation of its search, I will reconvene the inquiry and decide the issues for inquiry in a final order. The Applicant may request review of the new search if he is dissatisfied with it and I would then review the issue of adequacy of the Public Body's new search, as well as its application of section 20.

[para 27] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator
/kh