



## REPORT OF FINDINGS

*Right to Information and Protection of Privacy Act*

Matter No: 2018-4787-AP-2600

June 12, 2019

## I BACKGROUND

1. This Report of the Commissioner's Findings is made pursuant to s. 73(1)(a) of the *Right to Information and Protection of Privacy Act*<sup>1</sup>.
2. The Applicant filed a request with Horizon Health Network (Horizon) to obtain access to security video footage and other related records, as well as the names of security guards involved in an altercation with the Applicant at one of Horizon's establishments at a particular date.
3. Horizon refused to disclose the requested information, citing ss. 21(1), 21(2)(b) and 29(1)(o) of the *Act*.
4. The Applicant was not satisfied with Horizon's response, and therefore, filed a complaint with our Office.

## II INFORMAL RESOLUTION ATTEMPTS

5. Upon receipt of the Complaint, the matter was assigned to one of our Investigators for review and to attempt to informally resolve the matter as per s. 68 of the *Act* to the satisfaction of both the Applicant and Horizon, and in conformity with the rules of the *Act*.
6. To do so, she requested a copy of the relevant records from Horizon, being a copy of the video footage, as well as explanations as to why Horizon believed it, and the names of the security guards, should remain protected.
7. Horizon explained that it believed disclosure of the video footage would be an unreasonable invasion of third parties' privacy, given that individuals, other than the Applicant and the security guards, were visible in the footage.
8. With regards to the security guards' facial image and names, Horizon indicated that, while the *Act* does not deem disclosure of information relating to public bodies' employee's job classification, salary range, benefits, employment responsibilities or travel expenses to be an unreasonable invasion of their privacy, the *Act* did not speak to an employee's name or facial image in relation to an event. As such, Horizon maintained that disclosure of this information would be an unreasonable invasion of the security guards' privacy and could therefore withhold access to the information pursuant to s. 21(1) of the *Act*.
9. Finally, Horizon relied on s. 29(1)(o) of the *Act* to refuse to disclose the requested information given that the video footage was, at the time of the Request, part of an ongoing court matter, and disclosure of the

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<sup>1</sup> S.N.B., c. R-10.6 (the "Act")

video to the Applicant might be harmful to the legal proceeding as the Applicant may end up disclosing it more broadly, i.e. on social media.

10. The Investigator assigned to the complaint provided her findings to Horizon as to why she accepted that the Applicant was not entitled to receive access to the entire video footage, which consisted of two short video clips (each approximately 1.37 minutes in length), showing the front entrance of a Horizon establishment. The video footage captures what appears to be a 15-20 meter field of view. The video footage of both clips depicts a few individuals standing outside of the entrance, including the Applicant, as well as individuals going in and out of the entrance. It also shows parked vehicles and some driving by. While the footage is not of superior quality, as you cannot readily read license plate numbers, or clearly see the individuals' faces, The Investigator was therefore of the view that the video footage captures personal information, being individuals' images, and individuals' car license plates
11. The Investigator therefore asked Horizon whether it had video editing capabilities to blur out the images of third parties. Furthermore, the Investigator's findings indicated the reasons why she believed the security guards' facial images, as well as their names could not be withheld from disclosure. She invited Horizon to provide comments as to whether it accepted her findings.
12. Horizon responded by indicating that it had in-house editing capabilities to blur out third party's images on the video footage, it was not amenable to disclosing it as it maintained its position that the security guards' images and names should be protected, and given the ongoing legal proceeding involving the security guards, it was not prepared to disclose the information.
13. As the matter could not be informally resolved, it was remitted to me for my review, where I determined to launch a formal investigation.

### III FORMAL INVESTIGATION ANALYSIS AND FINDINGS

14. Upon being remitted a complaint, my goal is to determine whether to launch a formal investigation into the matter if I am of the view that the Applicant has not received access to the information he or she is entitled to receive under the *Act*, or if I am not satisfied with the efforts put forth by the public body in either the processing of the Request, or during the informal resolution process.

During my review, a meeting was held with Horizon officials, after which Horizon indicated it was amenable to inviting the Applicant to its offices to view the video, but not until the legal proceeding had ended; however, it was not amenable to disclosing the names of the security guards.

15. While I appreciate Horizon's willingness to allowing the Applicant to view the video footage, I cannot accept the time restraint imposed on the Applicant's right of access. As a result, I do not accept Horizon's arguments as to why it believes the Applicant is not entitled to receive access, in a timely manner, to the requested video footage, as well as to the names of the security guards.
16. As such, for the purposes of this Report, I will address the following issues:
  - a. Would disclosure of the security guards' names and facial image be deemed an unreasonable invasion of their privacy? and,
  - b. Could disclosure of the video footage, in an edited format (as to protect the privacy of individuals other than the Applicant and the security guards) reasonably be expected to be injurious to ongoing legal proceedings?

### **Unreasonable invasion of privacy**

17. S. 21(1) and (2) of the *Act* are mandatory exception provisions that enumerates the instances where disclosure of a third party's personal information would be deemed an unreasonable invasion of their privacy. As per the definition in the *Act*, a third party means a person other than the applicant and the public body. While employees of public bodies are considered third parties under the *Act*, this does not automatically mean that their personal information can be protected under this exception provision.
18. For the exception provision to apply, the information at issue must first be personal information, or of a personal nature. As per the definition of "personal information" found in the *Act*, names of individuals (and by extension, their facial image) is considered personal information. However, the analysis goes beyond this. To be considered an unreasonable invasion of an individual's privacy, the disclosure of the personal information must have been generated in the individual's personal capacity.
19. In this matter, the security guards' image and names were generated in a record (the video footage and other Horizon records) as part of their duties as security guards at a Horizon establishment, when interacting with the Applicant. They were not interacting with the Applicant as citizens outside of working hours. As such, would disclosure of their information constitute an unreasonable invasion of their privacy?
20. Conversely to s. 21(1) and (2) of the *Act*, s. 21(3) lists the circumstances where disclosure of a third party's personal information would not be deemed an unreasonable invasion of their privacy. For example, where the third party consents to the disclosure of his or her personal information, or where a law requires its disclosure. Another instance is where the information is about a third party's job

classification, salary range, benefits, employment responsibilities or travel expenses, as an officer or employee of a public body, as stipulated at s. 21(3)(f) of the *Act*. This does not mean that the information pertaining to these categories is not the third party's personal information – instead, it means that it will not be deemed to be an unreasonable invasion of their privacy if the information is disclosed.

21. Here, while Horizon is correct to state that s. 21(3)(f) of the *Act* does not list employee's facial image or names in relation to an event as information that would not be deemed an unreasonable invasion of their privacy if disclosed, I do not believe the legislature's intent was to restrict this exception to the specific items listed therein. In the Supreme Court of Canada decision *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R., an applicant has requested access to copies of logs with the names, identification numbers and signatures of employees entering and leaving the workplace on weekends. The Minister of Finance had disclosed the logs but redacted the employees' names, identification numbers and signatures on the ground that this information constituted personal information.
22. The Court found that the number of hours spend at the workplace is information that is "*related to the position or function of the individual in that it permits a general assessment to be made of the amount of work required for particular employee's position or function. For the same reason, the requested information is related to the responsibilities under the specific exception.*" With this decision in mind, I find that the images and the names of the security guards in this matter relate to their position or function as employees of Horizon, as well as to their employment responsibilities. Therefore, the disclosure of this information would not be deemed to be an unreasonable invasion of their privacy.
23. Furthermore, in a British Columbia decision rendered by our counterpart in Order F08-13<sup>2</sup>, the Commissioner determined that relevant video footage did contain third party information, being of another inmate that was in the same jail cell as the applicant for a brief period of time, as well as images of the staff members of the jail; however, it was of the view that only the images of the other inmate could be protected from disclosure as it would be deemed to be an unreasonable invasion of her privacy. As for the images of the jail staff, the Commissioner determined that its equivalent provision of our s. 21(3)(f) demonstrated that the legislature did not intend to treat information relating to a third party's position with a public body as an unreasonable invasion of his or her privacy. In that matter, the images of staff of the jail were captured while they were involved in the proper discharge of their duties, and also that staff were aware that the cameras were capturing their actions. As a result, the Commissioner ordered the disclosure of the video footage, edited to withhold the images of the other person held in custody in the same cell.

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<sup>2</sup> *Ministry of Public Safety and Solicitor General*, 2008 CanLII 41151

24. I agree and accept the British Columbia's analysis and find that the requested video footage in this matter should also be disclosed to the Applicant, by editing the images of the other individuals, as well as the license plate number of the visible vehicles captured by the footage, but by leaving unedited the Applicant and the security officers' images.

### **Ongoing legal proceedings**

25. Horizon relies on s. 29(1)(o) of the *Act* to refuse to edit and disclose a copy of the video footage and the names of the security guards. Horizon explained that one of the three security guards involved in the altercation with the Applicant had charges laid against him and a court date set, and therefore, Horizon did not want to disclose any information that would interfere with the court process.
26. To successfully rely on s. 29(1)(o) of the *Act*, Horizon must provide more information than simply indicating that a court process is ongoing. Horizon must meet the test of harm stipulated in that provision: that disclosure of the video footage could reasonably be expected to be injurious to the ongoing legal proceeding.
27. Here, the only arguments raised by Horizon for not disclosing the footage was that the Applicant may post it on social media, or could possibly alter the video. In my view, this is not sufficient to meet the test of harm stipulated at s. 29(1)(o) of the *Act* and to withhold access to the video footage.
28. As for the names of the security guards, Horizon's reasons for relying on this exception to withhold the information is that it wants to protect its employees. While this is noble, that is not the test to be met under this exception provision, especially in light of the fact that there are only one of three employees that is appearing before the court. As such, I do not find that Horizon met the test of harm to justify relying on this provision to refuse disclosing their names.

## **IV RECOMMENDATION**

29. In light of the above, I find that Horizon could not rely on s. 21 or 29(1)(o) of the *Act* to refuse to disclose the requested video footage and names of the security guards, save for editing the images of third party bystanders and vehicle licence plates.
30. As a result, I am recommending to Horizon Health Network to disclose an edited copy of the video footage to the Applicant, with third party bystanders' images and vehicle licence plates edited out of the footage, and by leaving the image of the Applicant and the security guards. I am also recommending that the names of the security guards appearing in the video footage be disclosed to the Applicant.

31. As set out in s. 74(2) of the *Act*, Horizon is to notify the Applicant of its decision with respect to this recommendation. If the Horizon decides to accept the recommendation, s. 74(3) requires the Horizon to comply or make the decision it deems appropriate within 20 business days of receipt of this Report.
32. If Horizon decides not to accept the recommendation or fails to notify the Applicant of its decision, the Applicant will have right to appeal the matter to the Court of Queen's Bench in accordance with section 75 of the *Act*.

This Report issued in Fredericton, New Brunswick this \_\_\_\_ day of June 2019.

\_\_\_\_ Original signed by \_\_\_\_  
Charles Murray  
Integrity Commissioner of New Brunswick