



REVIEW REPORT 160-2022

Ministry of Corrections, Policing and Public Safety

March 13, 2023

Summary:

The Ministry of Corrections, Policing and Public Safety (Corrections) received an access to information request from the Applicant related to an incident that occurred at a correctional centre. The Applicant was only interested in a review of video footage that Corrections withheld, in full, pursuant to subsections 15(1)(a), (c), (k), (m), and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that Corrections did not meet the burden of proof that subsections 15(1)(a), (c), (k) and (m) of FOIP applied to the video footage. The Commissioner also found that subsection 29(1) of FOIP does not apply to the images of the centre employees, and because the Applicant indicated they were not interested in the images of the inmates, the Commissioner did not need to consider if the exemption also applied to their images. Based on this, the Commissioner recommended that within 30 days of issuance of this Report, Corrections redact the images of the inmates from the full, non-segmented video footage and release it to the Applicant.

I BACKGROUND

[1] On June 28, 2022, the Ministry of Corrections, Policing and Public Safety (Corrections) received the following access request from the Applicant:

CAMERA ANGLE ON UNIT 3 FACING EXERCISE WEIGHT PIT AND MAIN YARD CAMERA ANGLE FOR ENTIRE YARD, COMMONLY USED FOR YARD OBSERVATION. INCIDENT REPORTS CONTAINING MY NAME AS EITHER AN AUTHOR OR WITNESS. [Date redacted] APPROX. FROM 11AM TO 11PM

[2] On July 27, 2022, the Applicant received a response from Corrections. In its response, Corrections indicated it was withholding some records in full or in part pursuant to

subsections 15(1)(a), (c), (k), (m), and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [3] On July 28, 2022, the Applicant asked my office to review Corrections’ decision.
- [4] On August 31, 2022, my office provided notification to both the Applicant and to Corrections of my office’s intention to undertake a review.
- [5] The Applicant provided a submission on September 3, 2022. On January 16, 2023, Corrections provided a submission to my office.

II RECORDS AT ISSUE

- [6] Corrections included 10 partially severed pages of documents in its response to the Applicant. The Applicant clarified with my office that they were not interested in a review of these 10 pages, and instead only wanted my office to review Corrections’ decision to withhold some video footage, in full, pursuant to subsections 15(1)(a), (c), (k), (m), and 29(1) of FOIP. As such, I will only include a review of the video footage.
- [7] The video footage depicts an incident at a correctional center (centre) that occurred on a certain date involving guards and inmates. Corrections broke the video footage down into seven segments as follows:

Video Description	Start Time	End Time
1422-1500	14:22:22	14:49:46
1500-1600	15:00:00	15:22:51
1500-1600_01	15:22:51	15:45:30
1500-1600_02	15:45:30	15:59:59
1600-1706	16:00:00	16:21:23
1600-1706-01	16:21:24	16:46:38
1600-1706-02	16:45:38	17:05:50

[8] The video footage is from a fixed point that captures the exterior of the centre. There is a road that spans the length of the video, approximately dividing it in half. Inmates appear on the top right portion of the video in a fenced area (not on the road), while guards appear on a portion of the road and on a grassy area below the road.

[9] As indicated at paragraph [7] of this Report, there appears to be a lapse in time of a little over 11 minutes between the first video (1422-1500) and the second video (1500-1600). Regarding the apparent lapse, Corrections stated as follows:

...We reviewed the video footage - [description of facility] disturbance 1422-1500 as well as the following video [description of facility] disturbance 1500-1600. It was noted that the timestamp on the first video ended at 14:49:46, however there is no gap in actual footage when looking at the following video ([description of facility] disturbance 150-1600).

Typically, video is overwritten on a cycle. When the request came in for the video footage – the centre wasn't certain they'd still be able to retrieve the footage – however were able to do so. The system that had been in place at the time of this event was an old system that has now been replaced. The old system was used to retrieve the video footage.

We've concluded and are led to believe that there is no gap in the actual video footage in question. We can't determine why the erroneous timestamp of the first video occurred given there is no visual evidence of a gap.

[Emphasis added]

[10] My office reviewed stills of the end and beginning points of the first and second videos, however, and it does not appear that there is continuity. That is, it appears there is no error in the timestamps and that there may be an 11-minute gap in video for which Corrections has not satisfactorily accounted. My office sent the stills to Corrections for further comment. Corrections did not respond within the time my office gave, and so I am proceeding with my review under the assumption that there may be 11 minutes of missing footage. I find this concerning because it may be that there is something the Applicant, who stated they appear in the video footage as an employee, required from footage that is not there. I will take this into consideration with my recommendation at the end of this Report.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[11] Corrections qualifies as a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, my office has jurisdiction in this matter.

2. Did Corrections properly apply subsection 15(1)(a) of FOIP?

[12] Subsection 15(1)(a) of FOIP provides:

15(1) A head may refuse to give access to a record, the release of which could:

(a) prejudice, interfere with or adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;

[13] Subsection 15(1)(a) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could prejudice, interfere with or adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention (*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 30, 2021 [*Guide to FOIP*, Ch. 4], p. 44).

[14] Section 15 of FOIP uses the word “could” versus “could reasonably be expected to” as seen in other provisions of FOIP. The threshold for could is somewhat lower than a reasonable expectation. The requirement for could is simply that the release of the information could have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked. For this provision to apply there must be objective grounds for believing that disclosing the information could result in the harm alleged (*Guide to FOIP*, Ch. 4, p. 44).

[15] Regarding subsection 15(1)(a) of LA FOIP, Corrections stated as follows:

... Releasing video footage from the camera in question, reveals camera angles and range which could cause safety concerns for the correctional centre, which could adversely affect the security of [institution redacted], which is a center of lawful detention.

[16] The phrase “adversely affect” refers to hurt, injury or impairment to prosecution of an offence.

[17] When there is a review by my office, the government institution is invited to provide a submission (arguments). The government institution should describe the harm in detail to support the application of the provision. Government institutions should not assume that the harm is self-evident on the face of the records (*Guide to FOIP*, Ch. 4. p 45).

[18] Corrections asserted that releasing the video footage would adversely affect the security of the correctional center, but it has not provided sufficient detail regarding how. It has also not provided detail regarding the ensuing harm, including what that harm would be. Section 61 of FOIP places the burden of proof on the head of a government institution as follows:

61 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[19] Since Corrections has not met the burden of proof, I find that it did not properly apply subsection 15(1)(a) of FOIP to the video footage. I will still, however, consider its application of subsections 15(1)(c), (k), (m) and 29(1) of FOIP to the video footage.

3. Did Corrections properly apply subsection 15(1)(c) of FOIP?

[20] Subsection 15(1)(c) of FOIP provides as follows:

15(1) A head may refuse to give access to a record, the release of which could:

...
(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[21] Subsection 15(1)(c) of FOIP is a discretionary class-based and harm-based exemption. Meaning it contains both a class and harm-based component. It permits refusal of access in situations where the release of a record could interfere with a lawful investigation or disclose information with respect to a lawful investigation (*Guide to FOIP*, Ch. 4, pp. 51-52).

[22] To determine if subsection 15(1)(c) of FOIP is relevant, the following two-part test can be applied:

1. Does the government institution's activity qualify as a "lawful investigation"?
2. Does one of the following exist?
 - a) Could release of the information interfere with a lawful investigation?
 - b) Could release of the information disclose information with respect to a lawful investigation?

(*Guide to FOIP*, Ch. 4, pp. 52-53)

[23] In its submission, Corrections provided the following:

... [Correctional facility] confirmed that this video was kept for the sole purpose of an investigation thus, releasing it would disclose information in respect to a lawful investigation.

[24] A "lawful investigation" is an investigation that is authorized or required and permitted by law. The government institution should identify the legislation under which the investigation is occurring. The investigation can be concluded, active and ongoing or be occurring in the future (*Guide to FOIP*, Ch. 4, p. 52).

[25] Corrections did not provide details on what lawful investigation was occurring, and who was conducting it and under what authority. As Corrections has not met the burden of proof, I find it did not properly apply subsection 15(1)(c) of FOIP to the video footage. I will still, however, consider if Corrections properly applied subsections 15(1)(k), (m) and 29(1) of FOIP to the video footage.

4. Did Corrections properly apply subsection 15(1)(k) of FOIP?

[26] Subsection 15(1)(k) of FOIP provides as follows:

15(1) A head may refuse to give access to a record, the release of which could:

...

(k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;

[27] Subsection 15(1)(k) of FOIP is a discretionary exemption that contains both a class and harm-based component. It permits refusal of access in situations where release of a record could interfere with a law enforcement matter or disclose information respecting a law enforcement matter (*Guide to FOIP*, Ch. 4, p. 75).

[28] The following two-part test can be applied:

1. Is there a law enforcement matter involved?

2. Does one of the following exist?

a) Could release of information interfere with a law enforcement matter?

b) Could release disclose information with respect to a law enforcement matter?

(*Guide to FOIP*, Ch. 4, pp. 75-76)

[29] In its submission, Corrections provided:

... It was confirmed by [correctional centre] that this video was used for investigation purposes therefore, disclosing it would disclose information respecting a law enforcement matter because a lawful investigation is a law enforcement matter.

[30] For the purposes of this provision, “law enforcement” includes investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which could lead to a penalty or sanction. “Matter” should be given its plain and ordinary meaning; it does not have to apply to some specific ongoing investigation or proceeding (*Guide to FOIP*, Ch. 4, p. 76).

[31] Corrections has not provided my office with any detail regarding what the law enforcement matter was or under what authority it was occurring. A review of the video footage does not make this clear, either. As Corrections has not met the burden of proof, I find it did not properly apply subsection 15(1)(k) of FOIP to the video footage. I will still consider its application of subsections 15(1)(m) and 29(1) of FOIP to the video footage.

5. Did Corrections properly apply subsection 15(1)(m) of FOIP?

[32] Subsection 15(1)(m) of FOIP provides:

15(1) A head may refuse to give access to a record, the release of which could:

...
(m) reveal the security arrangements of particular vehicles, buildings or other structures or systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems

[33] For subsection 15(1)(m) of FOIP, the following two-part test can be applied. However, only one of the questions needs to be answered in the affirmative for the exemption to apply. There may be circumstances where both questions apply and can be answered in the affirmative:

1. Could release reveal security arrangements (of particular vehicles, buildings, other structures or systems)?
2. Could release reveal security methods employed to protect the particular vehicles, buildings, other structures or systems?

(Guide to FOIP, Ch. 4, p. 87)

[34] Based on the submission provided to my office, Corrections appears to be asserting that question one has been answered as follows:

... Releasing the video produced by the security camera could cause safety and security concerns for the correctional buildings and those employed and incarcerated at the correctional facility because it reveals camera angles and range. Camera angles and range are specific security arrangements of the buildings, grounds and security camera system.

- [35] “Reveal” means to make known; cause or allow to be seen (*Guide to FOIP*, Ch. 4, p. 87).
- [36] “Security” means a state of safety or physical integrity. The security of a building includes the safety of its inhabitants or occupants when they are present in it. Examples of information relating to security include methods of transporting or collecting cash in a transit system; plans for security systems in a building; patrol timetables or patterns for security personnel; and the access control mechanisms and configuration of a computer system. Security means sufficient security (*Guide to FOIP*, Ch. 4, p. 87).
- [37] Corrections asserted that disclosing the video could reveal camera angles and range, thereby causing safety and security concerns. Corrections has not stated, though, *how* revealing the camera angles and range could cause safety concerns or what the safety concerns may be. It is also not up to my office to speculate. As Corrections has not met the burden of proof, I find it did not properly apply subsection 15(1)(m) of FOIP to the video footage. I will lastly review its reliance on subsection 29(1) of FOIP to the video footage.

6. Did Corrections properly apply subsection 29(1) of FOIP?

- [38] Subsection 29(1) of FOIP provides:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

- [39] Subsection 29(1) of FOIP is a mandatory exemption that prohibits the disclosure of personal information unless the individual about whom the information pertains consents to its disclosure or if disclosure without consent is authorized by one of the enumerated subsections of 29(2) or section 30 of FOIP. (*Guide to FOIP*, Chapter 6, “Protection of Privacy”, updated January 18, 2023 [*Guide to FOIP*, Ch. 6], p. 183).
- [40] Section 29 of FOIP only applies to personal information as defined by section 24 of FOIP. The list provided in section 24(1) of FOIP is not meant to be exhaustive. There can be other types of information that would qualify as personal information that are not listed.

[41] To qualify as personal information, the information must: 1) be about an identifiable individual; and 2) be personal in nature. Information is about an “identifiable individual” if the individual can be identified from the information (e.g., their name is provided) or if the information, when combined with information otherwise available, could reasonably allow the individual to be identified. To be “personal in nature” means the information provides something identifiable about the individual (*Guide to FOIP*, Ch. 6, pp. 32-33).

[42] Regarding the personal information involved, Corrections stated as follows:

... There is always a large group of inmates in view of the camera. Disclosing this information would identify people who have a criminal history. Criminal history is identified as personal information as per FOIP 24(1)(b).

[43] In my office’s [Review Report 244-2017](#) concerning the City of Saskatoon, I considered that an image of an individual captured from a video can contain that individual’s personal information. The person can be identified from the image, and the image may reveal something personal in nature about them, such as where they were at the time the video capture was taken.

[44] The video footage in this matter contains images of both inmates and centre staff (i.e., correctional guards).

[45] Corrections did not address the images of the correctional center employees in its submission. I have found in previous reports, however, (e.g., [Review Report 268-2021](#) concerning the Saskatchewan Health Authority), that images of individuals working in their professional capacity would not constitute personal information. I continue to adopt this approach in this matter and find that subsection 29(1) of FOIP does not apply to the images of the centre employees in the video footage.

[46] Regarding the inmates who appear in the video footage, the Applicant has stated with my office that they only want *their* image as it appears in the video footage, and that they are not concerned with the images of the inmates. I will, therefore, not consider if the images

of the inmates are personal information and take what the Applicant has stated into my recommendation.

[47] Given that my office conducted this review under the assumption that there is a little over 11 minutes of missing video footage, within 30 days of issuance of this Report, I recommend that Corrections release the full, non-segmented video footage (that is, the full, continuous video that it has not broken down into segments) to the Applicant after severing the images of the inmates in the video footage.

IV FINDINGS

[48] I find that Corrections did not meet the burden of proof pursuant to section 61 of FOIP that subsections 15(1)(a), (c), (k) and (m) of FOIP apply to the video footage.

[49] I find that subsection 29(1) of FOIP does not apply to the images of the centre employees in the video footage.

V RECOMMENDATION

[50] Given that my office conducted this review under the assumption that there is a little over 11 minutes of missing video footage, I recommend that within 30 days of issuance of this Report that Corrections release the full, non-segmented video footage (that is, the full, continuous video that it has not broken down into segments) to the Applicant after severing the images of the inmates in the video footage.

Dated at Regina, in the Province of Saskatchewan, this 13th day of March, 2023.

Ronald J. Kruzeniski, K.C.
Saskatchewan Information and Privacy
Commissioner