

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3006

Appeal MA12-427

Toronto Transit Commission

January 31, 2014

Summary: The appellant sought access to records relating to two specific incidents in which he was involved, and to specific records he alleged the TTC possessed. The TTC located three responsive records, audio/video recordings related to one of the specified incidents. It denied access to these records on the basis of the mandatory exemption in section 14(1) (invasion of privacy). The appellant raised the reasonableness of the TTC's search as an issue in the appeal. The TTC's decision to exempt the records is upheld and its search is also upheld as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) and 14(1) and 14(3)(b).

OVERVIEW:

[1] The appellant, a former member of the Canadian Forces, submitted a request to the Toronto Transit Commission (TTC) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to incidents involving TTC personnel and himself as follows:

1. All information of a named special constable's contact with the Canadian Forces Military Police regarding the February 16, [specified year], allegation of assault.

2. All audio/video recordings from September 12, [specified year], of the area where the alleged threatening and belligerent behaviour occurred.
3. All audio/video recordings from September 29, [specified year], of the area where the alleged domestic terrorism occurred.
4. All information the TTC has about his military training.

[2] The TTC located responsive records regarding one of the incidents only; audio/video recordings of September 29.¹ The TTC issued a decision denying access to these records in their entirety based on the mandatory exemption in section 14(1) (invasion of privacy). In its decision, the TTC also advised that no other responsive records exist.

[3] The appellant appealed the TTC's decision to this office on the basis that additional responsive records exist. As part of his appeal request, the appellant submitted four pages of records relating to the September 12 and 29 incidents, which he had previously obtained from the TTC following an earlier request under the *Act*.

[4] During mediation, the appellant raised the issue of reasonable search in this appeal. He also asserted that the Military Police had records related to the other incidents, and therefore, the TTC should similarly have such records.

[5] Also during mediation, the TTC advised that the audio/video recordings it had located regarding the incident of September 29 did not contain images of the appellant. The TTC further advised that the audio/video recordings that the appellant requested of the September 12 incident are not in its custody or control, as this incident did not occur on TTC property.

[6] Mediation did not resolve the issues in this appeal, and it was moved to the adjudication stage of the appeal process for an inquiry under the *Act*.

[7] During my inquiry, I sought and received representations from the parties and shared them in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[8] In this order, I uphold the decision and search of the TTC.

¹ To the extent possible, I will refer to the incidents by their month and date only in this order.

RECORDS:

[9] The responsive records at issue consist of three audio/video recordings on DVDs from September 29, [specified year], which run from 00:00 to 00:54 minutes; 00:54 to 01:47; and 01:49 to 04:00.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 14(1) apply to the information at issue?
- C. Did the institution conduct a reasonable search for records?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,

- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[11] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.²

[12] To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that an individual may be identified if the information is disclosed.³

Representations

[13] In its representations, the TTC states that the records consist of video recordings of a specified TTC subway station taken September 29 and downloaded on DVD. The TTC asserts that the information collected by its video surveillance cameras and downloaded on the DVDs at issue, qualifies as personal information as defined in section 2(1) of the *Act*. To support its assertion, the TTC relies on the following excerpt from the *Guidelines for the Use of Video Surveillance Cameras in Public Places* issued by Dr. Ann Cavoukian, the Information and Privacy Commissioner of Ontario, in 2001 and updated in 2007:

Personal information is defined in section 2 of the *Acts* as recorded information about an identifiable individual, which includes, but is not limited to, information relating to an individual's race, colour, national or ethnic origin, sex and age. If a video surveillance system displays these characteristics of an identifiable individual or the activities in which he or

² Order 11.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

she is engaged, its contents will be considered "personal information" under the *Acts*.

[14] The TTC adds that this excerpt was confirmed by the Commissioner at page 19 of her March 3, 2008, report entitled *Privacy and Video Surveillance in Mass Transit Systems: A Special Investigation Report*.

[15] The TTC states that while the records contain the personal information of a number of individuals, they do not contain any images or personal information of the appellant.

[16] The appellant does not directly address this issue in his representations. However, he assumes that the TTC has records containing his personal information because prior to the completion of certain TTC reports relating to him "video recordings and other relevant information would have been collected as part of a Special Constable investigation into a violation of law." He alleges that the TTC falsely implicated him in possible violations of law when it investigated an assault in February 16 and a bomb threat in September 12 of the same year. The appellant asserts that as a result of these two investigations, the TTC is in possession of his personal information. He adds that the TTC also collected his military information on or prior to January 30 of the same year, as part of its unlawful investigation.

Analysis and findings

[17] The records at issue contain recorded video footage that displays information relating to various individuals' race, colour, sex and age, and the activities in which these identifiable individuals are engaged. I agree with the TTC that previous orders of this office have held that this type of information qualifies as personal information as defined in section 2(1) of the *Act*.

[18] While the appellant asserts that the TTC is in possession of his personal information, I have no evidence before me to support his contention that the records contain his personal information. The TTC confirms that the records contain no images of the appellant, and I accept this submission.

[19] Accordingly, I find that the records contain the personal information of many individuals, but not of the appellant.

B. Does the mandatory exemption at section 14(1) apply to the information at issue?

[20] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[21] If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14.

[22] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[23] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14.

[24] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.⁴

[25] The TTC submits that the presumption in section 14(3)(b) applies to the records at issue.

[26] The presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law.⁵ The presumption can apply to a variety of investigations, including those relating to by-law enforcement.⁶ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁷

[27] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).⁸ If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁹ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.¹⁰

⁴ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

⁵ Orders P-242 and MO-2235.

⁶ Order MO-2147.

⁷ Orders MO-2213, PO-1849 and PO-2608.

⁸ *John Doe*, cited above.

⁹ Order P-239.

¹⁰ Orders PO-2267 and PO-2733.

Representations

[28] The TTC submits that the presumption in section 14(3)(b) applies because the video footage in the records was downloaded on September 29 for a criminal investigation by the Toronto Police into a suspicious package, possibly a bomb, that was located in the public washroom of one of its subway stations. The TTC adds that the Commissioner's *Privacy and Video Surveillance in Mass Transit Systems: A Special Investigation Report*, states:

[A]ny information obtained by way of video surveillance systems may only be used for the purposes of the stated rationale and objectives set out to protect public safety, detect or deter, and assist in investigating criminal activity. . .

[29] In this regard, the TTC points out that its Video Recording Policy states that "the installation of video recording cameras at the TTC is to ensure the safety and security of TTC employees, customers and property."

[30] The TTC also argues that disclosure of the records would be an unjustified invasion of privacy of the individuals whose personal information is contained in the records, as contemplated by section 14(1). It offers this additional quote from the Commissioner's report:

[I]ndividuals have a right to expect the following: that their personal information will only be collected for legitimate, limited and specific purposes; that the collection of their personal information will be limited to the minimum necessary for the specified purposes; and that their personal information will only be used and disclosed for the specific purposes.

[31] The TTC concludes by stating that the guidelines and the report of the Commissioner require that it have strict controls and safeguards in place to protect the privacy interests of its customers whose images are captured by its Video Recording Systems, and disclosure of the records in this appeal would be contrary to these requirements and absurd in the circumstances.

[32] The appellant does not directly address this issue in his representations. Instead, he sets out the series of events he believes are relevant in this appeal, including:

- The TTC implicating him as being a substantial danger to persons due to his behaviour and his military training in weapons and explosives.

- The TTC Special Constable's investigation into a violation of law on February 16, which resulted in his dismissal from the Canadian Forces, even though the Crown dropped the assault charge against him.
- The absence of any record of the TTC reporting a threat to the Toronto Police even though the TTC conducted a threat of harm investigation on September 12.
- He questions how the TTC knew of him and knew he was a member of the Canadian Forces when his first contact with the TTC was February 16.

Analysis and findings

[33] In his representations, the appellant accepts that the TTC compiled personal information about him as part of an investigation into a possible violation of law on more than one occasion. In fact, he repeatedly refers to "an investigation into a violation of the law" when characterizing the events he feels are relevant. Nowhere in his representations does he dispute the TTC's submission that the records at issue were compiled as part of an investigation into a possible violation of law as contemplated by the presumption in section 14(3)(b). Rather, his contention is that he was falsely accused and investigated and he would like me to address this allegedly fraudulent investigative activity.

[34] I have no authority or ability to address the appellant's allegations about the conduct of the TTC with respect to its investigations of him. My jurisdiction is limited to dealing with his request for access to the records at issue and his appeal of the TTC's access decision under the provisions of the *Act*.

[35] Based on my review of the records and the evidence before me, I accept the representations of the TTC that the records were downloaded by the TTC to assist in a criminal investigation by the Toronto Police. I find that the downloading of the video footage for the police investigation resulted in the DVD recordings being compiled as part of an investigation into a possible violation of law as contemplated by the presumption in section 14(3)(b). I find that disclosure of the records, which were compiled and are identifiable as part of the police's investigation into the possible existence of a bomb on TTC property, is presumed to constitute an unjustified invasion of privacy of the individuals whose personal information is contained in the records, and thus, I find that the records are exempt under the mandatory personal privacy exemption in section 14(1).

C. Did the institution conduct a reasonable search for records?

[36] The appellant claims that additional records exist beyond those identified by the TTC. Therefore, I must decide whether the TTC has conducted a reasonable search for

records as required by section 17.¹¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the TTC's decision. If I am not satisfied, I may order further searches.

[37] The *Act* does not require the TTC to prove with absolute certainty that further records do not exist. However, the TTC must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹² To be responsive, a record must be "reasonably related" to the request.¹³

[38] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.¹⁴

[39] A further search will be ordered if the TTC does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.¹⁵

[40] In the Notice of Inquiry I sent to the TTC, I noted that the appellant provided me with copies of records that appear to be responsive to the request, which he states he obtained in 2009 from the TTC. I asked the TTC to explain why it was not able to locate the records provided by the appellant as part of its search for responsive records in this appeal.

Representations

[41] The appellant asserts that on February 16, after a TTC operator falsely accused him of assault, he informed the TTC Special Constables that he was a member of the Canadian Forces. He asserts that his evidence clearly shows that the TTC had knowledge of him and his employment with the Canadian Forces on January 30 of the same year, even though he had not provided this information to it.

[42] The TTC asserts that its search for responsive records was reasonable. To support its assertion, it provides two affidavits which are summarized below. It also sets out the following chronology and explanation regarding the appellant's possession of additional records:

- In 2009, the appellant submitted an access request for:
 - A copy of his August/September [specified year] complaint regarding [specified incident].

¹¹ Orders P-85, P-221 and PO-1954-I.

¹² Orders P-624 and PO-2559.

¹³ Order PO-2554.

¹⁴ Orders M-909, PO-2469, PO-2592.

¹⁵ Order MO-2185.

- A copy of an interview conducted September [specified year] by a TTC representative.
 - A copy of the letter sent to him by the TTC representative.
 - All information to substantiate his incrimination in placing a fake explosive device at a subway station.
 - All information to substantiate his incrimination regarding verbal threats he made to TTC employees.
 - All information to substantiate he applied for a job with the TTC.
 - All information to substantiate he was denied a job application.
- The responsive records provided to the appellant in 2009 were:
 - Complaint Statement for incident [specified incident], September 26, [specified year].
 - Complaint Statement, September 12, [specified year].
 - TTC Claims/Legal Letter, September 21, [specified year].
 - Incident Report, September 29, [specified year].
 - General Occurrence Report, Supplementary Report, September 13, [specified year].

[43] The TTC states that the records provided to the appellant in 2009 were found not to be responsive to the appellant's request in this appeal. The TTC maintains that no record exists with respect to a request to obtain the appellant's military information; it states that the appellant informed the TTC representative that he was employed by the military.

[44] The first affidavit sworn by a Sergeant in the TTC's Special Investigations Unit, states:

- He was formerly the Coordinator of the Video Services Unit for the TTC.
- He has no recollection and no documentation of any contact he allegedly had with the Canadian Military regarding the appellant.
- The incident between the appellant and the TTC's Claims Adjuster on September 12 took place in a public restaurant and the TTC has no video footage of this incident.
- He has searched the TTC's records and has located video footage from September 29, which was downloaded for the purpose of a criminal investigation.
- He has no knowledge or records of a request for a record of the appellant's military training. He did not make such a request and has no records relating to the appellant's military training.

[45] In the second affidavit, the TTC Claims Adjuster referenced in the first affidavit deposes that he met with the appellant on September 12 at a specified restaurant in Toronto. He further deposes that he has searched his records and does not have any audio recordings or video footage of this incident.

Analysis and findings

[46] Having reviewed the representations of the parties, and with the benefit of the TTC's chronology of the appellant's 2009 request and the responsive records provided to the appellant at that time, I accept that the TTC conducted a reasonable search for records in this appeal. The appellant's request in this appeal is specific and clear, and the evidence before me demonstrates that the TTC made reasonable efforts to locate the records it has that are responsive to the request. Conversely, the appellant has not provided a reasonable basis for concluding that additional records exist, as he must in order for me to direct the TTC to conduct a further search.¹⁶ I further note that this is the second request that the appellant has made regarding the incidents of September 12 and 29, and there is nothing before me to indicate that additional responsive records beyond those located by the TTC exist.

[47] I am satisfied that TTC Sergeant is an experienced TTC employee knowledgeable in the subject matter of the request, and that he, along with the Claims Adjuster who met with the appellant, both expended a reasonable effort to locate responsive records. Accordingly, I find that the TTC's search was reasonable.

Additional issues

[48] In his representations, the appellant made a new allegation; namely, that the TTC breached his privacy under section 8(1) and (2) of the federal Privacy Act. I have no jurisdiction or authority to deal with federal privacy legislation; nor am I able to address in this appeal, any concerns the appellant has about how or when his personal information was allegedly disclosed by the TTC. The appellant is free to raise these allegations with this office or with the Office of the Privacy Commissioner of Canada as appropriate.

[49] I also note that after I received representations from the parties, the appellant forwarded me a copy of a Request Form that he sent to the TTC for the correction of his personal information. The appellant's letter accompanying the Request Form repeats many of the allegations he made during the appeal process about the TTC's conduct and its allegedly fraudulent investigation of him. I have already noted above that I cannot address the concerns the appellant has about the conduct of the TTC in its investigation of him.

[50] Regarding the appellant's request for correction of his personal information, the TTC provided me with a copy of its response to the appellant. In its response, the TTC advised that it would not be making any correction to the appellant's personal information. The TTC also advised the appellant in its decision that he is entitled to require that a statement of disagreement be attached to the records and that the

¹⁶ Order MO-2246.

statement of disagreement would be sent to any person to whom the record was disclosed in the previous 12 months.

[51] As noted above, the appellant is at liberty to appeal the correction decision of the TTC if he so chooses, though he has not done so to date.

ORDER:

I uphold the TTC's decision and the reasonableness of its search, and I dismiss this appeal.

Original Signed By: _____
Stella Ball
Adjudicator

_____ January 31, 2014