

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3094

Appeal MA13-500

Toronto Transit Commission

September 11, 2014

Summary: The appellant sought access to Toronto Transit Commission (TTC) audio recordings of an incident which occurred on a TTC streetcar in July of 2013, and which resulted in the death of an individual. The TTC denied access to the records on the basis of the exemptions in sections 8(1)(a) and (b) (law enforcement), 8(1)(f) (right to a fair trial), and 14(1) (personal information). The appellant took the position that the section 16 public interest override applies to the records.

During the processing of this appeal, the possible application of the exclusionary provision in section 52(2.1) (records relating to an ongoing prosecution) was raised. The Ministry of the Attorney General and the Toronto Police, who are involved in this matter, provided evidence that the records relate to an ongoing prosecution. This order determines that the exclusion in section 52(2.1) applies to the records and that, as a result, the records fall outside the scope of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(2.1).

Orders Considered: PO-2703, MO-3260.

Case Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (CanLII), March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

OVERVIEW:

[1] The records at issue in this appeal arise from an incident which occurred on a Toronto Transit Commission (TTC) streetcar in July of 2013, and which resulted in the shooting death of an individual. As a result of this incident, a police officer was charged with one count of second degree murder.

[2] The TTC received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the following:

... a transcript of all calls made to and from Transit Control regarding an incident onboard the Dundas 505 streetcar travelling west on Dundas between the evening of July 26, 2013 to the morning of July 27, 2013. Specifically, this request is for calls in the 24 hours after 11 p.m. on July 27.

The streetcar was stopped at Dundas and Grace streets shortly after midnight for a police investigation.

[1] In response to the request, the TTC issued a decision denying access to the records on the basis of the exemptions in sections 8(1)(a) and (b) (law enforcement) and (f) (right to a fair trial) of the *Act*.

[2] The appellant appealed the decision of the TTC to deny access to the records. In addition, the appellant took the position that disclosure of the records is in the public interest, raising the possible application of section 16 of the *Act*.

[3] During mediation, the TTC confirmed that the requested transcript of the calls does not exist; however, it confirmed that audio recordings of the requested calls do exist, and these were identified as the responsive records in this appeal. In addition, the TTC explained that it had applied the law enforcement exemption, as the records are being used by a police service as part of its ongoing police investigation.

[4] Also during mediation, the TTC identified that the mandatory exemption in section 14(1) of the *Act* (personal privacy) applies to the records. As a result, the possible application of that section was also identified as an issue in this appeal.

[5] The appellant maintained that the public interest override in section 16 applies in the circumstances of this appeal.

[6] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*.

[7] On my review of this file, I noted that the incident referenced in the records resulted in criminal charges being laid against an identified individual. As a result, I identified the possible application of the exclusion found in section 52(2.1) (ongoing prosecution) as an issue in this appeal.

[8] Both the appellant and the TTC confirmed that the Toronto Police Service (the police) were involved in the law enforcement investigation, and that they may have an interest in this appeal. I also noted that the Ministry of the Attorney General (the ministry), would be involved in this matter, and may have an interest in this appeal.

[9] As a result, I sent a Notice of Inquiry identifying the facts and issues in this appeal to the TTC, the police and the ministry, initially. In addition to inviting the TTC and the police to address the exemption claims in this appeal, all of the parties were also invited to address the issue of the possible application of section 52(2.1).

[10] I received representations from the TTC, the police and the ministry.

[11] I then sent the Notice of Inquiry, along with a copy of the complete representations of the TTC, the police and the ministry, to the appellant. The appellant provided representations in response.

[12] In this order, I find that the requested records relate to an ongoing prosecution, and that the exclusion in section 52(2.1) applies to the records. As a result, the records fall outside the scope of the *Act*.

RECORDS:

[13] The records remaining at issue consist of recorded calls made to and from transit control regarding an incident on a streetcar that took place on July 26 and July 27, 2013.

ISSUES:

- A. Does section 52(2.1) exclude the records from the scope of the *Act*?
- B. If the records are not excluded, do the discretionary exemptions at sections 8(1)(a), (b) and/or (f) apply to the information at issue?
- C. If the records are not excluded, does the mandatory exemption at section 14(1) apply to the information at issue?
- D. If the records are not excluded, does the public interest override in section 16 apply?

DISCUSSION:

RECORDS RELATING TO A PROSECUTION

A. Does section 52(2.1) exclude the records from the scope of the *Act*?

[14] This issue concerns whether the records are excluded from the *Act* as a result of the operation of section 52(2.1),¹ which states:

This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[15] The purposes of section 52(2.1) include maintaining the integrity of the criminal justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.²

[16] The term "prosecution" in section 52(2.1) means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine.³

[17] The words "relating to" require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution."⁴

[18] Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed. This question will have to be decided based on the facts of each case.⁵

[19] The ministry takes the position that the exclusion in section 52(2.1) applies to the requested records. It states:

The ministry can confirm that the incident onboard the streetcar that is the subject of this request has resulted in a criminal charge being laid,

¹ This exclusion is identical to the exclusion found in section 65(5.2) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, Ch. F.31.

² *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

³ Order PO-2703.

⁴ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above. See also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.

⁵ Order PO-2703.

and that the prosecution of that charge (for which the ministry has carriage) is ongoing.

[20] The ministry then provides details of the nature of the charge and the date of the charge, and then confirms that "the prosecution remains ongoing and has not yet reached completion."

[21] With respect to whether the records relate to the prosecution, the ministry states:

In this case, the requested recordings clearly "relate to" the ongoing prosecution, given that the events in question occurred on the streetcar and during the time period noted by the requestor.

[22] The ministry then refers to the *Toronto Star* case,⁶ stating that the Divisional Court in that case noted that this exclusion "can apply to materials held by another party and is not limited to records found only inside the Crown brief."⁷ It also states:

In arriving at its decision in *Toronto Star*, the Divisional Court noted that the underlying purposes of the section included, among others, the following:

- a) to ensure that the accused, the Crown, and the public's right to a fair trial is not jeopardized by the premature production of prosecution materials to third parties;
- b) to ensure that the protection of solicitor-client and litigation privilege is not unduly jeopardized by the production of prosecution materials; and
- c) to ensure that the court maintains control over the dissemination and publication of records relating to an ongoing prosecution.⁸

[23] The ministry then summarizes its position by stating:

The Ministry submits that the decision rendered in *Toronto Star* therefore gives effect to the need to protect sensitive prosecution-related documents from collateral or unintentional disclosure or dissemination. Consistent with this objective is the need to forego any premature

⁶ See citation in footnote 2.

⁷ The ministry refers to paragraphs 52-57 of that decision.

⁸ The ministry refers to paragraphs 49-51 of the decision.

collection and distribution of such materials while a legal proceeding is ongoing. As such, section 52(2.1) of the *Act* clearly excludes the IPC's jurisdiction over the requested records on a time-limited basis.⁹

The ministry submits that this request may therefore be properly addressed only once the related prosecution and any appeals have been completed, at which time any applicable exemptions may also be considered. ...

[24] Neither the TTC nor the police provide specific representations on the application of the exclusion in section 52(2.1); however, the TTC confirms the following with respect to the records:

The records at issue were immediately turned over to the law enforcement agency for investigation, which as reported in the media, resulted in the laying of criminal charges ...

[25] The police refer to "the fact that the record will be used during the current court proceedings."

[26] In addition, the TTC describes how these recordings are initiated and activated, and states that the initiation of the audio recordings at issue in this appeal occurred based on the actions of the TTC operator during the incident on board the streetcar. The TTC confirms that "there is no recording prior to the original incident onboard the vehicle."

[27] The appellant's representations focus on her position that the exemptions claimed by the TTC do not apply, and on the public interest in the subject matter of the request. She does not provide specific representations on the application of the exclusion in section 52(2.1); however, she takes the position that, in light of the unique circumstances of this case and the events that have transpired since the incident, the records should be disclosed "immediately," given their connection to "an event of great public interest." She then reviews the nature of the event, and the public's knowledge of and response to the charges that have been laid against the officer. She also notes that a great deal of information and evidence relating to this event, including bystander video, is in the public domain.

[28] The appellant then argues that the claimed exemptions do not apply to the information and that, in any event, the public interest override applies. She then reviews the reasons why the public interest override would clearly apply in the circumstances.

⁹ The ministry refers to paragraphs 35-36 and 62 of the decision.

[29] I note that the issue of the application of section 52(2.1) concerns whether this office has the jurisdiction to consider the records. If section 52(2.1) applies, this office does not have jurisdiction to review access to the records (including whether the exemptions or the public interest override apply), until "all proceedings in respect of the prosecution" have been completed.

Analysis and findings

[30] In order for the exclusion in section 52(2.1) to apply, the party relying on section 52(2.1) must establish that:

- There is a prosecution.
- There is some connection between the record and a prosecution.
- All of the proceedings with respect to the prosecution have not been completed.¹⁰

[31] In the present appeal, it is clear that there is an ongoing prosecution of the police officer respecting serious criminal charges, and that the trial has not yet taken place. As a result, I am satisfied that the necessary elements of parts one and three of the test under section 52(2.1) have been established, as there is a prosecution of the affected person which has not been completed.

[32] The only remaining issue is whether there exists "some connection" between the records at issue and that prosecution. As noted above, the words "relating to" require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution."

[33] In this appeal, the TTC has confirmed that the Toronto Police were involved in the investigation of this incident, and that the records at issue were "immediately turned over to the law enforcement agency for investigation." The police confirm that the record "will be used during the current court proceedings." In addition, the Ministry of the Attorney General confirms that it has carriage of the prosecution of the criminal charge resulting from the incident.

[34] Based on the evidence provided by the parties, it is clear to me that there is "some connection" between the records at issue in this appeal and the identified prosecution of the police officer. The prosecution results from the incident on the streetcar which is exactly what the requested records relate to, and it appears that the records will be used in the prosecution. As a result, I am satisfied that the second part of the test under section 52(2.1) has also been established.

¹⁰ See Order PO-3260.

[35] As all three parts of the test under section 52(2.1) have been established, I find that section 52(2.1) excludes the records from the scope of the *Act*, and I dismiss this appeal.

[36] I note that, as indicated by the Divisional Court in the *Toronto Star* decision, the section 52(2.1) exclusion is the only "time-limited" exclusion under the *Act*. The appellant may apply for records relating to the prosecution when all proceedings in respect of the prosecution have been completed.

[37] Having found that the records are excluded from the scope of the *Act*, there is no need to review the possible application of the claimed exemptions, or the public interest override for those exemptions, in this order.

ORDER:

I find that the records are excluded from the scope of the *Act* as a result of the application of section 52(2.1), and dismiss this appeal.

Original signed by: _____
Frank DeVries
Adjudicator

_____ September 11, 2014