

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4088

Appeal MA19-00541

Toronto Transit Commission

July 27, 2021

Summary: The Toronto Transit Commission (the TTC) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for any video recordings on a particular date at a named subway station in which a subway train hit the requester's son at track level, resulting in his death. The TTC denied access to a video, claiming the mandatory personal privacy exemption in section 14(1) of the *Act*. During the mediation stage of the appeal, the TTC also raised the discretionary exemption in section 13 (danger to safety or health) for the first time. The appellant raised the issues of method of access under section 23(1) and reasonable search.

In this order, the adjudicator finds that the method of access should be the disclosure of a copy of the video, subject to any exemptions that may apply. The adjudicator also finds that the compassionate grounds exception in section 14(4)(c) to the personal privacy exemption in section 14(1) applies to the video, such that the video is not exempt from disclosure under section 14(1). She allows the TTC to raise the discretionary exemption in section 13 late, but finds that the video is not exempt from disclosure under section 13. She also finds that the TTC's search for records was reasonable. The TTC is ordered to disclose the video in its entirety to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 (definition of personal information), 13, 14(1), 14(3)(a), 14(2)(f), 14(2)(i), 14(4)(c), 17, 23(1), 23(2) and 23(3).

Orders and Investigation Reports Considered: *Privacy and Video Surveillance in Mass Transit Systems: A Special Investigation Report* - Privacy Investigation Report MC07-68, Privacy Complaint Reports MC10-2, MC13-46 and MC13-60, and Orders MO-1570, MO-2237, MO-2245, MO-3006, MO-3238, MO-3803, PO-3129, PO-3273, PO-3510, PO-3951 and PO-4124.

OVERVIEW:

[1] This order deals with the issues raised as a result of an appeal of an access decision made by the Toronto Transit Commission (the TTC). The access request was originally made to the Toronto Police Service (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for the following:

“. . . all records regarding the police investigation into the death of [the requester’s son]. Of particular importance is the video recording of the incident which occurred at [named subway station] . . .”

[2] The police transferred the portion of the request relating to the video recording¹ to the TTC, in accordance with section 18(3) of the *Act*.

[3] In response to the request, the TTC issued a decision denying access to the video recording, claiming the discretionary personal privacy exemption in section 38(b) of the *Act*, in conjunction with section 14(1) (personal privacy). However, the TTC explained that it was willing to facilitate a viewing of the video based on the compassionate grounds exception to the personal privacy exemption under section 14(4)(c) of the *Act*.

[4] The requester, now the appellant, appealed the TTC’s decision to the IPC.

[5] During the mediation stage of the appeal, the TTC issued a revised decision letter, in which it claimed the mandatory personal privacy exemption in section 14(1) of the *Act*,² as well as raising the discretionary exemption in section 13 (danger to safety or health) for the first time and beyond the 35-day period stipulated in the Notice of Mediation.

[6] The TTC also explained to the mediator that it was still willing to facilitate a viewing of the video based on the compassionate grounds under section 14(4)(c), but was not willing to provide the appellant with her own copy of the video. Accordingly, the issue of method of access was added to this appeal. The TTC also advised the mediator that if the appellant were to agree to viewing the video as proposed, it would crop the video and blur the images of another individual. The TTC also said that it would edit the video for what it deemed to be sensitive content.

[7] During the mediator’s conversations with the appellant,³ she objected to the TTC’s late raising of the discretionary exemption in section 13. As a result, both the exemption and the TTC’s late raising of the exemption are at issue in this appeal.

[8] The appellant advised the mediator that she sought access to a copy of the video based on compassionate grounds, although she confirmed that she was not interested in obtaining access to any other individual’s information and would agree to those portions of the video recording being blurred out. As a result, the images of the other identifiable individual in the video is no longer at issue.

[9] Also during mediation, the appellant questioned the reasonableness of the TTC’s

¹ The video is of the requester’s son being hit by a subway train at track level.

² The TTC is no longer relying on the discretionary personal privacy exemption in section 38(b) of the *Act*.

³ Through her representative, one of her other sons.

search for responsive records, based on her belief that additional video recordings of the incident should exist (for example, other angles from the subway platform and video taken from on board the subway train). In response, the TTC advised the mediator that only one video of the incident exists, which is the record at issue in this appeal. Accordingly, the issue of reasonable search was added as an issue in this appeal.

[10] The file was then transferred to the adjudication stage where an adjudicator may conduct an inquiry under the *Act*. Representations and reply representations were sought and received from both the TTC and the appellant, and were shared in accordance with the IPC's *Practice Direction 7*. I have reviewed the Amended Mediator's Report, all of the representations provided by the appellant and the TTC, including all attachments/exhibits, as well as a report prepared by the TTC that sets out in detail the incident that is the subject matter of this appeal. I have not viewed the video, for reasons which I explain below.

[11] For the reasons that follow, I find that the appropriate method of access is disclosure of a copy of the video to the appellant, subject to any exemptions that may apply. I also find that the compassionate grounds exception in section 14(4)(c) to the personal privacy exemption in section 14(1) applies to the video, such that the video is not exempt from disclosure under section 14(1). I further find that the TTC may raise the discretionary exemption in section 13 late, but the video is not exempt from disclosure under section 13. I also find that the TTC's search for records was reasonable. The TTC is ordered to disclose a copy of the video to the appellant, as set out in Order provision 1.

RECORD:

[12] The sole record is a video recording of a TTC subway train hitting the appellant's son, including before, during and after the impact.

BACKGROUND

[13] Both the appellant and the TTC provided background information regarding the incident that is the subject matter of this appeal. The TTC advises that it has a priority scale for incidents that occur in the course of its operations. A priority one designation is the most serious and is defined as any time a TTC vehicle makes contact with a person. When a priority one incident occurs, the police are called in to conduct an investigation. The TTC, under the guidance of the police, gathers all of the video evidence it has and creates a report of the incident that assists in the investigation conducted by both the TTC and the police.

[14] The TTC included a copy of the priority one report created regarding this incident and urged me to read the report as opposed to viewing the recorded footage in order to limit exposure to sensitive footage. The TTC also states that it is cognizant of the impacts that viewing a priority one video can have on the viewer.

[15] The TTC asserts that the video must be broken down and considered as three separate parts, as follows:

- Part One – before impact;
- Part Two – impact; and
- Part Three – events after impact.

[16] The TTC also advises that it has established a process that allows grieving families to view footage of their loved one's last moments in a secure and supported environment. In order to ensure it addresses these situations appropriately, the TTC states that it has worked with various stakeholders and experts in mental health and suicide awareness, as well as trauma and grief counsellors.

[17] The TTC goes on to state:

In preparation for these submissions, hours of research has been conducted into previous IPC rulings regarding sensitive content being released under section 14(4)(c) compassionate grounds. From our research we have discovered that the IPC has made several rulings regarding sensitive content being released to grieving family members after a death of their loved ones. From the cases we reviewed, this content included photos, police reports, testimony from witnesses, as well as videos of crime scenes. There has never been an IPC decision about video of a suicide and/or an accident that resulted in an individual's death. This should be seen as an unprecedented case for both the TTC and the IPC. This video shows the last few moments of this individual's life. It shows the decisions that were made that resulted in the individual being hit by a TTC subway and sustaining injuries that ended their life.

[18] The appellant advises that, after their investigation, the police determined that her son's death was the result of an accident and not suicide.

[19] The TTC states that it was never made aware that the police deemed the incident as an accident as opposed to a suicide and apologizes for any distress this label may have caused. It advises that the use of the term "suicide" was based on the language it had been provided by its investigative services department and the security level of records of this type and classification. The TTC also states that whether the incident was a suicide or an accident, it would still be labelled as a priority one incident due to the sensitive content of the video.

[20] I have decided, based on my review of the parties' representations, including the priority one report prepared by the TTC that sets out in detail the incident forming the subject matter of this appeal, that it is not necessary for me to view the video itself. I have sufficient information before me to make findings relating to all of the issues in this appeal, without having to view the video.

ISSUES:

- A. Is the method by which the TTC has chosen to provide access consistent with the *Act*?

- B. Does the video contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory exemption at section 14(1) apply to the video?
- D. Should the TTC be permitted to raise a discretionary exemption more than 35 days after being notified of the appeal? If so, does the discretionary exemption at section 13 apply to the video?
- E. Did the TTC conduct a reasonable search for records?

DISCUSSION:

Issue A: Is the method by which the TTC has chosen to provide access consistent with the *Act*?

[21] Part I of the *Act* deals with access to general records, including requests for another individual's personal information. Sections 19 and 23 are found in Part I, and outline an institution's obligations when providing access to general records. If an institution decides that access to a record should be granted, section 19 of the *Act* requires the institution to give the requester access to the record.

[22] Section 23 contains mandatory provisions regarding how access is to be effected, subject only to the requirement of reasonable practicability.⁴ There may be circumstances where, although access is "granted", the method for the delivery of the records is so onerous that it amounts to denial of access.⁵

[23] Section 23(1) states:

Subject to subsection (2), a person who is given access to a record or a part of a record under this *Act* shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.

[24] This section requires an institution to provide the requester with a copy of the record or part thereof unless it would not be reasonably practicable to reproduce it by reason of its length or nature. If it is not reasonably practicable to reproduce the record, section 23(1) requires the institution to allow the person an opportunity to examine the record.

[25] In this appeal, the TTC has expressed its willingness to grant partial access to the record, but has stipulated that it is only willing facilitate a viewing of the cropped video, not provide a copy of it to the appellant. As stated, section 23(1) of the *Act* contains mandatory language requiring an institution to provide a copy of the record or part "unless it would not be reasonably practicable to reproduce it by reason of its length or

⁴ Order PO-1679, with reference to the provincial equivalent at section 30(1) of the *Freedom of Information and Protection of Privacy Act*.

⁵ Order MO-2910.

nature.”

[26] Sections 23(2) and 23(3) state:

If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

A person who examines a record or a part and wishes to have portions of it copied shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.

[27] Section 23(2) of the *Act* must be read in conjunction with section 2 of Regulation 823 enacted pursuant to the *Act*, which states:

1. A head who provides access to an original record must ensure the security of the record.
2. A head may require that a person who is granted access to an original record examine it at premises operated by the institution.
3. A head shall verify the identity of a person seeking access to his or her own personal information before giving the person access to it.

Representations

[28] The TTC submits that it is no longer pursuing its argument about the method of access. It states that through the development of this appeal, it has realized that its argument is not about the method of access to the record. Instead, it submits, the argument is about how much of the record (the video) is eligible for disclosure under the compassionate grounds in section 14(4)(c). The TTC further submits that it is clear that the appellant is entitled to a portion of the video. The TTC goes on to state:

The most desirable option for the TTC would be to have the appellant come into TTC Head Office and view part one of the video first to determine whether or not they actually wish to have a copy.

[29] The appellant submits that the TTC is not acting in good faith. In particular, the appellant submits that during the mediation of the appeal, the TTC’s arguments were based on two points, namely, invasion of privacy and method of access. The appellant argues that by its own admission, the TTC agrees that the method of access argument was baseless, and that it has used the adjudication process as a means to refine its arguments.

[30] In addition, the TTC’s position is that this case is precedent setting and it wants to ensure that the best outcome is determined for all parties involved. It goes on to state:

That being said, the TTC from the beginning has felt uncomfortable with the prospect of releasing a copy of the priority one footage. We have never been in a situation where the family member of a victim wanted a copy, as

viewing the footage at our facility was enough for them. As the appeal has progressed, the TTC has done significant reading about our responsibilities when it comes to providing access to a record, the harms associated with the sudden death of a loved one, and what that ultimately means under the legislation.

Analysis and findings

[31] The TTC is no longer disputing, and I find in any event, that the appropriate method of access under the *Act* in this appeal is to provide the appellant with a copy of the video, subject to any exemptions that may apply. For ease of reference, I refer to the mandatory exemption in section 23(1), which states:

Subject to subsection (2), a person who is given access to a record or a part of a record under this *Act* shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.

[32] I find that, in this case, it is reasonably practicable for the TTC to reproduce the video at issue.⁶ The TTC has not argued that it would not be reasonably practicable to provide the appellant with a copy of the video. As a result, it is mandatory under section 23(1) for the TTC to provide a copy of the video to the appellant, subject to any exemptions that may apply, which I address below.

Issue B: Does the video contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[33] In order to determine whether the mandatory personal privacy exemption applies to the video, it is necessary to decide whether it contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1), in part, 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,

⁶ Order MO-3803 is instructive in this appeal. Adjudicator Jaime Cardy found that requiring an appellant to attend a police headquarters to view the records (photographs of a deceased individual) was inconsistent with section 23, and that the police had failed to establish that it was reasonably practicable not to provide copies of the records to the appellant. In that case, Adjudicator Cardy rejected the police’s position that the appellant should attend their headquarters to view the records because they believed what was best for the appellant’s emotional well-being.

[34] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.⁷

[35] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁸

Representations

[36] The TTC submits that the video contains the personal information of the appellant’s son within the definition of personal information in section 2(1) of the *Act*. The TTC further submits that in the IPC’s *Guidelines for the Use of Video Surveillance Cameras in Public Places*, it is stated that “any recorded data or visual, audio or other images of an identifiable individual qualifies as “personal information” under the Acts.” The TTC goes on to argue that video records reveal significant personal information about any individual who is seen in them, such as information related to visible identifiers like sex, race/ethnicity, age and other visible identifiers of an individual. Further, the TTC submits, the IPC has consistently recognized that TTC video surveillance contains the personal information of its riders.⁹

[37] The TTC further submits that the video depicts the complainant’s son as well as a witness bystander who was at the scene when the incident occurred. However, the personal information of the bystander is not at issue in this appeal because the appellant has agreed to the blurring of the image of any other individual in the video. The TTC also submits that the video does not contain any images or personal information of the appellant.

[38] The appellant submits that she and her now deceased husband have already viewed a severed version of the video via the police. She also submits that suicide was not a factor and as such, there is no personal information in the video that she is not already aware of. Further, the appellant argues, as she has already viewed the video, in addition to the TTC offering her the opportunity to view the video, it is unclear how personal information is at issue.

[39] In reply, the TTC submits that the personal information in the video shows the victim involved in an accident where he sustains fatal injuries and the efforts made by emergency services to assist him. Further, the TTC argues that the fact that the appellant has already viewed a severed version of the video does not remove the personal information from the footage. It goes on to submit that having a copy of the video is very different than viewing a severed version. In addition, offering the appellant the opportunity to view the video does not release the TTC from its responsibility to protect the personal information contained within it.

[40] In sur-reply, the appellant submits that because the TTC is willing to offer her the

⁷ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁸ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁹ Orders MO-3006 and MO-3238.

opportunity to view part of the video, which contains personal information, it is unclear what additional personal information is being protected in the remainder of the video.

Analysis and findings

[41] One of the issues to be decided in this appeal is whether the video contains the personal information of the appellant's son. The fact that the appellant has viewed a portion of the video does not negate from the fact that the video may contain her son's personal information.

[42] The IPC has previously held that information collected about identifiable individuals from video surveillance cameras qualifies as their "personal information" under the *Act*.¹⁰

[43] I find that the video contains recorded video footage that displays information relating to the appellant's son. Most importantly, the video includes information about the fact that the appellant's son was on the TTC's premises on the day in question.

[44] I further find that the video contains medical information about the appellant's son, as it depicts the injuries which he suffered, falling within paragraph (b) of the definition of personal information in section 2(1) of the *Act*.

[45] In addition, the parties do not argue, nor do I find that the video contains the personal information of the appellant.

[46] Having found that the video contains the personal information of the appellant's son,¹¹ I will now determine whether his images are exempt from disclosure under the mandatory exemption in section 14(1)

Issue C: Does the mandatory exemption at section 14(1) apply to the video?

[47] The relevant portions of section 14(1) state:

14. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive;

¹⁰ See *Privacy and Video Surveillance in Mass Transit Systems: A Special Investigation Report* - Privacy Investigation Report MC07-68; Privacy Complaint Reports MC10-2, MC13-46 and MC13-60 and Orders MO-1570 and PO-3510.

¹¹ As previously stated, there is another individual depicted in the video. However, the appellant has agreed that the image(s) of that individual should be blurred. Therefore, the personal information of that individual is not at issue.

- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
 - (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
 - (c) discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[48] 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) applies.

[49] Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[50] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[51] 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.¹²

[52] 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.¹³ 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.¹⁴

[53] In its representations, the TTC submits that the personal privacy exemption applies to part of the video on the basis that none of the exceptions in section 14(1)(a) through (f) apply, and specifically that section 14(1)(f) does not apply because disclosure would constitute an unjustified invasion of the victim's privacy. As previously stated, the TTC has categorized the video into three parts, namely before impact, the impact, and the events after the impact. The TTC then goes on to describe each part, quoting from its priority

¹² *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

¹³ Order P-239.

¹⁴ Orders PO-2267 and PO-2733.

one report, the details of which I will consider, but will not set out in this order.

[54] The appellant submits that the TTC has argued and focused on the effect the viewing of the video will have on her, as opposed to the invasion of her son's privacy. In the appellant's view, the TTC has not demonstrated how an invasion of personal privacy is applicable.

[55] In reply, the TTC reiterated its position that the personal privacy exemption in section 14(1) applies to parts of the video as their disclosure would constitute an unjustified invasion of personal privacy through the disclosure of medical information and highly sensitive and graphic personal information of the son.

The presumption in section 14(3)(a) (medical history)

Representations

[56] The TTC submits that the presumption in section 14(3)(a) is applicable because the images in the video reveal information about the deceased's medical status.¹⁵ In particular, the medical information relates to the physical injuries sustained by the victim, which resulted in his death. The TTC also submits that, in the circumstances of this incident, there is also presumed medical information regarding mental health or substance abuse that can be seen when viewing the video.

[57] The appellant submits that the police determined that the death of her son was the result of an accident. Suicide, as the TTC has claimed, was not a factor and accordingly, there is no medical information being presented through the video.

[58] In reply, the TTC submits that even if the incident that was captured on video was not a suicide, it does not mean that there is no medical information contained in it. The TTC reiterates that the video shows an individual being fatally injured and the efforts that were made to remove that individual from the accident site. The video, the TTC submits, shows the visual minute by minute footage of the injuries that the victim sustained that later claimed his life.

[59] In sur-reply, the appellant submits that the TTC has not demonstrated how her son's medical history will be disclosed based on the images contained in the video. She further submits that the TTC's prior argument on medical history was solely based on the incident being the result of a suicide.

Analysis and findings

[60] As previously stated, under the mandatory exemption at section 14(1), where a record (in this case, the video) contains personal information of another individual but not the requester, the TTC is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy under section 14(1)(f). Sections 14(1)(a) to (e) have no relevance to this appeal and it is unnecessary to consider them further.

[61] In considering if section 14(1)(f) applies, if any of paragraphs (a) to (h) of section

¹⁵ See also, for example, Order MO-2245.

14(3) apply, disclosure of the video will be presumed to be an unjustified invasion of personal privacy, which can only be overcome if, in this case, section 14(4)(c) applies.

[62] This presumption applies in circumstances where the medical history and/or condition of a deceased person is contained in a record. In this case, I find that the presumption in section 14(3)(a) applies to the video, as it depicts the catastrophic injuries the appellant's son sustained. In other words, the video shows the victim's medical condition. I also find that whether or not the injuries were sustained as a result of an accident or otherwise is not relevant. The injuries were the result of the subway train making contact with the victim.

[63] Having found that section 14(3)(a) applies to the video and, therefore, its disclosure is presumed to be an unjustified invasion of the victim's personal privacy, it is not necessary for me to consider the factors in sections 14(2)(f) and 14(2)(i). However, for the sake of completeness, I will now consider the factors in section 14(2) that the TTC has claimed.

The factors in sections 14(2)(f) (highly sensitive) and 14(2)(i) (unfair damage to reputation)

[64] In its representations, the TTC relies on the factors in sections 14(2)(f) (highly sensitive) and 14(2)(i) (unfair damage to reputation).

[65] With respect to section 14(2)(f), to be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁶

[66] With respect to section 14(2)(i), but the issue is whether any reasonably foreseeable damage or harm would be "unfair" to the individual involved.¹⁷

Representations

[67] The TTC submits that in Order PO-3129, the adjudicator recognized that records containing information about the death of an individual are highly sensitive. It goes on to submit that the records at issue in Order PO-3129 were written records and that if they were considered to be highly sensitive then the video depicting the incident should also qualify as highly sensitive. The TTC further submits that the content of the video in this case becomes more sensitive as it progresses.

[68] The appellant submits that the police determined that the death of her son was the result of an accident. Suicide, as the TTC originally claimed, was not a factor and therefore it is inaccurate to consider the contents of the video to be highly sensitive. The appellant relies on Order MO-2245, which she submits is similar in nature to this appeal, and where the adjudicator ordered disclosure of a video to the requester.

[69] In reply, the TTC submits that while the police may have ruled that the incident was an accident, that does not change the sensitivity of the footage in the video. As previously stated, the footage shows "live" minute by minute graphic visuals of the injuries that the victim sustained, which later claimed his life.

¹⁶ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁷ Order P-256.

[70] The TTC goes on to distinguish Order MO-2245 from the circumstances in this appeal. While it acknowledges that there are some similarities, it argues that in Order MO-2245, the appellant was not seeking video footage of how their loved one died, but instead video footage of the crime scene where the body was found (with the dead body in the footage), as well as photographs and notes.

[71] In sur-reply, the appellant submits that in Order MO-2245 photographs were provided to the appellant. The appellant argues that in the summary of that order, it is stated that a video recording and a photograph are equally sensitive because it is the displayed image that defines the sensitivity. In other words, the appellant submits, the circumstances in Order MO-2245 and this appeal are not that materially different.

[72] Concerning the factor in section 14(2)(i), the TTC submits that the release of the video may unfairly damage the reputation of the victim. It argues that from the notes in the investigative report, it is clear that the victim is struggling and not in a good state, and the events do not present him in a positive way. As such, the TTC submits that one must consider the impacts that the release of the footage may have on the victim's reputation.

[73] The appellant's representations do not address the factor in section 14(2)(i).

Analysis and findings

[74] I find that the factor in section 14(2)(f), which is a factor favouring non-disclosure, applies to the video. From my review of the detailed description of the video, I am satisfied that it contains the son's personal information that is highly sensitive, since it relates to the specific circumstances surrounding the deceased's death.

[75] Regarding the orders that the parties have relied on, in Order PO-3129 the records were written records and photographs regarding a deceased individual. The adjudicator in that order found that this type of information of a deceased person was highly sensitive.

[76] The appellant relies on Order MO-2245, in which one of the records was a video which appeared to have been made by a police force at the scene where a deceased individual's body was discovered. The video showed the body as it was discovered as well as the surrounding area. While this order is instructive with respect to the application of the compassionate grounds in section 14(4)(c), it does not address the factors in section 14(2) and is, therefore, not relevant to my finding that the footage in the video in this case is highly sensitive.

[77] Turning to the factor in section 14(2)(i), I find that it does not apply, on the basis that the TTC has not provided sufficient evidence that the disclosure would unfairly damage the reputation of the victim.

[78] In any event, having found that section 14(3)(a) applies to the video, which means that its disclosure would be a presumed unjustified invasion of the victim's personal privacy, I now will address the exception to section 14(1) in section 14(4)(c), which has been raised by both the appellant and the TTC.

The compassionate grounds exception in section 14(4)(c)

[79] As stated previously, notwithstanding a finding that section 14(3)(a) applies to the video, this presumption can be overcome if the personal information is found to fall under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record that clearly outweighs the purpose of the section 14(1) exemption.¹⁸ In this appeal, the public interest override in section 16 has not been raised and, in my view, it does not apply. However, if any of the paragraphs in section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14(1).

[80] As stated above, section 14(4)(c) states:

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(c) discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[81] The terms "close relative" and "spouse" are defined in section 2(1) of the *Act* as follows:

"close relative" means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption; ("proche parent"); and

"spouse" means,

(a) a spouse as defined in section of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage. ("conjoint")

[82] The application of section 14(4)(c) requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?¹⁹

[83] After the death of an individual, it is that person's spouse or close relatives who are best able to act in their "best interests" with regard to whether or not particular kinds of

¹⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

¹⁹ Orders MO-2237 and MO-2245.

personal information would assist them in the grieving process. The task of the institution is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons".²⁰

Representations

[84] The TTC submits that the record contains the personal information of a deceased person, and the requester is the mother of the deceased, who is recognized as a "close relative." Regarding the third requirement, which is whether the disclosure of the personal information of the deceased is desirable for compassionate reasons, the TTC submits that there is no simple answer.

[85] The TTC's position is that section 14(4)(c) applies to Part One of the video (pre-impact), but not to Parts Two and Three of the video because the disclosure of this footage would not only be an unjustified invasion of the victim's personal privacy, but also because it would cause more harm than good for the appellant seeking closure. The TTC's position is that it is not desirable for compassionate reasons to provide access to parts two and three of the video.

[86] The TTC submits that it has considered the fact that any information regarding the death of a loved one is helpful for closure. It goes on to argue that no individual can truly know what watching footage like this will do to them in the long-term, as well as the fact that the impacts will be intensified for the victim's family members.

[87] The TTC further submits that it contacted the police to determine what types of records the police provided to the appellant. The police advised the TTC that they disclosed a redacted copy of the police report, as well as officers' notes and photographs of the scene. The TTC argues that the information contained in Parts Two and Three of the video would have been explained in detail in the police records that the appellant has already received. This means, the TTC submits, that denying access to Parts Two and Three of the video does not cause a gap in information for the appellant or prevent her from obtaining the information she feels is needed for her grieving process. Instead, the TTC submits, denying access to these two parts of the video protects the deceased from an invasion of his personal privacy through the release of highly sensitive personal information, as well as protects the appellant from highly graphic content that may be more harmful than helpful in the grieving process.

[88] The TTC goes on to state:

One order that was found to be applicable to this appeal was PO-3129. There were many different aspects to this appeal, and a number of different interests that the adjudicator needed to consider when deciding where the lines of unjustified invasion of personal privacy and compassionate grounds meet. The TTC asserts that while the details of this appeal are different than those in PO-3129, there are also many similar aspects between the two cases. The adjudicator in PO-3129 upheld the ministry's decision to withhold parts of a highly sensitive record despite there being a compelling case for compassionate release for a grieving father. This is the kind of consideration

²⁰ Order MO-2245.

that the TTC is looking for in our appeal. The TTC is not suggesting that the appellant should not receive any of the record, but instead that the IPC allow the TTC to sever the record into three parts and only release the first to the appellant under compassionate grounds. The TTC believes that part one of the video in combination with the information that [the police have] already provided to the appellant meets the requirements and intention of the 14(4)(c) compassionate grounds provision.

[89] The appellant submits that the TTC asserts that it knows what is in her best interests, in that the TTC believes providing the complete video will cause more harm than good. The appellant further submits that the victim was her youngest son, lived with her and his father for over 40 years, and that they had a very strong relationship. The appellant submits that the unexpected passing of her son was, and continues to be, extremely difficult. She also advises that since the death of her son, her husband (the victim's father) passed away. The appellant states that she suffers from depression, insomnia, anxiety and high blood pressure.

[90] Concerning the video itself, the appellant submits that her grieving process has been complicated by the lack of details surrounding her son's death, which has not allowed her to obtain closure. Questions, such as what exactly happened just before, during and after the incident have never been answered, and the police, fire and ambulance records cannot adequately address these questions. The appellant argues that the only recourse available to her is the video, and that viewing the complete unmodified video will allow her the opportunity to properly process the events in the privacy of her home and at a pace she can control. The appellant states that she and her husband viewed a redacted version of the video provided by the police and this did not assist the grieving process or assist them in achieving closure.

[91] In reply, the TTC submits that in this appeal it could easily be interpreted that it is trying to assert what is best for the appellant, but that is not true. Instead, the TTC submits, it is suggesting that this appeal deserves special consideration by the IPC, due to the highly sensitive nature of the video, as well as the fact that the video is different from any record reviewed by the TTC before.

[92] In sur-reply, the appellant submits that she is a responsible, fully functioning adult who determines on a daily basis what or will not cause her harm. She argues that she determines what is best for her by weighing the facts, both positive and negative. The appellant further submits that the TTC is not in a better position to determine personal harm and conclude that withholding a copy of the video will ultimately benefit her. The appellant goes on to argue that if this order ultimately favours the TTC, one could argue that a precedent would be set that a third party like the TTC is better able than a requester themselves to determine what is in their best interest.

Analysis and findings

[93] Many IPC orders have applied the compassionate grounds in section 14(4)(c) to order the disclosure of records regarding a deceased person, so long as the requirements in the three-part test are met as follows:

1. Do the records contain the personal information of a deceased individual?

2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?²¹

[94] After the death of an individual, it is that person's spouse or close relatives who are best able to act in their "best interests" with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons."²²

[95] Concerning part one of the test, I have already found, and the TTC agrees, that the video contains the personal information of a deceased individual, meeting the requirement of part one of this test. Regarding the second part of the test, there is no dispute that the requester is a "close relative" of the deceased individual, namely that she is the deceased's mother. I also note that, based on the appellant's representations, which I have no reason to question, the deceased individual lived with her and they had a close relationship.

[96] The only outstanding issue then, with respect to section 14(4)(c), is whether part three of the test has been met, which is whether the disclosure of the video of the appellant's son is desirable for compassionate reasons in the circumstances of the request. The TTC concedes that what it refers to as "Part One" of the video ought to be disclosed to the appellant on the compassionate grounds. This is the part of the video that was taken prior to the collision with the subway train. I have decided to conduct my analysis of section 14(4)(c) to the video as a whole. I note that the IPC has held that where information about a deceased individual does not relate to their death, disclosure is not desirable for compassionate reasons.²³ In this case, I have already found that the personal information of the deceased is about the circumstances surrounding his death.

[97] There have been several IPC orders dealing with the application of the compassionate grounds in section 14(4)(c), beginning with Order MO-2237, in which former Commissioner Brian Beamish found that the legislative intent of this section was recognition that, "for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate."

[98] In Order MO-2245, former Commissioner Beamish added that:

Losing a loved one is a sad and difficult process. Section 14(4)(c) of the *Act* was designed to allow families to have the records they feel they require in order to grieve in the way they choose.

[99] Subsequent IPC orders have also found that, in interpreting section 14(4)(c), a broad and all encompassing approach should be taken in determining whether or not disclosure is "desirable for compassionate purposes."²⁴

²¹ Orders MO-2237 and MO-2245.

²² Order MO-2245.

²³ Order PO-2850.

²⁴ See, for example, Orders PO-3129, PO-3273 and PO-3951.

[100] I give significant weight to appellant's position that disclosure of the records will help her with the grieving process. I find that, as graphic as it may be, the video will provide her with the opportunity to view the entire incident from start to finish and bring closure to any questions she may still have regarding her son's death. If the appellant needs to see the video footage of the incident involving her son in order to help her with the grieving process, she should be allowed that opportunity. Section 14(4)(c) of the *Act* was designed to allow families to have the records they feel they require in order to grieve in the way they choose. Therefore, on the question of what is "compassionate", I accept the evidence and representations of the appellant.

[101] I am not persuaded by the TTC's position, which is that the disclosure of Parts Two and Three of the video would do more harm than good in the appellant's grieving process, due to their graphic and sensitive nature and due to the fact that, in the TTC's view, the incident may have captured footage of a suicide. The appellant has clearly indicated a desire to view the video in its entirety, in her own home and at her own pace, in order to gain a better understanding of her son's untimely death, and in order to assist her with the grieving process and achieve closure. She is aware that these images are graphic. I find that the appellant is in the best position to determine whether disclosure is in her interests. While I appreciate the representations provided by the TTC, including its viewing policies and procedures regarding these types of videos, it does not rest on the TTC to make decisions on behalf of a grieving family member as to whether disclosure will assist with the grieving process. A well-informed adult, like the appellant, can make that decision on her own behalf.

[102] The TTC has also argued that because the appellant has already viewed a portion of the video (Part One) provided by the police, and also received certain records from the police regarding her son's death, withholding the rest of the video would not cause a gap in information for the appellant or prevent her from obtaining the information she feels is needed for her grieving process. In that regard, I find Order PO-3273 instructive and I adopt it for the purposes of this appeal. In that Order, Adjudicator Daphne Loukidelis noted that the institution had provided a great deal of information to the appellant about an accident that took the life of the appellant's son. Despite that, she concluded that the institution's reasons for not providing greater disclosure reflected its own views, rather than the appellant's, about what information might assist the appellant and his family in grieving the loss of their son in the way they chose. Adjudicator Loukidelis found that this was not the correct approach to take in assessing what disclosures are compassionate in the circumstances.

[103] Lastly, I would like to address Order PO-3129, which the TTC relied on in its representations. In that order, partial disclosure was provided to the appellant by the institution, under the compassionate grounds, which was upheld by the IPC. That order can be distinguished from this case. In that case, other individuals objected to portions of the records being disclosed to the appellant because these portions contained their own personal information. The institution balanced all of the competing interests, including the compassionate reasons for and against disclosure and decided to withhold the portions of the records that would cause distress to the individuals who objected to the disclosure. In this case, there are no competing interests amongst individuals; there is simply the appellant seeking access to the video of her deceased son from the TTC. As noted above, she does not seek the information of the other individual in the video.

[104] For all of these reasons, I am satisfied that disclosure of the video in its entirety²⁵ is desirable for compassionate reasons and that all the requirements for the application of section 14(4)(c) have been satisfied.

Issue D: Should the TTC be permitted to raise a discretionary exemption more than 35 days after being notified of the appeal? If so, does the discretionary exemption at section 13 apply to the video?

[105] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[106] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeals process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.²⁶

[107] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.²⁷ The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.²⁸

[108] The parties were asked to consider and provide representations addressing the following with respect to the TTC's late raising of the discretionary exemption in section 13 of the *Act*:

1. Whether the appellant has been prejudiced in any way by the TTC's late raising of the discretionary exemption in section 13 of the *Act*. If so, how? If not, why not?
2. Whether the TTC would be prejudiced in any way by not allowing it to apply an additional discretionary exemption in the circumstances of this appeal. If so, how? If not, why not?

²⁵ With the image of the other individual blurred, as referred to previously.

²⁶ *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

²⁷ Order PO-1832.

²⁸ Orders PO-2113 and PO-2331.

3. By allowing the TTC to claim the additional discretionary exemption, would the integrity of the appeal process be compromised in any way? If so, how? If not, why not?

Representations

[109] The TTC concedes that the section 13 exemption should have been raised from the beginning of the appeal, but was only raised in mediation after the mediator advised that the appellant could no longer “handle” the appeal and was authorizing her other son to act on her behalf. This arose after the deadline for the late raising of a discretionary exemption. The late raising of the exemption was not done in bad faith, but out of concern for the appellant’s well-being.

[110] The TTC further submits that it does not believe that the appellant is prejudiced in any way by the late raising of section 13, but that if the late raising were not allowed, it would be the party being prejudiced. Without the section 13 exemption, it submits, the arguments under the personal privacy exemption do not capture the potential consequences that releasing footage of parts two and three of the video could have on the appellant’s mental health and well-being.

[111] Further, the TTC’s position is that it does not believe that allowing the additional discretionary exemption would impact the integrity of the appeals process, as recognizing the additional exemption highlights key considerations that must be made for a decision to be made on this subject. It goes on to argue that this appeal is examining what can be classified as compassionate and that, without the section 13 exemption, the harms are not properly represented.

[112] The appellant submits that the TTC is not acting in good faith in the late raising of section 13. She argues that when her son was authorized to act as her agent during the mediation of the appeal, the TTC did not raise the exemption in section 13 until almost three weeks after the authorization was provided.

[113] In reply, the TTC submits that it was only advised about the appellant authorizing her son to act as her representative two days prior to it raising the possible application of section 13. This is why it raised the discretionary exemption when it did.

Analysis and findings

[114] I have decided to permit the TTC to claim the additional discretionary exemption in section 13, outside the IPC’s 35-day policy. This finding is unrelated to the merits of the exemption claim itself.

[115] With consideration to the overall circumstances of this appeal, although the appellant takes issue with it, I am satisfied that the failure to claim the exemption at the earliest possible time was not deliberate. I am also not persuaded that the late raising of section 13 delayed either any particular stage in the processing of this appeal or its completion. Furthermore, any possible prejudice that the appellant could suffer by the later raising of the exemption was addressed when the appellant was provided an opportunity to make representations on the application of section 13. Accordingly, I am satisfied that the late raising of section 13 has not compromised the integrity of the

appeals process or significantly prejudiced the appellant.

[116] Accordingly, I will consider the possible application of section 13 to the video.

[117] Section 13 states:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[118] For this exemption to apply, the TTC must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²⁹

[119] An individual's subjective fear, while relevant, may not be enough to justify the exemption.³⁰ The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.³¹

Representations

[120] The TTC submits that section 13 applies to Parts Two and Three of the video. It argues that there has been significant discussion around the impacts on the human brain of witnessing and viewing traumatic and violent content, as well as the overall consequences this may have on the health and well-being of an individual. It goes on to argue that every individual reacts and interprets the information differently, and will have varying experiences with the effects of trauma. In this case, the TTC asserts that viewing parts two and/or three of the video objectively poses a risk to the physical and mental health/safety of the appellant and her family due to the highly sensitive, graphic and traumatic content of the video.

[121] The TTC states:

To anyone else, this record may be disturbing, but the victim in this record is the appellant's family member, their son. There can be no doubt that watching the record in its entirety, but more specifically the graphic parts (parts two and three) of the record will be traumatic for the appellant. The TTC has reviewed several studies regarding suicide bereavement, and the physical and psychological harms that grieving family members are more susceptible to should not be ignored when determining what footage should be released to the appellant.

. . .

The TTC is very aware of the traumatic impacts that witnessing a suicide can have on an individual. From our operators who are driving the vehicles,

²⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

³⁰ Order PO-2003.

³¹ Order PO-1817-R.

to our video surveillance staff that review the incident, as well our employees who experience these events. TTC employees who experience priority one events can be off work for months trying to recover, sometimes not returning to work at all due to the trauma.

[122] The TTC goes on to submit that it believes so strongly in doing what it can to protect staff from the traumatic effects of witnessing a suicide, that it has implemented a strict priority one viewing protocol that prevents non-authorized staff, including FOI staff, from viewing priority one videos.

[123] The TTC further submits that I should seriously consider the risk of the trauma that could be caused by releasing parts two and three of the video, which is the harm and threat to mental health and the psychological impacts. These are legitimate concerns that need to be considered, and are not based on personal belief or feelings, but legitimate medical evidence of the harms associated with viewing or being connected to suicide.

[124] In support of its position, the TTC referred to three papers that refer to suicide bereavement and the effects of witnessing a traumatic incident on physical and mental health, such as the following:

- Physical illness,
- Hypertension,
- Depression,
- Psychiatric morbidity,
- Diabetes,
- Complicated grief,
- Chronic symptoms of post-traumatic stress disorder,
- Heightened risk of suicide, particularly where parents have lost a child,
- Attempted suicide,
- Psychiatric admission,
- Feelings of extreme sadness,
- Anxiety,
- Panic attacks,
- Guilt,
- Blame, and
- Anger.

[125] The appellant submits that the TTC asserts that there is an actual threat to her well-being were she to view the complete video. She states that her quality of life has suffered immeasurably since the passing of her son, that it is not normal to consistently wake up in the middle of the night, cry for hours and seek some degree of comfort by visiting the cemetery day-after-day, regardless of the weather. The appellant further submits that she finds it ironic that the TTC is concerned for her well-being when it has the ability to improve her well-being by simply providing her with a copy of the video.

[126] The appellant also submits that she has had to endure over a year and a half of paperwork, a mediation process and an adjudication process to try to get some closure on the passing of her son. She further submits that the TTC has been unwilling to help her and one has to question whether it is truly sincere when it claims that it is being guided by her well-being.

[127] The appellant goes on to argue that the graphic nature of the video does not concern her, as she was employed as a nurse's aide at SickKids and has witnessed events and been in situations others would find troubling. She adds that the positives of having the video far outweigh the negatives.

[128] In reply to the appellant's statements about consistently waking up in the middle of the night, as well as the other feelings she described, the TTC submits that, based on its research, this could be normal behaviour for someone experiencing the sudden loss of a loved one, as it has been documented that these are the types of emotions and feelings individuals express when dealing with loss. The TTC asserts that its concern is that disclosing parts two and three of the video would provide additional negative stimulus to the appellant's health and well-being, especially were she to watch and re-watch her child sustaining life-threatening injuries.

[129] Lastly, the TTC states that it understands that the appeals process has not been easy and can see why the appellant is skeptical of its decision, but it cannot knowingly risk the appellant's health and well-being without receiving further guidance on this matter from the IPC.

[130] In sur-reply, the appellant submits that arguing what is "normal" following the death of one's child is an unproductive exercise, and that having the complete video will allow her the opportunity to process the events and move on to a natural closure process. In addition, the appellant submits that the TTC continues to assert that it is better suited to determine what is in her best interest. Lastly, the appellant states that she is 70 years old, has lived a full life of challenging experiences and critical decisions, and these points should not be dismissed.

Analysis and findings

[131] Section 13 requires that any threat to health and safety be a result of disclosure of the records at issue. The party with the burden of proof under section 13, that is, the party resisting disclosure, must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm.

[132] I find that the TTC's arguments with regard to the possible application of the

discretionary exemption in section 13 to be speculative. The premise of the TTC's position is that the deceased committed suicide and that the disclosure of the video to the appellant would cause a threat to her health and safety. In the circumstances, whether the death of the appellant's son was the result of suicide or an accident, I accept that viewing the video will be very troubling for the appellant. However, I find that the TTC has not established that the disclosure of the video could reasonably be expected to result in a serious threat to the health and safety of the appellant.

[133] Therefore, I find that the disclosure of the video could not reasonably be expected to seriously threaten the safety and/or health of the appellant or any other person or group of persons. As a result, I find that video cannot be withheld under section 13.

Issue E: Did the TTC conduct a reasonable search for records?

[134] During mediation, the appellant advised the mediator that she is seeking access to all video recordings of the incident, including any that may exist from various on-board or subway platform cameras. The TTC advised the mediator that the only responsive record is the one identified in its decision letter, but the appellant believes additional records should exist.

[135] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.³² If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[136] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.³³ To be responsive, a record must be "reasonably related" to the request.³⁴ 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.³⁵

[137] A further search will be ordered if the institution 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.³⁶

[138] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.³⁷

[139] I asked the TTC to provide a written summary of all steps taken in response to the request. In particular, I asked the following questions:

³² Orders P-85, P-221 and PO-1954-I.

³³ Orders P-624 and PO-2559.

³⁴ Order PO-2554.

³⁵ Orders M-909, PO-2469 and PO-2592.

³⁶ Order MO-2185.

³⁷ Order MO-2246.

1. Did the TTC contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the TTC did not contact the requester to clarify the request, did it:
 - a. choose to respond literally to the request?
 - b. choose to define the scope of the request unilaterally? If so, did the TTC outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the TTC inform the requester of this decision? Did the TTC explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

Representations

[140] The TTC submits that it conducted a thorough search for records as required under section 17 of the *Act*.

[141] The TTC provided its representations on this issue by way of two affidavits, sworn by two TTC Freedom of Information Assistants. The first affiant submits that he coordinated the search for records. After receiving the request that was transferred from the police, the affiant contacted the appellant by email, confirming that the request was for a video recording of the incident. According to the affiant, the appellant did not send any communication advising that the interpretation of the request was incorrect. The affiant then proceeded with the search for records based on the request. The affiant states that he then sent an email to the TTC's Video Services Unit (VSU), requesting the video of the incident. The same day, the affiant was notified by the VSU that the video was downloaded and ready for pick-up.

[142] The affiant goes on to submit that due to the nature of such incidents and police involvement it is the TTC's procedure to have priority one incident videos downloaded and saved on the date of the incident for investigative purposes, prior to any freedom of information requests. The affiant argues that any video footage from all cameras in the entire subway station for the time period of the incident was preserved for the investigation, and that no other videos exist.

[143] The second affiant submits that she reviewed the video to determine whether the content was responsive to the request and to determine which camera(s) had responsive footage. This affiant states:

When video is requested for a subway station, it is standard operating procedure for videos from all cameras in the subway station for the specified date and time to be downloaded and preserved. As such, when the videos were preserved for the investigation of the priority one incident in question, it was videos for all of [named] subway station for [specified date] for the time that was indicated by Transit Control and TPS for their investigation.

I have watched the downloaded video footage and have identified that only one camera from [named] subway station showed the incident responsive to the request that is the subject of this appeal.

[144] The appellant submits that the TTC should conduct a reasonable search of all video recordings relating to the incident, including recordings from station and platform level cameras, as well as subway operator point-of-view cameras.

[145] In reply, the TTC submits that the subway vehicle involved in the incident was not equipped with a front facing camera, and that there is only one camera angle that showed the incident. As well, the TTC submits that there are not as many cameras on the platform at this particular station as at other stations. This station only has long angle cameras that show the platforms as a whole. The TTC goes on to argue that at the time of the incident, TTC employees reviewed the footage for the entire station and identified that the only responsive footage was the platform footage, and that only one angle of footage showed the incident. Other footage, the TTC submits, which did not show the incident was kept for only its 72-hour retention period.

[146] IPC staff contacted the TTC to seek clarification regarding the video images that were preserved, as well as the 72-hour retention period. The TTC advised that only the platform video of the incident was preserved. The TTC further submits that its Video Services Unit's typical process is to collect the video for the entire subway station when a priority one incident occurs. However, in this case, it was not necessary to preserve all of the videos from all of the station's cameras because the victim entered the subway station from another subway train, and not through one of the station's entrances, and he did not proceed beyond the subway platform. As a result, the TTC submits, videos from cameras other than the subway platform cameras were not preserved and were not available past the 72-hour retention period.

[147] In sur-reply, the appellant submits that it is disappointing that no other footage could be downloaded as the 72-hour retention period is past. The appellant further submits that she will never know if other footage of the incident was available. The TTC, she argues, made the determination of what footage was relevant and did not retain footage from other vantage points even though it easily could have.

Analysis and findings

[148] Having reviewed the representations of the parties, 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 at the time of the request, I am satisfied that the TTC contacted the appellant to confirm the nature of the request.

[149] Further, the evidence before me demonstrates that the TTC made reasonable

efforts to locate videos that are responsive to the request. I am satisfied that the TTC staff who responded to the access request were experienced employees, and knowledgeable about these types of requests. I accept the TTC's evidence that all videos from the relevant subway station were preserved and viewed by the second affiant, and that only one camera contained footage of the incident that forms the subject matter of this request. This is the video that is at issue in this appeal.

[150] Conversely, the appellant has not provided a reasonable basis for concluding that additional videos exist that capture the incident, as she must in order for me to direct the TTC to conduct a further search.³⁸ I find that there is nothing before me to indicate that additional responsive videos beyond that located by the TTC exist that show footage of the incident. Accordingly, I find that the TTC's search was reasonable.

ORDER:

1. I order the TTC to disclose a copy of the video in its entirety to the appellant by **August 31, 2021** but not before **August 26, 2021**. The image of the individual other than the appellant's son is to be blurred such that this individual cannot be identified.
2. I uphold the TTC's search for records as reasonable.
3. I reserve the right to require the TTC to provide me with a copy of the video provided to the appellant in compliance with order provision 1.

Original Signed by: _____

Cathy Hamilton
Adjudicator

July 27, 2021

³⁸ Order MO-2246.