

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4340

Appeal MA20-00338

Toronto Transit Commission

February 28, 2023

Summary: The appellant sought access to incident reports, photographs and video surveillance footage of all graffiti incidents on TTC subways and streetcars from May 1, 2018 to July 6, 2020. The TTC located records responsive to the request and, initially, denied access to all of them under the discretionary law enforcement matter exemption in section 8(1)(a) of the *Municipal Freedom of Information and Protection of Privacy Act*. During the adjudication stage of the appeal, the TTC issued five revised decisions, eventually disclosing most of the responsive records pertaining to 150 incident reports.

In this order, the adjudicator upholds the TTC's final decision to withhold responsive photographs and video surveillance footage related to four incidents under section 8(1)(a) of the *Act*. She also upholds the reasonableness of the TTC's search for responsive records and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M. 56, section 8(1)(a).

OVERVIEW:

[1] This appeal addresses the right of access to records documenting graffiti incidents that the Toronto Transit Commission (TTC) withheld under the discretionary law enforcement matter exemption in section 8(1)(a) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The appellant submitted a request to the TTC for access to incident reports, photographs and video surveillance footage for all instances in which spray painted graffiti was applied to the exterior of TTC subways and streetcars from May 1, 2018 to July 6, 2020. The TTC located records responsive to the request and issued a decision denying access to them under section 8(1)(a) of the *Act*. In its decision, the TTC also stated that no video surveillance records exist. Regarding the incident reports and photographs that it withheld under section 8(1)(a), the TTC provided the following explanation:

As of January 2019 graffiti incidents are no longer being addressed by the TTC Investigative Services Unit (ISU). They are now being handled exclusively by the Transit Enforcement Unit (TEU).

The TTC Transit Enforcement **does not** conduct follow up investigations – as Investigative Services once did in the past.

The photographs of what you are requesting are evidentiary scenes of crime photographs for potentially active cases. Transit Enforcement officers take the initial report and forward that to the Toronto Police Service for investigations. The records submitted in relation to Mischief (Graffiti) are submitted to the Toronto Police Service – where they are assigned to Toronto Police Services Investigators.

To possibly access such records please submit your request to Toronto Police. Disclosure of such records depends on whether or not investigations are still pending on these cases/files.

[3] The appellant was not satisfied with the TTC's decision and appealed it to the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the appeal. During mediation, the appellant challenged the application of section 8(1)(a) of the *Act* to the records at issue and the TTC maintained that section 8(1)(a) applies to the records in their entirety. The appellant also challenged the TTC's position that no video surveillance records exist in response to the request, raising the reasonableness of the TTC's search as an issue in this appeal.

[4] A mediated resolution was not possible and the appeal was moved to adjudication. I conducted an inquiry, inviting the parties' representations on the records at issue contained in 150 folders,¹ with each folder representing an incident and containing an incident report and any related photographs. During the course of my inquiry, the TTC issued five revised access decisions and disclosed most of the responsive records contained in the folders. The appellant responded to each of the revised decisions and the additional disclosure, as described below.

¹ Initially, the TTC identified 158 folders/incidents; however, it clarified that eight of those were not responsive to the appellant's request.

The TTC's five revised access decisions and additional disclosure, and the appellant's responses

[5] The TTC provided representations in response to the initial Notice of Inquiry and agreed to share them with the appellant. The TTC then consulted with the Toronto Police Services Board (the police) and, on September 24, 2021, issued a revised access decision and disclosed certain responsive records to the appellant. The appellant reviewed the revised access decision and disclosed records and, on October 12, 2021, confirmed that he seeks access to photographs and videos that he claims are missing from approximately 70 folders. The appellant provided a list of records he believes are missing to the TTC.

[6] The TTC then advised that it had suffered a cyberattack, which impacted its ability to respond to the appellant throughout November and December of 2021. In January of 2022, the TTC reviewed video surveillance footage and photographs to address the appellant's claim that additional responsive records exist. On January 31, 2022, the TTC issued a further revised decision to the appellant and disclosed most of the records at issue, including eight responsive videos that it had located. The January 31 decision also addressed the fees the TTC would charge for preparing the eight video recordings for disclosure.²

[7] On March 10, 2022, the TTC provided an amended revised decision confirming that one particular file (folder 20-1039) has no photographs. On March 23, 2022, the appellant confirmed that he wished to pursue his appeal and provided a list of "still missing photographs and videos" from 31 folders. The appellant stated that he compiled his list of missing records by reviewing all of the incident reports the TTC disclosed to him and noting the reports that noted the existence of photographs and/or video footage that the TTC claims are not locatable or do not exist. The appellant shared his list with the TTC.

[8] In response, on April 27, 2022, the TTC issued another revised decision to the appellant and disclosed additional photographs to him. On May 16, 2022, the appellant confirmed that the only issues he wishes to pursue in the appeal are the reasonableness of the TTC's search for records and the TTC's claim of the section 8(1)(a) exemption to the withheld records.

[9] In light of the TTC's multiple revised decisions and significant additional disclosure, and the corresponding responses of the appellant, I invited the TTC to provide supplementary representations on the reasonableness of its search and its claim of section 8(1)(a) in respect of the records that remain at issue. On June 17, 2022, the TTC issued its final revised decision and index in this appeal. It also confirmed that it relies on its initial representations.

² This decision also confirmed that, as a courtesy, the TTC had waived all fees associated with the preparation of reports and photographs for disclosure.

[10] I shared the TTC's representations with the appellant and invited him to provide representations in response. I also invited the appellant to provide representations on the issues set out in the Notice of Inquiry and the records that remain at issue following the TTC's final revised decision and index of June 17, 2022. Although the appellant had, until that point, participated in my inquiry by reviewing and responding to each revised access decision and the additional records disclosed by the TTC, as described above, he did not provide representations in this appeal. The appellant also did not respond directly to the TTC's representations or to the issues in the Notice of Inquiry that are set out below. Instead, the appellant confirmed that he had reviewed the Notice of Inquiry (and my letter enclosing it) and the TTC's representations, and stated that he had nothing to add and that the appeal could proceed.

[11] In this order, I uphold the TTC's decision of June 17, 2022, to withhold records relating to four graffiti incidents under section 8(1)(a) of the *Act*. I also uphold the reasonableness of the TTC's search for responsive records.

RECORDS:

[12] At issue in this appeal are the records from 18 incident files that the TTC lists in its June 17 index and asserts are exempt from disclosure or do not exist.³

[13] Regarding the withheld information, the TTC claims that 17 photographs and two videos relating to four incidents are exempt under section 8(1)(a). These are: 10 photographs from folder 18-1271; four photographs from folder 19-1645; TTC video surveillance records (CAM 8 and CAM 9) from folder 20-0407; and three photographs from folder 20-1014.

[14] Regarding the records that the TTC says do not exist, the appellant asserts that the following photographs and videos pertaining to 14 incident files should exist:

- two photographs from folder 18-1552; the incident report indicates that 26 photographs were taken but only 24 were located
- 11 photographs from folder 18-1859
- 9 photographs from folder 19-0099
- video surveillance record from folder 19-0257
- 13 photographs from folder 19-0402

³ The TTC's June 17 index also indicates that two photographs located in respect of incident 1 (Folder 18-1271) are not responsive. These two photographs and their responsiveness are not at issue in this appeal, since the appellant confirmed that he wishes to pursue only the issues of reasonable search and the section 8(1)(a) exemption claim.

- 5 additional photographs from folder 19-0680; the incident report indicates that 15 photographs were taken; the department has advised that only 10 are associated with this file and, likely, there was a typo indicating that there were five more
- video surveillance record from folder 19-0716
- video surveillance record from folder 19-1660
- video surveillance record from folder 19-1832
- video surveillance record from folder 19-2256
- video surveillance record from folder 20-0027
- video surveillance record and SOCO photographs from folder 20- 0724
- video surveillance record from folder 20-0778
- video surveillance record from folder 20-1115.

ISSUES:

- A. Does the discretionary law enforcement exemption at section 8(1)(a) apply to the records at issue?
- B. Did the TTC conduct a reasonable search for records?

DISCUSSION:

A. Does the discretionary law enforcement exemption at section 8(1)(a) apply to the records at issue?

[15] I will first consider the records that the TTC has identified and withheld under section 8(1)(a). Section 8(1)(a) is an exemption from a requester's right of access that protects records related to law enforcement matters by giving an institution the discretion to "refuse to disclose a record if the disclosure could reasonably be expected to interfere with a law enforcement matter." The term "law enforcement" is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)[.]

[16] As I noted in the Notice of Inquiry I sent to the parties, the IPC has found that “law enforcement” includes a police investigation into a possible violation of the *Criminal Code*.⁴ Also, the IPC approaches the law enforcement exemption in a sensitive manner, because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.⁵ Finally, for section 8(1)(a) to apply, the law enforcement matter must still exist or be ongoing;⁶ the law enforcement matter cannot be completed.⁷

[17] The TTC submits that the graffiti vandalism incident reports, photographs and video recordings that it has withheld under section 8(1)(a) are evidence in the police’s investigations into the acts of vandalism. The TTC submits that the records it has withheld relating to four incidents could reasonably be expected to interfere with a law enforcement matter because the police have open, ongoing investigations into these incidents. The TTC states that the law enforcement matter is the police investigation of graffiti vandalism, which is a violation of the *Criminal Code* of Canada. In its representations, the TTC includes emails it exchanged with the Coordinator of the Access and Privacy Section of the police asking the police to advise on the status of the police’s ongoing investigations into certain incidents of vandalism.

[18] The TTC submits that disclosing any information in the withheld investigation records could compromise the integrity of the investigations and provide insight about ongoing police investigations. The TTC argues that if the withheld records were disclosed, details of the police’s investigations would be revealed that could be used by individuals committing the crimes to evade police. The TTC asserts that disclosure of evidence before an investigation and/or legal proceeding has been completed can have significant impact on procedural fairness.⁸

[19] As noted above, the appellant did not provide any representations to challenge the TTC’s claim of the law enforcement exemption to the records at issue.

[20] I accept the TTC’s representations that the records for which it claims the law enforcement exemption relate to an ongoing “law enforcement matter.” Specifically, the police’s investigations of vandalism, which can result in mischief charges under the *Criminal Code* of Canada, is a law enforcement matter within the meaning of section

⁴ Orders M-202 and PO-2085.

⁵ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

⁶ Order PO-2657.

⁷ Orders PO-2085 and MO-1578.

⁸ The TTC’s representations state “procedural justice.” I take this to mean “procedural fairness.”

8(1)(a). I also accept that disclosure of the records, which constitute evidence in the police's ongoing investigation of incidents of graffiti vandalism, could reasonably be expected to interfere with the law enforcement matter within the meaning of section 8(1)(a) of the *Act*. I am satisfied that the records at issue form part of ongoing police investigations, and I find that they qualify for exemption under section 8(1)(a) of the *Act*.

The TTC exercised its discretion under section 8(1)(a) appropriately

[21] Furthermore, for the reasons that follow, I find that the TTC exercised its discretion under section 8(1)(a) appropriately. The TTC considered the nature of the information at issue, the wording of the exemption and the important law enforcement interests that section 8(1)(a) aims to protect. The TTC followed its historic practice with similar information, and the process it established with the police in a prior request. It consulted with the police to determine which incidents reports, photographs and videos related to ongoing police investigations. The TTC exercised its discretion in claiming section 8(1)(a) in good faith, by withholding only the responsive records relating to ongoing police investigations of graffiti incidents. The TTC also considered the purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited and specific, when it disclosed all of the responsive records for the investigations it knows are closed. Finally, there is no suggestion that the TTC exercised its discretion in bad faith or for an improper purpose, or that it took into account irrelevant considerations. Accordingly, I uphold the TTC's exercise of discretion and, therefore, its decision to withhold the information at issue.

B. Did the TTC conduct a reasonable search for records?

[22] Because the appellant claims that additional records exist beyond those found by the TTC, I must decide whether the TTC has conducted a reasonable search for records as required by section 17 of the *Act*.⁹ Previous IPC orders have found that a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.¹⁰ As well, previous IPC orders have found that a requester claiming that additional records exist must provide a reasonable basis for concluding that such records exist.¹¹

[23] Although the appellant challenged the reasonableness of the TTC's search for responsive records during the inquiry, he did not provide representations addressing it when I invited him to do so. The appellant's position on this issue is that the additional records, detailed in paragraph 14 above, should exist based on the information noted in the disclosed incident reports that he has reviewed. For the reasons that follow, I find

⁹ Orders P-85, P-221 and PO-1954-I.

¹⁰ Orders M-909, PO-2469 and PO-2592.

¹¹ Order MO-2246.

that the TTC has made a reasonable effort to identify and locate responsive records;¹² that is, records that are "reasonably related" to the request.¹³

[24] In its representations, the TTC addresses its search for certain photographs that the appellant claims should exist. Specifically, it states that, although the incident report for folder 18-1552 indicates that 26 photographs were taken, its search yielded only 24. Regarding folder 19-0680, the TTC states that although the incident report indicates that 15 photographs were taken, its search yielded only 10 photographs associated with this file. The TTC suggests that the incident reports indicating that two additional photographs should exist (for folder 18-1552), and that five additional photographs should exist (for folder 169-0680), may contain typos. The TTC's explanation in response to the appellant's assertion that the records described in paragraph 14 above should exist is that it searched for these specific records but could not locate them and they do not exist.

[25] The TTC's representations include an affidavit from its Freedom of Information Assistant that sets out the steps taken to search for records responsive to the appellant's request, specifically, video surveillance records. Although the TTC located and disclosed some video surveillance records, the affidavit explains why video surveillance for graffiti vandalism generally does not exist: limited video surveillance in non-public areas of the TTC and numerous blind spots making it difficult to capture video of vandalism incidents, which mostly occur in non-public areas of the transit system; the TTC does not have an official policy to secure and download video after a graffiti incident meaning that, although a video is noted as having been requested in an incident report, that video may not ultimately be secured or downloaded successfully; and the TTC has a 72-hour video retention period for cameras in public facing areas of the transit system (except for Wheel Trans Vehicles that have a seven-day retention period). The TTC also provided evidence of its search for records in the Video Services Unit of its Investigative Services department, which confirmed that specific videos, for which a download request was received, did not exist because the download was unsuccessful or not completed.

[26] The TTC's representations and, significantly, its actions throughout the inquiry – conducting multiple searches for responsive records and multiple searches specifically for all of the records that the appellant identified as records that, according to the incident reports, should exist and providing the appellant with an explanation in response to all of his queries – lead me to conclude that it conducted a reasonable search. The TTC had experienced employees knowledgeable in the subject matter of the request make reasonable efforts, repeatedly, to locate records that are reasonably related to the request. The TTC's explanation about why further video surveillance records do not exist is credible and explains why more videos were not located as a result of its searches. In addition, the appellant has provided no reasonable basis for

¹² Orders P-624 and PO-2559.

¹³ Order PO-2554.

me to conclude that further searches will yield more responsive records. In these circumstances, I find that the TTC's search for responsive records was reasonable and I uphold it.

ORDER:

I dismiss the appeal.

Original Signed By: _____
Stella Ball
Adjudicator

February 28, 2023 _____