

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2822

Appeal MA12-98

Regional Municipality of Waterloo

December 21, 2012

Summary: The region received a request for a report on the circumstances of an identified collision between a Grand River Transit bus and a pedestrian at a specified location. The region identified the responsive records as the Collision Review Committee file held by the Corporate Health and Safety office in the Region's Human Resources Department, and stated that the records fell outside the scope of the *Act* on the basis of the exclusionary provision in section 52(3)3 (employment-related matters). This order finds that the identified responsive records fall outside the scope of the *Act* because of the application of section 52(3)3 of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(3)3.

OVERVIEW:

[1] The Regional Municipality of Waterloo (the region) received an access request under the *Act* for the following records:

... the complete regional report on the circumstances of [an identified collision (the collision)] between a Grand River Transit bus and a pedestrian at a [specified location].

[2] In response to the request, the region issued a decision in which it stated:

The record that is responsive to your request is the Collision Review Committee file held by the Corporate Health and Safety office in the Region's Human Resources Department. The file contents are compiled under the Collision Review Program guideline and include incident report forms prepared by the employee involved in the collision and the GRT Supervisor, a Motor Vehicle Accident Report obtained from the Waterloo Regional Police, communications and related records pertaining to the Collision Review Committee and Collision Appeal Committee proceedings, photographs of the collision scene, a critical injury report prepared for the Ministry of Labour and a report to the Ministry of Transportation related to incidents involving transit vehicles equipped with bicycle racks.

[3] The region then indicated that the records are excluded from the scope of the *Act* on the basis of the exclusionary provision in section 52(3) (labour relations or employment-related matters). The region also referred to Order MO-2242, and stated that:

... the dominant purpose of the responsive records is to determine if the bus operator's actions led to a preventable collision. Regional employees who are involved in a preventable collision may face employment-related consequences such as supplemental training. Depending on individual circumstances of the collision or employee, additional employment-related measures may be taken ranging from written warnings to termination.

[4] The appellant appealed the region's decision.

[5] During mediation, the region confirmed that it was relying on the exclusion in section 52(3)3. Accordingly, the sole issue in this appeal is whether the responsive records are excluded from the scope of the *Act* on the basis of the exclusionary provision in section 52(3)3 of the *Act*.

[6] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the region, initially, and it provided representations in response. I then sent the Notice of Inquiry, along with a copy of the severed representations of the region, to the appellant, who also provided representations in response.

[7] In this order I find that the records are excluded from the scope of the *Act* on the basis of the exclusion in section 52(3)3.

RECORDS:

[8] There are 24 pages of records at issue, consisting of correspondence, forms, reports, a diagram, and a number of photographs.

DISCUSSION:

Are the records excluded from the scope of the *Act* based on section 52(3)3?

[9] The region takes the position that the requested records are excluded from the scope of the *Act* on the basis of the exclusionary provision in section 52(3)3 of the *Act*. This section reads:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[10] If section 52(3)3 applies to the record, and none of the exceptions found in section 52(4) apply, the record is excluded from the scope of the *Act*. There is no suggestion that the exceptions in section 52(4) apply, and I find that they have no application in the circumstances of this appeal.

[11] The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to."¹

[12] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.²

[13] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.³

¹ Order P-1223.

² *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.

³ Order PO-2157.

[14] If section 52(3)3 applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.⁴

[15] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to an employees' actions.⁵

Background

[16] As background, the region indicates that it has constructed roundabouts at a number of road intersections as part of its regional road system. It also states that it is responsible for the local transit system, Grand River Transit (GRT), and that in October of 2011 an accident occurred at a roundabout involving a GRT bus.

[17] With respect to the requested record, the region states that although the request is for the "complete report" on the circumstances of the accident, the region does not ordinarily create a report in these circumstances. It states:

Instead, a review of the circumstances of any collision or upset of a regional vehicle is conducted by an internal body, the Collision Review Committee. The Committee's file for this incident was deemed to be the responsive record.

[18] The region also provides background and context to the Collision Review Committee. It states:

Corporately, the Region as an employer is required to ensure that employees who operate on-road or off-road vehicles both hold and maintain the appropriate class of licence and certificate, and that each employee's standard of operation is adequate.

[19] The region then reviews a number of the requirements in place for these employees to assist the region to meet its statutory and regulatory requirements, to protect the health and safety of employees and members of the public, and to minimize the risk of damage to vehicles and property. The region then states:

The Region's Human Resources Department, through its Health and Safety/Fleet Safety/WSIB unit, has established a Collision Review

⁴ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

⁵ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

Committee with a mandate of investigating collisions and upsets to determine whether the incidents were, or were not preventable. The Committee's finding may lead to disciplinary consequences. The Committee includes members from several Regional departments, and uses a guideline to ensure consistency of approach, to set the methods by which affected employees participate in the review, and to provide the employee with an opportunity to appeal the Committee's finding.

[20] The region also indicates that, for the GRT (a division of the region's Transportation and Environmental Services Department), there are two specific labour relations standards pertaining to vehicle collisions. It refers to these standards specifically, and states that "both of these documents establish employees' obligations in the event of a collision, and the involvement of the corporate Collision Review Committee following the collision."

[21] The region then states:

When the Collision Review Committee finds that an employee has been involved in a preventable collision, the employee may be subject to discipline based on the judgment of the employee's supervisor or manager within the affected program. A range of consequences can apply, including additional training, warning letters, suspensions without pay, and termination of employment. ...

[22] In this context, the region takes the position that the Collision Review Committee file, which is the record at issue in this appeal, falls outside the scope of the *Act* under section 52(3)3 because it relates to a labour relations or employment-related matter.

[23] The appellant takes the position that the investigation into the collision was part of a public safety review and that section 52(3)3 does not apply.

Section 52(3)3: matters in which the institution has an interest

Introduction

[24] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Requirement 1: Were the records collected, prepared, maintained or used by the region or on its behalf?

[25] The region states that all but one of the responsive records were prepared by region staff, and that the staff preparing the records included the bus operator involved in the collision, GRT managers, Human Resources Department staff or the Collision Review Committee facilitator. With respect to the remaining record, the region states that this record is a Motor Vehicle Accident Report prepared by the Waterloo Regional Police Service officer who investigated the collision, which was collected by the Collision Review Committee from the Police Service.

[26] The appellant accepts that the records were collected and prepared by the region or on its behalf.

[27] In the circumstances, I am satisfied that all of the records at issue were prepared, collected or used by the region, and that part 1 of the three-part test is met.

Requirement 2: Were the records collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications?

[28] The region states:

All of the records were used in relation to Collision Review Committee meetings or appeal hearings. The content of the records was used in consultations and discussions about the operator's actions and deliberations by the Committee about the preventability of the collision. Several records form communications between the employee and the Collision Review Committee facilitator and the remaining records were communicated to either Collision Review Committee members, or GRT managers.

[29] The appellant states:

My challenge to [this part of the test] is that the collection and preparation of the records relates also to action taken by regional government to improve safety at the roundabout. This goes beyond meetings, consultations, discussions or communications.

[30] Based on the representations of the region, I am satisfied that they were prepared, maintained or used in relation to meetings, consultations, discussions or

communications. As identified by the region, some of the records are the actual communications between the Committee and the employee. The region also states that the records were used in consultations and discussions by the Committee about the employee's actions.

[31] With respect to the appellant's argument that the collection and preparation of the record also relates to actions by the region to improve public safety, I address this issue generally below. However, based on the records and the representations of the region, I find that the actual records at issue in this appeal were prepared, maintained or used in relation to meetings, consultations, discussions or communications.

Part 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which the region has an interest?

[32] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context.⁶

[33] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition⁷
- an employee's dismissal⁸
- a grievance under a collective agreement⁹
- disciplinary proceedings under the *Police Services Act*¹⁰
- a "voluntary exit program"¹¹
- a review of "workload and working relationships"¹²
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.¹³

⁶ (See, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 Div. Ct.).

⁷ Orders M-830, PO-2123.

⁸ Order MO-1654-I.

⁹ Orders M-832, PO-1769.

¹⁰ Order MO-1433-F.

¹¹ Order M-1074.

¹² Order PO-2057.

¹³ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

[34] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review¹⁴
- litigation in which the institution may be found vicariously liable for the actions of its employee¹⁵

[35] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce [*Solicitor General* (cited above)].

[36] With respect to the scope of the exclusionary provision, Swinton J. for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis*¹⁶ that:

In *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,

It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

[37] Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that "(w)hether or not a particular record is 'employment related' will turn on an examination of the particular document."

[38] I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal.

¹⁴ Orders M-941, P-1369.

¹⁵ Orders PO-1722, PO-1905.

¹⁶ Cited above.

[39] In this appeal, the region states:

All of the records form part of the Collision Review Committee file and were used either for assessing the collision and rendering a decision on the preventability of the collision, or to communicate with the affected employee regarding attendance at the Committee meetings or rights of appeal. ... After the Committee's decision, the findings are used by the employee's manager to judge whether disciplinary measures should be applied. If discipline is applied and then challenged, information in the records may be used in the grievance process, up to and including arbitration under the applicable Collective Agreement. Outcomes of Collision Review Committee reviews are retained and are added to the employee's record to form a history of findings. This history is used to determine appropriate disciplinary measures.

[40] The region then supports its position by referring to the Collision Review Committee's involvement. It states:

The applicable Collective Agreement and GRT Policies, Procedures and Practices ... contain express language regarding actions to be taken in relation to collisions involving GRT vehicles, and both include the involvement of the Collision Review Committee. Assessment of an employee's operation of a vehicle, and applying appropriate remedial actions or disciplinary measures where a finding of a preventable collision is rendered are clearly labour relations and employment-related matters.

[41] The appellant takes the position that this part of the test is not met. He states:

I disagree that the dominant purpose of the responsive records is related to employment-related matters that could lead to potential disciplinary measures. My argument, citing a regional document, [is] that the region investigated the roundabout collision to determine if it sheds light on the need for safety-related changes to the design and operation of the roundabout, including public education and training for drivers and pedestrians. This public safety purpose is different than cited by the region in its refusal to release the records. ...

My challenge to part 3 is that these meetings, consultations, discussions or communications are not about labour relations or employment-related matters. Rather, they are about action taken to improve public safety.

[42] In support of his position, the appellant refers to a memorandum from the region's Commissioner of Transportation and Environmental Services to Regional Councillors, sent shortly after the collision, which opens by stating:

Since the opening of [a named boulevard] region staff have been closely monitoring its operation. There have been 26 collisions ... including a severe pedestrian collision involving a [GRT] bus. This has caused significant concerns respecting the safety of the roundabout for both vehicles and pedestrians.

[43] The appellant states that the memorandum then discusses the steps taken "to improve safety at the roundabout," and connects these with the ongoing monitoring of the roundabout and the review of all of the collisions, including the collision resulting in the records at issue. He states: "Nowhere does the region connect the pedestrian collision to employment-related or labour relations matters. Rather the issue at stake is to improve public safety for vehicles and pedestrians." He then refers to the following excerpt from the memorandum:

Region staff have reviewed the collisions that have occurred to determine if there is a common cause and what additional changes could be implemented to improve safety at the intersection. The majority of the collisions have been minor fender benders with most caused by vehicles entering the roundabout failing to yield to vehicles already in the roundabout. While staff have done a preliminary review of the severe pedestrian accident all of the information to complete the review is not yet available. Once the information is available staff will complete the review of the pedestrian accident.

[44] The appellant states:

This critical section explains that the region is reviewing all collisions to determine common cause and to assess additional safety changes at the roundabout. It includes the pedestrian collision as part of this safety review. It states that information must still be gathered about the pedestrian collision to complete the review.

I submit that this memorandum reveals the dominant purpose behind the roundabout records. The region does not explain in this document that it is collecting records for an employment-related or labour-relations purpose. Rather, the region explains that it is reviewing the pedestrian collision and collecting information about it to assist in the monitoring of roundabout safety, to determine common cause in collisions, and to help guide "additional changes that could be implemented to improve safety."

I can only speculate as to why the region, after collecting records as part of a public safety review, would later recast its actions as part of a labour-relations and disciplinary procedure. ...

[45] The appellant then suggests that the region collected the records for one purpose (public safety) and later attributed that collection to an alternate purpose (employee discipline).

[46] He then distinguishes the decision in Order MO-2242, and states that, unlike the representations made by Toronto Police in that case, there are in this case differing explanations from the region as to why it collected the records. The appellant then states:

I urge you to accept the region's first explanation, made shortly after the roundabout collision, that it is collecting records as part of an operational public safety review. I urge you to reject the second explanation, offered later after a freedom-of-information request, that it collected the records for an employment-related purpose.

Furthermore, I point out that the phrase "labour relations or employment-related matters" has been found not to apply in the context of an organizational or operational review (Orders M-941, P-1369). Clearly from this memorandum, the region has investigated the roundabout collision and collected information about it to assist in reviewing the safe operation of the roundabout.

[47] The appellant also provides representations identifying the public interest in records concerning this roundabout and safety issues, and provides additional documents in support.

Analysis and findings

[48] Based on my review of the representations and the records, I am satisfied that the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the region has an interest.

[49] I note that the records responsive to this request are identified as the Collision Review Committee file held by the Corporate Health and Safety office in the Region's Human Resources Department. In its representations the region provided a copy of the guidelines for its Collision Review Program, which state that the program applies to "all Regional staff who operate regionally-owned or leased vehicles and/or heavy equipment." The guidelines also state that the purpose of the program is to review Regional vehicle collisions in an objective, fair manner "with the aims of determining preventability and recommending measures to prevent recurrence." The Collision

Review Committee is established under this program, and its purpose is to administer the program. In the circumstances, I am satisfied that Collision Review Committee's meetings, discussions or communications are about employment-related matters in which the region has an interest.

[50] I have also carefully reviewed the records at issue in this appeal. I note that these records consist of numerous photographs of the collision scene, completed incident report forms prepared by the employee involved in the collision and the GRT Supervisor, a critical injury report prepared for the Ministry of Labour, a report to the Ministry of Transportation related to incidents involving transit vehicles equipped with bicycle racks, a Motor Vehicle Accident Report obtained from the Waterloo Regional Police, and various records pertaining directly to the Collision Review Committee proceeding and Collision Appeal Committee proceeding.

[51] Based on my review of the records and the representations, I accept the region's position that the file contents are compiled under the Collision Review Program guidelines and are about employment-related matters. Clearly the records pertaining directly to the Collision Review Committee proceeding and Collision Appeal Committee proceeding involving the employee relate to employment-related matters. Based on my review of the other records, including the dates of these records, I am satisfied that all of these records, which form the Collision Review Committee's file, were collected, prepared or used by the region in relation to meetings, discussions or communications about employment-related matters.

[52] I have considered the appellant's argument that these records were collected by the region primarily as part of a public safety review, and that the region only later indicated that this collection was part of a labour relations and disciplinary procedure, and I do not accept the appellant's position. Although the appellant provides evidence that a public safety review was being conducted by regional staff, that evidence also suggests that any such review was ongoing at the time the memo was drafted. I have not been provided with any additional information regarding whether any public safety reviews were completed, whether additional reports were subsequently prepared, or what records or other information were relied on in conducting any such public safety reports. However, even if I had been provided with such additional information, I am not persuaded that this would affect my decision that the records at issue in this appeal are excluded from the scope of the *Act*.

[53] In this appeal, the specific records at issue are the Collision Review Committee's file for the collision. This appeal proceeded on that basis, and I find that these records, which are contained in and form the Collision Appeal Committee's file, were collected, prepared or used by the region in relation to meetings, discussions or communications about employment-related matters. The region also clearly has an interest in these records, and I am satisfied that they are excluded from the scope of the *Act* under section 52(3)3.

[54] As a final note, having found that the records at issue in this appeal are excluded from the scope of the *Act*, I wish to reiterate that this finding does not necessarily prohibit the region from disclosing certain records. As I stated in Order MO-2242:

... although I have found that the records are excluded from the scope of the *Act* as a result of the application of section 52(3)3, this section in no way prohibits an institution from disclosing records or portions of records, it simply removes them from the access and privacy regimes established by the *Act*. Outside the scope of the *Act*, an institution still has the discretion to disclose records even when section 52 is applicable.¹⁷

ORDER:

I uphold the decision of the region, and dismiss this appeal.

Original signed by: _____
Frank DeVries
Adjudicator

_____ December 21, 2012

¹⁷ See also Order PO-2613.