

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4149

Appeal MA20-00272

The Corporation of the City of Kingston

January 18, 2022

Summary: This order deals with a request to the Corporation of the City of Kingston (the city) for access to a video recording taken on a Kingston Transit bus on a specified date. The city denied access to the video, claiming that it was excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act* under the employment or labour relations exclusion in section 52(3)3. In this order, the adjudicator finds that the exclusion does not apply to the video and orders the city to issue another decision letter under the *Act* to the appellant.

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

Orders Considered: Orders M-927, PO-2556 and MO-4119.

OVERVIEW:

[1] This order disposes of the sole issue raised as a result of an appeal of an access decision made by the Corporation of the City of Kingston (the city). The appellant made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of video footage, including audio from a specified Kingston Transit bus during a specified time period, as well as a copy of audio recordings between the transit operator and the dispatch office of Kingston Transit on the same date.

[2] In response, the city issued an access decision to the appellant in which it

provided him with access to an audio recording from the Kingston Transit dispatch, which captured the transit operator's discussion with dispatch on the date and time noted in the access request. However, the city refused to disclose the requested video to the appellant because it claimed that the video is excluded from the scope of the *Act* under section 52(3)3 (employment or labour relations exclusion).

[3] The appellant appealed the city's access decision to the Information and Privacy Commissioner of Ontario (IPC). The appeal was not resolved during mediation and was then moved to adjudication stage of the appeals process where an adjudicator may conduct an inquiry. I sought and received representations from both the city and the appellant. Portions of the city's representations were withheld from the appellant as they met the IPC's confidentiality criteria.¹

[4] For the reasons that follow, I find that the video is not excluded from the scope of the *Act* under section 52(3)3 and I order the city to issue another access decision to the appellant without relying on the exclusion at section 52(3).

RECORD:

[5] The record at issue is a video recording taken on a Kingston Transit bus.

DISCUSSION:

[6] The sole issue in this appeal is whether exclusion in section 52(3)3 applies to the video recording. Section 52(3)3 states:

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:

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

[7] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[8] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.²

¹ As set out in Practice Direction 7.

² Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

[9] The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations is not enough to meet the "some connection" standard.³

[10] 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.⁴

[11] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.⁵

[12] 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.⁶

[13] For section 52(3)3 to apply, the city 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 use 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.

[14] The phrase "labour relations or employment-related matters" has been found to apply in the context of, for example, an employee's dismissal.⁷

[15] The phrase "labour relations or employment-related matters" has been found not to apply in the context of for example, an organizational or operational review⁸ or litigation in which the institution may be found vicariously liable for the actions of its employee.⁹

³ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

⁴ Order PO-2157.

⁵ *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.

⁶ *Ministry of Correctional Services*, cited above.

⁷ Order MO-1654-I.

⁸ Orders M-941 and P-1369.

⁹ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

[16] 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.¹⁰

[17] The records collected, prepared, maintained or used by the institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or “employment-related” matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees’ actions.¹¹

Representations

[18] Regarding the first part of the three-part test in section 52(3)3, the city submits that the video surveillance recording from a city transit bus was collected and used in accordance with the city’s Video Surveillance Policy in response to a service complaint that it received.

[19] The city provided a copy of its Video Surveillance Policy (the policy), which states that it applies to the collection, use, disclosure and disposal of recorded information collected through video surveillance. This technology, the policy states, is used to enhance the protection and safety of employees and the general public; to reduce, deter and investigate incidents of vandalism or criminal activity; and to protect property and assets.

[20] The policy further states that access to the recorded information is only permitted in accordance with the *Act*, other applicable laws and the policy itself. The policy then states that access to the video surveillance records shall be restricted to those responsible for the administration of the video surveillance system and to:

- City employees who lawfully require access to the records for the purpose of risk management, investigating complaints from the public, and the processing of personal injury claims to the damage of assets,
- Law enforcement agencies by official request where the records could assist in an investigation in accordance with the *Act* or other applicable laws, and
- The individuals whose images have been recorded and retained who make a request and are granted access to information under the *Act* or other applicable laws.

[21] The policy also makes reference to a Records Retention Schedule, including documenting how long video surveillance records are retained, but does not specify what the retention period is.

¹⁰ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

¹¹ *Ministry of Correctional Services*, cited above.

[22] Turning to the second and third parts of the three-part test, the city submits that it received a service complaint. As a result, the video was downloaded from the video surveillance system and used in investigating the complaint and in a discussion with the transit operator about proper procedures and about what is expected of the employee with respect to reporting defective accessibility equipment as well as wearing proper personal protective equipment.

[23] In support of its position, the city relies on Order MO-3531 in which the appellant sought access to records prepared by the Regional Municipality of Durham (the region) in response to information brought to its attention that one of its emergency services workers was not in compliance with the region's policies and procedures. In that Order, the adjudicator found that the region's evidence was that the records were created in response to information brought to its attention about an employee and that the IPC had found in previous orders that similar types of records addressing training and discipline issues pertaining to a specific employee relate to employment-related matters.

[24] The city goes on to state:

The City of Kingston maintained the subject video recording solely in response to information brought to its attention that one of its employees did not fully comply with its policies and procedures. If the incident had not been brought to the City's attention, this video recording would have been deleted long ago in accordance with the City's Video Surveillance Policy. The only reason the video was maintained and still existed at the time the Appellant made his MFIPPA request was so that the City could use it at meetings and discussions about labour relations.

The matters addressed with the employee form part of the employee's employee record and can be used in performance and disciplinary matters going forward if required. . .

[25] The appellant states that he seeks only the video footage from the camera on the bus pointing out the front windshield of the bus. He further states that he is not seeking the transit operator's name or any other identifying information about him, nor is he seeking any image of the transit operator's face. He submits that the city's refusal to provide him with a copy of the video recording is "bogus" and without merit.

Analysis and finding

[26] As previously stated, and for the following reasons, I find that the video recording is not excluded from the scope of the *Act* under section 52(3)3. In particular, I find that even if parts one and two of the three-part test in section 52(3)3 have been met, the third part of the test has not been met.

[27] Recently, in Order MO-4119, Adjudicator Marian Sami dealt with whether the exclusions in sections 52(3)1 and/or 52(3)3 applied to exclude video surveillance of an

arrest of an individual by police officers in Waterloo, following which the individual filed a complaint about the police's conduct. In making her findings, Adjudicator Sami referred to two previous IPC orders, namely Orders M-927 and PO-2556 which also dealt with the exclusion in section 52(3) and in the case of Order PO-2556, its provincial counterpart. Adjudicator Sami stated:

. . . The IPC has held that records created for one purpose, such as an accident investigation, and in advance of a complaint, do not fall within the ambit of section 52(3) simply because the records also reside in a complaint file.¹²

. . .

In Order M-927, the IPC identified an important distinction between two categories of records that can be found with police: records¹³ relating to day-to-day police investigations of incidents within their basic mandate (to protect peace and investigate possible criminal activity), and copies of those same records that may be found in a file relating to an investigation of a police officer's conduct. It was recognized that, while the first category may be prepared by police employees, such records are not "in essence" about employment or labour relations matters (which is what section 52(3) excludes from the scope of the *Act*). The request in Order M-927 was found to be in that first category, relating to day-to-day police investigations, not an investigation into police conduct. The IPC held that applying the exclusion at section 52(3) in those circumstances would lead to a "manifestly absurd result," which was not intended by the Legislature: the permanent removal of certain information maintained by the police regarding their basic mandate from the scope of the *Act* simply because they "happen to have been reviewed in connection with an investigation of an employee's conduct."

In Order PO-2556, the adjudicator applied the approach in Order M-927 and observed that any review of a police employee's conduct "does not alter the character of the original records, which were prepared for the purposes of the investigations conducted by the officer (see also Order MO-2504)." As a result, he found that the original records (an incident sheet and general occurrence report) were "not excluded from the operation of the *Act* simply because of their possible inclusion or review in subsequent complaint investigations and/or other proceedings."

[28] Adjudicator Sami adopted the approach taken in these orders, finding that the video of the arrest related to the police's initial interaction with the individual and that

¹² Order MO-2131.

¹³ Or copies of records.

the character of the video did not change simply because it was and/or could later be collected, maintained or used by the police in relation to complaint investigations and/or other proceedings relating to the police's employees. As a result, she found that the three part test in section 52(3)3 was not met.

[29] While I acknowledge that the orders referred to above deal with police records, the principles enunciated in them are equally applicable to the facts in this appeal. I find that the video at issue in this appeal was created as part of Kingston Transit's day-to-day operations. As previously stated, in its own policy regarding video surveillance, the city's position is that this technology is used to enhance the protection and safety of employees and the general public; to reduce, deter and investigate incidents of vandalism or criminal activity; and to protect property and assets. In my view, as was the case in Order MO-4119, the fact that the video was subsequently used by Kingston Transit to investigate the complaint the appellant made regarding the transit operator does not change its initial character. Accordingly, I find that the video does not relate to labour relations or employment related matters in which the city has an interest under section 52(3)3 of the *Act*.

[30] Further, regarding the city's position that the video would have been destroyed but for the appellant's complaint about the transit operator, I disagree. The appellant made his access request to the city under the *Act* the day after the video was taken. As a result, the video was retained not only for the purpose of investigating the complaint about the transit operator, but also in order to respond to the access request, and subsequent appeal to the IPC. In any event, I find the city's argument that the video would not exist but for the necessity of investigating the complaint to be irrelevant. In the present appeal, the video was retained and was identifiable as a responsive record for the purposes of responding to the appellant's access request. I also note that the city's own video surveillance policy provides for access under the *Act*, namely for those individuals whose images have been recorded and retained who make a request and are granted access to information under the *Act*.

[31] Because all three parts of the three-part test must be met in order for the exclusion in section 52(3)3 to apply, and having found that the third part of the test was not met, I find that exclusion does not apply and the video is subject to the *Act*.

ORDER:

[32] I find that the video recording is not excluded from the scope of the *Act* under section 52(3)3. I order the city to issue a decision letter to the appellant regarding his access request for the video, without relying on the exclusion in section 52(3), and treating the date of this Order as the date of the request for the purposes of the procedural requirements of the *Act*.

Original Signed by: _____

January 18, 2022 _____

Cathy Hamilton
Adjudicator