



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-160

Appeal M-9200222

Ottawa-Carleton Regional Transit Commission



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ORDER

BACKGROUND:

The Ottawa-Carleton Regional Transit Commission (OC Transpo) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for:

1. ... a letter received from Mr. Vincent Westwick, Counsel at an Inquest ... (The appellant states that this record is referred to in a letter dated Sept. 12, 1990, written by Mr. D. Coupland, Director, Employee Relations at OC Transpo to Mr. R. Graham, President, ATU Local 270, OC Transpo Files T-8-90, T-12-90, T-14-90 and the letter indicates that Transportation Operations will authorize payment of lost wages incurred by the grievors, including the appellant, and overall, cites a "settlement" regarding the matter.)
2. ... all such relevant records (to include commissions minutes, notes, opinions, computer data, etc.) under your institution's custody and/or control in relation to these subject matters ...
3. ... a statement of employment earnings for the pay period in which the transportation operations authorized the payment of lost wages for the booked work scheduled for [the requester].
4. ... a complete copy of your "record retention by-law" ... this by-law is to reflect your mandate on retention and disposal of all records under your institution's custody and control.

This request was the first received by OC Transpo. Initially, it responded to the request under the Act. However, it subsequently notified the requester that it was of the view that the Act did not apply to OC Transpo. The requester appealed the position taken by OC Transpo. In Interim Order M-13, I concluded that OC Transpo was covered by the Act and ordered it to make a decision under the Act respecting the request.

Following Interim Order M-13, OC Transpo issued its decision and granted partial access by providing records responsive to parts 1, 3 and 4 of the request.

The appellant appealed on the basis that he did not receive a decision addressing part 2 of his request, and because he believes that more records exist with respect to part 4 of his request. All outstanding issues regarding parts 1 and 3 of the request were resolved during mediation.

With respect to part 2 of the request, the Appeals Officer asked OC Transpo to issue a decision addressing this part of the request, as clarified by the appellant. The Appeals Officer advised OC Transpo that the phrase "these subject matters" referred to the subject matters discussed in the first paragraph of his request and that the phrase "all such relevant records" should include copies of any responses to Mr. Westwick's letter from the seven people who received it. He also clarified that although he had referred to three files in his request (T-8-90, T-12-90 and T-14-90), he is seeking records contained in his own file only.

OC Transpo issued a decision with respect to part 2 of the request and stated that records regarding OC Transpo minutes with respect to Mr. Westwick's letter did not exist. Access was denied to the records that form part of the grievance file (T-12-90) including any notes or opinions on this subject, on the grounds that the records are outside the jurisdiction of the Act.

The appellant is appealing the decision that the records in part 2 of his request are outside the jurisdiction of the Act.

With respect to part 4 of the request, the appellant is not satisfied with one of the records he received entitled CP 1005 as he believes that a more current version of the policy exists. The basis for his belief stems from a letter received by another requester from OC Transpo dated February 18, 1991. In this letter, the former Freedom of Information and Privacy Co-ordinator stated she would provide the requester with a copy of its records retention policy "as soon as it is available" and that "... it is currently being revised to ensure that it complies with the new GST legislation introduced on 1 January 1991". The present Co-ordinator informed the Appeals Officer that CP 1005 had never been updated. She explained that the wrong word had been used by the previous Co-ordinator and that policy document CP 1005 had not been "revised" but rather that it had only been "reviewed". The appellant is not satisfied with this explanation and wishes to continue with the appeal.

Notice that an inquiry was being conducted to review the decision was sent to the appellant and OC Transpo. Written representations were received from both parties. This is a final decision dealing with access to the records in issue in appeal M-9200222, formerly M-910059.

The records at issue are records requested under part 2 of the request which relate to the appellant's grievance file T-12-90. OC Transpo provided affidavits, accompanied by an index describing the records in question.

Also at issue are the records in part 4 of the request because the appellant believes that more responsive records exist.

ISSUES:

- A. Whether the records at issue are outside the jurisdiction of the Act.

- B. If the answer to issue A is no, whether the mandatory exemption provided by section 10 of the Act applies to the records.
- C. Whether OC Transpo conducted a reasonable search for records responsive to Part 4 of the request.

SUBMISSIONS/CONCLUSIONS:

A. Whether the records at issue are outside the jurisdiction of the Act.

In Interim Order M-13, I examined the issue of whether the application of the Act to OC Transpo is constitutionally valid. I concluded on page 17 that OC Transpo falls within the definition of "institution" in section 2(1) of the Act and it was my view that the Act applied to it. However, in Interim Order M-13, I noted that as a result of the principle of "interjurisdictional immunity", there were some limits on the application of the Act to OC Transpo.

The principle of "interjurisdictional immunity" provides that a provincial law may not be applicable to an interprovincial undertaking where the law in question affects a vital part of its management and operation, or sterilizes it in its essential powers. I stated on page 16:

It is possible that the disclosure of certain requested information might, in an unusual case, indirectly affect the management or labour relations of an institution. However, this concern is recognized in the Act, even for those institutions which are wholly within provincial jurisdiction, and exemptions from disclosure are available to the institution. In the very unusual case where it can be shown that disclosure of a record would clearly affect the working conditions, labour relations, or a vital part of the management and operation of an institution which is an interprovincial undertaking, then such a record would fall outside of the jurisdiction of the Act.

In its representations relating to this appeal, OC Transpo indicated that disclosure of the records would affect labour relations and therefore they are outside the Commissioner's jurisdiction as discussed in Interim Order M-13.

In order to determine whether the disclosure of the records would affect labour relations, it is first necessary to consider the nature of the records and determine whether they relate to labour relations. The records relate to the appellant's grievance file T-12-90.

In its representations OC Transpo stated:

Documents such as those at issue in these appeals are created because, under the collective agreement, employees are subject to discipline only for just cause, and because the [Canada Labour] Code requires that every collective agreement provide for the resolution of disputes (for example, the validity of disciplinary decisions) by binding rights arbitration. The documents in question, all of them relate to just such a proceeding.

I am of the view that the records do relate to the appellant's grievance.

I must also consider whether grievance proceedings relate to labour relations. In my view, the term labour relations involves the relationship between employers and their employees both union and non-union. Grievance procedures are designed to help resolve disputes which arise between employers and employees and are therefore an important part of that relationship. Accordingly, it is my view that records relating to grievances relate to labour relations.

I must now consider whether the disclosure of the records would affect labour relations. OC Transpo has indicated that the federally mandated collective agreement contains dispute resolution mechanisms including a grievance procedure. It submitted that the parties have, in accordance with general labour law, considered this grievance procedure to be confidential.

OC Transpo further states that:

the federal requirements for mandatory binding rights arbitration exist in a labour law general law which accords a privilege to discussions at grievance proceedings. That would, in our opinion extend to the documents which formed the subject matter of those discussions. No distinction is drawn between offers of settlement, per se, and any other discussion at such a meeting.

In support of the view that these discussions and documents are usually confidential, OC Transpo referred to several labour arbitration cases including Ottawa-Carleton and C.U.P.E. (1984), 14 L.A.C. (3d) 445 (Picher) and Re City of Calgary and C.U.P.E. (1979), 22 L.A.C. (2d) 434 (Mason).

In its representations, OC Transpo stated that any issues of confidentiality are generally dealt with by the arbitrator. OC Transpo submitted that:

Both our collective agreement as it is and as it must be pursuant to section 57(1) of the

Canada Labour Code vest exclusive and essentially unreviewable authority to determine issues of such confidentiality in an arbitrator.

As OC Transpo's grievance procedures are governed by the Canada Labour Code, which is a federal statute, any decisions concerning the disclosure of records related to a grievance would generally be made under that statute. Therefore, it follows that the application of the Act to records concerning grievances would impact on the way in which grievance procedures are carried out. Since I have found that grievances relate to labour relations and are an important part of the relationship between employers and employees, if the disclosure of the records in issue would impact on grievance procedures it would also clearly affect labour relations. In Interim Order M-13, I noted that where disclosure of a record would clearly affect labour relations of an institution which is an interprovincial undertaking, then such a record would fall outside of the jurisdiction of the Act. In my view, the disclosure of the records at issue in this appeal would have such an impact. Accordingly, I am of the view that the records are outside the jurisdiction of the Act.

In light of my conclusion, I will not consider Issue B.

C. Whether OC Transpo conducted a reasonable search for records responsive to Part 4 of the request.

Initially, OC Transpo responded to Part 4 of the request by sending the appellant a copy of The Employment Law Report, December 1989, Volume 10, Number 12, and subsequently, a copy of its corporate policy document CP 1005, dated April 14, 1982. OC Transpo subsequently provided a copy of the Regional Municipality of Ottawa-Carleton By-law No. 276 of 1982 on records retention and its "List of Record Categories by Division".

OC Transpo provided affidavits from the following personnel describing the steps taken to locate records responsive to Part 4 of the request: the previous and present Freedom of Information Co-ordinator; the Head, Administrative Services, Finance and Administration; and the Assistant Superintendent of Operating Personnel in the Transportation Division.

With the exception of By-law No. 276, the affidavits state that OC Transpo does not have by-laws governing administrative matters and that an overall records retention schedule was never created. With respect to the retention of employment records, the affidavits indicate that OC Transpo uses the general Ontario guidelines printed in The Employment Law Report dated December 1989. Although not directly responsive to the request, a copy of this record was provided to the appellant by OC Transpo.

OC Transpo also provided the appellant with what it said was the only policy document in its custody and control which referred to records retention, namely, CP 1005. During mediation access was granted to three records referred to in this policy document. The appellant believes that a more current version of the

policy document CP 1005 exists. The affidavits received attest to the fact that policy document CP 1005 was written in 1982, and although it was "reviewed" to ensure that it complies with the new G.S.T. legislation, OC Transpo states that it was never revised.

I have carefully reviewed the representations of the parties. In my view, several thorough searches were conducted for the records sought by the appellant during the processing of the request and the appeal and I find that the search conducted by OC Transpo was reasonable in the circumstances.

Original signed by: _____
Tom Wright
Commissioner

July 6, 1993