

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4080

Appeal MA19-00392

City of Ottawa

June 30, 2021

Summary: The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to OC Transpo bus collisions in 2017 and 2018. The city located a responsive record and granted partial access to some information contained in the record. The city denied access to the remaining information in the record, claiming that it was exempt under the discretionary law enforcement exemptions in section 8(1)(a) (law enforcement matter) and 8(1)(b) (law enforcement investigation), and the mandatory personal privacy exemption in section 14(1). The city also raised the exclusion in section 52(3) (labour relations and employment records). In this order, the adjudicator finds that the record is excluded from the *Act* by section 52(3)3 and dismisses the appeal.

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

Cases Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.); *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

OVERVIEW

[1] This appeal relates to a spreadsheet used by the City of Ottawa (the city) to

track OC Transpo¹ bus collisions. The requester, a member of the media, made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to documents, reports and correspondence relating to fleet safety and bus collisions. The initial request sought access to:

1. collision reports and related documents for OC Transpo buses from 2015 – present
2. any documents related to speed enforcement activities directed at OC Transpo drivers on the Transitway between Jan. 1, 2018 and the present
3. any reports, documentation, emails or memos related to a collision involving an OC Transpo bus in December, 2018 in or near the St. Laurent Transitway station
4. any correspondence between the city and Transport Canada regarding crashworthiness standards for public transit vehicles
5. any correspondence between the city and [a named company] between Sept 2013 and the present.

[2] The requester later narrowed the request for access to:

- Report from the Fleet Safety Unit;
- Collisions with injuries;
- Collisions “off-property”;
- Generated report (spreadsheet) from the software (not a print out of every collision report);
- Time frame: 2017-2018.

[3] The city downloaded a responsive record – an Excel spreadsheet – from its risk tracking and monitoring database called RiskMaster, which contained the requested information. The city issued a decision granting partial access to some of the information in the spreadsheet, including fields containing collision dates, locations and descriptions, and information about the types of associated injuries or property damage. The city denied access to information in certain fields that contained investigators’ notes, the city’s determinations about bus driver fault and preventability of the collision, and recommendations and determinations about driver sanctions or retraining. The city withheld this information on the basis of the law enforcement exemptions in section 8(1)(a) (law enforcement matter), section 8(1)(b) (law

¹ Ottawa-Carleton Regional Transit Commission.

enforcement investigation), and the mandatory personal privacy exemption section 14(1). The city also claimed that, because the information in the spreadsheet relates to matters of employment or labour relations, the entire spreadsheet is excluded from the application of the *Act* pursuant to section 52(3) (employment or labour relations), notwithstanding that the city disclosed some information from the spreadsheet to the requester.²

[4] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner (the IPC). The parties participated in mediation to explore the possibility of resolution.

[5] During mediation, the appellant further narrowed the request, confirming an intention to pursue access only to the information withheld from four specific fields. Those fields are titled:

- Investigation Notes
- Driver Assessment
- Outcome Preventable Y/N, and
- Bus Run Number.

[6] The appellant also took the position that there is a compelling public interest in disclosure of the requested information. As a result, the public interest override in section 16 of the *Act* was added as an issue to this appeal.

[7] When a mediated resolution was not reached, the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I conducted an inquiry, during which I received representations from the parties that were shared between them in accordance with the IPC's *Code of Practice* and *Practice Direction 7*.

[8] Because the city raised the application of the exclusion in section 52(3) of the *Act*, I invited both parties to submit representations on section 52(3), in addition to the specific exemptions claimed by the city and the application of the public interest override raised by the appellant. In its representations, the city wrote that it is no longer claiming the law enforcement exemptions in sections 8(1)(a) and (b), but maintains that the entire record is excluded from the application of the *Act* under section 52(3).

[9] In this order, I find that the record is excluded from the *Act* under section

² This disclosed information was the subject of a newspaper article that the city attached to its representations.

52(3)3. Since I find that the record is excluded, I make no findings on the application of the mandatory personal privacy exemption in section 14(1) or the application of the public interest override.

RECORD:

[10] The record at issue is an Excel spreadsheet containing information about 140 bus collisions in 2017-2018 in which an injury was reported. The information was obtained from the RiskMaster database.

[11] The city appeared to argue that the entire contents of the database are excluded under section 52(3). I do not find it necessary to make such a broad finding. Instead, I will examine the record that the city created and determine whether section 52(3) applies to it.

DISCUSSION:

[12] Because the city claims that the record at issue is excluded from the *Act* under section 52(3), I must first consider that issue. Only if the record is not excluded do the exemptions also relied on by the city to deny access become relevant.

[13] Pursuant to section 52 of the *Act*, the *Act* does not apply to certain types of records. A finding that the *Act* does not apply to the record at issue in this appeal ends the matter before me because if the *Act* does not apply, then the general right of access in section 4(1) does not apply.

[14] Section 52(3) excludes records concerning certain labour relations or employment-related matters. Section 52(3) states that:

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:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

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

[16] For the collection, preparation, maintenance or use of a record to be “in relation to” the subjects mentioned in paragraphs 1, 2 or 3 of section 52(3), it must be reasonable to conclude that there is “some connection” between them.³ 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.⁴

[17] The term “labour relations” refers to matters arising from the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation or analogous relationships.⁵ The meaning of “labour relations” is not restricted to employer-employee relationships.

[18] 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.⁶

[19] Examples in which the phrase “labour relations or employment-related matters” in section 52(3) has been found to apply include a job competition,⁷ an employee’s dismissal,⁸ and disciplinary proceedings under the *Police Services Act*.⁹

[20] 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.

[21] The IPC takes a “whole record approach” to the exclusions at section 52(3). This means that the record is examined as a whole. The exclusion cannot apply to a portion of the record. Either the entire record is excluded under section 52(3), or it is not. It is worth noting, however, that an institution may still exercise its discretion to disclose records or information outside of the access regime in the *Act*, as the city says it did by

³ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁴ Order MO-3663, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

⁵ *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.

⁶ Order PO-2157.

⁷ Orders M-830 and PO-2123.

⁸ Order MO-1654-I.

⁹ Order MO-1433-F.

granting access to some of the information in the record.¹⁰

[22] As noted above, the city generated the record at issue from its RiskMaster database, using fields that contained information that was responsive to the appellant's request. Here, I will treat this as the record for determining whether the section 52(3) exclusion applies to it. My findings are limited to the record that is before me, which was generated by the city specifically in response to the appellant's access request that is the subject of the appeal before me. I make no findings about the exclusion of other information contained in the RiskMaster database under section 52(3), nor do I find that every record generated using information from the RiskMaster database would necessarily be excluded under section 52(3) of the *Act*.

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

[23] The majority of the city's representations are about the application of paragraph 3 of section 52(3), although the city claims that the record is also excluded under paragraphs 1 and 2 of section 52(3). Below, I address section 52(3)3 first. Given my conclusion that the record is excluded under section 52(3)3, it is not necessary for me to address sections 52(3)1 or 52(3)2.

Representations

The city's representations

Background in the city's representations

[24] The city submits that its bus system has approximately 170 routes and 43 bus rapid transit stations. As soon as possible after a collision involving a transit vehicle occurs, the operator and a supervisor complete a vehicle collision report. OC Transpo special constables and the police may also be involved in this process. The collision report identifies the parties, vehicles and damage, includes a description of road conditions and weather, and typically also includes a sketch and photographs of the collision. The city says that it releases these collision reports in response to access requests under the *Act* (subject to any exemptions or exclusions).

[25] The city says that its Fleet Services department reported 2,510 bus collisions in 2017/2018 (the timeframe of the request), with 140 of those involving injuries. Because of the number of collisions during that time, the city says that the appellant reformulated and narrowed the request to access to fleet safety data only for transit vehicle accidents involving injuries (140 in total) for the 2017/2018 time period.

[26] The city submits that it is not prepared to disclose information that reveals,

¹⁰ See, for example, Orders OPO-2639 and PO-3549.

directly or indirectly, analysis and decisions that were made with respect to management of employees, including disciplinary action.¹¹

[27] Despite its position that its entire RiskMaster database is subject to the labour relations and employment-related exclusion, however, the city says that it decided to disclose some information from the record that gives a summary of each collision, along with other contextual information such as its location and severity. The city submits that this desire to be transparent allowed it to make available to the appellant a summary of collision activity while withholding information about driver activity and investigation outcomes that the city says is excluded under section 52(3).

Part 1: collected, prepared, maintained or used

[28] The city submits that it extracted the entire record at issue, which consists of fields responsive to the request, from the Riskmaster database. The city says Fleet Services uses RiskMaster to track investigations of accidents involving municipal fleet vehicles and to manage driver performance.

[29] According to the city, as a collision is investigated, the information in RiskMaster is updated and new information is uploaded as the investigation unfolds.

[30] The city's Fleet Services collected certain factual information about the accidents, such as dates and locations, from the city's transportation department, with Fleet Services officers completing and updating additional fields as they completed their review of the accidents. As part of the accident review process, Fleet Services updated or added additional information as necessary, including its own assessment of an accident's preventability.

[31] The city says that Fleet Services collected, prepared, maintained and used the information in the record as part of its mandate to review all collisions involving transit vehicles, and their investigation into the extent to which the bus operator may have been at fault and whether the accident was preventable.

Part 2: in relation to meetings, consultations, discussions or communications

[32] The city submits that the objective of Fleet Services' investigatory process is to investigate the reasons accidents involving municipal fleet vehicles occurred, to identify training program opportunities, and to discipline drivers. It says that meetings, consultations, discussions and communications, both within Fleet Services and between Fleet Services and transportation services department staff, occur throughout the investigatory process, and that Fleet Services inputs and updates the information in

¹¹ The city also withheld information that may identify operators, such as their employee numbers, operator numbers, and names, to protect the identify of those operators whose involvement would have been the subject of review by Fleet Services officers.

RiskMaster accordingly.

Part 3: labour relations or employment-related matters in which the institution has an interest

[33] The city submits that the dominant purpose of collecting, preparing, using and maintaining the information in RiskMaster is to ensure that collisions are fully reviewed with a view to disciplining and training employees as the city finds appropriate, including making determinations like whether drivers can continue to operate buses.

[34] The city says that the record at issue is directly related to both labour relations and employment-related matters in which it the city has an interest: bus drivers are both city employees and union members,¹² and the union may be involved at various stages of an investigation, including any appeal of the city's decision with respect to whether the collision was preventable, and would represent the driver in any grievances associated with the decisions or measures taken by the city as an employer.

[35] The city says that the preventable/not preventable finding is sent to the operator of the vehicle and to the transportation services department. The results of the investigation allow management to take any action they determine is warranted, such as driver training, assessment or discipline.

[36] The city says that that it applies its own standard when making an "at fault" assessment involving its drivers. Similarly, it says that the preventable/not preventable determination made by Fleet Services involves a more in-depth analysis to determine whether there were steps that a driver could have taken to avoid a collision, all of which relate to determinations about the driver's role in an accident. For example, the city says that an operator may be found not to be at fault for a collision while at the same time there being a determination that the accident was preventable. The city says that the outcome impacts training and disciplinary action, and determines whether a driver is permitted to continue operating buses.

[37] The city also submits that a vehicle operator has the right to appeal a determination that a collision is preventable. If an appeal is filed, an Accident Review Committee (ARC) conducts an inquiry and votes on whether the determination should be changed. Voting committee members include a supervisor representative, trainee department representative, and two operator representatives. A union representative also participates in the inquiry, but does not vote on the recommendation. The ARC can also make its own recommendation to have a driver attend training tailored to the particulars of a collision. The city says that RiskMaster (and, therefore, the type of information in the record at issue) is again updated to reflect the results of any successful appeal.

¹² Amalgamated Transit Union Local 279 (ATU 279).

The appellant's representations

[38] The appellant's representations do not specifically address the tests in section 52(3).¹³ The appellant submits that the public has a right to know about the safety records of those who operate the city's public transit system. Although disputing the application of section 52(3) to the record, the appellant does not make any specific representations on whether it was collected, prepared, maintained or used by the city. On the application of the exclusion, the appellant says only that:

- the request "neither requires nor asks for the names of drivers, hence it is difficult to see how any labour or human resources laws could be contravened with the release of this information;" and that,
- the request does not seek "access to any databank, only that the city provide us with information on at-fault accidents caused by drivers in our public transit system."

Analysis and findings

[39] For me to find that section 52(3)3 applies, I must be satisfied that:

1. the record was collected, prepared, maintained or used by the city 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 were about labour relations or employment-related matters in which the city has an interest.

Part 1: collected, prepared, maintained or used by the city or on its behalf

[40] I have reviewed the city's representations and the record at issue, and I find that the contents of the record, excerpted from the city's RiskMaster database, were collected, prepared, maintained and used by the city. Specifically, I am satisfied that the information in the record was prepared, maintained and used by Fleet Services to collect information during the course of its investigations into bus collisions, and was updated as information was gathered during the course of those investigations. I find that the city used the information in the record to track responses to recommendations made to individual drivers after an investigation was completed, and to track appeals when drivers disagreed with the city's determinations.

¹³ Both parties received a Notice of Inquiry asking them to submit representations on the application of the exclusion in section 52(3).

[41] I therefore find that the first part of the test in section 52(3)3 is met.

Part 2: in relation to meetings, consultations, discussions or communications

[42] Part 2 of the test in section 52(3)3 requires the record to have been collected, prepared, maintained or used "in relation to" meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. As I have noted above, to meet this requirement, it must be reasonable to conclude that there is "some connection" between the record and the subject of the exclusion.¹⁴

[43] The term "in relation to" in the context of section 52 has been the subject of some judicial interpretation. In *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*,¹⁵ the Divisional Court considered the meaning of "relating to." That case dealt with the exclusion in section 52's provincial counterpart, section 65, and specifically, section 65(5.2), which provides that the *Act* does not apply to a record "relating to" a prosecution if all proceedings in respect of the prosecution have not been completed. The court rejected an interpretation that would require there to be a "substantial connection" between the records and the prosecution, finding instead that the words "relating to" in section 65(5.2) require only "some connection" between a record and a prosecution.

[44] IPC orders have applied this reasoning in the context of the exclusion found at section 52(3), holding that for the collection preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraphs 1, 2 or 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.¹⁶ Therefore, as is the case here, for section 52(3)3 to apply, there must be "some connection" between "a record" and "meetings, consultations, discussions or communications about labour relations or employment-related matters in which the city has an interest."¹⁷

[45] Having considered the evidence before me, I am satisfied that, on the whole, the information in the record was collected, prepared, maintained or used by the city in relation to meetings, consultations or discussions, satisfying part two of the three-part test.

[46] The record is a spreadsheet containing information about accidents involving city buses and their drivers. As noted above, it includes the conclusions of consultations, meetings and discussions of the city's Fleet Services investigators and transportation

¹⁴ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

¹⁵ 2010 ONSC 991 (Div. Ct.).

¹⁶ See, for example, Orders PO-2639 and PO-3549.

¹⁷ See Orders MO-2537 and MO-2589.

department officers about subjects such as whether or not a driver took every reasonable step to avoid a collision. The RiskMaster database from which the record was extracted is updated and referred to as part of the process of assessing and managing driver performance, including determining whether a driver ought to be re-trained. I accept the city's position that meetings, consultations, discussions or communications took place regarding the information in the record, including in the making of the determinations recorded in it. I also accept that it is reasonable to expect that any decisions affecting a driver's involvement in an accident resulting in training or discipline are made after meetings, consultations, discussions or communications among city departments and ultimately communicated to an employee. I am therefore satisfied that the record is collected, prepared, maintained or used by the city in relations to meetings, consultations, discussions or communications.

[47] I am also satisfied that these meetings, consultations, discussions or communications were about labour relations or employment-related matters in which the city has an interest, which satisfies the third and final part of the test for section 52(3)3 to apply, discussed below.

Part 3: labour relations or employment-related matters in which the institution has an interest

[48] The remaining part of the test in section 52(3)3 requires a determination that the record was collected, prepared, maintained or used by the city in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the city has an interest.

[49] In its decision in Ontario (Ministry of Correctional Services) v. Goodis,¹⁸ the Divisional Court found that "employment matters are separate and distinct from matters related to employees' actions." Writing about matters involving allegations of employee misconduct and vicarious Crown liability, Justice Swinton, on behalf of the Divisional Court, wrote:

Subclause 1 of section 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution." The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations *per se* – that is, to litigation relating to terms and conditions of employment, **such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. [emphasis added]**

¹⁸ (2008), CanLII 2603 (ON SCDC), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct).

[50] The Divisional Court's reasoning has been adopted and applied in many subsequent IPC orders. 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.¹⁹

[51] The phrase "in which the city has an interest" has been found to mean more than a "mere curiosity or concern," and refers to matters involving an institution's own workforce.²⁰

[52] Based on my review of the record and the city's representations, I find that the record was prepared, maintained and used by the city "in relation to meetings, consultations, discussions or communications" about matters in which the city "has an interest" as an employer.

[53] I am satisfied that any decisions by the city about the training or discipline of bus drivers following an accident would only be taken after meetings, consultations, discussions or communications on the city's part. I accept that these meetings, consultations, discussions or communications took place within Fleet Services, and between Fleet Services and the city's transportation department, as well as between the city and the driver, in the case of communicating the results of an investigation to each driver. I find it reasonable to expect that drivers' union representatives would also be involved, especially in the case of a grievance or an appeal to the ARC. Although I have insufficient basis on which to find that the record relates to labour relations matters involving negotiations with a bargaining unit, I am satisfied that the meetings involve the city as an employer making decisions concerning the performance management of individual bus drivers, including determinations regarding their training and possible discipline.

[54] Because, as I have found above, the city was concerned with investigating the causes of collisions involving its work force, I find that the record, compiled from the RiskMaster database, was created in connection with employment matters in which the city has an interest. More particularly, whether resulting in discipline, a recommendation to retrain, or a grievance, I am satisfied that the information in the record, as a whole, relates to matters in which the city has an interest as an employer. The record relates to an employee's job performance, and to human resources matters arising from the employment relationship between the city and the individual drivers involved, including outcomes potentially affecting their employment as bus operators.

[55] For these reasons, I am satisfied that the record meets each of the requirements in section 52(3)3 because:

¹⁹ *Goodis*, supra, and Order PO-3549.

²⁰ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (ed) 355 C.A. [*Solicitor General*], leave to appeal refused [2001] S.C.C.A. No. 507.

- it was prepared, maintained and used during the course of investigations into collisions involving city employees
- the information in it, as a whole, was used in meetings, consultations, discussions and/or communication about the investigations and their outcome, including discussions about the city's ultimate decision regarding the involved employees after the results of the investigation contained in the record were communicated to it
- the focus of the investigations included determining and documenting the possible fault of city employees in bus collisions resulting in injuries, together with recommendations regarding their training or discipline, and the results of any associated employee appeals to the ARC, all of which I find are employment-related matters in which the city has an interest as employer.

[56] As I have noted above, my findings in this appeal are confined to the record before me that the city generated from its RiskMaster database in response to the appellant's access request, and are not meant to suggest that every record generated from the RiskMaster database will necessarily be excluded under section 52(3) of the *Act*. In the circumstances of this appeal, I am satisfied that, taken as a whole, there is some connection between this record and employment-related matters in which the city has an interest as an employer. For these reasons, I find that the record is excluded from the *Act* pursuant to section 52(3)3.

ORDER:

I find that section 52(3)3 of the *Act* applies to exclude the record from the *Act*.

Original signed by: _____
Jessica Kowalski
Adjudicator

_____ June 30, 2021