

Information and Privacy Commissioner,  
Ontario, Canada



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

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## PRIVACY COMPLAINT REPORT

PRIVACY COMPLAINT MC17-49

City of Toronto

July 16, 2019

**Summary:** The Office of the Information and Privacy Commissioner of Ontario received a complaint alleging that the City of Toronto contravened the *Municipal Freedom of Information and Protection of Privacy Act* when it disclosed four video records containing the complainant's personal information in response to a Freedom of Information request. This report finds that the records at issue were used by the city as the basis for an investigation of the complainant's conduct as a city employee and are excluded from the scope of the *Act* pursuant to section 52(3)3.

**Statutes Considered:** Municipal Freedom of Information and Protection of Privacy Act, section 52(3)3, 52(4)

**Orders and Investigation Reports Considered:** P-1242, MO-1270, MO-2589, MO-830, PO-2123, MO-1654-I, P-1627, P-1258, MO-3314 and Ombudsman Toronto. (2015). *Ombudsman Report: An Investigation into Toronto City Hall Security*.

**Cases Considered:** *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.

### BACKGROUND:

[1] The Office of the Information and Privacy Commissioner of Ontario (the IPC) received a complaint under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) relating to a disclosure of four video records by the City of Toronto in response to a Freedom of Information request. The complainant asserted

that the City of Toronto (the city) contravened the *Act* when it released the video records because the records contained the complainant's personal information.

[2] The complainant is an employee of the city. On April 21, 2014, the complainant completed his shift at 7:00pm. After his shift, the complainant attended the mayor's office. At approximately 9:50 pm, the complainant assisted the mayor from a city building to a private vehicle that was located in an underground parking lot at the city building (hereinafter referred to as the "incident"). This incident was recorded on the city's security cameras. The next day, the video footage of the incident became the subject of a security report that appears to have initiated an investigation by city officials into the complainant's conduct acting as private security for the mayor.

[3] Approximately 6 weeks later, in response to an access request received by the city regarding this incident, copies of the videos and the security report described above were released to a member of the media. The complainant's image in the four video records and his name in the security report were not redacted from this material.

[4] The complainant subsequently filed a complaint with the IPC. The complainant complained that the disclosure of the videos containing his image was a violation of the *Act*.

## **ISSUES:**

[5] The issues raised by the complaint are as follows:

1. Does section 52(3)3 of the *Act* apply to the information at issue in this complaint?
2. If section 52(3)3 does not apply, does the information at issue qualify as "personal information" under section 2(1) of the *Act*?
3. If section 52(3)3 does not apply and the information qualifies as personal information, was the personal information disclosed in compliance with section 32 of the *Act*?

## **DISCUSSION:**

### **Issue 1: Does section 52(3)3 of the *Act* apply to the information at issue in this complaint?**

[6] The application of section 52(3)3 of the *Act* is a threshold issue that must be addressed with respect to the records at issue in this complaint. If section 52(3)3 applies, and none of the exceptions found in section 52(4) are present, section 52(3)3 has the effect of excluding the records from the scope of the *Act*.

[7] Section 52(3) and 52(4) of the *Act* state:

52(3) 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.

*Exception*

52(4) This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

***The Complainant's Representations:***

[8] The complainant's position is that the *Act* applies to the records at issue because the video images were taken after his shift when he was not acting in his professional capacity as a security guard. The complainant argued that his image in the four video records is his personal information and should not have been released by the city. The complainant believed that the city should have blurred his image prior to the release of the videos. The complainant alleges that a city councilor was also in the video records and the city blurred the image of the councilor.

[9] The complainant explained that on the date of the incident he worked as a security guard at the city building until 7:00pm. During the complainant's shift, the mayor invited the complainant to meet him in his office when his shift ended. The complainant accepted the invitation and met the mayor after his shift. The complainant advised that he was not acting in a professional capacity as a security guard when he was with the mayor because his shift had ended.

[10] The complainant advised that after the date of the incident, he was questioned by his manager about what took place during his meeting with the mayor and he was asked to draft a report about his visit with the mayor.

[11] The complainant stated that he told his manager several times during interviews on April 22 and 23, 2014 that he was off duty.

[12] Although the complainant explained to his manager that he was off duty during the time he was with the mayor, the complainant was subsequently disciplined and transferred from the location he was working at.

[13] The complainant advised that Ombudsman Toronto completed an investigation into a number of matters including the complainant's role as a security guard of the mayor. The complainant provided Ombudsman Toronto's report titled "Ombudsman report: An Investigation into Toronto City Hall Security" (the report). The report states the following:

On April 21, 2014, while off duty, this security guard again directed the Mayor's car out of one of the parking lot entrances. He stated this was done because the Mayor had difficulty with his car hitting the top of the exit ramp. Because he was off duty at the time, he did not file a report. On this occasion, management addressed the matter the following day.<sup>1</sup>

[14] The complainant advised that he was the off duty security guard referred to in the report and it is his position that the information contained in the report supports that he was off duty in the video records at issue.

***The City's Representations:***

[15] The city's position is that the video records are excluded from the *Act*, pursuant to section 52(3)3, as it is a record that pertains to an employment-related matter.

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<sup>1</sup> Ombudsman Toronto. (2015). *Ombudsman Report: An Investigation into Toronto City Hall Security*. Retrieved from <https://www.ombudsmantoronto.ca/OmbudsmanToronto/media/Documents/Investigative%20Report/Ombudsman-Report-Security-April-2015.pdf?ext=.pdf>.

[16] The city advised that the video records at issue were collected as part of standard security surveillance in the publicly accessible area of the city building parking garage.

[17] The city explained that the videos were subsequently used as part of an employment meeting involving the complainant. An investigation was conducted regarding the professional conduct of the complainant and the videos were used as part of this investigation. The city advised that the videos were also referred to in interviews with the complainant that were conducted on April 22 and 23, 2014. The investigation also included an April 30, 2014 meeting that resulted in a Supervisory Report.

[18] The city advised that the complainant was previously investigated by the city and warned against acting as private security for the mayor and the video records were used in investigating the possibility of the employee not heeding employment-related warnings and considering staff discipline.

[19] The city noted that in addition to the above, the city has a policy that all staff are required to leave the work site 15 minutes after their shift has ended. The policy requires that if staff do not leave the work site, they are to notify management. The city stated that in the evening of the incident, the complainant did not notify management and was present on the job site without approval over two hours and fifty minutes after his shift ended, in contravention of city policy related to security officers remaining on site after hours.

[20] The city also advised that the Toronto Public Service by-law requires that employees, whether on duty or not, are to act with integrity, maintain political neutrality, "set the standard for a professional and ethical public service" and "display behavior that displays public trust". The city explained that the behavior demonstrated by the complainant would call into question the complainant's compliance with the by-law and would also reasonably make the video records employment or labour relations related.

[21] The city also argued that even if section 52(3)3 does not apply to the records at issue, the video records show the complainant acting in his professional capacity, and for this reason, the records do not consist of personal information as defined in the *Act*.

[22] The city advised that at the time the records were disclosed, the city Clerk's Office Access and Privacy staff were not aware that the complainant was off duty when the video images were captured.

[23] The city explained that in the videos the complainant was acting in a professional capacity given that the complainant engaged in security related activities by escorting the mayor to his vehicle, assisting the mayor to enter the vehicle, giving direction to the driver of the vehicle and remaining behind when the vehicle left the underground parking lot. It is the position of the city that the complainant, an employee of the city, was taking direction from the mayor and acting in a professional capacity.

[24] The city also advised that in the video records at issue the complainant is wearing his uniform under his jacket, wearing his lanyard and access card around his neck. The city advised that the complainant was observed wearing his jacket while on duty conducting security at city hall during his shift and the same jacket is worn in the videos.

[25] The city advised that the complainant's actions at the time of the videos were consistent with his actions during the course of his regular duties. The city's position is that it is reasonable to assume that a security guard, engaging in security-related activities wearing his uniform on city premises is on shift. The city advised that to assume otherwise would place an undue burden on the institution to verify the working status of every employee while reviewing records for freedom of information purposes.

***The Complainant's Response to the City's Representations:***

[26] In response to the city's submissions, the complainant advised that he never provided private security for the mayor and was never warned about acting as a private security guard for the then mayor. The complainant noted that other security guards provided the same duties that he did for the then mayor while on duty.

[27] As part of the city's response to the complaint, it relied on its Toronto Public Service by-law (TPS by-law), Chapter 192 of Toronto's Municipal Code, which states:

The TPS by-law provides guidance to members of the public service (City and applicable Agency employees) on:

Their rights and responsibilities for ethical matters related to conflict of interest and confidentiality, and political activity;

Their rights and responsibilities to disclose wrongdoing and the protection they have from reprisal for making such disclosures in good faith.

[28] The city submitted that the behaviour demonstrated by the complainant would call into question the complainant's compliance with the TPS by-law and would also reasonably make the video records employment or labour relations related.

[29] In response to the city raising the TPS by-law, the complainant advised that he only completed training of the TPS by-law April 21, 2017, 3 years after the incident.

[30] In addition, according to the city's website, the TPS by-law was adopted by the

city in June 2014 and came into effect December 31, 2015,<sup>2</sup> which is after the incident and video recording of the complainant's image.

[31] The complainant also noted that a security report that was released to the media, included his name but redacted the name of the security guard who prepared the report. The complainant explained that the security guard who wrote the report had performed the same duties that the complainant did for the mayor. The security report that the complainant referred to was accessible via a public media article. The complainant provided a link to the media article that included the redacted security report with his complaint.

[32] I reviewed the security report available through the link provided by the complainant. The city relied on an exemption under the *Act* when redacting some information from the security report and I have been given no information to suggest that it was incorrect in applying that exemption.

***Analysis:***

[33] As noted above, if section 52(3)3 applies to a record and none of the exceptions listed in section 52(4) exist, then the record is excluded from the scope of the *Act*.

[34] In order for an institution to show that a given record falls within the scope of section 52(3)3, it must demonstrate that the records satisfy the following three criteria:

1. That the record was collected, prepared, maintained or used by the city or on its behalf; and
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 municipality had an interest.<sup>3</sup>

[35] To satisfy Part 1 of the section 52(3)3 test, it must be established that the records were collected, prepared, maintained or used by the city or on its behalf. In this case, the records are video surveillance tapes that were collected, maintained and used by the city. The city has security cameras as part of its standard security surveillance of a publicly accessible area of the city building and its underground parking lot. The

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<sup>2</sup> City of Toronto. Toronto Public Service By-law. Retrieved from <https://www.toronto.ca/city-government/accountability-operations-customer-service/city-administration/toronto-public-service-by-law/>.

<sup>3</sup> Order P-1242, Order MO-1270.

copies of the video files that were released to the media consist of four segments running several seconds each, at least one of which was altered by blurring the image of another individual. These videos show the complainant's conduct assisting the mayor on April 21, 2014 and were used in the city's investigation of that conduct.

[36] I am satisfied that Part 1 of the section 52(3)3 test has been met.

[37] In order to satisfy Part 2 of the section 52(3)3 test, it must be established that the collection, preparation, maintenance or use of the record was in relation to meetings, consultations, discussions and communications.

[38] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.<sup>4</sup>

[39] The city advised that, prior to their release on June 5, 2014, the video records were used as part of an investigation into the professional conduct of the complainant. Interviews were completed with the complainant on April 22 and 23, 2014 regarding the incident and the videos were referenced in the interviews. More specifically, the video records were used by the city in discussions and meetings with the employee regarding concerns about the incident, the complainant's conduct and continuous issues regarding the complainant's employment. The meetings, consultations, discussions and communications took place in the context of an employee related matter.

[40] Based on this information, I am satisfied that Part 2 of section 52(3)3 of the *Act* has been met.

[41] To satisfy Part 3 of section 52(3)3 test, it must be established that the meetings, discussions and communications that took place were about labour relations or employment-related matters in which the municipality had an interest.<sup>5</sup>

[42] The phrase "labour relations or employment-related matters" has been found to apply in the context of records related to job competitions, the complete hiring process, employee dismissals and investigations into the actions of employees for workplace misconduct.<sup>6</sup>

[43] The city policy is that employees are required to leave the premises 15 minutes after their shift ends. The complainant left the city premises over two hours and fifty minutes after his shift ended. The city advised that the complainant's actions in the

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<sup>4</sup> Order MO-2589.

<sup>5</sup> *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.

<sup>6</sup> Order MO-830, Order PO-2123, Order MO-1654-I, Order MO-3314.



videos were consistent with actions performed by security guards on shift and that the complainant was previously investigated by the city and warned against acting as private security for the mayor. The complainant denies that he ever received such a warning. Whether the complainant received a warning or not, the record at issue was used in the investigation of the employee's conduct regarding the incident and in the city's consideration of discipline. In this context, it is not relevant whether the complainant was on duty or off duty at the time the videos were taken.

[44] Based on the above information, it is reasonable to determine that the city has an interest in an employee's conduct, future employment and misconduct allegations, and that the records at issue have been collected, prepared, maintained and used through meetings, consultations, discussions or communications about employment-related matters in which the city has an interest.

[45] I am satisfied that Part 3 of the section 52(3)3 test has been met.

[46] It should be noted that if section 52(3)3 applies at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.<sup>7</sup>

[47] In light of the above, I find that section 52(3)3 is applicable to the video records at issue in this complaint. The video records that were released in response to the request were used for an employment-related matter.<sup>8</sup> Since section 52(3)3 applies, the records are excluded from the privacy provisions of Part II of the *Act*. Therefore, sections 2(1) and 32 are not applicable to the circumstances of this complaint and the city was not prohibited from releasing the records in response to a request without regard to the provisions of the *Act*.

## **CONCLUSION:**

1. Section 52(3)3 of the *Act* applies to the video records at issue.
2. Given that section 52(3)3 applies, the video records at issue is excluded from the scope of the *Act* and section 2(1) and 32 are not applicable to the circumstances of this complaint.

Original Signed by: \_\_\_\_\_

Alanna Maloney  
Investigator

July 16, 2019 \_\_\_\_\_

<sup>7</sup> *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.

<sup>8</sup> Order MO-3314 at paras. 29, 122, 128-130