

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3402

Appeal MA15-508

London Transit Commission

January 26, 2017

Summary: The London Transit Commission (the LTC) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records about an incident when a LTC bus mirror hit the appellant. The LTC denied access to the responsive video, letters, and reports, citing the discretionary personal privacy exemption in section 38(b) and the discretionary solicitor-client privilege exemption in section 12, read with section 38(a). The adjudicator partially upholds the LTC's decision under section 38(a), in conjunction with section 12, and does not uphold the LTC's decision under section 38(b).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 38(a), 12, 38(b), 14(2)(a) to (d) and (h).

Orders and Investigation Reports Considered: Orders MO-1571 and MO-2933-I.

Cases Considered: *Gabeny v. Sobeys Capital*, [2002] O.J. No. 3151.

OVERVIEW:

[1] The London Transit Commission (the LTC) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

Any and all records, reports, briefing notes, memos, email correspondence, written correspondence, plans, documents,

specifications, including print, film, electronic records, video recordings, drawings, photographs, sound recordings, etc. produced within London Transit Commission or received by the London Transit Commission from any other source with respect to the incident on or about [date] involving a London Transit Commission bus and [the requester].

[2] The LTC issued a decision denying access in full to the responsive records, claiming of the discretionary solicitor-client privilege exemption in section 12 of the *Act*.

[3] The requester, now the appellant, appealed the LTC's decision.

[4] During the course of mediation, the mediator noted that the records contained information that may relate to the appellant and other individuals and raised the possible application of sections 38(a) (discretion to refuse requester's own information) and 38(b) (personal privacy) of the *Act*. The LTC issued a revised decision, denying access in full to the responsive records pursuant to sections 38(b) and 38(a), in conjunction with section 12.

[5] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry.

[6] Representations were sought and exchanged between the LTC and the appellant in accordance with section 7 of the IPC's¹ *Code of Procedure and Practice Direction 7*.

[7] Representations were also sought from the bus driver whose personal information may be contained in the records. The bus driver was advised that the appellant was not interested in receiving access to his address, telephone number, driver's licence number, employee number, date of birth, and marital and family status, but was interested in receiving access to the information in the records that contained the affected person's:

- driver's licence status
- driving record
- hours worked
- length of employment

[8] The bus driver did not provide representations in response to the Notice of Inquiry sent to him.

[9] In this order, I partially uphold the LTC's decision under section 38(a), in conjunction with section 12. I also do not uphold the LTC's decision under section

¹ The Information and Privacy Commissioner, Ontario, Canada.

38(b).

RECORDS:

[10] Remaining at issue are 11 pages of records and one DVD, as follows:

- A bus video DVD (the video),
- A Motor Vehicle Accident Report of London Police Force (Police MVA Report),
- a London Transit Motor Vehicle Accident Report (LTC MVA Report),
- two letters from the appellant's lawyer to a named insurance adjuster and the adjuster's response (the letters), and
- a statement from the bus driver taken by the insurance adjuster (the witness statement).

[11] Concerning the video, as the appellant and the LTC have both agreed in their representations to the appellant obtaining a copy of this video with faces blurred, I will order the LTC to issue a detailed fee estimate decision to the appellant regarding access to this video with the faces blurred. I will, therefore, no longer consider this record further in this order.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a), in conjunction with the section 12 solicitor-client privilege exemption, apply to the information at issue?
- C. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- D. Did the institution exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[12] In order to determine which sections of the *Act* may apply, it is necessary to

decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[13] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.²

[14] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

² Order 11.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.³

[16] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[18] The LTC states that the records contain personal information with respect to the bus driver in his personal capacity, including information with respect to his address, telephone number and driver's license.

[19] The appellant did not address this issue directly.

Analysis/Findings

[20] The remaining records consist of:

- the Police MVA Report,
- the LTC MVA Report,
- the letters, and
- the witness statement.

[21] The appellant was injured by a bus mirror of a bus driven by the bus driver. All of the records contain the personal information of the appellant. Some of the records

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

also contain the personal information of the bus driver. Some of this information is about the bus driver in his professional capacity. Other information qualifies as his personal information within the meaning of the *Act*.

[22] In accordance with paragraphs (a) to (e) and (g) of the definition of personal information in section 2(1) of the *Act*, I find that the records contain the following personal information:

- the appellant's home address and phone number, date of birth, and personal views or opinions about the appellant.
- the bus driver's home address and phone number, driver's licence number, date of birth, marital and family status, employment history, and his personal views.

[23] Of the four remaining records at issue, only three records, namely the Police MVA Report, the LTC MVA Report and the witness statement, contain the personal information of individuals other than the appellant, in particular the bus driver.

[24] The letters do not contain the personal information of individuals other than the appellant. The personal privacy exemption in section 38(b), therefore, cannot apply to the letters.

[25] With respect to the LTC MVA Report, the only possible personal information of other individuals in this record is the bus driver's employee number, which the appellant is not interested in receiving access to. As the remaining personal information in the LTC MVA Report is that of only the appellant, section 38(b) also cannot apply to this record.

[26] I will now consider whether section 38(a), in conjunction with section 12, apply to the four remaining records.

B. Does the discretionary exemption at section 38(a), in conjunction with the section 12 solicitor-client privilege exemption, apply to the information at issue?

[27] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[28] Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[29] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁶

[30] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[31] In this case, the institution relies on section 38(a) in conjunction with section 12. Section 12 states as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[32] The LTC states that the LTC MVA Report is a document prepared following an incident when it is anticipated that there may be litigation arising out of the incident. It states that it retains the services of an insurance adjuster when litigation is reasonably contemplated and that the three letters from the appellant's lawyer to the insurance adjuster clearly showed that litigation was contemplated. As a result, it states that the insurance adjuster took a statement from the bus driver.

[33] The LTC relies on the case of *Gabeny v. Sobeys Capital*,⁷ where the Court held that witness statements and adjuster's reports prepared after the plaintiff had notified the defendant of a possible claim were privileged. It submits that at the time that the documents were produced litigation was reasonably contemplated given the notice provided by appellant's counsel.

[34] The LTC states the purpose of the preparation of the LTC MVA Report and the witness statement is to allow it to present a defence to the statement of claim, therefore, these documents are litigation privileged.

[35] The appellant states that the LTC has not provided justification for the suppression of the LTC MVA Report, which was produced the day after the incident, well before any litigation was considered. She states that it was prepared for a variety of reasons and refers to the LTC's Staff Report #4, which found that there was a 50% increase in preventable Motor Vehicle Accidents from 2013 to 2015. Thus, she submits that this accident report was also likely used to identify damage to the bus for repairs and issues with driver factors and would have been prepared for a variety of reasons other than litigation protection.

⁶ Order M-352.

⁷ *Gabeny v. Sobeys Capital*, [2002] O.J. No. 3151.

[36] In reply, the LTC states that it retains the services of an insurance adjuster when litigation is reasonably contemplated, as was the case in this appeal, and the insurance adjuster took a statement from the bus driver. It states that the purpose of the witness statement is to allow the LTC to present a defence and is litigation privileged in the course of a lawsuit.

[37] The LTC states that the LTC MVA Report is a document prepared following an incident when it is anticipated that there may be litigation arising out of the incident. It submits that the dominant purpose of the documents was to assist it in the contemplated litigation.

Analysis/Findings

[38] Section 12 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law. Branch 2 (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[39] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[40] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.⁸ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁹ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹⁰

[41] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹¹

[42] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.¹² The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹³

[43] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that

⁸ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁹ Orders PO-2441, MO-2166 and MO-1925.

¹⁰ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹¹ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹² *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹³ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.¹⁴

[44] Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.¹⁵ It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.¹⁶ The litigation must be ongoing or reasonably contemplated.¹⁷

[45] Branch 2 is a statutory privilege that applies where the records were “prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.” The statutory and common law privileges, although not identical, exist for similar reasons.

[46] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

[47] This privilege applies to records prepared by or for counsel employed or retained by an institution “in contemplation of or for use in litigation.” It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.¹⁸

[48] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.¹⁹

[49] At issue are:

- Police MVA Report,
- LTC MVA Report,
- The letters, and
- Witness statement.

[50] The LTC only provided direct representations on two of these records, the LTC

¹⁴ *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

¹⁵ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

¹⁶ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹⁷ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

¹⁸ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

¹⁹ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

MVA Report and the witness statement. I will consider each record at issue individually.

Police MVA Report

[51] This report is on an Ontario Government form prepared by the police officer who was investigating the incident in the records where the appellant was hit by a LTC bus mirror. The LTC did not provide representations on this record concerning section 12.

[52] The Police MVA report was prepared by the police from information obtained by them following the incident set out in the records. It appears to contain information obtained by the police from both the LTC bus driver and the appellant directly. This record was prepared before the appellant's lawyer wrote to the LTC.

[53] I find that the Police MVA Report is not privileged within the meaning of section 12, as it is not subject to solicitor-client communication privilege or litigation privilege as detailed above. I find that this record was not prepared for the purpose of communication between a solicitor and client nor was it prepared for the dominant purpose of litigation.

[54] Accordingly, I find that section 12 does not apply to this record. I will consider whether the personal privacy exemption in section 38(b) applies to the Police MVA Report.

LTC MVA Report

[55] This report was prepared the day after the incident set out in the records. It is on a LTC form that is required to be completed within a short time frame following a LTC accident. The completed form must be submitted to a LTC clerk.

[56] The LTC MVA Report form is only partially completed and specifically does not contain any information about the appellant being injured. It was prepared over two weeks before the appellant's lawyer wrote to the LTC indicating their retainer by the appellant.

[57] From my review of the records and the parties' representations, I find that at the time this record was prepared litigation was not reasonably contemplated. It was prepared before the LTC was advised that the appellant had been injured and well before the appellant's lawyer contacted the LTC. This record was prepared 10 days before the Police MVA Report was prepared.

[58] I do not agree with the LTC that this record is privileged within the meaning of section 12. I find that this record was not prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation. Nor is it a direct communications of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice.

[59] Accordingly, I find that section 38(a), in conjunction with section 12, does not apply to this record.

[60] As stated above, the appellant is not interested in receiving access to the employee number of the bus driver. I found that the remainder of this record does not contain the personal information of other individuals, therefore, the personal privacy exemption in section 38(b) cannot not apply to it. As no other discretionary exemptions have been claimed for the LTC MVA Report and no mandatory exemptions apply, I will order the LTC MVA Report disclosed.

The Letters

[61] There are three letters at issue, two from the appellant's lawyer indicating their retainer and a confirmatory response to the appellant's lawyer from the insurance adjuster acknowledging receipt. The LTC did not provide representations as to the applicability of section 12 to the letters, nor can I see any reason at all to find that these letters, which are either to or from the appellant's lawyer, come within this exemption.

[62] Accordingly, I find that section 38(a), in conjunction with section 12, does not apply to the letters.

[63] As stated above, the letters do not contain the personal information of other individuals. Therefore, the personal privacy exemption in section 38(b) cannot apply to the letters. As no other discretionary exemptions have been claimed for the letters and no mandatory exemptions apply, I will order the letters disclosed.

Witness Statement

[64] As stated above, the LTC relies on the case of *Gabeny v. Sobeys Capital*,²⁰ where the Court held that witness statements and adjuster's reports prepared after the plaintiff had notified the defendant of a possible claim were privileged.

[65] The witness statement is the only record that was prepared after the appellant's lawyer had been in communication with the LTC. This record is a detailed account of the incident in the records as provided by the bus driver. Based on my review of the witness statement and the parties' representations, I agree with the LTC that this record was prepared for the insurance adjuster in contemplation of litigation. It was prepared after the appellant's lawyer had been in communication with the adjuster about the incident advising that the appellant had been injured by the LTC bus mirror.

[66] In Order MO-2933-I, I considered the application of section 12 to similar records, which in that appeal were letters from the insurance adjuster and a report from an

²⁰ *Gabeny v. Sobeys Capital*, [2002] O.J. No. 3151.

investigator hired by the city to aid an insurance adjuster. I relied on Order MO-1571, where Adjudicator Bernard Morrow summarized orders which found that adjuster's reports fell within the scope of litigation privilege, as follows:

In Order M-285, Adjudicator Holly Big Canoe found that reports prepared by an insurance adjuster for the City of Kitchener in response to damage claims for flooded homes by homeowners met the dominant purpose test and fit within the scope of litigation privilege. Adjudicator Big Canoe found that the dominant purpose for the preparation of the reports in that case was to prepare for anticipated litigation between the City and the homeowners. In Order M-502, Adjudicator Donald Hale found that a report prepared by the City of Timmins' Public Works Department following two incidents in which the appellant's home was damaged by a sewer back-up, met the dominant purpose test. In that case, Adjudicator Hale found that the report was intended to inform the adjuster retained by the City's insurer of the occurrence and the possible cause of the problems with the sewer on the appellant's street. As the City had been put on notice by the appellant that a claim was being made, Adjudicator Hale found that there was a reasonable prospect of litigation at the time the report was prepared. Accordingly, Adjudicator Hale concluded that litigation privilege applied.

[67] In Order MO-2933-I, I stated that:

Consistent with Orders M-285 and M-502, I am satisfied that the consultant's report was prepared on behalf of the Municipality for the dominant purpose of using it in reasonably contemplated litigation against the City. It is clear that the Municipality's insurer sought the report to assess the Municipality's liability, in possible future litigation, for damages caused by the storm. In fact, some of the contemplated litigation has already come to fruition, and the Municipality has established that there is a reasonable prospect of further claims...

Based on the communication between the city and the appellants, as set out in the records and the representations, and consistent with the reasoning in Order MO-1571 and the orders referred to therein, I find that the information at issue in the records was prepared by the insurance adjuster and the insurance investigator evaluating the city's liability for damages and that this information fits within the scope of litigation privilege. These records were created to aid in the conduct of litigation and that there was a reasonable prospect of litigation at the time they were prepared.

The adjuster's and the investigator's reports that comprise the records were prepared by third parties retained to assess the city's liability after

the incident of the water damage to the appellants' home occurred.²¹ I find that when the records were created, litigation was reasonably foreseeable by the city and the dominant purpose of the creation of these records by the city was to assist it in litigation. Therefore, I find that branch 1 litigation privilege applies to the information at issue in the records. The information at issue in the records is subject to the litigation privilege component of branch 1 of section 12. Subject to my review of the city's exercise of discretion, the information at issue in the records is exempt under section 38(a).

[68] I find that when the witness statement in this appeal was created, litigation was reasonably foreseeable by the LTC and the dominant purpose of the creation of this record by the LTC was to assist it in litigation. The witness statement was prepared by the insurance adjuster evaluating the LTC's liability for damages and this information fits within the scope of litigation privilege. This record was created to aid in the conduct of litigation and there was a reasonable prospect of litigation at the time it was prepared. The contemplated litigation in this appeal has already come to fruition.

[69] Therefore, I find that branch 1 litigation privilege applies. Section 38(a), in conjunction with section 12, applies to the witness statement as it was prepared for the LTC in contemplation of litigation. This record is exempt, subject to my review of the LTC's exercise of discretion.

C. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[70] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[71] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.²²

[72] Of the records (other than the video), the LTC only provided specific representations on the witness statement. As I have found the witness statement subject to the solicitor-client privilege exemption above, it is not necessary for me to consider the application of 38(b) to this record.

²¹ See Orders M-285, M-503, M-1571, M-2124-I, MO-2647 and PO-2818.

²² See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

[73] In particular, the LTC did not provide specific representations on the application of section 38(b) to the remaining record at issue, the Police MVA Report. From this record, as stated above, the appellant is not interested in receiving access to the bus driver's address, telephone number, driver's licence number, and date of birth.

[74] Therefore, the personal information of the bus driver remaining at issue in the Police MVA Report consists of the checkmark answers concerning the bus driver's drivers licence category and status and whether any testing was done after the accident.

[75] The remaining information in this record is either the personal information of the appellant or is not personal information, namely, information about the LTC, e.g. its bus and insurance details, and a brief description of the accident and the accident scene.

[76] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b).

[77] If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this appeal, these paragraphs do not apply.

[78] Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[79] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. The LTC only provided representations on section 14(2).

[80] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.²³

[81] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).²⁴

[82] The LTC states that the factors in sections 14(2)(a) to (c) that favour disclosure do not apply. In particular, it states that disclosure is not desirable for the purpose of subjecting the activities of the institution to public scrutiny. It further states that the information involves a singular accident and does not include things such as the activities of government or broader issues of public accountability. In addition, it

²³ Order P-239.

²⁴ Order P-99.

submits that access to the information does not promote public health and safety or promote an informed choice in the purchase of goods and services.

[83] The LTC relies on the factor in section 14(2)(h). This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.²⁵

[84] The LTC was asked in the Notice of Inquiry concerning the factor in section 14(2)(h) whether the personal information had been supplied by the individual to whom the information relates in confidence. As well, it was asked what assurances of confidentiality, if any, were given, and who gave and received those assurances. The LTC did not respond to these specific questions regarding the Police MVA Report. I find that I do not have sufficient evidence to determine that this record is subject to the factor in section 14(2)(h).

[85] The appellant's representations focus on the application of the factors in section 14(2) as they concern disclosure of the video.

[86] The appellant also did not provide specific representations on the Police MVA Report either, but did state that she relies on the factor favouring disclosure in section 14(2)(c) regarding disclosure of all of the records. This factor reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

access to the personal information will promote informed choice in the purchase of goods and services.

[87] The appellant submits that knowing the dangers of standing near a bus may lead others to remain further away, to walk, or to take an alternate mode of transportation, as the incident where she was hit by a bus mirror occurred on a public road and a public walkway.

[88] The LTC did not provide reply representations to the appellant's representations on section 14(2)(c).

[89] I find that the factors in sections 14(2)(a) and (b) more appropriately apply than the factors in section 14(2)(c) concerning the appellant's submission about knowing the dangers of standing near a bus.

²⁵ Order PO-1670.

[90] These factors that favour disclosure of the Police MVA Report in sections 14(2)(a) and (b) read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(b) access to the personal information may promote public health and safety;

[91] For section 14(2)(a) to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application.²⁶

[92] Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 14(2)(a).²⁷

[93] I find that disclosure of the Police MVA Report in the circumstances of this appeal is desirable for the purpose of subjecting the activities of the LTC concerning the operation and maintenance of its buses to public scrutiny.

[94] I also find that access to the personal information in the record will promote public safety as it will provide information as to the circumstances surrounding accidents involving LTC public buses. Knowledge of how a mirror from a public bus can become dislodged and strike a person on the sidewalk may promote public safety.

[95] The appellant also states that she has a right to know what happened to her during the accident. She relies on the factor favouring disclosure in section 14(2)(d), which reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request.

[96] The appellant was advised in the Notice of Inquiry that for section 14(2)(d) to

²⁶ Order PO-2905.

²⁷ Order P-256.

apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing²⁸

[97] I find that the appellant has not provided sufficient evidence in support of my finding that the information in the Police MVA Report is subject to the factor in section 14(2)(d). She has not addressed the four items above concerning this factor. Nor is it apparent to me from my review of the record and the representations that the application of this factor has been established.

[98] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.²⁹

[99] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In this appeal, the parties did not provide representations on the application of section 14(3). I find that I do not have sufficient evidence to find that section 14(3) applies.

[100] In determining whether the disclosure of the personal information in the Police MVA Report would be an unjustified invasion of the bus driver's personal privacy under section 38(b), I have considered, and weighed, the factors discussed above in section 14(2) and have balanced the interests of the parties.³⁰ On balance, as all of the applicable factors in section 14(2) favour disclosure, I find that disclosure of the Police MVA Report would not be an unjustified invasion of personal privacy.

[101] I am making this finding based on my review of the parties' representations,

²⁸ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

²⁹ Order MO-2954.

³⁰ Order MO-2954.

which did not include representations from the LTC on this record, as well I have considered that the bus driver did not provide representations in response to the Notice of Inquiry sent to him.

[102] Accordingly, I will order disclosure of the Police MVA Report, less the bus driver's address, telephone number, driver's licence number, and date of birth, which is information the appellant is not interested in receiving.

[103] As the only record, namely the Police MVA Report, for which section 38(b) applies has been ordered disclosed, it is not necessary for me to consider whether the LTC exercised its discretion under section 38(b) in a proper manner concerning this record.

D. Did the institution exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

[104] The section 38(a) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[105] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[106] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³¹ This office may not, however, substitute its own discretion for that of the institution.³²

[107] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³³

- the purposes of the *Act*, including the principles that
 - information should be available to the public

³¹ Order MO-1573.

³² Section 43(2).

³³ Orders P-344 and MO-1573.

- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[108] The parties did not provide specific representations on this issue, however, the LTC's representations on section 12 concerning the witness statement indirectly address its exercise of discretion, the only record that I have found that section 38(a), in conjunction with section 12, applies to.

[109] The LTC states that the appellant has issued a Statement of Claim and litigation is now ongoing. It states that at the time the document was produced litigation was reasonably contemplated given the notice provided by the appellant's counsel. The fact that litigation has now commenced supports its contention.

[110] Based on my review of the witness statement and the parties' representations, I find that the LTC exercised its discretion in a proper manner under section 38(a), in conjunction with section 12, taking into account relevant considerations. Accordingly, I am upholding the LTC's exercise of discretion concerning the witness statement and find that it is exempt.

ORDER:

1. I order the LTC to issue the appellant with a fee estimate and interim access decision regarding access to the video with the faces blurred containing details as to the preparation method for disclosure of this video, treating the date of this order as the date of the request.
2. I order the LTC to disclose to the appellant by **March 3, 2017** but not before **February 27, 2017**, the following information:
 - the letters,
 - the LTC MVA Report (less the employee number), and
 - the Police MVA Report (less the bus driver's address, telephone number, driver's licence number, and date of birth).
3. I uphold the LTC's decision to deny access to the witness statement.

Original Signed by: _____
Diane Smith
Adjudicator

_____ January 26, 2017