

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4071

Appeal MA19-00218

City of Ottawa

June 23, 2021

Summary: Under the *Municipal Freedom of Information and Protection of Privacy Act*, the appellant, a member of the media, sought access to records related to a collision between two OC Transpo buses. The City of Ottawa (the city) initially denied access to all of the responsive records. Following the appellant's appeal of the city's decision, the city issued a revised decision granting partial access to the requested records. The city withheld some of the records, in their entirety, under the exclusion for labour relations and employment-related records at section 52(3)3 and portions of some of the records under the mandatory personal privacy exemption at section 14(1) of the *Act*. During mediation, the appellant raised the possible application of the public interest override provision at section 16 of the *Act*. In this order, the adjudicator finds that the exclusion at section 52(3)3 applies to the records for which it was claimed. She also finds that the exemption at section 14(1) applies to the personal information for which was claimed, and that section 16 does not apply to override the exemption. The adjudicator upholds the city's decision and dismisses the appeal.

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"), 14(1), 14(2)(a), (f) and (h), 14(3)(a) and (d), 16 and 52(3)3.

Orders and Investigation Reports Considered: Orders MO-1264 and MO-3314.

Cases Considered: *Ontario (Ministry of Health and Long Term Care) v. Mitchinson* [2013] O.J. No. 4123 (C.A.).

OVERVIEW:

[1] In December of 2018, two OC Transpo buses collided on the Transitway at the St. Laurent Station in Ottawa. Subsequently, the appellant, a member of media, submitted an access request to the City of Ottawa (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records, including reports, documentation, emails or memos relating to the investigation into that collision.

[2] The city denied access to the responsive records, in their entirety. The city claimed that the exclusion at section 52(3)3 of the *Act* (labour relations and employment-related records) applies to the majority of the records. The city also claimed that the discretionary exemptions at section 8(1)(a) and (b) (law enforcement) apply to some of the records, and the mandatory exemption at section 14(1) (personal privacy) of the *Act*, applies to portions of some of the records.

[3] The appellant filed an appeal of the city's decision with the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to explore the possibility of resolving the appeal.

[4] During mediation, the appellant advised that he does not agree with the city's decision to withhold the requested records under the exclusion or the exemptions claimed. The appellant also took the position that even if the exemptions apply, the public interest override at section 16 of the *Act* applies, as there is a compelling public interest in the disclosure of the records.

[5] As a mediated resolution could not be reached, the file was transferred to adjudication where an adjudicator may conduct an inquiry. As the adjudicator, I decided to conduct an inquiry. I sent a Notice of Inquiry setting out the facts and issues on appeal to the city, initially, and received representations in response.

[6] Together with its representations, the city provided me with a copy of a revised decision letter that was sent to the appellant, granting partial access to the requested records. In its representations, the city advised that as a result of its revised decision, it was no longer claiming that the discretionary exemptions at sections 8(1)(a) and (b) applied to the records. The Notice of Inquiry was modified to reflect this change and sent to the appellant along with a non-confidential version of the city's representations. The appellant provided representations in response.

[7] The city was invited to provide a reply to the appellant's non-confidential representations on the issue of whether there is a compelling public interest in the disclosure of the records. In its reply representations, the city not only responded to the appellant's representations on compelling public interest but also claimed, for the first time, the application of the discretionary exemption at section 7(1) (advice or recommendation) to information that it had already identified as falling under the exclusion at section 52(3)3. The appellant was then invited to provide a sur-reply to the city's reply representations to address the city's late raising of the discretionary exemption at section 7(1), as well as the application of that exemption to the

information for which it has been claimed. The appellant provided sur-reply representations.¹

[8] In this order, I find that the exclusion for labour relations and employment-related records at section 52(3)3 applies to all of the records for which it was claimed. As a result, it is not necessary for me to consider the issues of the city's late raising of the section 7(1) exemption or its possible application. I find that section 14(1) applies to the portions of records remaining at issue, as claimed, and that the compelling public interest override at section 16 does not apply. I uphold the city's decision and dismiss the appeal.

RECORDS:

[9] During mediation, the city provided the appellant with an index describing the responsive records and the exemptions claimed for them. The records remaining at issue are reports, emails and other correspondence, photocopies of photographs of the scene of the collision and an employee file.

[10] In its index, the city has not numbered the records at issue on a record-by-record basis. It has numbered each individual page of the collective group of responsive records, consecutively. Each individual page reflects a separate record, unless a range of pages has been identified. For example, pages 39 to 46 set out below, is one record comprising multiple pages.

[11] Specifically, the city claims that:

- the exclusion at section 52(3) 3 applies to pages 3, 4, 5, 9, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 39 to 46, 48 to 53, 54, 55 to 57, 58 to 63, 64, 66 to 68, 70, 71 to 74, 75, 76, 77, 78, 79, 80, 81 and 82, 84, 87 and 119;² and,
- the exemption at section 14(1) applies to portions of pages 1, 7, 8, 13, 15, 17 and 35.³

[12] The city also made alternative exemption claims for portions of some of the records if the exclusion at section 52(3)3 is found not to apply to those records. The city claims that the exemption at section 7(1) applies to portions of pages 50, 51, 64,

¹ The parties' representations were shared between them in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

² It is important to note that the city has claimed the exclusion at section 52(3) applies to records in their entirety and not to portions of records. The city has applied the record-by-record approach endorsed by this office and will be discussed further, below.

³ These pages are from records that have been disclosed to the appellant, in part.

70, 71 and 72 and the exemption at section 14(1) applies to portions of pages 3, 4, 9, 18, 19, 21, 22, 23, 24, 25, 26, 29, 30, 33, 34, 55, 56, 57, 58, 59, 60, 61, 62, 63, 76, 77, 78, 79 and 80.

ISSUES:

- A. Does the exclusion for labour relations and employment-related information at section 52(3)3 exclude some of the records from the scope of the *Act*?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory personal privacy exemption at section 14(1) apply to the personal information in the records?
- D. Is there a compelling public interest in disclosure of the exempt personal information that clearly outweighs the purpose of the exemption at section 14(1)?

DISCUSSION:

Issue A: Does the exclusion for labour relations and employment-related information at section 52(3)3 exclude some of the records from the scope of the *Act*?

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

[13] The exclusion at section 52(3) states that the *Act* does not apply to certain records arising in an employment or labour relations context. This office has consistently taken the position that the application of section 52(3) (and the equivalent section in the *Act's* provincial counterpart⁴) is record-specific and fact-specific. This means that when determining whether the exclusion applies, the record is examined as a whole rather than by individual pages, paragraphs, sentences or words. This whole-record method of analysis has also been described as the "record by record approach".⁵

[14] In considering the responsive records, the city applied the record-by-record approach and claims that paragraph 3 of the exclusion at section 52(3) applies to pages 3, 4, 5, 9, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 39 to 46, 48 to 53, 54, 55 to 57, 58 to 63, 64, 66 to 68, 70, 71 to 74, 75, 76, 77, 78, 79, 80, 81 and 82, 84, 87 and 119. As noted above, in this case, each page reflects a separate record,

⁴ *Freedom of Information and Privacy Act*, RSO 1990, c F.31, section 65(6).

⁵ See, for example, Orders M -352, PO- 3642, MO-3798-I, MO-3927 and MO-3947

unless a range of pages is identified.

[15] Paragraph 3 of section 52(3) states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

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

[16] If section 52(3)3 applies to the records, and none of the exceptions found in section 52(3) applies, the records are excluded from the scope of the *Act*. In other words, if I find that the records at issue fall within section 53(3)3, then the *Act* does not apply to the records and I will have no jurisdiction to order the city to disclose them to the appellant. The city may, however, choose to disclose such records outside of the scheme of the *Act*, and a finding that the records are excluded from the *Act* does not affect any disclosure obligations the city may have in relation to the pending disciplinary proceeding, described below.⁶

[17] For the collection, preparation, maintenance or use of a record to be “in relation to” the subjects mentioned in paragraph 3 of section 52(3), it must be reasonable to conclude that there is “some connection” between them.⁷ The “some connection” standard requires a connection that is relevant to the statutory scheme and purpose, understood in their proper context.⁸

[18] The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of “labour relations” is not restricted to employer-employee relationships.⁹

[19] 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.¹⁰

[20] If section 52(3) applied at the time the record was collected, prepared,

⁶ Order PO-2639.

⁷ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁸ Order MO-3664, upheld on judicial review in *Brockville (City) v. Information and Privacy Commissioner of Ontario*, 2020 ONSC 4413.

⁹ *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.

¹⁰ Order PO-2157.

maintained or used, it does not cease to apply at a later date.¹¹

[21] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.¹²

[22] For paragraph 3 of section 52(3) to apply, the city must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or 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 institution has an interest.

Representations, analysis and findings

[23] In its representations, the city provides some context for its claim that some of the records are subject to the employment or labour relations exclusion at section 53(3)3. It explains that the records relate to an investigation into the performance of a bus operator who was involved in two bus accidents. It submits that the specific records at issue in this appeal relate to the investigation of the earlier of the two accidents, which as noted above, was a collision between two buses on the Transitway at St. Laurent station.

[24] The city submits that it has not applied the exclusion at section 53(3)3 to "day-to-day operational records" such as collision reports and photographs from the scene of the accident. These records were disclosed, in part, to the appellant. It submits that the records that it claims are excluded from the scope of the *Act* under section 53(3)3 are records that relate directly to employment or labour relations processes involving the two bus operators who were involved in the December 2018 collision, both of whom are city employees and members of a union.

[25] The appellant does not specifically address whether the exclusion at section 52(3)3 applies to the records for which it was claimed. Rather, the appellant's representations submit generally that public interest in the disclosure these records overrides the city's exemption claims. It should be noted, however, that the public interest override at section 16 cannot apply to records for which the exclusion at section

¹¹ *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.

¹² *Ministry of Correctional Services*, cited above.

52(3)3 has been established. I will discuss this below.

Part 1: the records were collected, prepared, maintained or used by the city

[26] The city explains that the records that it claims are excluded under section 52(3) 3 include disciplinary records, training records, performance evaluations and correspondence prepared by City Fleet Services and Transit Services supervisors or managers. It submits that these records concern the performance of the bus operators involved in the accident and were prepared, maintained and used by the city as part of a workplace process which involves a determination of whether a bus operator should be removed from the road, provided with refresher training and reassessed to ensure there are no issues when they return to their job.

[27] While the appellant generally disputes the application of section 52(3)3 to the records at issue, he does not make any specific submissions on whether they were "collected, prepared, maintained or used" by the city.

[28] On my review of the evidence before me, including the city's description of the records in its representations, and the records themselves, I am satisfied that the records for which section 52(3)3 has been claimed were all collected prepared, maintained and used by the city. I accept the city's evidence that the records were prepared by city staff, including managers and supervisors of the City Fleet Services and Transit Services departments of the city and collected, maintained and used as part of the process that evaluates a bus operator's performance following an incident. I find that the first part of the test for exclusion under section 52(3)3 has been met.

Parts 2 and 3: the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest

[29] To determine whether the second and third parts of the test have been met, it is necessary to identify the matter in relation to which the records were collected, prepared, maintained or used. Section 52(3)3 only applies if the records were collected, prepared maintained or used in relation to meetings, consultations, discussion or communications about labour relations or employment related matters in which the city has an interest.

[30] The city submits that its collection, preparation, maintenance and use of the records for which it claimed the exclusion was directly linked to meetings, consultations, discussions or communications between the city and the two bus operators involved in the collision. The city submits that the records include emails, performance evaluations, opinions, training records and other correspondence created to consider, address and resolve potential performance management issues concerning the bus operators. In its confidential representations, the city points to specific records and explains the context in which those records were considered internally by city staff in meetings, consultations and discussions and also identifies records that were created as a result of those meetings, consultations or discussions that dealt with the employment issues arising from the collision. The city also submits that some of the records consist of

confidential correspondence between city staff and the bus operators that address the employment issues that were discussed. It submits that unlike the collision reports that document the accident that occurred, the records for which it has claimed section 52(3)3 were primarily created by City Fleet Services, whose role is to make assessments with respect to an operator's performance, and Transit Supervisors, whose role is to implement remedial action, including training.

[31] The city submits that the central purpose of the records for which it has claimed section 52(3)3, is for the city, as employer, to address any employment issues in respect of the employees, in this case the bus operators and, in particular, whether there are any driving competency issues.

[32] The city also submits that although the union does not figure prominently in the excluded records, employees often involve their union representatives with respect to the post-collision process and this was done in this case. It submits that in Order MO-1264, Adjudicator Laurel Cropley found that "labour relations" is properly defined as the collective relationship between an employer and its employees, It also submits that in *Ontario (Ministry of Health and Long Term Care) v. Mitchinson*,¹³ the Ontario Court of Appeal held that the term "labour relations" under the *Act* extends to "relations and conditions of work beyond those relating to collective bargaining." The city further submits that although records relating directly to the training and evaluation of employees were used in the employee-employer relationship context, the city also had an interest from a labour relations perspective.

[33] Again, the appellant does not make any specific submissions on whether the city has established parts 2 and 3 of the section 52(3)3 test.

[34] Having considered the evidence before me, including the confidential portions of the city's representations, I am satisfied that the records for which the exclusion at section 52(3)3 has been claimed were collected, prepared, maintained or used by the city in relation to meetings, consultations or discussions, satisfying part 2 of the three-part test. The records relate to an investigation into a collision between two buses and I accept that meetings, consultations or discussions occurred regarding the records at issue, which detail some of the facts and circumstances surrounding the accident, including the performance of the bus operators and steps to take moving forward. Therefore, I am satisfied that the records relate to meetings, consultations or discussions that were both internal meetings involving various city staff, as well as meetings between city staff and the bus operators involved in the collision. I find that part 2 of the test has been met.

[35] I am also satisfied that the evidence demonstrates that these meetings, consultations or discussions were about labour relations or employment-related matters

¹³ *Supra*, note 6.

in which the city has an interest, which satisfies the third and final part of the test for section 52(3)3 to apply.

[36] I accept that the meetings, consultations or discussions were about “labour relations or employment-related matters.” As records created in the context of an investigation into the performance of OC Transpo bus operators following a collision, they address performance management issues and discuss training, including consideration of next steps such as whether remedial or disciplinary action is warranted. In the context of these records, the city is acting as employer, addressing matters related to two of its employees.

[37] As noted above, the terms “labour relations” and “employment-related” have different meanings. “Labour relations” specifically refers to matters arising from the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation or analogous relationships.¹⁴ 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.¹⁵

[38] In Order MO-3314, Assistant Commissioner Sherry Liang noted that while only some of the records before her related to grievances filed under a collective agreement between the city and a union, the records all related to employment-related matters as they addressed human resources and staff relations matters arising from the employment relationship between the city and the employees involved. As a result, she found that the records related to either labour relations or employment-related matters without determining which specific records fell under which specific term.

[39] In this appeal, although it is clear that the operators are part of a union, it is not clear whether all of the records relate to matters arising from the collective bargaining relationship between the parties and, therefore, are labour relations records. However, from my review of the records at issue, as with the records considered by Assistant Commissioner Liang in Order MO-3314, I find that even if they are not related to labour relations, strictly speaking, they clearly relate to employment-related matters: they address human resources and performance management matters arising from the employment relationship between the city and the bus operators involved in the accidents.¹⁶ As a result, I am satisfied that all of the records that the city claims are excluded under section 52(3)3, fall within one of the two terms contemplated in that exclusion.

[40] I also accept that the city “has an interest” in these labour relations or

¹⁴ *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.

¹⁵ Order PO-2157.

¹⁶ See, for example, Orders MO-3314 and PO-3391.

employment-related records.

[41] 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 the institution’s own workforce.¹⁷ As noted above, this part of the analysis is necessary to respect the statutory intention of the exclusion and to ensure that the exclusion is not given a broader reach than necessary to accomplish the goal of protecting information relating to an institution and its workforce.¹⁸

[42] The records relate to investigations undertaken by the city, into the actions of OC Transpo bus operators, who are city employees, and involve conditions of their employment, including assessments of their performance and training and consideration of whether remedial or disciplinary action should be taken. Given the context in which they were created, as well as having considered their content, I accept that these records relate to matter in which the city is acting as an employer and, particularly, in the context of its management of members of its own workforce. As a result, I am satisfied that the city has more than a mere curiosity or concern with respect to these matters and therefore, that the city has an interest in the records.

[43] I find that part 3 of the test has been met.

Section 52(3)3 applies and the records are excluded from the scope of the Act

[44] All three parts of the test that must be met for section 52(3)3 to apply have been established. I find that all of the records for which the exclusion was claimed were collected, prepared, maintained or used by the city in relation to meetings, consultations, discussions or communications about either labour relations or employment-related matters in which it has an interest.

[45] Although neither of the parties raised the possible application of any of the exceptions to the exclusion at section 52(3), set out in section 52(4),¹⁹ I have

¹⁷ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.) [*Solicitor General*], leave to appeal refused [2001] S.C.C.A. No. 507.

¹⁸ MO-3664, upheld on judicial review in *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (CanLII).

¹⁹ Section 52(4) states:

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.

considered whether any of the exceptions might apply in this case and find that they do not. As a result, section 52(3)3 applies to the records for which it was claimed and I uphold the city's decision to withhold them on that basis.

[46] For some of the records, the city claims section 7(1) applies as an alternative to its section 52(3)3 claim. As I have found that all of the records for which the city claims section 7(1) are excluded from the scope of the *Act* under section 52(3)3, I will not consider either the city's late raising of that exemption or whether that exemption applies. I will, however, go on to consider whether the mandatory personal privacy exemption at section 14(1) applies to the portions of the records for which it was claimed and to which the exclusion does not apply.

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

[47] The city claims that the mandatory personal privacy exemption at section 14(1) applies to portions of pages 1, 7, 8, 13, 15, 17 and 35.

[48] In order for section 14(1) to apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. Section 2(1) of the *Act* defines personal information as "recorded information about an identifiable individual." The definition also includes the following non-exhaustive list of examples of personal information:

- 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,

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.

- 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[.]

[49] Information that does not fall under paragraphs (a) to (h) of the definition may still qualify as personal information.²⁰

[50] Exceptions to the definition of personal information exist for information about individuals who have been deceased for more than 30 years,²¹ and information that would identify an individual in a business, professional, or official capacity.²² However, even when information relates to an individual in a business, professional or official capacity, it may still qualify as personal information if it reveals something of a personal nature about the individual.²³

[51] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²⁴

Representations

[52] The city submits that the pages that it has identified contain the personal information of the two bus operators involved in the collision and the passengers of the two buses. The city submits that the personal information of the passengers involved includes their names, personal contact information and information about any injuries that they may have sustained as a result of the accident. The city submits that the personal information of the bus operators includes their personal contact information, information relating to their health after the accident, including any medical treatment that they received, and information about their educational and employment history. The city also confirms that it is not claiming that the names alone of city staff or any business contact information is personal information as it accepts that information would qualify as business information that is not personal in nature.

[53] The appellant does not specifically comment on whether the records at issue might contain the personal information of identifiable individuals.

²⁰ Order 11.

²¹ Section 2(2) of the *Act*.

²² Sections 2(2.1) and 2(2.2) of the *Act*. 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. See, for example, Orders MO-1550-F and PO-2225.

²³ Orders P-1409, PO-2225 and MO-2344.

²⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

The records contain personal information

[54] Having reviewed the records at issue, I am satisfied that they contain the personal information of identifiable individuals, specifically, the two bus operators involved in the collision and the passengers who were on the buses at the time. As submitted by the city, the personal information about these individuals consists of their names, where they appear with other personal information about them (paragraph (h) of the definition of "personal information" in section 2(1) of the *Act*), their sex and date of birth (paragraph (a)), their personal address and telephone number (paragraph (d)) and information about any injuries that they sustained as a result of the accident (paragraph (b)). The driver's licence numbers of the bus operators are also included in the records (paragraph (c)) as well as information about their education and employment history (paragraph (b)).

[55] Notably, I find that all of the information at issue that relates to the bus operators qualifies as their personal information and not their professional information. As stated above, even if information relates to an individual in their professional capacity, it may be considered to be personal information if it reveals something of a personal nature about them. Prior IPC orders have held that information relating to an investigation into an individual's conduct during the course of their employment reveals something of a personal nature about them and, as such, qualifies as their "personal information" within the meaning of the *Act*.²⁵ I agree.

[56] In this case, although the incident to which the records relate occurred during the bus operators' working hours in the course of the performance of their duties of employment, the records relate to an investigation into their conduct. I accept that their personal information, as it appears in the records, would reveal something of a personal nature about them. As a result, I am satisfied that the information in the records qualifies as their personal and not professional, information.

[57] Accordingly, I find that the records contain the personal information of both of the bus operators, as well as that of their passengers, as that term is defined in section 2(1) of the *Act*.

Issue C: Does the mandatory personal privacy exemption at section 14(1) apply to the personal information in the records?

[58] Where a requester seeks the personal information of other individuals, the mandatory personal privacy exemption at section 14(1) of the *Act* prohibits the city from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. The parties did not address the exceptions at section 14(1)(a)(e) and in my view, the only exception that could apply in this case is section 14(1)(f),

²⁵ Orders PO-2225, PO-2524, PO-2633, PO-3169 and PO-4125.

which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, if the disclosure does not constitute an unjustified invasion of personal privacy.

[59] I have found that the records contain the personal information of identifiable individuals, specifically, the bus operators involved in the accident and the passengers who were on the buses at the time of the collision. Under section 14(1)(f), if disclosing these individuals' personal information to the appellant would not constitute an unjustified invasion of their personal privacy, it is not exempt from disclosure. Sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy.

Section 14(3): presumptions against disclosure

[60] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of these individuals' personal information to the appellant is presumed to constitute an unjustified invasion of their personal privacy under section 14. The city submits that the presumptions at sections 14(3)(a) and (d) of the *Act* apply in the circumstances of this case. Those sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

...

(d) relates to employment or educational history [.]

[61] The city submits that the presumption at section 14(3)(a) applies because some of the personal information that it has withheld under section 14(1) provides details about the injuries sustained by the bus operators and passengers as a result of the collision. The city also submits that the presumption at section 14(3)(d) applies because portions of the records include information about the educational and employment history of the bus operators.

[62] The appellant does not specifically address whether the presumptions against disclosure raised by the city might apply.

[63] I accept that the presumptions against disclosure at sections 14(3)(a) and (d) apply to some of the personal information at issue in the records. Given the nature of the investigation into the collision between the two buses, the records contain information about injuries sustained or not sustained, by all those involved in the accident, which, from my review, consists of personal information that relates to a medical diagnosis, condition, treatment or evaluation. Also given the nature of the investigation, the records contain information relating to the employment or educational history of the bus operators, within the meaning of the presumption at section 14(3)(d). Therefore, I find that the presumptions at sections 14(3)(a) and (d) apply to all of the

personal information at issue that is of the types described in those sections.

[64] The Ontario Divisional Court has found that, in assessing whether records are exempt under section 14(1), a presumed unjustified invasion of personal privacy under section 14(3) once established, can only be overcome if section 14(4) or the “public interest override” at section 16 applies.²⁶ None of the circumstances listed in paragraphs (a) to (c) of section 14(4) are relevant in the context of this appeal. However, below, I will review section 16 and consider whether there is a compelling public interest in the disclosure of the information that clearly outweighs the purpose of the section 14(1) exemption.

Section 14(2): factors weighing for or against disclosure

[65] In addition to the personal information that I have found to be subject to a presumption against disclosure under section 14(3) of the *Act*, the records also contain personal information that does not fall under any of the presumptions in section 14(3). As a result, for that information I must consider whether any of the factors weighing for or against disclosure set out in section 14(2) apply.

[66] The city submits that the factors weighing against disclosure set out in section 14(2)(f) and (h) apply. It also submits that it considered and dismissed the possible relevance of the factor weighing in favour of disclosure at section 14(2)(a). Those sections 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;

...

(f) the personal information is highly sensitive;

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence [.]

[67] The appellant does not address whether any of the factors, whether weighing for or against disclosure, apply in the circumstances of this appeal. Additionally, from my review, I find that none of the factors other than those mentioned by the city might apply, nor are there any unlisted factors that might be relevant here

Section 14(2)(a): public scrutiny

[68] Section 14(2)(a) contemplates disclosure of information in order to subject the

²⁶ *John Doe v. Ontario (Information and Privacy Commissioner)*(1993), 1993 CanLII 3388 (ONSCDC), 13 O.R. (3d) 767 (Div. Ct.).

activities of the government institutions to public scrutiny.²⁷ In order for this section to apply, the issues addressed in the records need not have been the subject of public debate, but this is a circumstance which, if present, would favour its application.²⁸

[69] The appellant notes, and the city acknowledges, that one of the bus operators involved in the accident to which the records at issue relate was subsequently involved in another accident that resulted in fatalities. The city submits that the second accident is unrelated. It states that it investigated both accidents separately, taking the appropriate action in each case. The appellant submits that disclosure of the information related to the accident to which these records relate, particularly in the context of the subsequent, more serious accident involving the same bus operator, is not only relevant but would serve to provide the public with a greater understanding of how the city responds to and addresses accidents that occur within its public transit system.

[70] I agree with the appellant that the city's response to accidents occurring within its public transit system is a matter that, generally speaking, attracts a degree of public scrutiny. As a result, I accept that disclosure of information relating to the city's investigation and response to such accidents could be considered to be desirable for the purpose of subjecting the activities of the city to public scrutiny within the meaning of section 14(2)(a). However, in this case, the information that remains at issue is limited to very specific personal information of the bus operators involved and the passengers on the buses at the time of the collision. Given the limited and specific nature of the information remaining at issue, I do not accept that its disclosure would assist in subjecting the city's response to and investigation into the accident to which these records relate or the subsequent accident involving the same bus operator, to public scrutiny.

[71] Accordingly, I find that while the factor favouring disclosure in section 14(2)(a) is a relevant factor to consider in this appeal, in the circumstances, I find that it carries little to no weight with respect to the disclosure of the information that remains at issue.

Section 14(2)(f): highly sensitive

[72] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.²⁹ Based on my review of the information at issue, I find that due to its subject matter and the context in which it was gathered, an investigation into a collision between two OC Transpo buses, the personal information remaining at issue is highly sensitive and the factor listed at

²⁷ Order P-1134.

²⁸ Order PO-2905.

²⁹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

section 14(2)(f) weighs against its disclosure.

Section 14(2)(h): supplied in confidence

[73] In order for section 14(2)(h) to apply, both the individual supplying the information and the recipient must have had an expectation that the information would be treated confidentially, and that expectation must be reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.³⁰

[74] The records relate to an investigation into a collision and the personal information at issue belongs to the OC Transpo bus operators who were investigated as a result, as well as the passengers who were on the buses when the collision occurred. Given the context in which the records were created and the personal information that was supplied by these individuals, I accept that it was supplied in confidence and that the factor in section 14(2)(h), which weighs against disclosure, applies.

[75] My consideration of the factors at section 14(2) that might apply in the circumstances of this appeal relates specifically to the personal information that does not fall under the presumptions against disclosure found above. I have found that although the factor weighing in favour of disclosure at section 14(2)(a) is a relevant consideration, given the nature the information that remains at issue, it carries little to no weight in this appeal. I have also found that none of the other factors weighing in favour of disclosure, have been established. However, I have found that the factors weighing against disclosure at sections 14(2)(f) and (h) apply. Accordingly, I find that the personal information that remains at issue qualifies for exemption under section 14(1) of the *Act*.

[76] In sum, I find the disclosure of all of the personal information that the city has severed and withheld would amount to an unjustified invasion of the personal privacy of the individuals to whom it relates. As a result, subject to the possible application of the public interest override at section 16 of the *Act*, discussed below, I find that the exemption at section 14(1) applies to the personal information for which it was claimed.

Issue D: Is there a compelling public interest in disclosure of the exempt personal information that clearly outweighs the purpose of the exemption at section 14(1)?

[77] The appellant submits that there is a public interest in the disclosure of all of the records at issue. However, as mentioned above, the public interest override at section 16 cannot apply to the records that are excluded from the *Act* under section 52(3)3. As I have found that section 52(3)3 applies to all of the records for which it has been

³⁰ Order PO-1670.

claimed, I will consider the possible application of section 16 to only the portions of records that remain at issue, those that contain personal information that I have found to be exempt under section 14(1).

[78] Section 16 reads:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

[79] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption.³¹

[80] The *Act* is silent on the issue of who bears the burden of proof regarding the application of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, this office will review the record with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.³²

Compelling public interest

[81] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government.³³ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to effectively express public opinion or to make political choices.³⁴

[82] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.³⁵

[83] A public interest does not exist where the interests being advanced are

³¹ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.) [MOF].

³² Order P-244.

³³ Orders P-984 and PO-2607.

³⁴ See Orders P-984 and PO-2556.

³⁵ Order P-984.

essentially private in nature.³⁶ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.³⁷ A public interest is not automatically established where the requester is a member of the media.³⁸

[84] Any public interest in *non*-disclosure that may exist also must be considered.³⁹ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".⁴⁰ A public interest has been found not to exist where the records do not respond to the applicable public interest raised by the appellant.⁴¹

Purpose of the exemption

[85] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also be demonstrated to clearly outweigh the purpose of the exemption that has been claimed which, in this case, is the personal privacy exemption at section 14(1). Section 14(1) is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.⁴²

[86] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.⁴³

The parties' representations

[87] The appellant states that the primary issue in this case is whether the public interest in the matter to which the records relate is sufficiently compelling to override the exemptions that the city has applied to them. The appellant submits that it is.

[88] The appellant submits that, "by the city's own admission," the accident to which these records relate involves a bus operator who was subsequently involved in a second crash that killed three people and injured dozens. The appellant submits that the second crash was the second multiple fatality experienced by OC Transpo,⁴⁴ which places it in the position of having the worst record on passenger fatalities of all the transit agencies in the country.

³⁶ Orders P-12, P-347 and P-1439.

³⁷ Order MO-1564.

³⁸ Orders M-773 and M-1074.

³⁹ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

⁴⁰ Orders PO-2072-F, PO-2098-R and PO-3197.

⁴¹ Orders MO-1994 and PO-2607.

⁴² Order MO-2012.

⁴³ Order P-1398, upheld on judicial review in *MOF*, cited above.

⁴⁴ The bus operator involved in the accident to which the records at issue relate was not involved in the other multiple fatality accident referred to by the appellant.

[89] The appellant submits that as a service that provides nearly 100 million rides per year, with an estimated 340,000 people using the service on a daily basis, OC Transpo is an integral part of daily life in Ottawa. The appellant submits that “[its] riders have a considerable interest in knowing if the drivers are well-trained, properly supervised and that the city learns from collisions.” The appellant submits that the public interest in this case is not a narrow one and that the actions taken by a transit service used by thousands of people should meet the threshold of a compelling public interest.

[90] In reply, the city acknowledges that the safety of transit customers is clearly a matter of public interest but submits that the specific issue here is whether the disclosure of the exempted information rouses strong interest or attention and in this case, it does not.

[91] The city notes that the information that it has exempted under section 14(1) would not provide the appellant with any additional insight into how the city responds when an operator is involved in an accident. It argues that instead, there is a public interest in the non-disclosure of the exempted information as the disclosure of information related to an individual’s medical history is highly sensitive and the disclosure of personal identifiers including dates of birth and identification numbers including the bus operators’ driver’s licence numbers may result in identity fraud.

[92] The city also submits that, as noted by the appellant, one of the bus operators involved in the accident to which the records at issue relate was subsequently also involved in another accident that resulted in fatalities. It submits that the accident to which these records relate, while not insignificant, was reviewed in detail by OC Transpo and the city’s Fleet Safety Unit and was a separate incident from the bus operator’s subsequent, and more serious accident. It disputes the appellant’s position that the relationship between these two collisions gives rise to a compelling public interest in the disclosure of the specific information that remains at issue.

[93] The city also disputes the appellant’s submission that OC Transpo “has the worst record of passenger fatalities” and submits that this is “predicated on fatality statistics that are skewed due to two tragic accidents.”

[94] The city submits that the appellant has already been provided with information that addresses the type of public interest that the appellant says exists. The city states that it has disclosed to the appellant the Operator’s Collision/Incident Report and the Vehicle and Equipment Collision Report and submits that they collectively provide the same information as one would expect to find in a police collision report, including a description of the accident. The city submits that the appellant was also provided with additional information about OC Transpo’s safety practices and procedures. In particular, it submits that the appellant was provided with a statement from the city’s General Manager explaining that if a bus operator is involved in an accident, the bus operator is pulled off the road, is given refresher training and is subsequently reassessed. Additionally, the city submits, its Chief Safety Officer advised the appellant, in an email, that refresher training “takes place on a one-to-one ratio between an operator and instructor that includes a minimum four hours of training and a road

evaluation by a certified instructor.” The city submits that this response was published in the media. The city further submits that while the disclosure of the specific information that remains at issue would not further the public interest that the appellant refers to in his representations, the appellant is not barred from seeking and obtaining further information pertaining to OC Transpo’s safety-related practices and procedures.

[95] The city submits that unlike some of the previous orders issued by the IPC that have applied the public interest override, in this case, disclosure of the information that it has withheld under section 14(1) would not provide any additional insight into its response to the collision to which the records relate, or any other collision. It refers to Order MO-1749 and says, similarly, in this case the remaining undisclosed personal information in the records does not contain the type of information that the appellant claims the public has an interest in.

[96] The city disputes that a compelling public interest in the disclosure of the information that remains at issue exists, however, it submits that even if I find one exists, it would not clearly outweigh the purpose of the mandatory personal information exemption due to the sensitive nature of the personal information and potential for identity fraud it noted. The city notes that one of the purposes of the *Act* is to protect the privacy of individuals with respect to personal information about them that is held by an institution. The city submits that there has been a significant amount of antagonism expressed by certain members of the public towards one of the bus operators and any public interest in the disclosure of their personal information is outweighed by the purpose of section 14(1).

[97] In sur-reply, the appellant notes that previous IPC orders that have found section 16 applies where there are public safety issues. The appellant submits:

...[T]here can be no doubt that records pertaining to an accident...which led to passenger injuries is by itself relevant to public safety, it becomes rather more relevant when it is the same OC Transpo employee involved in a second accident ... involving passenger fatalities. These episodes were not internal personnel matters relevant only to union members and city officials. They led to injuries and deaths of passengers that OC Transpo employees serve and for whom they have a duty of care. While there may or may not be a valid argument for protecting internal interactions of a public employer and employees, the validity disappears when citizen safety is threatened and, indeed, violated.

There is no compelling public interest in the disclosure of the information subject to section 14(1)

[98] I have considered the parties’ representations and have reviewed the personal information that remains at issue with a view to determining whether there is a compelling public interest in its disclosure, which clearly outweighs the purpose of the personal privacy exemption at section 14(1). I am satisfied that there is not a public interest in the disclosure of the particular personal information that remains at issue in

the records, let alone a compelling one that outweighs the purpose of the mandatory personal privacy exemption in section 14(1). Section 16(1) does not apply.

[99] I accept the appellant's position that there is public interest in ensuring that a public transit system is safe and that after an accident occurs, the actions taken by the body in charge are appropriate. Depending on the circumstances, this public interest is arguably a compelling one. However, I do not accept that because there is a general public interest in the safety of its public transit system, it necessarily follows that the disclosure of the specific personal information that remains at issue in the records before me advances that public interest. I also do not accept that any correlating public interest that might exist in the transparency of city actions with respect to how it responds to transit incidents threatening public safety would be served by the disclosure of the personal information that has been withheld from the records under section 14(1).

[100] The information that I have found to be exempt under section 14(1) consists of the personal information of the bus operators and passengers on the buses involved in the collision. The information is limited, specific and related to those individuals alone. It does not reveal additional details about the collision or the city's response to it.

[101] As noted above, previous IPC orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.⁴⁵

[102] In my view, the disclosure of this specific personal information that I have found exempt under section 14(1) would not address the compelling public interest suggested by the appellant. I do not accept that its disclosure would serve the purpose of informing or enlightening the appellant or the public about the city's response to matters relating to the safety of its public transit service, either with respect to the specific incident to which the records relate or more generally. Therefore, I find that there is not a compelling public interest in the disclosure of the information that has been withheld under section 14(1).

[103] Even if a compelling public interest in the disclosure of the information that remains at issue had been established, I do not accept that in this case any such interest would clearly outweigh the purpose of the mandatory personal privacy exemption in section 14(1) under which this information has been withheld. Given the sensitive nature of the personal information that the records contain, in my view, this is a case where the personal privacy of the involved individuals must be maintained. The

⁴⁵ See for example Orders P-984 and PO-2556.

evidence before me does not point to a conclusion that infringements on these privacy interests are justified.

[104] Accordingly, I find that the public interest override at section 16(1) of the Act does not apply and section 14(1) applies to the information on pages 1, 7, 8, 13, 15, 17 and 35, for which it was claimed.

ORDER:

1. I find that pages 3, 4, 5, 9, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 39 to 46, 48 to 53, 54, 55 to 57, 58 to 63, 64, 66 to 68, 70, 71 to 74, 75, 76, 77, 78, 79, 80, 81 and 82, 84, 87 and 119 are records that are excluded, in their entirety, from the *Act* pursuant to section 52(3)3.
2. I uphold the city's decision to withhold personal information on pages 1, 7, 8, 13, 15, 17 and 35 pursuant to section 14(1).
3. I dismiss the appeal.

Original signed by _____
Catherine Corban
Adjudicator

June 23, 2021 _____