

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4545

Appeal MA21-00163

Toronto Transit Commission

July 11, 2024

Summary: The Toronto Transit Commission (the TTC) received a multi-part request under the *Act* for records relating to its investigation into the requester's complaint and to information about transit fare enforcement and revenue. The TTC granted partial access to responsive records, withholding portions on the basis of the exemptions in sections 14(1) (personal privacy) and 38(b) (discretion to refuse requester's own information) of the *Act*. The TTC denied access to the investigation file claiming the exclusion in section 52(3)3 (employment or labour relations). In addition, the TTC stated that other requested records did not exist. The requester appealed the TTC's decision to pursue access to the withheld information and records and stated that additional records ought to exist.

In this order, the adjudicator upholds the TTC's search as reasonable. The adjudicator finds that the exclusion in section 52(3)3 applies to the investigation file. In addition, the adjudicator upholds the TTC's decision to withhold portions of the records because they are exempt under section 14(1) and section 38(b). She 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 (definition of personal information), 14(1), 17, 38(b) and 52(3)3.

Orders Considered: Orders M-878 and MO-4308.

Case Considered: *Ontario (Ministry of Correctional Services) v. Goodis* 2008 CanLII 2603 (ON SCDC).

OVERVIEW:

[1] The requester made a complaint to the Toronto Transit Commission (the TTC) customer service in which he alleged harassment and discrimination on the part of TTC operator(s). The TTC referred the complaint to its Human Rights and Investigations Department (HRID) for investigation pursuant to its applicable workplace policy. This order reviews the TTC's decision to grant the requester partial access to records relating to his complaint and to deny access to records of its investigation. The order also considers the reasonableness of the TTC's search for records.

[2] The TTC received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

1. Written notes from Customer Service, the Division involved, and Transit Enforcement pertaining to [the requester] and any complaint he has made or was made against him since June 22, 2020.

(This would include any action taken by the division, Transit Enforcement, or TTC Supervisor – including notes, emails from [a named individual] to Diversity and Human Rights Dept. - as well audio/written notes regarding [the requester's] phone calls to TTC Customer Service regarding June 26, 2020 event as well as his complaints to Customer Service since June 26, 2020).

2. 3 video requests and any associated complaints with the recorded videos whether they are by [the requester] or one of the drivers:
 - a. Video from Bus# 8055 on September 24, 2020 between 5:00-5:15 a.m.
 - b. Video from Bus# 8461 on November 7, 2020 at approximately 11 :35 a.m.
 - c. Video from Bus# 8460 on November 18, 2020 at approximately 12:03 p.m.
3. Statistics from the TTC regarding estimated or actual loss from rear-door boarding of buses effective from mid-March to July 2, 2020.
4. Statistics from the TTC regarding estimated or actual number of rides that occurred on buses where customers walked on and did not pay a fare.
5.
 - a. Requesting any memos that the TTC circulated to Divisions regarding policies, changes to policy, and regarding enforcement of fares with respect to rear-door boarding on buses and streetcars in general AND any memos, correspondence, from TTC to Divisions or press regarding fare enforcement and rear-door boarding practices or changes to this effective July 2, 2020.

- b. Memos, emails, correspondence, from Transit Enforcement/Fare Enforcement and/or Management and Divisions with respect to how drivers are to approach customers whom they believe have not paid during mid-March to July 2, 2020.
- 6.
- a. Copy of all press/media releases (released to the media or on the internet, either website or social media) regarding policies with respect to fare payment during the pandemic and if there was any differentiation between payment or lack thereof on subways, streetcars, buses, LRTs.
 - b. Any correspondence or media or social media release that describes why the rear-door policy on buses took effect in response to COVID-19 and measures implemented in this regard from mid-March 2020 to July 2, 2020; and
 - c. Any press/media release regarding the loss of fares or revenue to TTC from rear-door boarding on buses during COVID during mid-March to July 2, 2020.
7. Any manual or part of instruction that describe how Transit Enforcement/Fare Enforcement/Special Constables officials are to treat fare payment or fare evasion from mid-March 2020 to July 2, 2020 and any current manual used by Transit Enforcement and an explanation of the differences in their roles.

[3] The TTC identified responsive records and issued a decision to the requester. In its decision, the TTC granted full access to some records. These records included some records responsive to part 1 of the request relating to the requester's customer service complaint files and audio recordings of his calls to TTC customer service and records responsive to parts 5 and 7 of the request.

[4] The TTC granted partial access to some records responsive to parts 1 and 2 of the request. It withheld portions of some customer service complaint notes and incident reports and blurred portions of bus surveillance video recordings citing the discretionary personal privacy exemption in section 38(b)(discretion to refuse requester's own information) and the mandatory personal privacy exemption in section 14(1) of the *Act*.

[5] Regarding the written notes from the HRID's investigation into the requester's complaint, the TTC decided to refuse access in full citing the employment or labour relations exclusion in section 52(3)3 of the *Act*.

[6] In addition, the TTC identified some of the requested information as published or currently available to the public and provided the requester with hyperlinks to sites where the sought information is available. In response to parts 1(i), 3 and 4 of the request, the TTC stated that the records sought do not exist.

[7] The requester (now the appellant) appealed the TTC's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore

resolution.

[8] During mediation the appellant advised that he challenges the TTC's application of the exemptions in sections 38(b) and 14(1) and its reliance on the exclusion in section 52(3)3. The appellant also advised that he believes records exist in addition to those identified by the TTC. The reasonableness of the TTC's searches was added as an issue in the appeal.

[9] As a mediated resolution was not achieved, the file was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and invited and received representations from the parties.

[10] During my inquiry, the TTC issued a revised access decision granting the appellant access to additional information in the records. The appellant confirmed that the revised access decision does not resolve the issues in the appeal.

[11] For the reasons that follow, I find that the TTC has conducted a reasonable search for records responsive to the appellant's request. In addition, I find that the exclusion in section 52(3)3 applies to the records comprising the investigation file, and the personal privacy exemptions in sections 38(b) and 14(1) apply to the remaining records at issue. I dismiss the appeal.

RECORDS:

The records remaining in issue are the portions withheld from records 1(a), (b) and (k) and 2(a), (b) and (c) and record 1(h) in full, described below.

Record #	General description	Exemption/exclusion claimed
1	Withheld portions of written notes from Customer Service, the Division involved, and Transit Enforcement pertaining to [the requester] and any complaint he has made or was made against him since June 22, 2020. Customer Service Files/Notes: (a) CSC [specified file number] (b) CSC [specified file number] (h) Written notes from the Division	 (a) s. 38(b) and 14(1) (b) s. 38(b) and 14(1) (h) s. 52(3)3

	(i) Written notes from Transit Enforcement (k) Incident reports	(i) Record does not exist (k) s. 38(b) and 14(1)
2	Bus surveillance video recordings (a) Video from Bus #8055 on September 24, 2020 between 5:00 am and 5:15 am (b) Video from Bus #8461 on November 7, 2020 at approximately 11:35 am (c) Video from Bus #8460 on November 18, 2020 at approximately 12:03 pm	(a) s. 14(1) (b) s. 38(b), 14(1) (c) s. 14(1)

ISSUES:

- A. Did the TTC conduct a reasonable search for records?
- B. Does the section 52(3)3 exclusion for records relating to labour relations or employment matters apply to record 1(h)?
- C. Do the records at issue contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- D. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue in records 2(a) and (c)?
- E. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue in records 1(a), (b), (k) and 2(b)?

- F. Did the TTC exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Issue A: Did the TTC conduct a reasonable search for records?

[12] In its decision, the TTC stated that records responsive to parts 3 and 4 of the appellant's request do not exist. It is the appellant's position that records exist in addition to those located by the TTC in its searches. If a requester claims that additional records exist beyond those found by an institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.¹

[13] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[14] The TTC's position is that it conducted a reasonable search. In support of its position, it relies upon affidavit evidence of the employee who coordinated the searches, its Freedom of Information assistant at the time of the appellant's request.

[15] In their affidavit, the Freedom of Information assistant explains the steps they took to clarify the appellant's request. The affidavit also describes the departments they contacted to request responsive records, including the customer service departments, human rights department, operations/bus transportation, transit enforcement and revenue protection, corporate communications, video services department and revenue and ridership analytics.

[16] The affidavit evidence identifies the records located in the searches.

[17] The appellant has not provided any explanation for why he believes that additional records exist or a description of the additional records. The appellant repeats parts of his request and states that he has not been provided with the information he is seeking.

[18] I find that the TTC has demonstrated that it conducted a reasonable search in response to the appellant's request. Based upon the affidavit evidence of the employee who coordinated the TTC's searches, I am satisfied that they are familiar with the subject matter of the appellant's request and that they made a reasonable effort to locate records reasonably related to the request. I find the TTC conducted a reasonable search in response to the request.

¹ Orders P-85, P-221 and PO-1954-I.

Issue B: Does the section 52(3)3 exclusion for records relating to labour relations or employment matters apply to records 1(h)?

[19] The TTC has refused to grant access to records from the HRID, the division to which the appellant's complaints were referred.² The TTC's position is that these records, comprising the investigation file, relate to employment matters and are excluded from the *Act* by virtue of the exclusion in section 52(3)3.

[20] Section 52(3) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although an institution may choose to disclose it outside of the *Act*'s access regime.³

[21] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.⁴

[22] Section 52(3)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.

[23] 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.⁵

[24] The phrase "labour relations or employment-related matters" has been found to apply in the context of a job competition,⁶ an employee's dismissal,⁷ a grievance under a collective agreement,⁸ disciplinary proceedings under the *Police Services Act*,⁹ and a "voluntary exit program."¹⁰

² These are records identified by the TTC as responsive to part 1(h) of the appellant's request in the index above.

³ Order PO-2639.

⁴ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

⁵ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No 289 (Div.Ct.), 2008 CanLII 2603 (ON SCDC).

⁶ Orders M-830 and PO-1769.

⁷ Order MO-1654-I.

⁸ Orders M-832 and PO-1769.

⁹ Order MO-1433-F.

¹⁰ Order M-1074.

[25] For the collection, preparation, maintenance, or use of a record to be “in relation to” one of the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is “some connection” between them.¹¹

[26] The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of “labour relations” is not restricted to employer-employee relationships.¹²

[27] 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.¹³ It has been found not to apply in the context of an organizational or operational review¹⁴ or litigation in which the institution may be found vicariously liable for the actions of its employee.¹⁵

[28] For section 52(3)3 to apply, the institution 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 use 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.

Parties’ representations

[29] By way of background, the TTC explains that it has an investigative process in place that escalates customer complaints to the HRID when allegations of discrimination are made against a TTC employee. The HRID is responsible for conducting and overseeing investigations into harassment, discrimination, a poisoned work environment or workplace violence. These investigations are undertaken by the HRID pursuant to the TTC’s Respect and Dignity Policy or its Workplace Violence Policy.

[30] The TTC states that the records for which it claims the labour relations or employment-related matters exclusion consist of TTC internal emails and investigative

¹¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

¹² *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.

¹³ Order PO-2157.

¹⁴ Orders M-941 and P-1369.

¹⁵ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

records, including written interviews with the relevant employee who is subject of the investigation, the complaints, and emails scheduling meetings in the investigation.

[31] The TTC cites Order MO-4308 in support of its submission that the “whole record” approach should be taken to view the records, which comprise the details and evidence of the employee investigation file that stems from the complaints made by the appellant regarding the conduct of specific TTC employees.

[32] The TTC states that the records were created by various members of the TTC staff and collected for the purposes of its Human Rights Investigation. The TTC states that copies of correspondence and investigation notes were provided from the HRID manager who conducted the investigation. The TTC submits that the first part of the test is met.

[33] Turning to the second part of the test, the TTC states that the records at issue were collected, prepared, maintained or used in relation to meetings, consultations, discussions, or communications between the relevant internal TTC parties regarding the employee conduct investigation. The TTC states that there is a connection between the records and the subject of the exclusion because they relate directly to the meetings and discussions regarding the employee conduct investigation, which is an employment-related matter in which the TTC has an interest.

[34] The TTC submits that all the documentation collected by the HRID as part of the internal investigations process, making up the evidence of the case, is relevant to the investigation. The TTC adds that the communications between its managers regarding the investigation demonstrate the purpose for which the materials were collected and the TTC’s interest in it.

[35] The TTC relies on Order MO-2589 where the adjudicator stated that “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.” It is the TTC’s position that in this appeal the records at issue address exactly this type of matter and the possible breach of employee conduct rules.

[36] Turning to the third part of the test, the TTC states that the records in the investigation file are directly related to an employment-related matter in which the TTC has an interest, namely an investigation into employee conduct that could result in discipline of varying levels, including dismissal. The TTC submits that although the investigation into the conduct of the employee in relation to the appellant’s complaints has concluded, its interest in the situation has not changed.

[37] The TTC submits that none of the exceptions to the exclusion in section 52(4)

apply to the records at issue in this appeal.¹⁶

[38] The appellant states that after he raised concerns of discrimination by TTC drivers, he was informed that the human rights concerns were passed to the appropriate department within the TTC. The appellant states that he is seeking access to the notes pertaining to the TTC's investigation of his complaints.

[39] The appellant disagrees with the TTC's position that the investigation into his concerns was a labour issue and asserts that it was about him, that it includes his personal information and allegations that he made about discrimination that he suffered. The appellant's position is that the TTC gathered information from him and the TTC drivers concerned, and he is entitled to know what was said, whether his concerns were addressed and, if so, how they were addressed. The appellant submits that the records at issue are not about employment related matters or employee rights but about him and his rights.

[40] The appellant submits that his interest in the investigation of allegations of discrimination and harassment in breach of the *Human Rights Code* "trumps" the TTC's interest in keeping the records confidential to protect its interests or those of the employees involved. The appellant submits that the *Human Rights Code of Ontario* must prevail over other laws, including labour laws.

[41] It is also the appellant's position that there is a public interest in the disclosure of the details of the investigation into his complaint. The appellant submits that if the TTC did not adequately investigate his concerns and hold the drivers involved accountable, as he states he suspects it did not, then both he and the general public have a right to know.

[42] The appellant does not directly address the three-part test for the application of the exclusion under section 52(3)3 of the *Act*.

Analysis and findings

[43] For the reasons that follow, I find that record 1(h) consists of the investigation file of the TTC's internal investigation into the appellant's complaints pursuant to its workplace policies. I find that record 1(h) is excluded from the *Act* under section 52(3)3.

[44] I agree with the TTC's submission that a "whole record" approach should be taken when reviewing the records at issue. The IPC takes the "whole record" approach meaning that each record over which an exclusion under section 52(3) is claimed, is examined as a whole. The exclusion cannot apply to a portion of the record. An entire record is excluded under section 52(3), or it is not. This was the reasoning of the adjudicator in Order MO-4308, cited by the TTC, and it is an approach that I agree with and adopt in

¹⁶ Records falling within any of the exceptions in section 52(4) are not excluded from the application of the *Act*.

this appeal.

[45] However, I do not agree with the TTC that this approach requires me to consider the *investigation file* “as a whole,” without reviewing the individual records that it contains and over which the exclusion is claimed. Accordingly, I have reviewed each of the records identified as record 1(h) in their entirety.

[46] From my review of the records in the investigation file, I note that, with one exception, it contains records created following the appellant’s complaint made to the TTC’s customer service on June 26, 2020. The exception to this is a file of six records created at the time of the incident giving rise to the complaint.

[47] Section 52(3)3 of the *Act* requires that for the exclusion to apply the records must be about the employment-related matter in which the institution has interest *at the time they are collected, prepared, maintained or used* [my emphasis].¹⁷

[48] The IPC has previously held that records created as part of an institution’s day to day operations that later make their way into an investigation file of an employment related matter in which an institution has an interest, are not excluded from the *Act*.¹⁸ For example, bus video surveillance or calls to customer service that are recorded as a part of routine operations for passenger safety or training purposes are not subject to the exclusion. I have therefore considered whether these six records were about the employment related matter at the time they were created.

[49] Without revealing the contents of these records, I find that they concern the changing dynamics of a TTC employee’s workplace and their ability to perform their duties as the event leading to the appellant’s complaints was unfolding. Notwithstanding that these records predate the formal complaints being made to customer service, I find that they were not created as part of the TTC’s day to day operations but came into existence as a direct result of an employee’s acute concerns. I am satisfied that these records were created in relation to communications about an employment-related matter for the purposes of section 52(3).

[50] I now turn to the other records that form the file from the investigation into the employee conduct following the appellant’s complaint. From my review of the records, I find that they were collected, prepared, maintained or used by the TTC. These records comprise internal emails and communications between TTC staff relating to the employees connected with the complaints. I am satisfied that these records were collected, prepared, maintained or used in relation to meetings, consultations, discussions, and communications about employment-related matters. Specifically, the TTC’s investigation as an employer into the conduct of one of its employees pursuant to

¹⁷ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.).

¹⁸ For example, see Orders MO-4354 and MO-4149.

a TTC workplace policy.

[51] In Order M-878, the adjudicator found that a municipality's workplace harassment policy, which was implemented to address harassment by or against municipality employees, was about an employment-related concern. The adjudicator went on to find that an investigation that took place pursuant to a workplace harassment policy was an "employment-related matter" for the purposes of section 52(3)3 of the *Act*. Regarding the municipality's "interest" in the matter, the adjudicator adopted the reasoning of the former Assistant Commissioner in Order P-1242. In that order, the former Assistant Commissioner reviewed the legal authorities and held that the expression "has an interest" means "more than mere curiosity or concern."

[52] In the context of an investigation that takes place pursuant to a workplace harassment policy, the adjudicator in Order M-878 found that the municipality's interest arose from its obligations to act on a complaint of harassment under the provisions of the *Ontario Human Rights Code* (the *Code*).

[53] I agree with this reasoning and adopt it in this appeal. I am satisfied that the TTC has an interest as an employer in its investigation of complaints of harassment and discrimination made against its employees. Besides the TTC's obligations to act on the appellant's complaints pursuant to the provisions of the *Code*, I accept the TTC's submission that the potential outcome for an employee whose conduct is under investigation by the HRID includes dismissal. In my view, the potential dismissal of an employee, which brings the employment relationship to an end, is an outcome in which the TTC has an interest.

[54] I do not agree with the appellant's submission that as the individual who made the complaints that instigated the investigation, the records in the investigation file are about him and not an employment-related matter. While I accept that the TTC's investigation began as a result of the appellant's complaints, in my view it does not follow that the investigation is about him rather than the employee(s) concerned.

[55] I note that the TTC's investigation took place as part of its escalation of the appellant's complaints to the HRID, pursuant to its internal workplace policies. The TTC states that the HRID's responsibilities include investigations of matters of harassment, discrimination, the work environment, and workplace violence. The potential outcomes of the investigation, including the possibility of an employee dismissal and the TTC's liability for failure to act on the complaint, arise from the employee-employer relationship. In my view, these outcomes do not engage the interests of third parties. Accordingly, I do not agree with the appellant's submission that the records are not about an employment-related matter because they are "about" him.

[56] Finally, and for similar reasons, I also do not agree with the appellant's submission that his interests in the investigation of his allegations of discrimination and harassment "trump" the TTC's interest in "keeping the records confidential." The determination

whether the exclusion in section 52(3) applies to the records in the investigation file does not require a weighing of the parties' competing interests as the appellant suggests. Rather, an institution relying on the exclusion must demonstrate that it has an interest in the subject matter of the records, and I am satisfied that this is the case in this appeal.

[57] In *Ontario (Ministry of Correctional Services) v. Goodis*¹⁹ the Divisional Court considered the purpose and scope of the equivalent to section 52(3) in the provincial version of the *Act*. The Court held that the intention of the exclusion provision is to "protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce." I am satisfied that the exclusion of the records of the TTC's internal investigation into the conduct of its employee is consistent with the purpose of section 52(3) and serves to protect the TTC's interests in the investigation process.

[58] For these reasons, I find that the exclusion in section 52(3)3 applies to record 1(h) comprising the investigation file.

[59] The appellant argues that there is a public interest in the disclosure of the investigation file. As I have found that the *Act* does not apply to the investigation file, the public interest in the records is not an issue to be determined in this appeal.²⁰

Issue C: Do the records at issue contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[60] The TTC has withheld portions of records 1(a), (b) and (k) and has blurred portions of the surveillance video recordings in record 2(a), (b) and (c) on the basis of the personal privacy exemptions in sections 14(1) and 38(b) of the *Act*. These exemptions can only apply to personal information. To decide which, if any of these personal privacy exemptions apply to this withheld information, I must first determine whether it is personal information as defined in section 2(1) of the *Act* and, if so, whose personal information.

[61] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Information is "about" an individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Information is about an "identifiable individual" if it is reasonable to expect that they can be identified from the information either by itself or combined with other information.²¹

¹⁹ 2008 CanLII 2603 (ON SCDC).

²⁰ The public interest override in section 16 of the *Act* is only relevant when considering the application of exemptions to records to which the *Act* applies. There is no provision in the *Act* for public interest to override the exclusion of records from the access regime of the *Act*.

²¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[62] Generally, information about an individual in their professional, official, or business capacity is not considered to be “about” the individual.²² Sections 2(2.1) and (2.2) of the Act specifically deal with this kind of information and state:

(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.

[63] Section 2(1) of the *Act* gives a list of examples of personal information. It states, in part:

“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,

...

(d) the address, telephone number, symbol or other particular assigned to the individual,

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

(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.

[64] The list of examples of personal information under section 2(1) is not a complete

²² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

list. Other kinds of information could also be “personal information.”²³

[65] It is important to know whose personal information is in the record. If the record contains a requester’s own personal information, their access rights are greater than if it does not. Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.

[66] The TTC’s position is that the customer service file and incident reports contain the personal information of its employees and TTC operators. In addition, the TTC submits that the bus surveillance video recordings include images of passengers and the appellant.

[67] The appellant does not specifically address this issue in his representations but states that the images of the passengers on the bus video recordings should not be released without the passengers’ consent.

[68] From my review of the records, I find that they contain the appellant’s name, sex, his views and opinions and the views and opinions of others about him. I am satisfied that this is the appellant’s personal information within the meaning of paragraphs (a), (b), (e), (g) and (h) of the definition in section 2(1).

[69] In addition, I find that the records contain the personal information of identifiable individuals other than the appellant. The records comprising customer service files and incident reports (records 1(a), (b) and (k)) contain the names, telephone numbers, home addresses, signatures, views and opinions and information relating to medical history of identifiable TTC employees. This is information that relates to the employees in their personal capacity as it would reveal something of a personal nature about them.

[70] The appellant has been granted access to the employee’s names and employee numbers. I accept that this information is not their personal information but is information about them in a professional capacity. As the remaining information identifying the TTC employees that has not been disclosed is contained in records created in the course their employment as TTC operators, I have considered whether it also identifies them in their business, professional or official capacity, within the meaning of section 2(2.1). I find that it does not and am satisfied that, if disclosed, the identifying information would reveal something of a personal nature about the TTC operators.

[71] The IPC has previously held that whether or not a signature is personal information depends upon the context and the circumstances.²⁴ I agree with this approach and adopt it in this appeal. From my review of the signatures, together with the names, home addresses, telephone numbers, views and other information identifying the TTC operators in the records, I am satisfied that it qualifies as personal information. This information identifies these individuals in the context of events in which they were personally involved

²³ Order 11.

²⁴ Order MO-1194.

and records their personal accounts. In particular, I find that the signatures attached to the incident reports provide *personal* verification of the information in these records. In my view, this information qualifies as the personal information of identifiable individuals within the meaning of paragraphs (a), (b), (d), (e) and (h) of the definition of that term in section 2(1).

[72] I also find that the images of the passengers, including the appellant, which are captured in the bus surveillance video in record 2(b) qualifies as their personal information. The IPC has previously held that information collected about identifiable individuals from video surveillance cameras qualifies as "personal information."²⁵ In the context of the bus surveillance video recordings at issue in this appeal these recordings contain information about individuals identifiable from their images and taking TTC transport at specific times and locations. In my view, this information qualifies as the personal information of the appellant and other identifiable individuals within the meaning of the definition in section 2(1) of the *Act*.

[73] The video recordings comprising records 2(a) and (c) contain only the personal information of identifiable individuals other than the appellant. I will consider the application of the mandatory personal privacy exemption in section 14(1) to the blurred images of passengers in these records.

[74] For all the other records, as I have found that they contain the personal information of the appellant and other identifiable individuals, I will consider the application of the discretionary personal privacy exemption in section 38(b) of the *Act* to the information at issue.

Issue D: Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue in records 2(a) and (c)?

[75] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless any of paragraphs (a) to (f) applies.

[76] Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[77] 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 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can

²⁵ For example, see Orders MO-1570 and PO-3510.

only be overcome if section 14(4) or the “public interest override” at section 16 applies.²⁶

[78] If no section 14(3) presumption applies and the exceptions in section 14(4) do not apply, 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.²⁷ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory exemption applies.

[79] The TTC’s position is that none of the exceptions in paragraphs 14(1)(a) to (e) apply in this appeal, nor any of the presumptions in section 14(3). The TTC submits that none of the factors in section 14(2) apply to the recorded images of passengers and explains that these images are captured in accordance with its internal video recording policy and on the trust of passengers that the TTC will act responsibly and in accordance with the provisions of the *Act* in relation to its collection, use and disclosure.

[80] The TTC submits that using the facial images to identify passengers in the surveillance recordings falls outside its recognised business use of the recordings. The TTC states that disclosure of the passengers’ facial images without the passengers’ consent would constitute an unjustified invasion of personal privacy.

[81] The appellant’s position in relation to the images of individuals captured on the recordings of bus surveillance is unclear. On the one hand, the appellant states that if consent cannot be obtained for the disclosure of the images of passengers, then their disclosure is “not necessary” to his request. However, the appellant maintains that he is seeking access to the images of TTC drivers captured on the video recordings, as their identities are already known to him. The appellant submits that the factor in section 14(2)(d) applies to the images of the TTC drivers.

[82] From my review of the bus surveillance recordings, I find that none of them contain images of the TTC operators. Accordingly, I make no finding whether disclosure of their images would be an unjustified invasion of personal privacy under section 14(1).

[83] Regarding the images of the passengers in records 2(a) and (c) that have been blurred, I find that a non-listed factor raised in the TTC’s representations is relevant to my determination of whether their release would constitute an unjustified invasion of personal privacy. In essence, the TTC submits that it would be a breach of the trust placed in it by its passengers to disclose images captured on its bus surveillance recordings without their knowledge or consent. This unlisted factor weighs against disclosure of the passenger images.

[84] I accept the TTC’s submission that the bus surveillance video recordings are made

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

²⁷ Order P-239.

in accordance with its internal video recording policy and on the trust of passengers that the TTC will act responsibly and in accordance with the provisions of the *Act* in relation to its collection, use and disclosure. The appellant does not assert and there is no reasonable basis for me to find that the identities of other passengers are relevant to his complaints to the TTC.

[85] Accordingly, I find that the disclosure of the images of passengers in records 2(a) and (c) would be an unjustified invasion of the passengers' personal privacy so that section 14(1)(f) does not apply. I find these images are exempt under the personal privacy exemption in section 14(1) and uphold the TTC's decision to withhold them.

Issue E: Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[86] As I have found that records 1(a), (b) and (k) and the bus surveillance recordings in record 2(b) contain the personal information of the appellant and other identifiable individuals, I must consider the application of the discretionary personal privacy exemption under section 38(b) to the withheld information.

[87] 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 some exemptions from this right.

[88] Under section 38(b), where a record contains personal information of both the appellant 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 appellant. This involves a weighing of the appellant's right of access to their own personal information against the other individual's right to protection of their privacy.

[89] Since the section 38(b) exemption is discretionary, once the TTC determined that the record was exempt under section 38(b), it is required to exercise its discretion to decide whether to nonetheless disclose the records to the appellant in full or to claim the application of the exemption in relation to all or part of it.

[90] If disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 38(b).

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

The parties' representations

Customer service file notes and incident reports (records 1(a), (b) and (k))

[92] The TTC states that the presumption against disclosure in section 14(3)(d) relating

to employment or educational history applies to the information withheld from the customer service file notes and incident reports. The TTC submits that this information, while of a personal nature, relates to the employment history of the TTC operators and matters concerning their state of health in their workplace in the context of the reported incidents.

[93] In addition, the TTC submits that the factors in section 14(2)(f) (highly sensitive) and (h) (supplied in confidence), which weigh against disclosure, apply to the information attached to the customer service reports, which it describes as highly sensitive and pertaining to its internal investigation.

[94] The appellant states that he is also pursuing access to the TTC drivers' contact information and submits that the factors in section 14(2)(a) and (d) apply and weigh in favour of disclosure.

[95] The factor in section 14(2)(a) weighs in favour of disclosure where disclosure is desirable for the purpose of subjecting the activities of an institution to public scrutiny. The appellant submits that the information he is seeking would allow him to hold the TTC accountable as he does not think it has adequately dealt with his discrimination and harassment concerns.

[96] The factor in section 14(2)(d) weighs in favour of disclosure where the personal information is relevant to a fair determination of rights affecting the person making the request. The appellant submits that he has brought a formal complaint against the TTC in the Human Rights Tribunal of Ontario (HRTO) and that the complaint is ongoing. The appellant's position is that the personal information that he is seeking is significant to the determination of the rights in question and it is required to prepare for the proceeding or to ensure an impartial hearing.

Images of passengers captured on bus surveillance recordings (records 2(a) and (c))

[97] The parties' positions in relation to the blurred images of passengers captured in the bus surveillance recordings are set out in paragraphs [81] to [83] above.

Analysis and findings

[98] For the reasons that follow and subject to my finding on the TTC's exercise of discretion, I am satisfied that the discretionary personal privacy exemption in section 38(b) applies to the information at issue in the records. I find that its disclosure would be an unjustifiable breach of personal privacy of the individuals to whom it belongs, namely the TTC operators and the passengers whose images appear in the bus surveillance videos.

Information withheld from the customer service file notes (records 1(a) and (b)) and incident reports (record 1(k))

[99] The TTC submits that the information withheld from the customer service file notes concerns the employment history of the TTC operators so that the presumption in section 14(3)(d) applies. There is no evidence before me that this information concerns the TTC operators' employment *history* rather than information about their current employment. Accordingly, I find that the presumption in section 14(3)(d) does not apply.

[100] From my review of the withheld portion of records 1(a) and (b), which comprises information about the TTC operator(s)' state of mind, I am satisfied that section 14(3)(a) applies and the disclosure of this personal information relating to an identifiable individual's medical history is presumed to be an unjustified breach of personal privacy.

[101] Turning to the factors in section 14(2), to find that the factor in section 14(2)(f) applies and the information withheld to be "highly sensitive", I must be satisfied that the disclosure of the personal information could reasonably be expected to cause significant personal distress to the individual to whom it belongs.²⁸ From my review of the information withheld from the customer service file notes and in the context in which it was recorded, being the appellant's complaint and allegations, I am satisfied that it would be reasonable to expect that its disclosure would cause significant personal distress to the TTC operator concerned. Accordingly, I find that the factor in section 14(2)(f) applies weighing against disclosure.

[102] Regarding the information withheld from the incident reports in record 1(k) consisting of the personal contact information of the TTC operators, I find that the factor in section 14(2)(h) applies weighing against its disclosure. I find that this information was provided by the TTC operators to their employer, upon completion of the incident report forms, with the expectation that the information would be treated confidentially. The IPC has previously held that the expectation of confidentiality must be reasonable.²⁹ I am satisfied that, on an objective basis, an employee providing personal information to an employer would expect it to be treated confidentially and not released to a member of the public as would be the case if the information were disclosed in the context of this appeal.

[103] I disagree with the appellant's submission that the disclosure of the TTC operators' personal information would allow him to hold the TTC accountable. The appellant has not demonstrated how this personal information will achieve transparency in relation to the TTC's operations or, more specifically, its response to the appellant's customer service complaints. Accordingly, I find that the factor in section 14(2)(a) does not apply to the circumstances of this appeal.

[104] I also disagree with the appellant's submission that the factor in section 14(2)(d)

²⁸ Order PO-2518.

²⁹ Order PO-1670.

applies in this appeal, weighing in favour of disclosure. The appellant submits that the factor applies because the disclosure of the information he seeks is relevant to the determination of his rights in his complaint before the HRTO and is required from him to prepare for the proceedings and to ensure an impartial hearing. In this respect, the appellant repeats in his submission the test for applying section 14(2)(d) from Order P-312.

[105] The appellant's submission focuses on how disclosure of the investigation file is necessary for his HRTO complaint to allow him to determine whether the human rights concerns he has raised have been dealt with adequately. However, I have found that the investigation file is excluded from the *Act*. For the factor in section 14(2)(d) to apply in this appeal, the appellant must demonstrate that the withheld personal information of the TTC operators is relevant to a fair determination of his rights.

[106] I accept that the appellant has brought a formal complaint against the TTC in the HRTO but there is no evidence before me that the personal information of the TTC operators is relevant to that complaint or necessary for the preparation of the proceedings or to ensure an impartial hearing. The names of the TTC operators involved in the appellant's complaint have been disclosed to him and he has been able to commence his formal complaint before the HRTO. There is no basis for me to find that the withheld personal information is necessary to prepare further for the HRTO proceedings or to ensure that they are impartial. I find that the factor in section 14(2)(d) does not apply to the facts of this appeal.

[107] Accordingly, I find that the presumption against disclosure in section 14(3)(a) applies to the personal information of the TTC operators, together with the two factors weighing against disclosure in section 14(2)(f) and (h). I find that no factors, listed or unlisted, weigh in favour of disclosing the TTC operators' personal information.

[108] Having weighed the applicable factors, I find that the disclosure of this information would constitute an unjustified breach of the TTC operators' personal privacy and, subject to my review of the TTC's exercise of discretion, I find that it is exempt under section 38(b).

Images of passengers captured on bus surveillance recordings (record 2(b))

[109] Regarding the images of the passengers, that have been blurred from the recording in record 2(b), I find that the non-listed factor raised in the TTC's representations is relevant to my determination of whether their release would constitute an unjustified invasion of personal privacy. As I have noted, the TTC submits that it would be a breach of the trust placed in it by its passengers to disclose images captured on its bus surveillance recordings without their knowledge or consent. This unlisted factor would weigh against the disclosure of the passengers' images.

[110] I accept that the bus surveillance video recordings are made in accordance with

the TTC's internal video recording policy and on the trust of passengers that the TTC will act responsibly and in accordance with the provisions of the *Act* in relation to its collection, use and disclosure. In my view, it is reasonable for the passengers using the TTC to expect that their images captured on surveillance videos will not be used to identify them without their consent. The appellant does not assert and there is no reasonable basis for me to find that the identities of other passengers are relevant to his complaints to the TTC.

[111] I find no factors weighing in favour of disclosure of the images of the passengers apply in this appeal. Accordingly, I find that the disclosure of the images of passengers captured on the bus surveillance recordings in record 2(b) would constitute an unjustified invasion of personal privacy and the blurred images are exempt under section 38(b), subject to my findings on the TTC's exercise of discretion.

Issue F: Did the TTC exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

[112] The personal privacy exemption in section 38(b) is discretionary meaning that the TTC can decide to disclose information even if the information qualifies for exemption. The TTC must exercise its discretion. On appeal, the IPC may determine whether an institution has failed to do so.

[113] The IPC may also 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; or it fails to take into account relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of its discretion based on proper considerations.³⁰

[114] The TTC submits that it exercised its discretion and only withheld from the appellant the portions of records 1(a), (b) and (k) that it considered contained highly sensitive personal information about TTC operators. Similarly, by only withholding the faces of passengers in the bus surveillance recording in record 2(b). The TTC submits that it considers the information that the appellant was seeking and the overall purpose of the *Act* and sought to provide the appellant with the information it could regarding his complaints, while recognising its responsibilities to protect the personal information of its employees and passengers. The TTC states that it exercised its discretion in good faith and for a proper purpose.

[115] The appellant submits that the TTC did not consider some relevant considerations: the purposes of the *Act* and that exemptions from the right of access should be limited and specific; whether the requester has a sympathetic or compelling need to receive the information and whether disclosure will increase public confidence in the operation of the institution. The appellant lists these factors but does not address how the TTC has failed

³⁰ Order MO-1573.

to take them into account.

[116] From my review of the factors taken into consideration by the TTC, I am satisfied that it has exercised its discretion in deciding to withhold portions of the records containing personal information of its employees and passengers and that it has done so properly. I note that the portions of the written records withheld by the TTC amounts to a couple of sentences and that most of the information in the customer service files and the incident reports has been released to the appellant. I am satisfied that the TTC has not exercised its discretion in bad faith or for an improper purpose but that it has sought to balance the appellant's right to the information in the records and his desire to know about the investigation into his complaint with its duty to protect third party privacy rights.

[117] Accordingly, I uphold the TTC's exercise of discretion.

Summary

[118] In summary, I uphold the TTC's application of the exclusion in section 52(3)3 to the investigation file and its application of the mandatory personal privacy exemption in section 14(1) to the images of passengers in record 2(b) and the discretionary personal privacy exemption in section 38(b) to the information at issue in records 1(a), (b) and (k) and the images of passengers in records 2(a) and (c). I dismiss the appeal.

ORDER:

I uphold the TTC's decision and dismiss the appeal.

Original signed by: _____
Katherine Ball
Adjudicator

_____ July 11, 2024