

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4163

Appeal MA20-00076

City of Ottawa

February 16, 2022

Summary: A former employee of the City of Ottawa (the city) made a request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to him during a certain period of time, and specifically, for emails between any combination of four specified individuals. In response, the city located responsive records. The city withheld some as being excluded from the application of the *Act* under section 52(3) (labour relations and employment matters), and withheld other records (in full or in part) under exemptions of the *Act*, including the mandatory exemption at section 14(1) (personal privacy). In this order, the adjudicator upholds the city's determination that the *Act* does not apply to certain records, under the exclusion at section 52(3)3. She also finds that the remaining records all contain the appellant's personal information, despite the professional context in which they were generated, and that the withheld information is exempt under the discretionary exemption at section 38(b) (personal privacy). As a result, the appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2 (definition of "personal information"), 2(2.1), 14(1), 14(2)(f), 14(3)(a), 38(b), and 52(3)3.

Order Considered: Order MO-1264.

OVERVIEW:

[1] A former employee of the City of Ottawa (the city), who had been the subject of discipline and subsequent grievance proceedings, made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to

him during a certain period of time, and specifically, for emails between any combination of four specified individuals.

[2] Despite taking the position that the *Act* does not apply to the records, the city opted to provide the requester with some access to the records outside of the *Act*. The city issued a decision granting partial access to the records responsive to the request. The city withheld access to information under the exclusion at section 52(3) (labour relations and employment). In the alternative, the city withheld the records under a number of exemptions under the *Act*.¹

[3] The requester (now the appellant) appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore the possibility of resolution.

[4] During mediation, the mediator had discussions with both the appellant and the city. The appellant advised the mediator that he was seeking access to the withheld information. The mediator reviewed the withheld information and observed that the records appear to contain the appellant's personal information under the *Act*, and as a result, the discretionary exemptions at sections 38(a) (discretion to refuse requester's own personal information) and 38(b) (personal privacy) were added to the scope of the appeal.

[5] The mediator had further discussions with the city regarding the withheld information. Following those discussions, the city issued a revised decision granting further access to some of the previously withheld information. Access to the remaining withheld information continued to be denied under the exclusion at section 52(3) and certain exemptions. The appellant confirmed receipt of the revised decision and further records, but advised the mediator that he wishes to pursue access to the remaining withheld records at the next stage of the process.

[6] Since no further mediation was possible, this appeal moved to the adjudication stage of the appeal process.

[7] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the city. I sought and received written representations from the city in response. I then provided the appellant with an opportunity to provide written representations in response to the city's representations and to the Notice of Inquiry. The appellant did not do so, but indicated that he would like his appeal to continue being processed, as he seeks disclosure of the redacted information.

[8] For the reasons that follow, I uphold the city's access decision, in part. I find that that the *Act* does not apply to the records that the city withheld under the exclusion at

¹ The city claimed the mandatory exemption at section 14(1) (personal privacy), and the discretionary exemptions at section 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*.

section 52(3) of the *Act*, and dismiss that portion of the appeal. I find the remaining records contain the appellant’s personal information. As a result, the appropriate personal privacy exemption to consider is the discretionary one at section 38(b) of the *Act*. In this order, I find that the personal information of individuals other than the appellant is exempt under section 38(b), and as a result, I dismiss the appeal.

RECORDS:

[9] The city withheld records, in full or in part, under a number of provisions of the *Act*.² I have assigned record numbers, as set out below, on my review of the records.³

Section(s) of the <i>Act</i>	Description of the records
Section 52(3)	Internal emails – record 1 Notes/brief – records 4, 8, 10, 22 and 23 Investigation printouts – records 32, 33, and 43 Internal emails/meeting invites – record 41
Section 38(a), read with sections 7(1) and 12	Notes/brief - page 15 of record 4
Section 38(b)	Vehicle and Equipment Collision Reports – record 5 and 15 “VATE” Incident Reports – record 6 and 14 Transit Services Occurrence Report – record 13 Statements – records 21, 24-30 Photos – records 35-37 Transit Special Constable Occurrence Summary and Report, including supplementary reports – record 42 Duplicate of portions of record 42

² While the city did not rely on section 38(a) or (b), since my decision is that a right of access must be considered under section 38, I have set out sections 38(a) and 38(b) in this table.

³ I have assigned record numbers, after my review of the records and the city’s most current index of records, because a determination of whether a record is excluded under the *Act* or contains the requester’s own personal information must be done on a record-by-record basis.

ISSUES:

- A. Does section 52(3) apply to the records over which this exclusion was claimed?
- B. Do the remaining records contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?
- C. Does the discretionary exemption at section 38(b) apply to the information at issue?
- D. Did the institution exercise its discretion under section 38(b)? If so should the IPC uphold the exercise of discretion?

DISCUSSION:

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

[10] The city submits that some of the records are excluded from the *Act* pursuant to the section 52(3) exclusion, and for the reasons that follow, I agree.

[11] 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 the institution may choose to disclose it outside of the *Act*'s access scheme.⁴

[12] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.⁵

[13] 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:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the

⁴ Order PO-2639.

⁵ *Ontario (Ministry of Community and Social Services) v. John Doe*, (invalid CanLII citation) 2015 ONCA 107 (CanLII).

institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

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

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

[15] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.⁶

What types of records are covered by this exclusion?

[16] The type of records excluded from the Act by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.⁷

[17] Section 52(3) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions.⁸

"In relation to"

[18] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.⁹

[19] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.¹⁰

⁶ *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.

⁷ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

⁸ *Ministry of Correctional Services*, cited above.

⁹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

¹⁰ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

"Labour relations"

[20] 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.¹¹

"Employment of a person"

[21] 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.¹²

The city's position

[22] The city's position is that all of the responsive records relate to the appellant's employee performance in the specified role that he held, and are, therefore, directly related to labour relations and employment-related matters.

[23] In representations shared with the appellant, the city states that the records relate to multiple workplace events, including a collision that occurred on a specified date. The city provided further details about the records in its confidential representations, to¹³ However, the city's shared representations were sufficient to understand the basis of its argument, and confidential details about these records do not need to be shared in this public order to understand why section 52(3) of the *Act* applies to the records.

[24] The city explains that workplace events involving the appellant resulted in performance reviews and disciplinary action. The city says that the appellant's union also filed a grievance on the appellant's behalf. As a result, the city submits that records with respect to employee performance are directly related to labour relations and employment-related matters, within the meaning of the exclusion at section 52(3) of the *Act*.

[25] While I have considered the city's representations in their entirety, I will discuss its representations regarding section 52(3)3 (matters in which the institution has an interest), below.

¹¹ *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.

¹² Order PO-2157.

¹³ These portions of the city's representations were withheld from the appellant under Practice Direction 7 of the IPC's *Code of Procedure*.

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

[26] 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.

Part 1: collected, prepared, maintained or used

[27] The city states, and I find, based on my review of the records, that the records were collected, prepared, maintained and used by city staff, including Labour Relations staff and supervisors/management within a specified department of the city, relating to the appellant's (now former) employment. Furthermore, the city states, and I find, that the records were collected, prepared, maintained, and used by those city staff to address workplace issues, both during the appellant's employment at the city at or around the date the workplace incidents occurred, and the date the employee was terminated.

[28] Furthermore, the city states, and I find, that the records were also collected, prepared, maintained and used in anticipation of addressing the grievance that his union filed on his behalf.

[29] Therefore, I find that the records meet part one of the test.

Part 2: meetings, consultations, discussions or communications

[30] Under part two of the test, a record must have been collected, prepared, maintained or used "in relation to" meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. To meet this requirement, it must be reasonable to conclude that there is "some connection" between the record and the subject of the exclusion.¹⁴ Therefore, for section 52(3)3 to apply, there must be "some connection" between "a record" and "meetings, consultations, discussions or communications about labour relations or employment-related matters in which the city has an interest."¹⁵

[31] The city submits that the collection, preparation, maintenance, and use of the records was directly linked to consultations, discussions and communications between

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

¹⁵ See Orders MO-2537 and MO-2589.

the city's Labour Relations staff and the supervisors/management within the department where the appellant worked. In addition, the city states that there were also consultations, discussions, communications between those city staff and the appellant, as well as between city staff and the union whose president the appellant specifically identified in his request.

[32] Based on my review of the city's evidence, and the records themselves, which are various types of incident reports or meeting records, I am satisfied that the information in the records was collected, prepared, maintained or used by the city in relation to meetings, consultations or discussions. I accept the city's evidence that the records relate to consultations, discussions or communications that took place between the specified city staff (or city staff and union personnel).

[33] As a result, I find that the records meet part two of the test.

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

[34] The third and final requirement for the exclusion at section 52(3)3 to apply is that each record was collected, prepared, maintained or used by the city in relation to meetings, consultations, discussions or communications *about labour relations or employment-related matters in which the city has an interest*.

[35] The phrase "labour relations or employment-related matters" has been found to apply in the context of, for example: a job competition,¹⁶ an employee's dismissal,¹⁷ a grievance under a collective agreement,¹⁸ and disciplinary proceedings under the *Police Services Act*.¹⁹

[36] The phrase "labour relations or employment-related matters" has been found not to apply in the context of an organizational or operational review²⁰ and litigation in which the institution may be found vicariously liable for the actions of its employee.²¹

[37] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.²²

[38] The records collected, prepared, maintained or used by the institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to

¹⁶ Orders M-830 and PO-2123.

¹⁷ Order MO-1654-I.

¹⁸ Orders M-832 and PO-1769.

¹⁹ Order MO-1433-F.

²⁰ Orders M-941 and P-1369.

²¹ Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

²² *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

employees' actions.²³

[39] The city submits that the connection of the consultations, discussions, and communications to employment-related matters is direct and not merely superficial. The city explains that the purpose for the creation and use of the records was for the city as the employer to address employment issues, and that the records relate directly to the review of employment issues in a labour-relations context. For example, the city states that the record at page 197 relates to workplace meeting to discuss employment-related issues concerning workplace events that involved the appellant.

[40] Furthermore, the city submits that the meetings, consultations, discussions, and communications were related to labour relations matters in which the city has an interest. The city relies on Order MO-1264, in which the IPC found that "labour relations" is properly defined as the collective relationship between an employer and its employees. It also points to a court decision of the Ontario Court of Appeal, where the court held that the term "labour relations" under the *Act*²⁴ extends to "relations and conditions of work beyond those relating to collective bargaining."²⁵

[41] Based on my review of the records themselves and the city's representations, I find that the records withheld under the exclusion at section 52(3) of the *Act* were prepared, maintained, and used by the city in relation to consultations, discussions, or communications about matters in which the city has an interest as an employer. Given the nature of the records, the circumstances being investigated in relation to the appellant's job performance, and the human resources decision to end the appellant's employment with the city, I am satisfied that the information in the records was reasonably related to the city's consultations, discussions, or communications regarding matters in which the city has an interest as an employer.

[42] Therefore, the records meet part three of the test for section 52(3)3 of the *Act*.

Conclusion

[43] For these reasons, I uphold the city's decision to withhold records 1, 4, 8, 10, 22, 23, 32, 33, 41, and 43 under section 52(3)3 of the *Act*. I find that the records meet the three-part test for section 52(3)3 of the *Act* because they were collected, prepared, maintained and used by the city in relation to meetings, consultations, discussions and/or communication regarding labour relations or employment-related matters in which the city has an interest as an employer.

Section 52(4): exceptions to section 52(3)

[44] If the records fall within any of the exceptions in section 52(4), as contracts or

²³ *Ministry of Correctional Services*, cited above.

²⁴ In the provincial counterpart of MFIPPA.

²⁵ In *Ontario (Ministry of Health and Long Term Care) v. Mitchinson* [2013] O.J. No. 4123 (C.A.).

an expense account described in section 52(4), then the *Act* applies to them.²⁶

[45] The city submits, and I find, that none of the records that it has claimed an exclusion over fall within any of the exceptions to the exclusion at section 52(4). The city states, and I find, that the city has not excluded any records that are agreements, and the records are not related to an expense account.

[46] For these reasons, I uphold the city's decision to withhold records 1, 4, 8, 10, 22, 23, 32, 33, 41, and 43 under section 52(3)3 of the *Act*. Given my finding about record 4, it is not necessary to also consider the city's alternate submissions that page 15 of record 4 is exempt under sections 7(1) and/or 12 of the *Act*.

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

[47] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. For the reasons I will explain below, I find that the remaining records at issue contain personal information belonging to the appellant and other identifiable individuals.

What is "personal information"?

[48] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

Recorded information

[49] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.²⁷

About

[50] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the

²⁶ 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
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.

²⁷ See the definition of "record" in section 2(1).

individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.²⁸

[51] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.²⁹

Identifiable individual

[52] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.³⁰

What are some examples of "personal information"?

[53] Section 2(1) of the *Act* gives a list of examples of personal information:

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

- (a) information relating to the [...] age [...] of the individual,
- (b) information relating to [. . .] the medical, psychiatric, psychological, criminal or employment history of the individual [. . .],
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number [...] of 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.

²⁸ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

²⁹ Orders P-1409, R-980015, PO-2225 and MO-2344.

³⁰ Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

[54] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."³¹

Statutory exclusions from the definition of "personal information"

[55] Sections 2(2), (2.1) and (2.2) of the *Act* exclude some information from the definition of personal information.³²

[56] Due to the city's position that the records contain little, if any, of the appellant's "personal information" due to the professional backdrop of the records, I will set out the language of section 2(2.1) of the *Act*, below:

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.³³

Whose personal information is in the record?

[57] It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.³⁴ Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.³⁵

The city's position

[58] The city submits that the records contain the personal information, including names, phone numbers, addresses, and medical information relating to members of the public who were witnesses to workplace incidents involving the appellant. The city also states that the witness statements include personal information about a member of the public who caused a disturbance, in addition to personal identifiers of the witness.

[59] The city states that some records contain personal information pertaining to staff including personal telephone numbers of city staff.

[60] In addition, the city submits that the records withheld contain little, if any, personal information belonging to the appellant because the records relate to his actions in his work capacity, rather than in a personal capacity.

³¹ Order 11.

³² Section 2(2) states that personal information does not include information about an individual who has been dead for more than thirty years.

³³ Section 2(2.2) of the *Act* says: 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.

³⁴ Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

³⁵ See sections 14(1) and 38(b).

Analysis/findings

[61] Based on my review of the records and the city's representations, I agree with the city's determination about whose personal information is in the records, in part. I find that the records also contain or consist of personal information belonging to the appellant, as I will explain below.

[62] It is helpful to start with a brief description of what types of records remain at issue. The remaining records at issue can be grouped into three broad categories: incident reports (records 5, 6, 13-15, and 42), photographs (records 35-37), and witness list/statements (records 21 and 24-30).

Personal information of the appellant

[63] If an employee's conduct is called into question, such as through a formal investigation, the IPC has found that that information may qualify as "personal information" under the *Act*.³⁶

[64] Based on my review of the records, I find that each of the records at issue was generated as a result of workplace incidents involving the appellant and as a result of these events, the appellant was investigated and his employment was terminated. In the circumstances, I do not agree that the information in the records is solely the appellant's professional information relating to the role that he held. Rather, I find that the records clearly reveal something of a personal nature about him. By the very nature of the events investigated, described, or pictured, I find that the records reveal personal information of the appellant. As a result, I find that the records contain the "personal information" of the appellant, under the introductory wording of that term at section 2(1) ("recorded information about an identifiable individual").

[65] In addition, I find that the incident reports and witness statements contain views or opinions about the appellant during these events that reveal something of a personal nature about him. This is the appellant's "personal information" under paragraph (g) of the definition of that term, at section 2(1) of the *Act*, even if the witnesses do not mention him by name.

Personal information of affected parties

[66] Based on my review of the records, I find that they all contain personal information of one or more affected parties, including witnesses, bystanders, and "a member of the public who caused a disturbance" (as described by the city) who are identifiable individuals.

[67] More specifically, I find that the personal information of these affected parties includes their names with contact information, age, and/or medical information relating

³⁶ See, for example, Order PO-2524.

to these individuals found in the collision/incident reports and the witness list/statements. This is the "personal information" of these individuals under paragraphs (a), (b), (d), and/or (h) of the definition of that term in section 2(1) of the *Act*. In addition, I find that each witness statement, as a whole, is the personal information belonging to each of these witnesses because each contains the witness' views or opinions under paragraphs (e) and/or (g) of the definition of "personal information" at section 2(1).

[68] Furthermore, the *fact* of each bystander's or witness' involvement in such events and/or subsequent involvement in investigations is itself their "personal information," under the introductory wording of the definition of that term at section 2(1) ("recorded information about an identifiable individual"). Similarly, the images of individuals that were withheld in the photographs are the "personal information" of each of those individuals under the introductory wording of the definition of that term. As mentioned, recorded information" is information recorded in any format, including photographs.

[69] With respect to the licence plate numbers withheld in some photographs, I find that they too are "personal information" of identifiable individuals. This is in keeping with past IPC orders that have held that that licence plate numbers qualify as "personal information," because they are considered an "identifying number" as contemplated by paragraph (c) of the definition of "personal information" in section 2(1) of the *Act*.³⁷ Furthermore, the license plate numbers could serve to identify individuals who were present in the area in question.

[70] With respect to the personal contact information of some city employees, I agree with the city, and find, that this is their "personal information" under the *Act* (under paragraph (d) of the definition of that term, and in combination with the disclosed names of these individuals).

[71] The city relied on the mandatory personal privacy exemption at section 14(1) to withhold the personal information of individuals other than the appellant, but given my finding that all the records contain the personal information of the appellant, the relevant personal privacy exemption to consider is the discretionary personal privacy exemption at section 38(b) of the *Act*. While the only information that has been withheld in some records is the personal contact information and names of witnesses or city staff, since each record contains the appellant's own personal information, any right of access that the appellant may have to that personal information must still be considered under the discretionary exemption at section 38(b) of the *Act*. Order M-352 establishes that I need to determine whether the record as a whole contains the appellant's personal information, using a "record-by-record approach," where "the unit of analysis is the record, rather than individual paragraphs, sentences or words contained in a record."

³⁷ Orders MO-1863, MO-1917, and MO-3902.

[72] In the circumstances of this appeal, although the city has claimed that section 14(1) applies and the correct exemption to consider in these circumstances is section 38(b), I will be able to proceed and consider section 38(b) because the city's representations about the factors that it believes weigh against disclosure under section 14(1) are also relevant to a section 38(b) analysis. I have sufficient evidence before me to complete my assessment of whether the information at issue is exempt under section 38(b), and whether the city exercised discretion in its decision-making about what to withhold from disclosure.

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

[73] For the reasons that follow, I find that the discretionary personal privacy exemption at section 38(b) applies to the information at issue in the records remaining at issue, which are records 5, 6, 13, 14, 15, 21, 24-30, 35-37, and 42.

[74] 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.

[75] Under the section 38(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.

[76] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of the other individual's personal privacy.³⁸

[77] 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).

[78] Also, the requester's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.³⁹

What information has been withheld in the remaining records at issue?

[79] It is helpful to keep in mind what the city actually withheld in each remaining record because it is that information which the city withholds on the basis that disclosure of it would be an unjustified invasion of the personal privacy of identifiable individuals other than the appellant.

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

³⁹ Order PO-2560.

[80] The city disclosed most of records 5 and 15 (a Vehicle and Equipment Collision Report), 13 (a Transit Services Occurrence Report), and 6 and 14 ("VATE" Incident Reports) to the appellant. The city withheld the names and contact information of witnesses in each of these records. In addition, the city withheld personal contact information of city employees in records 5, 13, and 15.

[81] Record 21 is a list of witnesses and their contact information, and records 24-30 are witness statements. The city withheld these records in full.

[82] Records 35-37 are photographs that the city disclosed to the appellant, in part. The city withheld images of individuals and/or licence plate numbers in these photographs.

[83] With this background in mind, I turn to the question of whether disclosure of the information withheld by the city would be an unjustified invasion of the personal privacy of the affected parties.

Would disclosure be "an unjustified invasion of personal privacy" under section 38(b)?

[84] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy.

Section 14(1) – do any of the exceptions in sections 14(1)(a) to (e) apply?

[85] If any of the section 14(1)(a) to (e) exceptions apply,⁴⁰ disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

[86] The city did not make submissions on this point.

[87] However, in the circumstances, there is insufficient evidence for me to find that any of the exceptions at section 14(1)(a) to (e) apply.

Sections 14(2), (3) and (4)

[88] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would *not* be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply.

⁴⁰ The exceptions at sections 14(1)(a) to (e) relate to: prior written consent from affected parties whose personal information appears in the records, compelling circumstances affecting health or safety, the record being available to the public, the disclosure of the information being required by another statute, and research.

[89] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the decision-maker⁴¹ must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁴²

Section 14(3) - is disclosure presumed to be an unjustified invasion of personal privacy?

[90] Sections 14(3)(a) to (h) list several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 38(b).

14(3)(a): medical information

[91] While the city did not reference the presumption at section 14(3)(a) in its representations, it listed it next to two records in its index of records in relation to pages 62-73 (record 15) and pages 198-209 (record 42). Records 15 and 42 are a Vehicle and Equipment Collision Report and Transit Special Constable Occurrence Summary and Report, including supplementary reports, respectively.

[92] Based on my review of records 15 and 42, I agree with the city, and find, that the presumption at section 14(3)(a) applies to personal information found in these records because it relates to the medical history, diagnosis, condition, treatment, or evaluation of one or more affected parties. However, for the same reason, based on my review of the witness statements (records 24-30), I find that the presumption at section 14(3)(a) also applies to information in the witness statements.

[93] The application of the presumption at section 14(3)(a) weighs significantly against disclosure.

[94] Since the records contain personal information other than medical-related information about one or more affected parties, I will go on to consider whether there are factors weighing for or against disclosure, under section 14(2).

Section 14(2): Do any factors in section 14(2) help in deciding if disclosure would be an unjustified invasion of personal privacy?

[95] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.⁴³ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[96] The list of factors under section 14(2) is not a complete list. The institution must

⁴¹ The institution or, on appeal, the IPC.

⁴² Order MO-2954.

⁴³ Order P-239.

also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).⁴⁴

[97] Each of the first four factors, found in sections 14(2)(a) to (d), if established, would tend to support disclosure of the personal information in question, while the remaining five factors found in sections 14(2) (e) to (i), if established, would tend to support non-disclosure of that information.

[98] As the appellant did not provide representations in the inquiry, he did not establish that any of the factors found in sections 14(2)(a) to (d), or other relevant factors, would tend to support disclosure of the personal information at issue.

[99] Based on my review of the records, and in particular, considering the nature of the information withheld (personal information relating to affected parties such as witnesses or bystanders appearing in records related to incidents of the nature investigated, described and pictured in the records, which led to the appellant's employment being terminated), I find that there is insufficient evidence before me that there are factors favouring disclosure of the information withheld by the city.

14(2)(f): the personal information is highly sensitive

[100] Section 14(2)(f) is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.⁴⁵ For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.⁴⁶

[101] The city submits that the factor at section 14(2)(f) applies, weighing against disclosure of information withheld under section 14(1), including the personal information of witnesses who provided the city with information about the workplace incidents. The city submits that witness information is ordinarily held in confidence by the city and is highly sensitive.

[102] As discussed, I have found that the records contain the personal information of the affected parties, which includes that of witnesses, bystanders, and an individual who had caused a public disturbance. Based on my review of the information at issue and the city's representations, I find that the personal information of the affected parties is highly sensitive information because it was compiled in the context of investigations into collisions and/or other workplace incidents that resulted in the eventual termination of the appellant's employment. The IPC has long held that personal information of individuals relating to their contact with police "as complainants,

⁴⁴ Order P-99.

⁴⁵ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

⁴⁶ Order MO-2980.

witnesses or suspects...is highly sensitive information".⁴⁷ Although the investigators here were the appellant's employer, I apply that reasoning here, noting the seriousness of the incidents described in the records, including information relating to the medical information I have already discussed. I cannot elaborate further without disclosing some contents of the records that have been withheld. Therefore, in the circumstances, I find that the factor at section 14(2)(f) is highly relevant, and weighs significantly against disclosure.

Are any of the situations listed in section 14(4) present?

[103] If any of the paragraphs in section 14(4) of the *Act* apply, disclosure of personal information is *not* an unjustified invasion of personal privacy under section 38(b), even if one of the section 14(3) presumptions exists. The situations listed in section 14(4) relate to (a) certain employment-related information (specifically, classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution), (b) personal services contracts, and (c) personal information of a deceased individual.

[104] Based on the evidence before me, none of these situations is relevant to this appeal.

Weighing the presumptions and factors for and against disclosure

[105] In determining whether disclosure of the personal information in the records would constitute an unjustified invasion of personal privacy, I have considered the factors and presumptions at sections 14(2) and 14(3) of the *Act*, in the circumstances of this appeal. I have found that the presumption at section 14(3)(a) and the factor at section 14(2)(f) weigh significantly against disclosure, and that there are no factors weighing in favour of disclosure, in the circumstances. Given my findings, it is not necessary for me to also consider the city's position on the application of the factor weighing against disclosure at section 14(2)(h).

[106] Weighing the factors and presumptions, and the interests of the parties, I find that disclosure of the records at issue would be an unjustified invasion of personal privacy of the affected parties whose personal information is in the records. Therefore, I find that the records are exempt from disclosure under the discretionary personal privacy exemption at section 38(b) of the *Act*, subject to my examination of the city's exercise of discretion.

Severance

[107] I find that the witness statements (which the city withheld from disclosure in full) contain the mixed personal information of the appellant and other identifiable individuals and cannot be reasonably severed to disclose information only relating to

⁴⁷ Order P-1618.

the appellant. Similarly, the list of witnesses and their contact information (record 21) is the mixed personal information of the appellant and the individuals listed, though the appellant's name does not appear on this record, because the record itself exists because of the appellant's behaviour that was being investigated, and is therefore part of "recorded information" relating to him.

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

[108] The section 38(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

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

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

[110] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴⁸ The IPC cannot, however, substitute its own discretion for that of the institution.⁴⁹

What considerations are relevant to the exercise of discretion?

[111] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:⁵⁰

- the purposes of the *Act*, including the principles that:
 - information should be available to the public,
 - individuals should have a right of access to their own personal information,
 - exemptions from the right of access should be limited and specific, and
 - the privacy of individuals should be protected,

⁴⁸ Order MO-1573.

⁴⁹ Section 43(2).

⁵⁰ Orders P-344 and MO-1573.

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

[112] While the city did not provide representations on exercising its discretion under section 38(b), based on the information disclosed to the appellant, I find that there is no evidence that the city's decision to withhold small portions of the collision/incident records and photographs was made in bad faith, for an improper purpose, or taking into account irrelevant considerations. What was withheld in those records appears to reflect a balancing, on the one hand, of the right of an individual to have access to his own personal information with, on the other hand, the need to protect highly sensitive information that was given in confidence to the city in the course of investigating collisions and/or incidents of serious concern involving the appellant. The city disclosed most of the information in these records. There is no evidence that what has been withheld from the appellant was withheld in bad faith towards him or for an improper or irrelevant purpose.

[113] Similarly, with respect to the records withheld in full (the witness list and statements), given the nature of the information in these records (both their substantive contents and the fact that the affected parties are largely witnesses or bystanders), and the circumstances in which the records were generated, I find that the city considered the nature of the information, the purpose of the personal privacy exemption, and the city's ability to maintain public confidence in its investigations into collisions and incidents such as those described in the records. It is also clear that, although the city took the position that the records do not contain the appellant's "personal information," the city took into account that the records relate to the appellant. These are all relevant considerations, and there is no evidence that any irrelevant considerations were taken into account. Therefore, I uphold the exercise of discretion by the city.

[114] Since I have upheld the city's decision to withhold records under the exclusion at section 52(3)3, and since I have found that the remaining information at issue is exempt under section 38(b), the appeal is dismissed.

ORDER:

I uphold the city's decision under section 52(3)3 and find that the remaining information is exempt under section 38(b) of the *Act*, and dismiss the appeal.

Original Signed by: _____

Marian Sami
Adjudicator

February 16, 2022 _____