

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4623

Appeal MA21-00110

Windsor-Essex County Health Unit

January 31, 2025

Summary: A media requester sought access to information regarding COVID-19 workplace outbreaks from a health unit. After notifying the workplaces, the health unit denied access to the information claiming disclosure would reveal third party information (section 10(1)), endanger the health or safety of an individual (section 13), and result in an unjustified invasion of personal privacy (section 14(1)).

In this order, the adjudicator finds that portions of the records containing the personal information of identifiable individuals qualify for exemption because disclosure would constitute an unjustified invasion of personal privacy. The adjudicator finds that no mandatory or discretionary exemption applies to the remaining information at issue. The health unit is ordered to disclose most of the withheld records but for portions found exempt under section 14(1).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 10(1), 13(1), 14(1), 14(3)(a), 14(3)(b), 14(3)(h), and 16.

Orders Considered: Orders MO-4166-I and MO-4190.

OVERVIEW:

[1] A member of the media made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Windsor-Essex County Health Unit (health unit) for public health inspection records related to workplace outbreaks for a specified period of time.

[2] The health unit issued a decision denying access to the records claiming the application of a number of exemptions under the *Act*.¹

[3] The appellant appealed the health unit's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was assigned to explore settlement with the parties. During mediation, the appellant narrowed the scope of the request to the following:

- The top 10 workplace outbreaks with employer name and number of COVID cases, and
- The entire outbreak file with attachments for certain named employers.

[4] In response, the health unit located eight outbreak files and reviewed its initial access decision. The health unit notified the employers who may be impacted by the appellant's narrowed request. Some of the employers consented to the release of the information related to their business to the appellant.

[5] The health unit subsequently issued a revised access decision granting the appellant partial access to the records. The health unit now claims that the withheld portions of the records qualify for exemption under section 10(1) (third party information), section 13 (danger to health or safety) and section 14(1) (personal privacy) of the *Act*. The appellant, in turn, took the position that the public interest override under section 16 would apply to any portions of the records found exempt.

[6] Mediation did not resolve the appeal, and the file was transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry. I commenced my inquiry by inviting the written representations of the health unit. The health unit submitted brief representations asserting that it continues to rely on section 13 and 14(1) to withhold portions of the records. However, the health unit says in its representations that it "... takes no position on the records withheld in the IPC Appeal MA21-00110 based on Section 10."

[7] I then invited the representations of the employers (the affected parties). Of the

¹ The health unit also stated in its decision that some of the withheld information "... may also constitute ... personal health information" under the *Personal Health Information Protection Act (PHIPA)*. I did not consider whether *PHIPA* applies in the circumstances of this appeal. *PHIPA* governs the manner in which personal health information may be collected, used and disclosed within the health sector. The appellant does not assert that it has a right to access the requested records under *PHIPA*. In addition, the appellant says that it is not pursuing information which would reveal medical, or other identifying information related to individuals. Accordingly, I do not need to consider questions regarding the possible application of *PHIPA* to this appeal such as whether the health unit is a health information custodian (section 3(1) of *PHIPA*) or whether the appellant is entitled to exercise an independent right of access to any personal health information of other individuals (sections 23 and 26).

seven employers notified, five provided written representations.² I did not receive a response from the two other employers I notified. The employers, who replied, objected to the release of their written representations to the appellant.

[8] The arguments relied upon by the employers to oppose disclosure were provided to the appellant in summary form.³ Any specific information contained in an affected party's written representations about their business operations was not provided to the appellant in summary, or any other format.⁴ The appellant was then invited to submit written representations in response and was also asked to address the relevancy of Order MO-4190.⁵ While the appellant did not object to sharing their representations with the other parties, I decided they did not need to be shared and did not seek a reply from the health unit or employers.

[9] In this order, I uphold the health unit's decision to withhold the portions of records containing the personal information of identifiable individuals under the personal privacy exemption under section 14(1). I find that the remaining information at issue does not qualify for exemption and order the health unit to disclose these portions to the appellant.

RECORDS:

[10] The records remaining at issue are the withheld portions of the top ten outbreak list and the withheld portions of eight outbreak files set out in the chart below:

Record number	Affected Parties	Number of pages	Institution's Disclosure decision	Description of Record
1	Employer 1	23	Partial disclosure (section 13 and 14)	Outbreak file comprising of six 3-page reports prepared by the health inspector and a 4-page epidemiological summary report with curve (numbers and graphic reporting positive cases or

² I did not seek the representations of employers 1 and 6 as they did not object to the information which relates to them being disclosed to the appellant. However, portions of the records which relate to these employers were included in my review of the records as the health unit maintain that the exemptions at section 13 and/or 14(1) applied. Employers 1 and 6 have received a copy of this order.

³ Given the affected parties' opposition to sharing their representations with the appellant, I decided to summarize their submissions in the Notice of Inquiry sent to the appellant inviting its written representations.

⁴ This information was not reproduced in summary form as I was satisfied that it would meet the IPC's confidentiality criteria set out *Practice Direction Number 7*.

⁵ In Order MO-4190, Senior Adjudicator Gillian Shaw ordered a municipality to disclose a list of the top five workplace outbreaks (non-health care sectors) of COVID-19.

				results in certain age groups withheld)
2	Employer 2	5	Withheld entirely under section 10 also relying on section 14 for certain portions	Outbreak file comprising of a 3-page report prepared by the health inspector and 2-page email exchange between the health unit and employer
3	Employer 3	62	Withheld entirely under section 10 also relying on sections 13 and 14 for certain portions	Outbreak file comprising of a 3-page report prepared by the health inspector, emails and attachments exchanged between the health unit and employer, internal emails exchanged between health unit staff, logs and photographs
4	Employer 4	81	Withheld entirely under section 10 also relying on sections 13 and 14 for certain portions	Outbreak file comprising of a 7-page report prepared by the health inspector, emails and attachments exchanged between the health unit and employer, internal emails exchanged between health unit staff, logs and photograph
5	Employer 5	2	Withheld entirely under section 10 also relying on sections 13 and 14 for certain portions	Outbreak file comprising of a report prepared by the health inspector

6	Employer 6	2 + 1 ⁶	Partial disclosure of outbreak file (section 13) Name withheld under section 14 in email located in Employer 4's outbreak file	Outbreak file comprising of an epidemiological summary report prepared by health unit without the curve (numbers reporting positive cases or results in certain age groups withheld) Email exchanged between health unit staff describing case counts in 3 worksites (Employers 4, 9 and a subsidiary of employer 6)
7	Employer 7	3	Withheld entirely under section 10 also relying on section 13 for certain portions	Outbreak file comprising of a report prepared by the health inspector and Epidemiological summary report prepared by health unit without the curve (numbers reporting positive cases or results in certain age groups withheld)
8	Employer 8	2	Withheld entirely under section 10 also relying on section 13 for certain portions	Outbreak file comprising of an epidemiological summary report prepared by health unit without the curve (numbers reporting positive cases or results in certain age groups withheld)
9	Employer 9	1	Name withheld under section 14 in email located in Employer 4's outbreak file	Email exchanged between health unit staff describing case counts in 3 worksites (Employers 4, 9 and a subsidiary of employer 6)

⁶ A subsidiary of Employer 6 is mentioned in an email exchanged between health unit staff located in the outbreak file of Employer 4. The health unit claims that the name of the employer qualifies for exemption under section 14(1).

10	Top Workplace COVID-19 Outbreaks	1	Partial disclosure (section 10)	Chart prepared by the health unit listed the top ten workplace outbreaks in order from most to least. The names of four companies withheld (employers 4, 7, 8 and 9). Also withheld are the dates the health unit closed its file and the case count related to these companies. The health unit disclosed the remaining portions of the chart to the appellant.
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PRELIMINARY ISSUE:

Should an affected party be allowed to raise the application of the discretionary solicitor-client privilege exemption at section 12?

[11] The Notice of Inquiry sent to the employers invited their representations on the mandatory exemptions at sections 10(1) (third party information) and 14(1) (personal privacy) claimed by the health unit. In response, an employer submitted representations asserting that the information at issue relating to its business was subject to the solicitor-client privilege exemption under section 12.⁷ The employer also says that its identification in the top ten list raises “serious solicitor-client privilege” concerns. The employer cited portions of the federal *Access to Information Act* in its representations which I will not consider in this order as my jurisdiction is limited to reviewing the health unit’s access decision made under the *Act*.

[12] In most cases, where an institution relies on exemptions to withhold records, the IPC considers only those exemptions and any additional mandatory exemptions that might apply. However, in exceptional circumstances, the IPC might consider additional discretionary exemptions raised by a third party but that were not claimed by the institution in its access decision. This is because of the distinction between mandatory and discretionary exemptions.⁸

[13] The IPC takes a strict view when it comes to a third party’s claim that additional discretionary exemptions, not claimed by the institution, apply. The question of whether

⁷ The employer also provided supplemental representations restating its position that the withheld information relating to it is subject to the solicitor-client privilege exemption under section 12.

⁸ See paragraphs 23 to 25 of Order PO-4416 for a discussion of the distinction between mandatory and discretionary exemptions.

a party other than the institution can claim a discretionary exemption has been considered in a number of orders, although this kind of situation is rare.⁹ Generally, where an affected party raises the possible application of a discretionary exemption, the adjudicator must consider the matter in the context of the purposes of the *Act* to decide whether the appeal might constitute the “most unusual of circumstances” in which such a claim should be allowed. As noted in previous IPC orders, one of the “most unusual of circumstances” may be when the interests of third parties are at stake.

[14] I find the affected party has not established that the circumstances in this appeal fall within the most unusual of cases. In my view, the employer’s representations regarding the discretionary solicitor-client privilege exemption essentially raise the same concerns it already addressed in its representations regarding the mandatory third party information exemption under section 10(1). The employer’s interests are already being considered within the context of this appeal and I see no further reason to permit the affected party to be able to claim a discretionary exemption in this appeal.

ISSUES:

- A. Does the mandatory personal privacy exemption at section 14(1) apply to the records?
- B. Does the discretionary exemption at section 13 regarding a threat to safety or health apply to the portions of the records found not exempt under section 14(1)?
- C. Does the mandatory exemption at section 10(1) for third party information apply to the remaining records?
- D. Does the public interest override apply to any portions of the records found exempt?

DISCUSSION:

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

[15] One of the purposes of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions.

[16] For section 14(1) to apply, the information at issue must contain the personal information of an individual. Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.” Information is “about” the individual when it refers to them in their personal capacity, which means that it reveals

⁹ Order PO-4416 refers to Orders PO-4328, PO-4084, MO-2635 and MO-2792 as examples.

something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be “about” the individual.¹⁰

[17] The appellant says that it does not object to the names, gender, ages, names of close contacts, or dates of birth of individuals contained in the records being redacted. The appellant says that disclosing the remaining information would not identify workers. In support of this position, the appellant says:

Data published by the [Workplace Safety and Insurance Board] shows that farms with the largest outbreak typically saw between 100 to 200 lost-time claims, or symptomatic cases.¹¹ Given such high case counts, it is not reasonable to expect that an individual could be identified by disclosing a limited range of personal information. Agricultural operations rely heavily on large numbers of temporary foreign workers.¹² Disclosing immigration status would not risk identifying an individual, given the large numbers of agricultural workers with temporary immigration status.

[18] The information found in each outbreak file located by the health unit varies. For instance, some employers’ outbreak file only contains reports prepared by the health inspector. Other files only contain one report or consists mostly of emails exchanged with the health inspector. In some cases, the emails before me refer to attachments that were not included with the records provided to the IPC.

[19] The employers take the position that the records contain the personal information of identifiable individuals. In support of their position, the employers say in their representations that the records contain:

- information about the worker’s gender, age, assessed exposure, and outcomes of their infection (whether at home or unknown) along with their names, addresses and job position,
- medical information about each worker, including diagnosis and symptoms such as when they were diagnosed with COVID-19, when and where they were quarantining, who they came into contact with, and what medical intervention they sought (i.e. doctor visits, COVID- 19 tests, etc.),

¹⁰ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹¹ Footnote 15 in appellant’s representations states:

Leah F. Vosko, Tanya Basok, Cynthia Spring, Guillermo Candiz, Glynis George, “COVID-19 Among Migrant Farmworkers in Canada: Employment Strain in a Transnational Context” International Labour Organization Working Paper (2022) online: <https://www.ilo.org/legacy/english/intserv/working-papers/wp079/index.html>

¹² Footnote 16 in the appellant’s representations state:

Agriculture and agri-food labour statistics, Statistics Canada (13 June 2022) online: <https://www150.statcan.gc.ca/n1/daily-quotidien/220613/dq220613d-eng.htm>

- details contained in quarantine plans for each worker, including the worker's racial, ethnic, and/or ancestral origin (i.e. where the employee was flying into the country from), and their medical information (i.e. vaccination status and COVID-19 test results), and
- the information that "goes well beyond job titles or job descriptions" – such as information regarding workers health status, their dates of birth and their immigration status.

[20] The employers also argue that even if individual names, dates of birth, and immigration status were redacted, disclosure of the remaining information would nonetheless reveal personal information. They argue that the portions of the records which contain statistical information can be "broken down to a level of specificity that would be able to identify those workers which had COVID-19."

[21] The health unit's representations did not specifically address this issue. However, the health unit identified the portions of the records it claims constitutes personal information that qualifies for exemption under section 14(1) in the copy of the records it provided the IPC.

Some portions of the records do not contain personal information

[22] I have reviewed the records along with the parties' representations and find that the following information in the records does not contain the personal information of identifiable individuals:

- Address of the employer's worksites, including information describing which offices administrative staff reside,
- Address of housing provided by the employer along with information of how many unnamed workers were living in the house before they were moved to isolation, the name of the isolation site along with how many workers tested positive,
- Information about an unnamed worker who tested positive along with how many other workers the individual lived with and how many workers in total were transferred to a named isolation facility,
- Health inspection numbers or other numbers ascribed to hotels contained in reports prepared by the institution¹³,

¹³ It is not clear whether this numerical information was redacted in the records by error as in some cases, the information is not redacted.

- Information identifying the name and/or address of houses or isolation sites, including hotels provided by the employer that is not connected with a specific worker,
- Information describing how many temporary foreign or local workers an employer employs,
- Identification of any grocery chain or caterer the employer paid to provide food to workers in isolation,
- Name or professional contact information of Ministry of Labour or Service Canada employees,
- General description of when and how workers arrive to the worksite,
- Initials of workers and supervisors on sanitation or cleaning logs along with date written in a language other than English, and
- The identification of three worksites and their corresponding case counts in an internal email along with information about when staff anticipates that the outbreak orders would be rescinded.¹⁴

[23] As disclosure of the above-noted information would not reveal recorded information about an identifiable individual, it can not be said to constitute personal information. Accordingly, the personal privacy exemption under section 14(1) cannot apply to this information.

[24] The health unit claims that some of the information listed above qualifies for exemption under section 13 (danger to safety or health). The employers resisting disclosure take the position that the entire outbreak files qualifies for exemption under section 10(1)(third party information). Later in this order, I will determine whether sections 10(1) and 13 applies.

The portions of the records that contain personal information qualify for exemption under section 14(1)

[25] I have reviewed the records and am satisfied that the following information contained in the records would, if disclosed, reveal the personal information of identifiable individuals¹⁵:

¹⁴ As identified in the records section of this order, employers 4, 9 and a subsidiary of employer 6 are identified in this email.

¹⁵ I find that the following portions of the records contain the "personal information" of an identifiable individual as defined in paragraphs (a), (b), (c), (d) and (h) of the definition of that term in section 2(1). Section 2(1), in part, reads:

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

- Portions of the epidemiological summary report and graphics reporting numbers so low that I am satisfied that a worker could be identified at a particular worksite at the time the report was issued as testing positive for COVID-19 and the outcome in records 1, 6, 7 and 8,
- Personal phone numbers of individuals, including a Ministry of Labour inspector located in record 3 and personal email address of a worker in record 4,
- Emails containing information identifying workers by name, date or birth along with information identifying their address and information describing their health status in record 4,
- Name of worker along with information of the specific housing or seasonal housing they have been assigned in record 5,
- Chart prepared by an employer containing information identifying workers by name, employee number, date of birth along with information regarding testing and results in record 4,
- Photographs of workers in record 4, and
- Information not identifying workers by name but identifying specific circumstances about their COVID-19 exposure in record 4.

[26] For the reasons stated below, I find that the disclosure of this information to the appellant would constitute an unjustified invasion of personal privacy under section 14(1).

[27] Section 14(1) of the *Act* creates a general rule that an institution cannot disclose personal information about another individual to a requester. This general rule is subject to a number of exceptions.

[28] If any of the five exceptions covered in sections 14(1)(a) to (f) exist, the institution must disclose the information. The parties have not claimed that any of the exceptions in sections 14(1)(a) to (e) apply in the circumstances of this appeal and I am satisfied that none applies.

[29] The section 14(1)(f) exception requires the institution to disclose another

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

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

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

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

(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; ("renseignements personnels")

individual's personal information to a requester only if this would not be an "unjustified invasion of personal privacy." Other parts of section 14 must be looked at to decide whether disclosure of the other individual's personal information would be an unjustified invasion of personal privacy.

[30] Sections 14(2)¹⁶, (3), and (4) help in deciding whether disclosure would be an unjustified invasion of personal privacy.

[31] Sections 14(3)(a) to (h) should generally be considered first.¹⁷ These sections outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy.

[32] If one of these presumptions applies, the personal information cannot be disclosed **unless**:

- there is a reason under section 14(4) that disclosure of the information would **not** be an "unjustified invasion of personal privacy," or
- there is a "compelling public interest" under section 16 that means the information should nonetheless be disclosed (the "public interest override").¹⁸

[33] As noted above, I received representations from 5 of the 7 employers invited to make representations to the IPC. In summary, the employers claimed that one or more of the presumptions at sections 14(3)(a), (b), (d), and (h) apply to the information I determined contain the personal information of identifiable individuals. These sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

¹⁶ 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 (see Order P-239). Some of the factors weigh in favour of disclosure, while others weigh against disclosure. If no factors favouring disclosure are present, the section 14(1) exemption — the general rule that personal information should not be disclosed — applies because the exception in section 14(1)(f) has not been proven (see Orders PO-2267 and PO-2733).

¹⁷ If any of the section 14(3) presumptions are found to apply, they cannot be rebutted by the factors in section 14(2) for the purposes of deciding whether the section 14(1) exemption has been established.

¹⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

(c) relates to employment or educational history;

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[34] I have considered the representations of the parties along with the records and find that the presumptions at sections 14(3)(a), (b), and (h) apply to the withheld personal information in the records. I am satisfied that the personal information at issue contains medical information (section 14(3)(a)), relates to an individual's racial or ethnic origin (section 14(3)(h)) and was compiled as part of an investigation into a possible violation of law under the *Health Protection and Promotion Act* (section 14(3)(b)).

[35] I have also considered whether, despite the application of these presumptions under sections 14(3)(a), (b), and (h), any of the exceptions of section 14(4) applies such that disclosure would not constitute an unjustified invasion of personal privacy. I find that none of the exceptions of section 14(4) apply in this case.

[36] Accordingly, I find that disclosure of the personal information in the records to the appellant would constitute an unjustified invasion of personal privacy under the mandatory exemption at section 14(1). The health unit withheld some of this information under section 13 (danger to safety or health). Given my finding, it is not necessary for me to determine whether section 13 also applies to this information. However, I will go on to consider the appellant's claim that the public interest override in section 16 applies later in this order.

[37] For now, I find that disclosure of the personal information in the records to the appellant would constitute an unjustified invasion of personal privacy under the mandatory exemption at section 14(1), combined with sections 14(3)(a), (b), and (h).

B. Does the discretionary exemption at section 13 regarding a threat to safety or health apply to the portions of the records found not exempt under section 14(1)?

[38] As noted above, in some cases the health unit claimed that section 13 applies to portions of the records I determined did not contain the personal information of an identifiable individual. These portions in the records comprise of:

- Address of housing provided by the employer along with information of how many unnamed workers were living in the house before they were moved to isolation, the name of the isolation site along with how many workers tested positive,
- Information about an unnamed worker who tested positive along with how many other workers the unnamed individual lived with and how many workers in total were transferred to a named isolation facility,
- General description of when and how workers arrive to the worksite, and

- Initials of workers and supervisors on sanitation or cleaning logs along with the date written in a language other than English.

[39] Section 13 is meant to protect individuals from serious threats to their health or safety resulting from disclosure of a record. Section 13 states:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[40] Parties resisting disclosure of a record cannot simply assert that the harms under section 13 are obvious based on the record. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 13 are self-evident and can be proven simply by repeating the description of harms in the *Act*.¹⁹

[41] The institution must show that the risk of harm is real and not just a possibility.²⁰ However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.²¹

[42] For section 13 to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to seriously threaten someone's safety or health. A person's subjective fear, or their sincere belief that they could be harmed, is important, but is not enough on its own establish this exemption.²²

[43] The term "individual" is not necessarily confined to a particular identified individual and may include any member of an identifiable group or organization.²³

[44] Although the health unit bears the onus of establishing this exemption, its representations did not specifically address this issue, nor did they identified a specific threat to safety or health that would result from the disclosure of the above-noted information. Accordingly, I did not seek the representations of the appellant on this issue.

[45] I have reviewed the records and find that disclosure of the information described above could not reasonably be expected to seriously threaten the safety or health of an individual. In fact, no individual is identified in these portions of the records.

[46] In my view, the records themselves or circumstances of this appeal does not

¹⁹ Orders MO-2363 and PO-2435.

²⁰ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

²¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

²² Order PO-2003.

²³ Order PO-1817-R.

establish the risk of harm required for section 13 to be proven. I find that disclosure of non-identifying information regarding the housing workers lived before they were moved to isolation, the address of the isolation site along with information of how many tested positive could not be expected to seriously threaten an individual or group of individuals safety or health. The context in which this information appears in the records is that a COVID-19 outbreak had occurred. Accordingly, it is expected that a vast number of workers were impacted. Given the number of workers impacted, I am satisfied that the disclosure of non-identifying information could not reasonably be expected to seriously threaten the safety or health of an individual or group of individuals.

[47] Accordingly, I find that the exemption under section 13 does not apply to this information and will go on to determine whether the third-party information exemption applies to this information which appears in the outbreak files of employers 3 and 4.

Issue C: Does the mandatory exemption at section 10(1) for third party information apply to the remaining records?

[48] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,²⁴ where specific harms can reasonably be expected to result from its disclosure.²⁵

[49] The relevant portions of section 10(1) state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency....

[50] For section 10(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

²⁴ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

²⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[51] The health unit's representations did not address section 10(1). I received representations from five employers. Four of the five employers oppose disclosure of their information contained in the outbreak files. The remaining employer opposes disclosure of case count information.²⁶

[52] I begin my discussion with part two of the three-part test in section 10(1).

Part 2 of the section 10(1) test: supplied in confidence

[53] The requirement that the information have been "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.²⁷

[54] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.²⁸

[55] The party arguing against disclosure must show that the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an **objective** basis.²⁹

[56] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,

²⁶ This employer (employer 9) is one of the employers listed in the top ten list. This employer's case count information is also located in an internal email located in the outbreak file of employer 4. This employer submitted written representations opposing case count information during the inquiry of this appeal.

²⁷ Order MO-1706.

²⁸ Orders PO-2020 and PO-2043.

²⁹ Order PO-2020.

- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.³⁰

[57] In Order MO-4190, the IPC considered whether information included in a list of the top five COVID-19 workplace outbreaks was *supplied in confidence* to a municipality. In that order, the adjudicator considered Order MO-4166-I along with the Commissioner's Message in the IPC's 2020 Annual Report in which the Commissioner stated:

It is essential to inform citizens about the public health risks of COVID-19 as the evidence evolves, and to establish confidence in the government decisions and actions affecting them and their loved ones. Our office received many media and public enquiries about the level of information public institutions could or should release to keep Ontarians safe during the pandemic. The direction from my office on this matter has been consistent — Ontario privacy laws do not prevent health authorities from sharing as much non-personal information as is necessary to protect public health, without identifying individuals. Public health units and government organizations should provide as much non-identifying information as possible to explain the risk profile of community spread and protect public health. Depending on the context, this information could include numbers of affected individuals, demographic data about infected or deceased individuals, and in some cases, even names and locations of organizations experiencing outbreaks.

[58] The adjudicator in Order MO-4190 found that key information in the top five list, such as the number of cases associated with the outbreak was *supplied* by the employer to the municipality. However, she was doubtful that the employer had a reasonable expectation of confidentiality when it provided this information to the municipality and stated:

... in my view, [the Commissioner's message is] reflective of the realities facing employers and public health during the COVID-19 public health crisis as it stood in 2020. Public health authorities were, and are, responsible for keeping the public informed about risks relating to COVID-19, including those present at workplaces. In this context, it is doubtful that the [employer] could reasonably have expected that the information at issue —

³⁰ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

which does not identify any individuals – would be kept in confidence by the municipality.³¹

Decision and analysis

[59] I agree with the adjudicators' rationale in Order MO-4190 and adopt it for the purposes of this appeal.

[60] I already found that information supplied by the employers to the health unit relating to identifiable individuals qualifies for exemption under the personal privacy exemption in section 14(1).

[61] The non-identifying information remaining at issue is found in the top ten list and the employer's outbreak files. Many of the employers take the position that their entire outbreak file qualifies for exemption under section 10(1).

[62] I have reviewed the records and find that certain portions cannot be said to have been supplied to the health unit, let alone, supplied in confidence. These portions comprise of informational materials (such as blank COVID screening tools and website pages from the Ministry of Health), as well as the inspector's observations and recommendations contained in their reports and emails, along with internal emails exchanged between health unit staff.³²

[63] I am satisfied that the employers supplied the remaining information at issue contained in the top ten list and outbreak files to the health unit. This includes the case count information contained in internal emails (but not, for example the staff's comments of when an outbreak order might be rescinded). However, for this information to meet part 2 of the test, the party arguing against disclosure must further show that when it supplied this information to the health unit it had a reasonable expectation that the information was to be treated confidentially.

[64] There is no dispute between the employers that they were required by law to supply information regarding outbreaks at their worksite to the health unit. In fact, more than one employer said that it was required to provide this type of information to the health unit under the *Health Protection and Promotion Act (HPPA)*.

[65] The employers do not suggest that when they supplied non-identifying information

³¹ The adjudicator found it was not necessary to make a finding under part 2 of the test in section 10(1) given her finding that part 3 of test was not met.

³² The internal emails exchanged between health unit staff discuss matters such as possible new cases being reported, existing case counts and when the outbreak orders for some employers can be rescinded. For instance, record 4 contains an email in which the case counts of three worksites are discussed (employer 4, 9 and a subsidiary of employer 6). Employers 4 and 9 provided written representations opposing the release of case count information. Employer 6 did not object to the release of case count information during the request stage.

to the health unit, they did so under an explicit condition of confidentiality.³³ Rather, they appear to rely on an implicit expectation of confidentiality to support their position, although most of their representations do not address this issue. Instead, their representations focus on arguments that personal and medical information relating to workers should not be disclosed.

[66] The appellant questions the employers' position that they had a reasonable expectation of confidentiality and says that "[i]n the context of a public health emergency, it was reasonable to expect that the information would be disclosed in an effort to contain COVID transmission." The appellant also says that non-identifying information should be disclosed and that this information can be reasonably severed from the records.

The top ten list

[67] The top ten list consists of three columns: the name of the workplace, the date the health unit closed its file and the case counts. The workplaces are named from 1 to 10 with the workplace with the most case counts appearing first. The employers were required by law to provide the information relating to it to the health unit, who in turn, had responsibilities to keep the public informed about outbreaks, even after they were contained.

[68] I find that the information appearing in the top ten list was not supplied to the health unit with a reasonable expectation that it would be kept confidential. In arriving at this decision, I took into consideration the adjudicators' rationale in Orders MO-4166-I and MO-4190 which echo the Commissioner's comments in the 2020 Annual Report.

The outbreak files

[69] In my view, the health unit's responsibility to the public goes beyond keeping the public informed about case counts and workplace outbreaks. The health unit is also accountable to the public about what type of information it requested and received during its outbreak investigations. Accordingly, I reject the suggestion from some of the employers that there was a reasonable expectation of confidentiality regarding all of the information they exchanged with the health unit during its investigation.

[70] Approaching inspection or investigation records created by institutions in this manner would be contrary to the purpose of the *Act*, which is to make government held information available to the public.³⁴ Furthermore, the position advanced by some of the employers that the entire outbreak file relating to their business should be withheld is

³³ The employers claim that privacy provisions in various legislations, such as the *Personal Health Information and Protection Act*, function to create an explicit expectation of confidentiality to protect sensitive personal, health or medical information of identifiable individuals. However, this argument is not relevant to my determination of whether the third party information exemption applies as I already found that the personal information relating to identifiable individuals exempt under section 14(1).

³⁴ See section 1(a)(i) of the *Act*.

contrary to the principle that exemptions from the right of access should be limited and specific.³⁵ I have reviewed the records and am satisfied that any information found exempt can be reasonably severed from non-exempt information.

[71] As noted above, the purpose of section 10(1) is to protect certain information that businesses or other organizations supply to government institutions in confidence,³⁶ where specific harms can reasonably be expected to result from its disclosure.³⁷

Reports

[72] Many of the outbreak files contain reports created by the health inspector. These reports contain some information supplied by the employer but as noted above, also contain the inspector's observations, recommendations and explanation of the next steps the employer should take to contain the outbreak. Also contained in the reports are the inspector's notes of phone calls and discussions they had with the employer in question and the information exchanged during those phone calls. I have reviewed the inspector's reports in each of the outbreak files and am not satisfied that the information contained in these reports was supplied in confidence. The information the employers supplied the health unit in the reports was provided in the context of an investigation the employers were required by law to cooperate.

Emails, photographs, policy, and safety plan

[73] I note that the outbreak files for employers 3 and 4 contain substantially more information than the outbreak files of the other employers.³⁸ These employers attached photographs of signage posted and/or barriers erected at their worksites with their email responses to the health unit. In addition, employer 4 supplied an policy document and a COVID-19 safety plan with its own bullet points.³⁹

[74] I have reviewed the non-identifying information found in the email exchanges, photographs, policy and safety plan. I find that it is similar to the type of information contained in the inspector's reports, such as the inspector's observations, recommendations and explanations to the employers concerning the outbreak and the employer's responses relating to the outbreak at its worksite. I am not satisfied that when the employers exchanged this information with the health unit that they did so with a reasonable expectation of confidentiality. The information the employers supplied the

³⁵ See section 1(a)(ii) of the *Act*.

³⁶ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

³⁷ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³⁸ It appears that a map was attached to an email employer 3 sent to the health unit. However, the copy of the records I reviewed did not contain a map. Accordingly, I make no finding whether a map of an employer's worksite would qualify for exemption under section 10(1).

³⁹ The safety plan is a template document created by the Ministry of Health which provides a list of questions for readers to consider. In this case, the employer considered the safety plan and inputted its answers in bullet form under various headings.

health unit inform it about their efforts to respond to COVID-19 in the workplace. Again, the context in which this information was exchanged was in response to an outbreak where the public health unit had a responsibility to educate, investigate and contain.

Epidemiological summaries created by the health unit

[75] The epidemiological summaries are contained in five of the eight outbreak files responsive to the appellant's revised request. I have reviewed this information and for the same reasons I found the case count information did not meet the *in confidence* part of the test, I find that non-identifying information the employers provided to the health unit about the numbers of positive COVID-19 cases and their outcomes was not supplied with a reasonable expectation that it would be kept confidential. The employers were required by law to provide core information related to case counts and outcomes to the health unit.

Summary

[76] I find that the top ten list and non-identifying information contained in the reports, email exchanges, policy, photographs,⁴⁰ safety plan and epidemiological summaries were not supplied in confidence thus failing part 2 of the three-part test in section 10(1). As all three-parts of the test in section 10(1) must be met for exemption to apply, I find that these records are not exempt under the third-party information exemption under section 10(1). As no other mandatory exemption could apply and no other discretionary exemption was claimed by the health unit, I order the health unit to disclose these portions of the records to the appellant.

Issue D: Does the public interest override apply to any portions of the records found exempt?

[77] Section 16 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

⁴⁰ Even if I found that the photographs of signage and barriers erected meet parts 1 and 2 of the three part test in section 10(1), I would conclude that the harms test in part 3 was not met. I reviewed these records along with the representations of the party opposing disclosure and note that the photographs are close range and do not capture images which would enable an individual to discern the lay out or extent of the employer's operations. Though partial images of machinery can be seen in some of the photographs, I find that disclosing a partial image of a machine in use years ago would not result in the harms contemplated under section 10(1)(a) or (c). In addition, disclosure of the images of the signage and/or barriers erected could not reasonably be expected to result in the harms contemplated in sections 10(1)(a) and (c) given the context in which they appear and the fact that most worksites operating during the pandemic also erected signage and barriers.

[emphasis added]

[78] For section 16 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[79] The *Act* does not state who bears the onus to show that section 16 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.⁴¹

[80] The only information for which the public interest override could apply to in the context of this appeal is the personal information I found exempt under section 14(1).

[81] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government.⁴² In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.⁴³

[82] A public interest is not automatically established because a requester is a member of the media.⁴⁴

[83] The IPC has defined the word “compelling” as “rousing strong interest or attention”.⁴⁵ The IPC must also consider any public interest in *not* disclosing the record.⁴⁶ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling.”⁴⁷

[84] The appellant says in its representations that:

The information at dispute is a matter of public interest. The information will enlighten the public citizenry about actions of a public health unit in a

⁴¹ Order P-244.

⁴² Orders P-984 and PO-2607.

⁴³ Orders P-984 and PO-2556.

⁴⁴ Orders M-773 and M-1074.

⁴⁵ Order P-984.

⁴⁶ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

⁴⁷ Orders PO-2072-F, PO-2098-R and PO-3197.

region of high COVID-19 transmissions during a public health emergency, in sectors that employ a large number of vulnerable migrant workers.

[85] The appellant also says it is not pursuing access to the names, gender, ages, or the date of birth of infected workers or their close contacts.

[86] In my view, there is no compelling public interest in disclosing information that may directly or indirectly identify specific individuals. Disclosing this information to the appellant, would not inform the citizenry of the actions the health unit took in the course of its investigation of various COVID-19 outbreaks.

[87] I acknowledge that there may be a compelling public interest in portions of the epidemiological summaries I found exempt under section 14(1).⁴⁸ However, I am not satisfied that the compelling public interest in this information is enough to trigger disclosure under section 16. The interest must also *clearly* outweigh the purpose of the exemption in the specific circumstances. An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption. The purpose of the personal privacy exemption under section 14(1) is to protect personal information about individuals held by government institutions.

[88] For the reasons set out above, I find that this is not an appropriate case to apply the public interest override under section 16 to the portions of the records I found exempt under section 14(1).

ORDER:

1. I uphold the health unit's decision to withhold some portions of the records found exempt under section 14(1). For the sake of clarity, a highlighted copy of records, showing the specific information to be redacted in pink, will be provided to the health unit.
2. The health unit is to disclose the remaining withheld information to the appellant by **March 10, 2025**, but not before **March 3, 2025**.
3. In order to ensure compliance with paragraph 2, I reserve the right to require the health unit to send me a copy of the records disclosed to the appellant.

Original Signed by: _____
Jennifer James

January 31, 2025 _____

⁴⁸ I found that portions of the epidemiological summary reports and graphics reported numbers so low that a worker could be identified as testing positive for COVID-19. I found that this information constituted the personal information of identifiable individuals, and that disclosure would constitute an unjustified invasion of personal privacy under section 14(1).

Adjudicator