Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-173

Appeal M-9200156

City of Ottawa

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ORDER

BACKGROUND:

The City of Ottawa (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for:

> The dollar value of severance benefits offered/provided to three commissioner-level city employees who took early retirement on Feb. 06 1992.

The requester subsequently clarified his request and indicated that he was seeking access to "records that document the financial and/or benefit package offered or provided to three commissioner-level city employees" as well as "any non-monetary severance provisions contained in the package that may have value." The three employees (the affected persons), to whom the benefits packages relate, were the City Clerk, the Commissioner of Finance and the City Solicitor.

The City provided the requester with copies of the minutes of the Council meeting which considered the access request, as well as the salary ranges and employment benefits package for the City's Executive Group. The City, however, denied access to the three early retirement agreements entered into between the City with each former employee based on the exemptions contained in sections 10, 12, 14(1)(f), 14(2) 14(3)(d) and (f) of the Act. These three agreements are, thus, the records which are subject to this appeal.

In his letter of appeal, the appellant stated that, in his opinion, section 16 of the Act (the so-called public interest override) should apply to the facts of the case.

During the mediation stage of the appeal, the City withdrew its reliance on section 10 of the Act. Further mediation was not successful and notice that an inquiry was being conducted to review the City's decision was sent to the City, the appellant, and to the three former employees. Representations were received from all parties.

On June 30, 1993, while these representations were being considered, the Ontario Divisional Court issued its decision in the case of John Doe et al. v. Information and Privacy Commissioner et al. (Unreported). This decision interpreted several statutory provisions of the provincial Freedom of Information and Protection of Privacy Act in a way which differed from the interpretation developed in orders of the Commissioner. Since similar statutory provisions are at issue in the present appeal, it was determined that copies of the Divisional Court decision should be provided to the parties to the appeal along with a statement that the Commissioner's Office planned to follow the interpretations established by the Court.

Since a new approach to the operation of the Act was being adopted, the appellant, the City and the former employees were provided with the opportunity to state whether the new approach would cause them to change or to supplement the representations which they had previously made. Additional representations were received from all parties.

ISSUES:

The issues arising in this appeal are:

A. Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.

B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies to the personal information contained in the retirement agreements.

C. Whether the discretionary exemption provided by section 12 of the Act applies to the information contained in the retirement agreements.

D. If the answer to Issue B is yes, whether a compelling public interest in the disclosure of the records clearly outweighs the purpose of the exemption provided by section 14 of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.

The term "personal information" is defined in section 2(1) of the Act, in part, as recorded information about an identifiable individual ...". In my view, all of the information contained in the three agreements, and in the appended schedules, with the exception of the last four clauses in each agreement, fits within the definition of "personal information". The clauses which do not contain information about identifiable individuals, and which are better described as boilerplate, concern severability; the governing law of the agreement; the release of the employer from contractual liability; the status of the document as the entire agreement between the parties; as well as the standard closing and signature lines.

After representations were received, the Commissioner's Office was notified that one of the affected persons had died. Under section 2(2) of the Act, personal information does not include information about an individual who has been dead for more than 30 years. In the circumstances of this appeal, section 2(2) does not apply to the deceased's personal information as his death occurred within the past 30 years.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies to the personal information contained in the retirement agreements.

Once it has been determined that a record contains personal information, section 14 of the Act provides a general rule of non-disclosure of the personal information to any person other than the individual to whom the personal information relates. Section 14(1) provides some exceptions to this general rule of non-disclosure, one of which is section 14(1)(f) of the Act. This provision reads as follows:

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

In order for section 14(1)(f) to apply, I must find that the release of the personal information at issue would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. In the Divisional Court case which I referred to earlier, the Court addressed the interrelationship between sections 21(2), (3) and (4) of the provincial Freedom of Information and Protection of Privacy Act. These provisions are similar to sections 14(2), (3) and (4) of the Act. At page 28 of the decision, the majority of the Court states:

> The words of the statute are clear. There is nothing to confuse the presumption in section 21(3) with the balancing process in section 21(2). There is no other provision in the Act and nothing in the words of the section to collapse into one process, the two distinct and alternative processes set out in section 21. Once the presumption has been established pursuant to section 21(3), it may only be rebutted by the criteria set out in section 21(4) or by the "compelling public interest" override in s. 23. There is no ambiguity in the Act and no need to resort to complex rules of statutory interpretation".

In Order M-170, Commissioner Tom Wright, in adopting the interpretation outlined by the Divisional Court, described the effect of the decision as follows:

> Putting the matter somewhat differently, and with reference to the provisions contained in the municipal Act, where personal information falls within one of the presumptions found in section 14(3) of the Act (and where section 14(4) of the Act does not otherwise apply), a combination of the circumstances set out in section 14(2) of the Act which weigh in favour of disclosure, cannot collectively operate to rebut the presumption.
>
> The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under

> section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

I adopt this approach for the purposes of this order.

In making its decision to withhold the contents of the retirement agreements in their entirety, the City did not consider whether sections 14(4)(a) and (b) of the Act might apply to the records. Since the Appeals Officer assigned to the case considered that these provisions could be relevant to the disposition of the appeal, these sections were raised in the Notice of Inquiry. Owing to the nature of the information contained in the records, I will begin my analysis by discussing the application of these provisions.

(a) Do sections 14(4)(a) and (b) of the Act apply to the personal information contained in the retirement agreements?

In its representations, the City states that section 14(4)(b) does not apply to the records at issue but that it is prepared to provide the appellant with a copy of the relevant salary ranges for the three positions. The appellant, on the other hand, submits that:

> Although severance compensation and/or benefits may not be specifically identified as information that can be released by the head, section 14(4)(a) and (b) do indicate an intent by the Legislature to disclose this type of information. These provisions of the Act specifically exclude from unjustified invasion the "classification, salary range and benefits" accorded to an employee "who is or was an officer or employee of an institution." ...

Sections 14(4)(a) and (b) read as follows:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; or
>
> (b) discloses financial or other details of a contract for personal services between an individual and an institution.

In Order M-23, Commissioner Tom Wright made the following comments about the application of section 14(4):

> In my view, section 14(4) is a clear indication by the legislature that the disclosure of the identified types of information is in the public interest. It is my opinion that the words "[d]espite subsection (3)" do not limit the application of section 14(4) to those types of information identified in section 14(3); rather, they identify types of information that the legislature clearly intended to fall within the exception contained in section 14(1)(f). Generally, speaking, if a record contains information of the type described in section 14(4), the exception to the section 14 exemption contained in section 14(1)(f) will apply.

In the same order, Commissioner Wright also provided a definition for the term benefits which is found in section 14(4)(a) of the Act:

> Since the "benefits" that are available to officers or employees of an institution are paid from the "public purse", either directly or indirectly, I believe that it is consistent with the intent of section 14(4)(a) and the purposes of the Act that "benefits" be given a fairly expansive interpretation. In my opinion, the word "benefits", as it is used in section 14(4)(a), means entitlements that an officer or employee receives **as a result of being employed** by the institution. Generally speaking, these entitlements will be in addition to a base salary. They include insurance-related benefits such as life, health, hospital, dental and disability coverage. They will also include sick leave, vacation, leaves of absence, termination allowance, death and pension benefits. As well, a right to reimbursement from the institution for moving expenses will come within the meaning of "benefits". [emphasis added]

I adopt Commissioner Wright's comments for the purposes of this order.

I have carefully examined the contents of the three retirement agreements, each of which has been customized to some extent. With some exceptions, each agreement contains clauses relating to the following topics: annual leave, sick leave credits, salary continuation, statutory holidays, accumulated annual leave, salary and economic adjustments, leave without pay, insurance, benefit continuation, pension contributions, payments to be made in the event of death, payment of tax, payment for financial consulting services, professional fees, legal fees, provision of reference letters, co-operation with income tax authorities, relief from employment duties, relocation counselling, the triggering of leave payments in a lump sum, alternative employment and confidentiality.

In my view, these clauses confer entitlements to the three former employees which are not dissimilar from those which the individuals would have received had they continued to be employed by the City. However, the entitlements reflected in the retirement agreements were not received by the former employees as a result of being employed by the City. Rather, they were negotiated by the three individuals in exchange for the acceptance by them of early retirement packages from the City. On the basis that these entitlements did not derive from the original contracts of employment entered into between the parties, nor from periodic changes made to these contracts, I must conclude that these entitlements do not constitute benefits as

defined in Order M-23. Consequently, I find that the personal information contained in these agreements does not fall within the ambit of section 14(4)(a) of the Act.

I also find that section 14(4)(b) of the Act does not apply to the personal information contained in the three agreements. That is the case because the three former staff members were hired as employees and not as independent contractors. Thus, they were retained pursuant to contracts of employment rather than through contracts for personal services.

To summarize, therefore, neither section 14(4)(a) nor (b) applies to the personal information contained in the three agreements.

(b) Do the presumptions contained in sections 14(3)(d) and (f) of the Act apply to the personal information contained in the retirement agreements?

It will now be necessary for me to review the provisions contained in section 14(3) of the Act to determine whether the release of the personal information would constitute a presumed unjustified invasion of the personal privacy of the three former employees. A section 14(3) presumption can only be rebutted by one of the factors set out in section 14(4) of the Act (which is not the case here) or by the application of section 16 of the Act. I will address the applicability of section 16 to the retirement agreements later in this order.

In its representation, the City submits that sections 14(3)(d) and (f) of the Act apply to the personal information in question. These provisions read as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

I have carefully reviewed the contents of the three retirement agreements and, in my view, the great majority of the personal information recited in the various clauses falls outside the wording of the two presumptions. While it is true that a number of the clauses confer monetary entitlements on the three former employees, with one exception, these provisions cannot be said to describe an individual's "finances, income, assets, net worth, financial history or financial activities" for the purposes of section 14(3)(f) of the Act. Rather, these entitlements represent one time payments to be conferred immediately or over a defined period of time that arise directly from the acceptance by the former employees of retirement packages.

Similarly, while the three agreements arose out of pre-existing employment relationships, the personal information contained in the various clauses, with some exceptions, does not pertain to the employment history of the three individuals for the purposes of section 14(3)(d) of the Act. Rather, this information more accurately relates to the arrangements which have been put in place to end the employment connection.

In my view, there are only four cases where personal information recited in the agreements falls under sections 14(3)(d) or (f) of the Act. First, all of the agreements contain information which indicates the date on which each former employee was hired. This information qualifies for exemption under the presumption contained in section 14(3)(d) as it relates to the employment history of each individual. Second, the agreements recite the dates on which each former employee is eligible for early retirement. I also find that this information falls within the ambit of section 14(3)(d) of the Act. Similarly, the personal information contained in the appendix to each agreement comes within this presumption. That document coveys information relating to the age of the individual, the number of years of service, the last day worked, the date of earliest retirement, the actual number of sick leave and annual leave days used and possible dates for the commencement of pensions under different formulas.

In addition, one agreement contains the amount which a former employee contributed to a pension plan. I find that this information falls within the presumption found in section 14(3)(f) of the Act in that it describes the individual's financial activities.

I have highlighted the personal information which is subject to the section 14(3)(d) and (f) presumptions in yellow in the copy of the records which I will provide to the City with this order.

(c) Which of the circumstances contemplated by section 14(2) of the Act apply to the personal information contained in the retirement agreements?

The remainder of the personal information contained in the three retirement agreements does not meet the requirements for a presumed unjustified invasion of personal privacy. Based on the approach adopted in Order M-170, I must now consider the application of section 14(2) of the Act to this personal information. This provision reads, in part, as follows:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> ...
>
> (e) the individual to whom the information relates will be

exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

...

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

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

In interpreting section 14(2), all the relevant circumstances of the case must be considered not only the factors enumerated in the section.

Both the City and the former employees submit that the retirement agreements were entered into on a confidential basis. That expectation, they argue, is evidenced by the following contractual term which appears (with some modifications) in each agreement:

> The terms of this Agreement shall remain strictly confidential and shall not be disclosed by [the former employee] to any person other than his professional and financial advisors, his immediate family and the Executor of his estate. The [former employee] agrees not to consent to any request under the **Freedom of Information and Protection of Privacy Act** for his permission for release of this document ...

On this basis, the parties have implicitly raised the application of section 14(2)(h) of the Act to the personal information contained in the retirement agreement (i.e. that the personal information has been supplied by the individuals to whom the information relates in confidence).

A number of orders decided under section 17 of the provincial Freedom of Information and Protection of Privacy Act have addressed the question of whether information contained in a contract entered into between an institution and an affected person was **supplied** by the affected person. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the affected person (see Orders 87, 179, 203, 204 and P-251).

Based on my review of the retirement agreements, there is no evidence that the personal information contained in the final contractual provisions was originally supplied by the former employees. Rather, the strong inference is that the terms were arrived at through a process of negotiation undertaken between the parties and that the agreements reflect compromise positions. On this basis, it cannot be said that this information was **supplied** by the former employees to the City for the purpose of section 14(2)(h) of the

Act.

I believe, however, that despite the fact that section 14(2)(h) does not apply to the facts of the case (and that it is not possible to contract out of the provisions of the Act), the three former employees did have an expectation that the terms of the agreements would not be released to the public. In my opinion, that expectation is a relevant circumstance which would weigh in favour of protecting the privacy interests of the former employees.

In his representations, one former employee submits that the release of his retirement agreement could impinge on his ability to obtain future employment and adversely affect future salary negotiations. Implicitly, the employee has raised the applicability of section 14(2)(e) of the Act (the individual to whom the information relates will be exposed unfairly to pecuniary or other harm). The former employee has, however, not presented the necessary evidence to establish a sufficient causal connection between the release of the agreement and the harms which he has envisaged. In the absence of such evidence, and based on my own evaluation of the agreements, I find that section 14(2)(e) is not a relevant consideration in determining whether or not to release the personal information.

In its representations, the City states that the personal information contained in the retirement agreements is also "highly sensitive" pursuant to section 14(2)(f) of the Act. No evidence has been provided, however, to support this assertion. I would also note that none of the former employees have raised this consideration in their submissions.

In order for personal information to be considered "highly sensitive", the parties relying on this proposition must establish that disclosure of the information would cause excessive personal distress to the affected persons (Order P-434). In the absence of any specific representations to this effect and based on my independent review of the records, I find that section 14(2)(f) is not a circumstance which weighs in favour of protecting the privacy interests of the former employees.

The City also submits that section 14(2)(i) of the Act applies to the personal information contained in the retirement agreements (the disclosure of the information may unfairly damage the reputation of any person referred to in the record). To support this assertion, the City simply states that:

> To release the records may unfairly damage the reputation of these individuals ... and cause them extreme embarrassment.

None of the former employees have joined the City in claiming this exemption. Nor has the City provided any indication as to how the release of the information would unfairly damage the reputations of the former employees. On this basis, I find that section 14(2)(i) is not a relevant consideration in determining whether the disclosure of the information found in the agreements would constitute an unjustified invasion of personal privacy.

To summarize, therefore, of the four considerations raised by the City and/or the former employees, only one (the expectation of confidentiality) weighs in favour of **not** releasing the personal information at issue in this appeal.

I now wish to explore the considerations outlined in section 14(2) and any other relevant circumstances which weigh in favour of disclosing the personal information contained in the retirement agreements.

In his letter of appeal, the appellant submits that:

> ... [The] sudden departure [of three City employees] was extraordinary and formed an integral part of an overall city reorganization plan (see attached city press release). ... The retirement attracted considerable public attention at the time (see attached newspaper clipping ...).
> ...
>
> ... [T]he application of section 14 is a frivolous attempt to shield the city from potential political embarrassment, which does not serve the public interest.

Based on the nature of these submissions, I find that the appellant has implicitly raised the application of section 14(2)(a) of the Act (the disclosure of information is desirable for the purpose of subjecting the activities of the institution to public scrutiny).

In its representations, the City indicates that, in determining whether to release the personal information, it considered the application of section 14(2)(a) but decided against releasing the documentation. The City puts its position as follows:

> It was also determined that the disclosure for the purposes of subjecting the activities of the institution to public scrutiny, did not outweigh the harm which could potentially result to the three individuals concerned, as a result of the disclosure of the highly sensitive personal information.

In order to establish the relevance of section 14(2)(a), the appellant must provide evidence demonstrating that the activities of the City have been publicly called into question, necessitating disclosure of the personal information of the affected persons in order to subject the activities of the City to public scrutiny (Order M-84).

Based on the evidence which has been provided to me, the departure of the three City employees generated considerable public interest at the time that the event occurred. The announcement was made through a formal press release which was followed by an article in the local newspaper. On this basis, it is fair to say that the City's decision to negotiate these retirement packages was a matter of serious public debate. In

addition, I find that the contents of retirement agreements entered into between institutions and high ranking government employees represent the sort of records for which a high degree of public scrutiny is warranted. On this basis, I find that section 14(2)(a) of the Act is a relevant consideration which weighs in favour of releasing the personal information found in the retirement agreements.

Previous orders issued by the Commissioner's Office have also identified another circumstance whichshould be considered in balancing access and privacy interests under section 14(2) of the Act. This consideration is that "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution". It would be useful to summarize how this concept has evolved in past orders and then to determine whether it applies to the personal information contained in the retirement agreements.

In Order 99, which dealt with the hiring practices of the Ontario Human Rights Commission, former Commissioner Sidney B. Linden raised this consideration for the first time. He there stated that:

> In addition to the criterion identified in subsection 21(2)(a) [the provincial equivalent to section 14(2)(a) of the Act], in very unusual circumstances, disclosure could be desirable for the purpose of restoring public confidence in the integrity of so vital a government institution as the Ontario Human Rights Commission. Indeed, this could be considered as an additional unlisted circumstance to be taken into consideration under subsection 21(2).

This consideration was also referred to more recently in Order P-237.

In Order M-18, which involved a request for the release of information respecting the salaries paid to senior school board officials, Commissioner Wright made the general observation that the current economic environment places a particularly high value on the prudent use of public funds.

In Order M-129, Commissioner Wright again dealt with a situation where a requester sought information respecting the employment of senior government officials - in this case the decision of Regional Councillors to participate in an unpaid leave program. In the course of issuing his decision, Commissioner Wright made the following comments:

> In previous orders involving the provincial Freedom of Information and Protection of Privacy Act the following unlisted factor has been identified under the equivalent to section 14(2) of the Act - the disclosure of personal information could be desirable for the purpose of ensuring public confidence in the integrity of an institution (see Orders 99 and P-237). In the circumstances of this appeal, it is my view that this additional unlisted factor is a relevant consideration. In my view, persons holding an elected position such as Regional Councillor are the "public face" of an institution such as the Region. Therefore, the actions of a Regional Counsellor will reflect directly on the Region.

In determining whether the public confidence consideration is relevant in the context of the present appeal, I have considered the following factors. First, the retirement agreements involve large amounts of public funds. Second, the agreements involve senior municipal employees with a high profile within the community. Third, the current recessionary climate places an unparalleled obligation on officials at all levels of government to ensure that tax dollars are spent wisely. Based on an evaluation of these factors, I have concluded that the public confidence consideration is applicable in this appeal.

After balancing the competing interests of public scrutiny, public confidence in the integrity of an institution and the expectation of confidentiality held by the former employees, I find that the considerations which favour disclosure outweigh those which would protect the privacy interests of the employees. On this basis, I find that, subject to the following caveat, the release of the personal information contained in the retirement agreements would not constitute an unjustified invasion of the personal privacy of the three individuals.

I believe equally, however, that an adequate level of public scrutiny respecting the terms of the agreements can be achieved without disclosing the names or other identifying information of the former employees. While I appreciate that knowledgable individuals may still be able to link the named individuals to these agreements, the disclosure of this additional information would, in my view, not be warranted in the circumstances. On this basis, I find that the release of this identifiable information would constitute an unjustified invasion of the privacy interests of the three former employees.

I have highlighted the personal information in this category in blue in the copy of the records which I will provide to the City with this order.

ISSUE C: Whether the discretionary exemption provided by section 12 of the Act applies to the information contained in the retirement agreements.

The City has also claimed that the discretionary exemption contained in section 12 of the Act applies to the records at issue.

This provision reads as follows:

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

This section provides the City with the discretion to refuse to disclose:

1. A record that is subject to the common law solicitor-client privilege (Branch 1); or

2. A record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

[Orders M-2, M-52, M-61]

It has been established in a number of previous orders that, for Branch 1 of the section 12 exemption to apply, the following criteria must be satisfied:

1. (a) there must be a written or oral communication; **and**

(b) the communication must be of a confidential nature; **and**

(c) the communication must be between a client (or his agent) and a legal advisor; **and**

(d) the communication must be directly related to seeking, formulating or giving legal advice.

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders M-2, M-11, M-19 and M-61]

In its representations, the City states that:

> ... a solicitor client relationship was formed when the City retained a private law firm through one of its officers for the purpose of obtaining legal advice. The law firm therein supplied a written communication explicitly stated to be confidential, which was directly related to seeking, formulating and giving legal advice. For purposes of this branch of the test it was irrelevant whether or not litigation was involved. On the basis of the analysis and the factors considered herein, the Head determined that the City had satisfied the requirements of the first branch of the ... exemption.

As I read them, the City's representations appear to suggest that the solicitor client privilege would apply, not only to the original written legal advice which it obtained from its law firm and to any prior offers which it may have been presented to the employees, but also to the final agreements which were signed with the parties.

I have considered the City's submissions in light of the wording of section 12 and the nature of the records at issue. I have concluded that the first branch of this exemption does not apply to the retirement agreements for three reasons. First, the contracts, themselves, do not constitute communications between the City and its solicitors. These documents are, instead, binding agreements entered into between the City and three separate individuals. Second, the three former employees, who are admittedly parties to the agreement, did not retain the City's solicitors as their legal advisors. Third, the agreements cannot be said to be directly related to seeking, formulating or giving legal advice for existing or contemplated litigation.

With respect to the other aspect of the Branch 1 test, the City has not provided me with any specific representations on this subject, and I will not consider this matter any further.

The City claims that the second branch of the section 12 exemption also applies to the retirement agreements. It goes on to state that the dominant purpose for the preparation of the agreements was the provision of legal advice in contemplation of litigation and that there was a significant and real probability that the City would be sued for wrongful dismissal as a result of the proposed course of action.

In order to qualify for exemption under the second branch of the section 12 exemption, the following two criteria must be satisfied:

1. The record must be prepared by or for counsel retained or employed by the institution; and

2. The record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order M-86]

A record may be exempt under Branch 2 of the section 12 exemption regardless of whether the common law criteria relating to Branch 1 of the exemption are satisfied.

The term legal advice referred to in the second part of the test will ordinarily involve a legal opinion about a legal issue and a recommended course of action, based on legal considerations, regarding a matter with legal implications. Such advice does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed (Order 210).

I have carefully reviewed the retirement agreements and, in my view, these documents cannot accurately be described as records prepared by counsel for use in giving legal advice. As I have previously indicated, these documents represent the end product of negotiations undertaken between the City and the three former employees which incorporate the positions of both parties.

I must now consider whether the agreements were prepared in contemplation for use in litigation. The question of what constitutes "in contemplation of litigation" was considered by former Assistant Commissioner Tom Mitchinson in Order M-86. There, he indicated that for a record to qualify as being prepared in contemplation of litigation:

> the **dominant** purpose for the preparation of the document must be in contemplation of litigation; **and** ... there must be a reasonable prospect of such litigation at the time of the preparation of the record - litigation must be more than just a vague or theoretical possibility.

I adopt this approach for the purposes of this order.

Following a careful review of the representations which the City has provided, I am not persuaded that, at the time the retirement agreements were entered into, the City could reasonably have contemplated that litigation would occur respecting the terms of the contracts. In fact, I would consider that such an outcome would be most unlikely given that all parties to the agreements had endorsed their contents.

For these reasons, therefore, I find that the second branch of section 12 exemption does not apply to the retirement agreements.

To summarize, the City cannot rely on either the first or second branch of the section 12 exemption to withhold the records from disclosure.

ISSUE D: If the answer to Issue B is yes, whether a compelling public interest in the disclosure of the records clearly outweighs the purpose of the exemption provided by section 14 of the Act.

I have found under Issue B that the disclosure of some personal information found in the agreements would constitute an unjustified invasion of personal privacy either under sections 14(3)(d) or (f) of the Act, or as a result of the balancing process undertaken through section 14(2).

That being the case, I must now go on to consider the argument made by the appellant that, despite the findings which I have made, this information should be disclosed pursuant to the public interest override found in section 16 of the Act. This provision states as follows:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does

> not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

In his letter of appeal, the appellant states "... [G]iven the likely taxpayer expense in this high profile matter ... Section 16 must apply in the face of a clear and compelling public interest."

In order for section 16 of the Act to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this compelling interest must clearly outweigh the purpose of the exemption (Order M-6). Based on the facts of this appeal, I must, therefore, determine whether there is a compelling public interest in the disclosure of the remaining personal information in the agreements which clearly outweighs the purpose of the section 14 exemption.

In undertaking this analysis, I am mindful of the fact that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. Second, in the context of the present appeal, I have already directed that the majority of the information found in the retirement agreements be released. In my view, this level of disclosure should permit the appellant to adequately address the public interest concerns which he has expressed.

Based on these considerations, I find that there does not exist a compelling public interest in the disclosure of the remaining personal information that clearly outweighs the purpose of the section 14 exemption. On this basis, my decision is that section 16 does not apply in the circumstances of this appeal.

ORDER:

1. I uphold the City's decision not to disclose to the appellant the highlighted portions of the three retirement agreements which will accompany this order.

2. I order the City to disclose the portions of the three retirement agreements which have **not** been highlighted in the copy of the records which will accompany this order to the appellant within 35 days following the date of this order and not earlier than the thirtieth (30th) day following the date of this order.

3. In order to verify compliance with the provisions of this order, I order the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: August 11, 1993
Irwin Glasberg
Assistant Commissioner