



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-278

Appeal M-9300272

City of Ottawa



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

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 value of severance benefits, including cash payout and benefits, and specifics of the itemized payout, ..." provided to a senior official who had recently left the City's employ (the affected person).

The City's response indicated that it was denying access to the requested information based on the exemptions in sections 12 and 14 of the Act. The City did, however, provide the requester with copies of the salary ranges and the employment benefits package of its executive group. I have reviewed these documents and in my view they do not contain the requested information.

The requester appealed the City's decision to deny access to the information he requested.

While the City's decision letter did not specify which record or records contain the requested information, it became clear at the outset of the mediation stage of this appeal that the responsive record identified by the City consists of a Memorandum of Agreement between the City and the employee. The Memorandum includes a Final Release and Indemnity signed by the affected person.

Mediation of the appeal 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 the affected person. Representations were received from the City only.

In its representations, the City states that it is not pursuing the exemption contained in section 12 of the Act. As this is a discretionary exemption, I will not consider it in this order.

The City's representations also indicate that, after reviewing Orders M-173 and M-204 (both of which ordered substantial disclosure of records similar to the one at issue here), the City is now prepared to disclose certain portions of the record.

Section 14 is a mandatory exemption. As the City has not communicated its revised views on disclosure to the affected person, I will consider the possible application of section 14 to the record in its entirety, and will view the City's comments on which portions of the record should be withheld as part of its representations.

ISSUES:

The issues arising in this appeal may be summarized as follows:

- A. Whether the information contained in the record 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 record.
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Act applies to the information contained in the record.

- C. If the answer to Issue B is yes, whether there is a compelling public interest in the disclosure of the record which clearly outweighs the purpose of the exemption provided by section 14 of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the record 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, several of the clauses in the agreement, namely those dealing with the severability of unenforceable parts of the agreement, as well as the law to be applied to its interpretation, do not contain personal information. These paragraphs are entitled: "17. Severability" and "19. Laws". As no other exemption has been claimed for them, they should be disclosed.

In my view, the contents of the remainder of the record are recorded information about an identifiable individual (the affected person), and therefore qualify as "personal information" as defined in section 2(1) of the Act.

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

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). 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 the disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 14(2) provides some

criteria to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

In its representations, the City argues that the presumed unjustified invasion of personal privacy identified in section 14(3)(d) of the Act is applicable to several parts of the record. That section states as follows:

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

relates to employment or educational history;

In Order M-173, Assistant Commissioner Irwin Glasberg dealt with three agreements which are very similar to the record in this appeal. In that order, the Assistant Commissioner found that section 14(3)(d) of the Act applied to several parts of those agreements, including the date upon which the employees who had signed the agreements were hired and the number of sick days used. I agree.

In the record at issue in this appeal, the number of sick days used is conveyed by the dates upon which sick leave commenced and terminated, which are specified in paragraph 1. The record also indicates the date upon which the affected person was hired. I find that the disclosure of this information would be a presumed unjustified invasion of personal privacy within the meaning of section 14(3)(d).

The record also contains the commencement and termination dates of the affected person's salary continuation and the commencement date of his unpaid leave. In my opinion, disclosure of this information would also be a presumed unjustified invasion of personal privacy under section 14(3)(d).

I have carefully reviewed the record and in my view, none of the remaining information it contains raises a presumed unjustified invasion of personal privacy under section 14(3) of the Act.

Section 14(4) of the Act states 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.

The City states in its representations that, in its view, neither section 14(4)(a) or (b) is applicable to the

record. Having carefully reviewed the record, I agree with this view for the following reasons.

The only aspect of section 14(4)(a) which could be relevant to the record is the reference to benefits. In Order M-173 (which, as noted previously, dealt with three agreements of a similar nature to the record in this appeal), Assistant Commissioner Glasberg determined that the entitlements reflected in the 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 that basis, it was concluded that these entitlements did not constitute benefits. The same reasoning applies to the record in this appeal.

Section 14(4)(b) is also inapplicable, because the affected person was an employee of the City, and was therefore not a party to a contract for personal services with the City (Order M-173).

I will now consider the possible application of section 14(2) of the Act. The City did not address this part of section 14 in its representations. However, based on my review of the record and the circumstances of this appeal, it appears that several parts of this section could apply. The relevant parts of section 14(2) state 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;
- ...
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;
- ...

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

I will deal first with the factors which favour non-disclosure. In order for section 14(2)(h) to be a relevant factor, the information must have been **supplied** in confidence. However, in this case there is a strong inference (in the absence of any evidence to the contrary) that the information in the record was the result of negotiations, and was therefore not supplied to the City. Accordingly, section 14(2)(h) is not relevant in the circumstances of this appeal.

In view of the confidentiality provision in the record, however, I believe that despite the fact that section 14(2)(h) does not apply to the facts of this case, the affected person did have an expectation that the terms of the agreement would not be released to the public. In my view, that expectation is a relevant

circumstance which would weigh in favour of protecting his privacy interests. This approach was also taken in Order M-173, where the records contained a similar confidentiality provision.

One factor listed in section 14(2), and an additional unlisted factor, were found to weigh in favour of release in Order M-173. Both of these factors were implicitly raised in the appellant's letter of appeal, and both relate to the public's interest in the activities of government organizations.

The listed factor is found in section 14(2)(a), which is relevant if disclosure would be desirable for the purpose of subjecting the activities of the City to public scrutiny. It has been held in previous orders that to establish the relevance of section 14(2)(a), the appellant must demonstrate that the activities of the City to which the record relates 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 (Orders M-84 and M-173).

That requirement was the subject of comment in Order P-634, in which Assistant Commissioner Glasberg was interpreting section 21(2)(a) of the Freedom of Information and Protection of Privacy Act (which is similar to section 14(2)(a) of the Act). The Assistant Commissioner stated as follows:

The records at issue in this appeal were created during a recessionary environment which has placed an unparalleled obligation on government agencies to ensure that tax dollars are spent wisely. Furthermore, it is reasonable to expect that investigation reports which are designed to respond to allegations of financial improprieties will inherently be subject to a high degree of public scrutiny. In these situations, I believe that the evidentiary threshold to establish that "the activities of [an institution] have been publicly called into question" should be modest in nature. That threshold will be satisfied, in my view, where there is some evidence that a public interest has been expressed about the circumstances which led to the creation of the record.

Although the record in this appeal is of a different character from the record which was the subject of Order P-634, I believe that the threshold established by the Assistant Commissioner is equally applicable here, and I adopt it for the purposes of this appeal.

In assessing the possible application of the factor listed in section 14(2)(a), I have reviewed the record and considered the circumstances surrounding its creation. I have also reviewed a newspaper article submitted by the appellant, which speculated about the possible contents of the record. Based on all these considerations, I find that the threshold established by the Assistant Commissioner in Order P-634 has been met, and therefore section 14(2)(a) is a relevant factor in the circumstances of this appeal.

I will now turn to the unlisted factor. Previous orders issued by the Commissioner's Office have identified another circumstance which should be considered in balancing access and privacy interests under section 14(2). This consideration is that "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution" (Orders 99, P-237 and M-129).

This unlisted factor is also mentioned in Order M-173, where Assistant Commissioner Glasberg stated as follows:

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.

In my view, the same considerations apply in the circumstances of this appeal. Therefore, I find that ensuring public confidence in the integrity of the City is a relevant factor under section 14(2).

After balancing the competing interests of public scrutiny, ensuring public confidence in the integrity of the City, and the expectation of confidentiality held by the affected person, I find that the considerations which favour disclosure outweigh those which would protect the privacy interests of the affected person. On this basis, I find that, with two exceptions, the release of the personal information contained in the record would not constitute an unjustified invasion of the personal privacy of the affected person.

The first exception is personal information whose disclosure would be a presumed unjustified invasion of personal privacy under section 14(3)(d), as outlined above. As noted in Order M-170, a presumed unjustified invasion of personal privacy cannot be rebutted by factors favouring disclosure under section 14(2).

The second exception relates to the name of the affected person, which appears a number of times in the record. In my view, the factors favouring disclosure with regard to public scrutiny and public confidence in the institution can be adequately addressed without disclosing the name of the affected person. While I appreciate that knowledgeable individuals may still be able to link the affected person to this agreement, the disclosure of this additional information would not be warranted in the circumstances. On this basis, I find that the affected person's name is identifiable information whose disclosure would be an unjustified invasion of his personal privacy.

Accordingly, the portions of the record which are exempt from disclosure under section 14 of the Act consist of the affected person's name, and the information whose disclosure would be a presumed unjustified invasion of personal privacy under section 14(3)(d) as outlined above. These parts of the record are highlighted in the copy of the record which is being sent to the City with this order.

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

Under Issue B, I found that the disclosure of some personal information in the agreement would be an unjustified invasion of personal privacy either under section 14(3)(d) or as a result of the balancing process under section 14(2).

In his letter of appeal, the appellant stated that, as the affected person was among the City's most senior officials, disclosure of the complete severance package is justified in the public interest. He has, thereby, indirectly raised the application of section 16 of the Act. Therefore, I must consider whether the personal information which I previously exempted from disclosure should be released pursuant to the public interest override found in section 16. That provision states:

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]

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this compelling public interest must clearly outweigh the purpose of the exemption (Order M-6). In Order M-173, Assistant Commissioner Glasberg analyzed whether section 16 applied in the circumstances of that appeal, and stated as follows:

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 concerns which he has expressed.

In my view, this reasoning is applicable in the present appeal. 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, and therefore section 16 of the Act 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 retirement agreement which will accompany this order.
2. I order the City to disclose the portions of the retirement agreement which have **not** been

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highlighted in the copy of the record 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 record which is disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____
John Higgins
Inquiry Officer

_____ March 2, 1994