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

ORDER P-1348

Appeal P_9600189

Management Board Secretariat

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant (a school board) requested information from the Ministry of Education (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). This information pertains to records outlining the terms or benefits offered to Ministry employees who were offered or encouraged to accept early retirement. It includes any buy-out packages given to employees "forced" to leave over the period June 1995 to the date of the request.

The appellant subsequently clarified its request to include only severance agreements that amended the personal services contracts of Deputy Ministers and Assistant Deputy Ministers which were "entered into by the new government, in order to move or remove individuals from positions they held prior to the provincial election on June 8, 1995". The appellant specified that he was also seeking access to certain information relating to pension incentives or top-ups used to facilitate these moves as well as any other benefits or incentives offered.

The Ministry transferred the amended request to Management Board Secretariat (Management Board) pursuant to section 25(2) of the Act, as the latter had a greater interest in the records. Management Board granted access to some general information regarding Deputy Minister Termination Packages, a summary of entitlements for surplus and job threatened senior managers, and a sample settlement agreement, dated 1991. It denied access to any executed severance agreements under section 21(1) (invasion of privacy).

The appellant appealed this decision. Following receipt of the Confirmation of Appeal, and within the time limits for claiming new discretionary exemptions, Management Board issued a second decision letter in which it claimed that, in addition to section 21(1), the following exemptions apply to any severance agreements:

- economic and other interests - sections 18(1)(c) and (d)
- solicitor-client privilege - section 19.

In responding to the Confirmation of Appeal, Management Board indicated that it had only one severance agreement relevant to the time frame of the request. Accordingly, the only record at issue in this appeal is a five-page document entitled "Minutes of Settlement and Release" between the Crown and an employee at the Senior Management level.

During mediation, the appellant indicated that it was not seeking any information that would identify the individual who is the subject of the record, such as the name, address or other personal identifiers. The appellant also raised the application of section 23 of the Act, the so_called "public interest override".

This office sent a Notice of Inquiry to Management Board, the appellant and the individual who is the subject of the record (the affected person). Representations were received from the appellant and Management Board. Along with its representations, Management Board also provided an affidavit sworn by a Senior Counsel at its Legal Services Branch (Counsel). In this affidavit, Counsel indicates that he acted as legal counsel for the Crown in the termination of the affected person's employment and subsequent negotiation of the severance agreement.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Management Board has claimed the application of section 19 to the record at issue in this appeal. 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 Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide Management Board with the discretion to refuse to disclose:

1. a record which is subject to the common law solicitor-client privilege; (Branch 1) and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Management Board is relying on both branches of the exemption.

Branch Two

In order to qualify for exemption under the second branch of section 19, the following criteria must be satisfied:

1. The record must have been prepared by or for Crown counsel; and

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

A record may be exempt under Branch 2 of the section 19 exemption regardless of whether the common law criteria relating to Branch 1 are satisfied.

In his affidavit, Counsel indicates that he drafted the agreement following extensive negotiations with the affected person's lawyer. Management Board submits that this record was produced by or for Crown counsel in contemplation of litigation. In this regard, Management Board indicates that the legal rights of the parties have been fully determined in accordance with the terms of the agreement. Further, Management Board claims that the agreement was prepared by Crown counsel with the full knowledge that the matter would end in litigation if settlement negotiations culminating in the agreement were unsuccessful. Consequently, Management Board submits that the document which reflects these settlement negotiations is privileged and is therefore, properly exempt under Branch 2 of the section 19 exemption.

I have carefully considered Management Board's representations, the affidavit of Counsel and the case law submitted by Management Board in support of its submissions. I do not agree that the executed agreement is privileged within the meaning of this section.

A severance agreement is a contract, executed by the parties, to conclude the employment relationship in an orderly fashion and to determine the rights of the parties. It is perhaps arguable that settlement privilege might exist with respect to discussions leading up to the agreement. However, in my view, once an agreement has been reached and executed by the parties, the privilege would not attach to this agreement.

Further, I am not persuaded that, at the time the severance agreement was entered into, the institution could reasonably have contemplated that litigation would occur with respect to the terms of the agreement, particularly since both parties to the agreement endorsed its contents (Order M-173). Accordingly, I find that the record does not qualify for exemption under the second branch of section 19.

Branch One

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the following criteria must be satisfied:

1. (a) there is 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.

Management Board submits that the agreement is also privileged at common law in that it was created or obtained especially for the lawyer's brief for contemplated litigation. In this regard, Management Board relies on previous orders of this office (Orders M-477 and M-712) which dealt with settlement negotiation correspondence and a draft settlement agreement, and argues that the reasoning in those orders is equally applicable in the current appeal.

I note that Order M-477 dealt with records which would otherwise qualify under litigation privilege. The issue in that appeal concerned the waiver of privilege. In Order M-712, the records consisted of correspondence containing settlement discussions from the institution's solicitors to the solicitors for a developer. Inquiry Officer Anita Fineberg found that it was apparent from the content of the letters that litigation was contemplated and that the

correspondence was made in furtherance of the solicitor's instructions to implement a settlement. Following the reasoning in Order M-477, she upheld the exemption in section 12 of the municipal Act, the equivalent of section 19 of the provincial Act.

In my view, the circumstances in these two orders are distinguishable from the current appeal. In both cases above, the decisions concerned the issue of waiver with respect to records which would otherwise qualify for exemption.

In the current appeal, I must determine whether the records were created or obtained **especially** for the lawyer's brief for existing or contemplated litigation. In the circumstances of this appeal, I am not satisfied that the agreement was created **especially** for this purpose. As I indicated above, the agreement was drafted by counsel to set out the agreed terms upon which the affected person's employment was terminated. The terms of the agreement were endorsed by all parties and it is unlikely that any further litigation would be contemplated with respect to these terms. Therefore, I find that the record does not qualify for exemption under the first branch of section 19.

In summary, I find that the exemption in section 19 does not apply to the severance agreement.

ECONOMIC AND OTHER INTERESTS

Management Board claims that sections 18(1)(c) and (d) also apply to the records. These provisions state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

To qualify for exemption under section 18(1)(c) of the Act, the record in question must contain information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of an institution.

Similarly, to establish a valid exemption claim under section 18(1)(d), Management Board must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of the province arising from disclosure.

With respect to both sections 18(1)(c) and (d), Management Board states that there is a public interest in the settlement of litigation and in the avoidance of litigation through negotiations that lead to settlement, and that this principle is embodied in these two sections.

Management Board notes that the funds required to pay for the negotiated terminations come out of the individual institution's fiscal allocation. Management Board argues that the economic interests of all institutions that have senior officials whose employment may be terminated through negotiated severance agreements would be prejudiced by the disclosure of such agreements. In this regard, Management Board submits that other parties involved in litigation or who are negotiating severance agreements will have access to previous agreements which were negotiated in circumstances which may be similar to their own. Management Board suggests that these parties would have an advantage in any settlement negotiations.

On the other hand, Management Board surmises that since severance agreements are tailored to the particular circumstances of each case, this could result in a greater number of failed negotiations and thus more litigation.

In this regard, Counsel indicates, in his affidavit, that in his experience regarding the negotiation of settlement packages, where legal counsel for a terminated employee is aware of a settlement package for another former employee, that settlement package becomes a point of reference for the negotiations. Counsel claims that this can be an impediment to settlement regardless of whether the circumstances concerning the different employees are similar or not.

Counsel concludes that:

> ... disclosure of the terms of settlement agreements would inhibit the ability of the Crown to negotiate terms of other settlement agreements ... first, by creating expectations of similar terms of settlement where the personal circumstances of the former employee do not justify such terms ... second, by inhibiting the ability of the Crown to negotiate, in individual cases, terms less costly to the Crown than are contained in the settlement agreements.

Management Board refers to a number of previous orders of the Commissioner's Office which have upheld the exemption in section 18(1)(c) (Orders P-1026, P-1022 and M-712) and argues that the reasoning in these orders applies equally to severance agreements. These orders all dealt with significant commercial negotiations involving institutions and third parties. In essence, these orders found that the economic interests and competitive position of the institution would be prejudiced if the institution could not negotiate the "best possible deal for the province". Further, they found that disclosure of the information at issue would inhibit the institution's ability to negotiate the "best possible deal".

On this basis, Management Board submits that disclosure of the severance agreement will hamper the Crown's ability to negotiate "the best deal possible for the province" in future severance agreements.

With respect to Management Board's arguments that disclosure of the severance agreement would impede or inhibit future negotiations with other employees, I am not persuaded that these difficulties would "prejudice" the economic interests or competitive position, or be "injurious" to the financial interests of Management Board or the Government of Ontario.

In this regard, I note that neither Counsel or Management Board provide details of financial or economic implications of disclosure. In my view, the concerns expressed in the representations demonstrate some of the difficulties Counsel might face during the negotiation process, but the submissions are insufficient to establish that either of the harms in sections 18(1)(c) or (d) could reasonably be expected to occur as a result of disclosure of the settlement agreement.

Moreover, in my view, it is in the interests of both parties to settlement agreements to conclude these agreements. I am not persuaded that disclosure of concluded severance agreements, negotiated on the basis of the individual circumstances of each case, could reasonably be expected to interfere with the interest of the institution in concluding these types of agreements in the future.

As a result, I am not persuaded that disclosure of the severance agreement could reasonably be expected to result in the harms in either section. Accordingly, I find that neither section 18(1)(c) nor (d) applies in the circumstances.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. As I indicated above, the appellant states that it is not seeking access to certain identifying information of the affected person. I have highlighted these parts of the record on the copy of the record which is being sent to Management Board with this order. This information is not at issue in this appeal and should not be disclosed to the appellant.

Once this information is removed, it must be determined whether the individual can be identified from the remaining information. Management Board argues that, in this case, it is possible to identify the affected person because the severance agreement was tailored to the particular background and circumstances of the affected person. Management Board submits that disclosure of the information contained in the agreement, taken as a whole or individually, may identify this individual.

I accept that in the circumstances of this appeal, the affected person would be identifiable even with the personal identifiers removed. However, in reviewing the record, I note that it contains a number of standard clauses. Except for the name of the affected person, these clauses do not contain information about identifiable individuals, and are better described as "boilerplate". Once the personal identifiers of the affected person (in this case, name and address) are removed from clauses 9, 11, 12, 13, 14, 15 and the signature lines, the remaining information in these clauses does not qualify as personal information.

I find that, with the exception of the paragraphs which I have just described, the portions of the agreement which contain information relating to the notice period, severance pay benefits, insurance coverage, automobile, payment for unused vacation, other employment, legal costs, compensation and conditions of release, qualify as the personal information of the affected person.

INVASION OF PRIVACY

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

Section 21(4)(a) of the Act provides:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> > 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 a member of the staff of a minister. [emphasis added]

The entitlements reflected in the agreement were not received by the affected person as a result of being employed. Rather, they were negotiated in exchange for acceptance of the agreement. Accordingly, these entitlements do not constitute "benefits" within the meaning of section 21(4)(a) of the Act (Orders M-173, M-204 and M-278).

I noted above that the request was for severance agreements that amended the personal services contracts of Deputy Ministers and Assistant Deputy Ministers. Section 21(4)(b) states:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> > discloses financial or other details of a contract for personal services between an individual and an institution.

Management Board indicates that the affected person was a Crown employee prior to entering into a personal service contract and that the severance agreement terminated both the personal service contract and the affected person's employment as a Crown employee. In the circumstances, it is not possible to separate the details which relate to the affected person's contract for personal services with those of his employment. Accordingly, I find that section 21(4)(b) does not apply to the information contained in the record.

Management Board submits that the terms of the severance agreement relate to employment history or contain information from which employment history may be deduced. Management Board provides extensive representations on its views regarding the possibility of deducing

certain facts about the affected person's employment history from the information contained in the agreement. Management Board has also indicated its disagreement with previous decisions of this office as they pertain to severance or retirement agreements. I have considered all of the arguments presented by it in its representations.

A number of previous orders of the Commissioner's office have addressed the question of access to retirement agreements entered into between institutions and their employees, which, in my view, are similar to the agreement at issue. In particular, the application of the presumptions contained in sections 21(3)(d) and (f), or their equivalent provisions in the municipal Act, were addressed in Orders M-173, M-204, M-273 and M-278.

In these appeals, information such as the names of the affected persons, their start dates with the institution, their sick time entitlements, the start and finish dates of a salary continuation agreement and the start date of an unpaid leave, were found to fall within the presumption in section 14(3)(d), which is the equivalent to section 21(3)(d) in the provincial Act. These orders have also found that references to the specific salary to be paid to the affected person over a period of time, and the contributions to a pension plan made by the affected person fall within the section 14(3)(f) presumption, which is equivalent of section 21(3)(f) in the provincial Act.

I agree with these findings. I have reviewed the agreement at issue in this appeal and find that those portions which describe the date upon which the period of notice commenced and terminated, the actual date of termination of the affected person's employment, and references to other employment by the affected person fall within the ambit of the section 21(3)(d) presumption. I further find that the amount which pertains to the affected person's salary and contributions to the pension plan falls within the section 21(3)(f) presumption.

In Order M-173, former Assistant Commissioner Irwin Glasberg commented on the monetary entitlements contained in retirement agreements and found that:

> 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.

I agree with these findings. I find that none of the remaining information in the agreement raises a presumed unjustified invasion of personal privacy under section 21(3) of the Act. I have highlighted the personal information which is subject to the section 21(3)(d) and (f) presumptions in yellow on the copy of the records which I will provide to Management Board with this order.

Management Board also submits that the following factors under section 21(2) which favour non-disclosure of the information in the record are relevant in the circumstances of this appeal:

- the information is highly sensitive - section 21(2)(f),

- it has been supplied in confidence - section 21(2)(h).

In addition, Management Board argues that the context in which the agreement was prepared and signed, the purpose of the agreement (to terminate the affected person's employment and provide financial compensation in that regard), and the fact that clause 12 of the agreement specifically requires that the terms of the agreement be kept confidential are all relevant factors which militate against disclosure.

The appellant submits that section 21(2)(a) is relevant in the circumstances. The appellant also refers to its own process in developing early retirement incentive plans for senior individuals, which it indicates was very publicly debated and open to public scrutiny. The appellant states that the Ministry has challenged the appropriateness of these retirement plans, and submits that it is unable to judge this challenge if it is not allowed to scrutinize how the provincial government compensates its own senior people in similar situations.

Previous orders issued by the Commissioner's Office have identified another circumstance which should be considered in balancing access and privacy interests under section 21(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, M-129 and M-173).

Having reviewed the evidence before me, I have made the following findings:

1. The information in the agreement was negotiated and not "supplied" as required by section 21(2)(h) (Order M-173). This provision, therefore, is not relevant in the circumstances.

2. Despite the fact that section 21(2)(h) does not apply to the facts, I am satisfied that based on the confidentiality clause in the agreement, it would not be unreasonable for the affected person to have an expectation that the terms of the agreement would not be released to the public. This expectation is a relevant circumstance which weighs in favour of privacy protection (Orders M-173 and M-278).

3. I have not been provided with sufficient evidence to show that disclosure of the agreement could reasonably be expected to produce the excessive personal distress required under section 21(2)(f) in the circumstances of this case. In this regard, I would have thought that, had he considered the information to be highly sensitive, the affected person would have responded accordingly. I note, however, that, although invited to do so, the affected person chose not to make representations. As a result, I find that this section is not relevant.

4. The contents of agreements entered into between institutions and senior employees represent the sort of records for which a high degree of public scrutiny is warranted (Order M-173). Based on this, and the appellant's concern regarding its ability to scrutinize how the provincial government compensates its own senior people in situations similar to the appellant's, I find that section 21(2)(a) is a relevant consideration.

5. The severance agreement involves a large amount of public funds and involves a senior Crown employee. Further, the current climate of spending restraints in which this agreement was negotiated places an unparalleled obligation on officials to ensure that tax dollars are spent wisely. On this basis, I conclude that the public confidence consideration is relevant.

After balancing the competing interests of public scrutiny, ensuring public confidence in the integrity of the institution, 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 one exception, 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 exception pertains to personal information whose disclosure would be a presumed unjustified invasion of personal privacy under sections 21(3)(d) and (f), 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 21(2). I will consider this information in my discussion of section 23, which follows.

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the Act states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

I found above, that disclosure of some personal information in the agreement would be a presumed unjustified invasion of personal privacy under sections 21(3)(d) and (f). The appellant did not provide specific representations on the application of section 23.

For section 23 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, former Assistant Commissioner Glasberg analysed whether section 16 of the municipal Act (which is similar to section 23 of the provincial Act) applied in the circumstances of that appeal, and stated as follows:

> In undertaking this analysis, I am mindful of the fact that section 14 [which is the equivalent of section 21 of the Act] 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 21 exemption, and therefore section 23 of the Act does not apply in the circumstances of this appeal.

ORDER:

1. I uphold Management Board's decision not to disclose to the appellant the highlighted portions of the severance agreement which is being sent to Management Board's Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I order Management Board to disclose the portions of the retirement agreement which have **not** been highlighted on the copy of the record which is being sent to Management Board with a copy of this order to the appellant by **March 27, 1997**, but not earlier than **March 24, 1997**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require Management Board to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: February 20, 1997
Laurel Cropley
Inquiry Officer