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

ORDER MO-1405

Appeal MA_000223_1

Niagara Regional Police Services Board

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NATURE OF THE APPEAL:

The appellant, a newspaper reporter, made a request to the Niagara Regional Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy* (the *Act*) for records regarding the resignation of the former Police Chief (the former Chief). The Police denied access to all responsive records on the basis that they qualified for exemption under section 14(1) of the *Act* (invasion of privacy).

The appellant appealed this decision.

During mediation, the appellant narrowed the scope of her request to the amount of the settlement reached with the former Chief. Only two records were responsive to this narrowed request. The Police continued to maintain that these records were exempt under section 14(1), and identified the presumptions under sections 14(3)(d) and (f) in support of this position.

Once the appeal had been moved to the adjudication stage, I sent a Notice of Inquiry to the Police and to the former Chief, as an individual whose interest could be affected by disclosure of the records. The Police and the former Chief both submitted representations in response to the Notice. I then sent the Notice to the appellant, together with a copy of the non-confidential portions of the Police's representations. The appellant chose not to make any representations.

RECORDS:

The two records at issue are:

Record #1	a four-page letter dated May 10, 2000 from a law firm representing the Police to the law firm representing the former Chief, confirming the settlement reached with respect to the former Chief's severance package; and
Record #2	a Release dated May 11, 2000, signed by the former Chief and the Police.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

The section 14(1) personal privacy exemption only applies to information that qualifies as personal information. "Personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including information relating to the employment history of an individual or information relating to financial transactions in which the individual has been involved [paragraph (b)].

The Police submit:

> In our opinion, these two records at issue clearly contain information regarding the former Chief's employment history with the Police Services Board. Therefore, it is our respectful submission that the information in these two documents constitutes personal information.

I concur. Consistent with past orders of this Office dealing with termination or severance arrangements with former employees, I find that the records contain information concerning the former Chief's employment history and financial transactions involving his departure from his position with the Police, and as such fall within the scope of the definition of personal information in section 2(1) of the *Act* (see, for example, Orders P-1348, MO-1184 and MO-1332).

The records do not contain personal information of any other identifiable individuals, including the appellant.

Where a requester seeks access to the personal information of another individual, section 14(1) of the *Act* prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception with potential application in the circumstances of this appeal is section 14(1)(f), which reads:

> 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.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of privacy. Section 14(2) provides some criteria for institutions to consider in making this determination, and section 14(3) identifies the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 14(4) itemizes specific types of information whose disclosure is presumed not to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure under section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Section 14(4)

If personal information falls within the scope of section 14(4), its disclosure is deemed not to constitute an unjustified invasion of privacy.

Section 14(4)(a) of the *Act* reads:

> 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;

The Police submit that the two records do not fall within the scope of section 14(4)(a), because they "contain specifics of employment history and specific financial details that go beyond the information contemplated in section 14(4)."

Having reviewed the records, they clearly do not contain a classification, salary range or employment responsibilities of the former Chief. As far as whether they contain information that could properly be considered a "benefit", the findings in Orders M-23 and M-173 are relevant.

In Order 23, former Commissioner Tom Wright interpreted the term "benefits" as follows:

> 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 will 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.

Order M-173 went on to apply this interpretation in the context of entitlements which were negotiated as part of an early retirement package. Former Assistant Commissioner Irwin Glasberg stated in that Order:

> 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 [of Ottawa]. 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 agree with the reasoning in Order M-173, and find that it applies in the circumstances of this appeal. Although some of the entitlements are similar in nature to the type of benefits received by employees of the Police, all of the entitlements referred to in the records arose out of settlement discussions between the former Chief and the Police upon the termination of employment, and as such cannot be characterized as section 14(4)(a) benefits (see also Orders MO-1332, M-1082 and M-758).

Section 14(3)

The Police claim that requirements of sections 14(3)(d) and (f) of the *Act* are present in the context of this appeal. These sections read:

> 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;

The Police make the following submissions:

> **Record #1**
>
> The letter dated May 10, 2000 ... relates directly to [the former Chief's] employment history with the Niagara Regional Police. It contains information including his termination date, salary, benefits, vacation and mitigation duties pursuant to the settlement. It is our opinion that disclosure [of] this information [would] constitute a presumed unjustified invasion of personal privacy under section 14(3)(d) of the Act.
>
> This document also contains information regarding the former Chief's finances, income and assets. ... In our opinion, this information is covered by the presumption in Section 14(3)(f).
>
> In addition, the May 10th letter disclosing information with respect to benefits the former employee will receive including, ... In our opinion, this information is also covered by the presumption in Section 14(3)(f).
>
> **Record #2**
>
> It is our opinion that the release forms part of [the former Chief's] employment history and speaks to the circumstances surrounding his retirement. Therefore, it is our respectful position that the presumption in Section 14(3)(d) applies.

In Order MO-1322, Adjudicator Sherry Liang reviewed past orders which dealt with the application of section 14(3) in the context of severance agreements. She states:

> A number of decisions of this office have considered the application of this section of the *Act*, or its provincial equivalent, to severance agreements entered into by former public officials or employees. In Order M-173, which dealt with severance agreements between the City of Ottawa and three former high-ranking employees, the monetary entitlements under those agreements was found not to fall under the presumption in section 14(3)(f) (finances, income, etc.) of the *Act*, insofar as they represented "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." Further, in the same order, Assistant Commissioner Irwin Glasberg found that much of the information in those agreements did not pertain to the "employment history" of the individuals for the purposes of section 14(3)(d) of the *Act*, but could more accurately be described as relating to arrangements put in place to end the employment connection.
>
> The above order has been followed in other decisions of this office, including Order M-1184, cited by the appellant, which found that the one-time amounts agreed to in the settlement of the wrongful dismissal suit of a former employee against the City did not fall under the presumption in section 14(3)(f) (finances, income, etc.). Thus, the total amount agreed to between the City and the former employee, as well as the breakdown of this amount for legal costs and out-placement counselling, did not give rise to the presumption in that section.
>
> The decisions about "one time payments" can be distinguished from those which deal with salary continuation agreements. In Order P-1348, which dealt with the application of the provincial equivalent to sections 14(3)(d) and (f) to severance agreements, [Adjudicator] Laurel Cropley reviewed other decisions in this area, and concluded that the start and finish dates of a salary continuation agreement have been found to fall within the presumption in section 14(3)(d) (employment history), and references to the specific salary to be paid to an individual over that period of time, within the presumption in section 14(3)(f) (finances, income, etc.).
>
> Further, information which reveals the dates on which former employees are eligible for early retirement, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, and the number of sick leave and annual leave days used has been found to fall within the section 14(3)(d) presumption: Orders M-173 and P-1348. Contributions made to a pension plan have been found to fall within the section 14(3)(f) presumption: see Orders M-173 and P-1348.

I agree with Adjudicator Liang's review of these past orders and the reasoning set out in the orders she refers to.

Applying that reasoning to the records at issue in this appeal, I find that clauses 2, 3, 14 and portions of clauses 4 and 5 of Record #1 are accurately characterized as work and salary continuation provisions, and fall within the scope of sections 14(3)(d) and/or (f). The remaining portions of clauses 4 and 5, and all other clauses contained in Record #1, describe one-time payments or entitlements that were negotiated by the Police and the former Chief in the context

of his retirement and termination of employment with the Police, and I find that disclosure of these provisions would not constitute a presumed unjustified invasion of privacy under sections 14(3)(d) or (f) of the *Act*.

As far as Record #2 is concerned, I find that it does not contain information relating to the former Chief's employment history. Instead, the record consists of the standard release provisions normally associated with implementing a severance agreement such as Record #1, and relate primarily to activities which take place at or after the point where the former Chief ceases to have an employment relationship with the Police. Therefore, I find that disclosure of Record #2 would not constitute a presumed unjustified invasion of privacy under section 14(3)(d) of the *Act*.

Section 14(2)

I will now go on to consider section 14(2) for Record #2, and the parts of Record #1 which I have determined do not fall within the scope of section 14(3). As noted earlier, *John Doe*, *supra*, states that factors under section 14(2) cannot rebut a presumption under section 14(3), so I will not be considering these factors for the clauses in Record #1 which fall within the scope of sections 14(3)(d) and/or (f).

Section 14(2) of the *Act* reads:

> 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;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

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

Neither the Police nor the appellant provided representations on the application of any factors under section 14(2).

The former Chief submits that the factors favouring non-disclosure in sections 14(2)(f) and (h) are relevant considerations. He states:

> Disclosure, if provided, would constitute an unjustified invasion of personal privacy. The personal information is highly sensitive (Section 14(2)(f)) and, although the information was not necessarily "supplied" in confidence, [the former Chief] did have an expectation that the terms of the agreement would not be released to the public. That expectation is a relevant circumstance which would weigh in favour of protecting his privacy interests (Order M-278 and M-173, for example).

Section 14(2)(f)

For information to be considered highly sensitive, I must find that its disclosure could reasonably be expected to cause excessive personal distress (see Orders M_1053, P_1681 and PO-1736).

Although I accept that disclosure of certain portions of Record #1 could reasonably be expected to cause the former Chief excessive personal distress, these portions are all included among the clauses I have found qualify for protection under sections 14(3)(d) and (f). The remaining parts of Record #1 are, in my view, fairly standard clauses contained in severance or retirement agreements of this nature. The former Chief's representations do not deal with specific components of Record #1 and, based on my review of these clauses and the representations, I am not convinced that the disclosure of these remaining clauses would cause him excessive personal distress. Accordingly, I find that section 14(2)(d) is not a relevant consideration with respect to the information contained in the clauses that do not qualify under section 14(3) (see Order MO-1332).

Similarly, I find that Record #2 contains the standard terms and conditions found in release documents normally associated with the implementation of agreements of this nature. As such, I find disclosure of this record would not cause excessive personal distress to the former Chief, and section 14(2)(d) is not a relevant consideration.

Section 14(2)(h)

As noted earlier, the former Chief states that he expected the terms of the agreement would not be disclosed to the public. Both records contain clauses precluding the parties from discussing the contents of Record #1. However, as the former Chief acknowledges, the information at issue was not supplied by him to the Police in confidence, as required by section 14(2)(h). For this reason, I find that section 14(2)(h) is not a relevant consideration in the circumstances of this appeal.

Section 14(2)(a)

Past orders dealing with records of this nature generally take into account the factor described in section 14(2)(a), which favours disclosure. Generally speaking, adjudicators have determined that, subject to the application of section 14(3), disclosing the content of severance agreements involving high ranking public officials is desirable for the purpose of subjecting the activities of an institution to public scrutiny. This factor is then balanced against any other factors favouring privacy that may be present in the particular circumstances of an appeal. However, as far as I can determine, the relevance of the section 14(2)(a) factor has always been established, at least in part, on the basis of representations or other documentation provided by an appellant.

In this appeal, the appellant's request and appeal letter make no reference to any public scrutiny considerations, and the only representations provided by the appellant are the following:

> We shall not be submitting any representations other than this letter. We believe that [the *Act*] directs the release of the public information we have requested.

Clearly, the *Act* does not direct the release of the type of personal information contained in the records at issue in this appeal. Rather, section 14(1) of the *Act* precludes the disclosure of personal information unless it can be determined that such a disclosure would not constitute an unjustified invasion of privacy. The Notice of Inquiry provided to the appellant included a comprehensive description of the operation of section 14, including references to past orders dealing with similar records; yet the appellant chose not to provide any representations which would establish the relevance of any factors under section 14(2)(a) that favour disclosure, in particular section 14(2)(a).

That being said, in my view, section 14(2)(a) is nonetheless a relevant consideration in the circumstances of this appeal. The former Chief is a high ranking public official whose departure from employment with the Police was the subject of some public debate. In addition, the appellant is a reporter employed by a newspaper that services the Niagara Region, and I accept that her professional responsibilities include subjecting the activities of government institutions, such as the Police, to public scrutiny. I also find that past orders point to what might be characterized as an inherent relevance of section 14(2)(a) in circumstances of this nature. For example, former Assistant Commissioner Glasberg, in finding the relevance of section 14(2)(a) in Order M-173 stated:

> ... 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.

For these reasons, I find that the public scrutiny factor in section 14(2)(a) is a relevant consideration with respect to Record #2, and the portions of Record #1 not captured by any of the presumptions in section 14(3). I also find that this factor outweighs any privacy interest that may exist with respect to this information, and that its disclosure would not constitute an unjustified invasion of privacy. Therefore, Record #2 and the remaining portions of Record #1

do not qualify for exemption under section 14(1) of the *Act* and should be disclosed to the appellant.

ORDER:

I. I uphold the Police's decision to deny access to clauses 2, 3, 14 and the portions of clauses 4 and 5 of Record #1 that satisfy the requirements of sections 14(3)(d) and/or (f). I have attached a highlighted version of clauses 4 and 5 with the copy of this order which is being sent to the Police's Freedom of Information and Privacy Co-ordinator indicating the portions that should **not** be disclosed.

II. I order the Police to disclose Record #2 and the remaining portions of Record #1 to the appellant by **April 10, 2001** but not before **April 5, 2001**.

III. In order to verify compliance with Provision 2, I reserve the right to require the Police to provide me with a copy of the records sent to the appellant.

Original signed by: March 6, 2001
Tom Mitchinson
Assistant Commissioner