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

ORDER MO-1970

Appeal MA-040032-1

City of Waterloo

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NATURE OF THE APPEAL:

The City of Waterloo (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to directors and officers' liability protection under the City's insurance polices for the period from 1999 to 2003 inclusive. The request specifically stated:

> I would like to peruse whatever directors and officers' liability protection under insurance policy/agreement to The City of Waterloo exists for the period 1999 through 2003 inclusive, including any re-insurance beyond the limit of the Regional "insurance pool". I also wish to peruse any agreement/policy/procedure outlining the City of Waterloo's legal obligation to defend or not defend its directors and/or officers against such liability claims.

The City identified a number of records responsive to the request and provided the requester with access to all but one responsive record. Access was denied to an eight-page settlement agreement between the City and an affected person, pursuant to section 14 (personal privacy) of the *Act*.

The requester, now the appellant, appealed the City's decision to deny access to the settlement agreement.

During the mediation stage of the appeal process, the affected party who might have an interest in the disclosure of the record, was notified of the appeal. The affected party advised that he does not consent to the disclosure of the information as it relates to him.

Also during mediation, the appellant argued that there is a compelling public interest in the disclosure of the settlement agreement (section 16) that outweighs the purpose of the section 14 exemption. Accordingly, the public interest exemption was added as an issue in this appeal.

As further mediation was unsuccessful, the file was streamed to the adjudication stage of the process.

At the outset of adjudication, a Notice of Inquiry setting out the facts and issues on appeal was sent to the City, and representations were received in return. At that time, the Notice of Inquiry was also sent to the affected party. The affected party advised this office by telephone that he did not wish to submit representations but that he continued to object to the disclosure of his personal information.

The Notice of Inquiry was then sent to the appellant, along with a copy of the non-confidential representations submitted by the City. The appellant responded with representations. As the appellant's representations raised issues to which the City should be given an opportunity to reply, a copy of the appellant's representations were provided to the City and it was invited to provide a reply. The City declined to submit reply representations.

Subsequently, a supplementary Notice of Inquiry was issued to both the appellant and the City asking the parties to address the jurisdictional issue of the possible application of section 52(3) of the *Act*. Section 52(3) provides that the *Act* does not apply to records related to labour and

employment. The appellant responded with representations. The City chose not to submit representations on the section 52(3) issue.

RECORD:

The record at issue in this appeal is an eight-page settlement agreement between the affected party and the City.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General principles

Section 52(3) and (4) state:

> 52(3) Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.
>
> (4) This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about

employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

If section 52(3) applies to the record, and none of the exceptions found in section 52(4) applies, the record is excluded from the scope of the *Act*. If section 52(3) does not apply, or if one of the exceptions in section 52(4) applies, then the record is subject to the *Act* and I have jurisdiction to consider the issue of denial of access by the City and whether the settlement agreement qualifies for exemption under section 14(1).

Section 52(4)

It appears that the exclusion from the scope of the *Act* found in section 52(3)2 may apply. However, as explained below, I have concluded that the exception to the section 52(3) exclusions provided by section 52(4)3 applies, with the result that the record is subject to the *Act*.

With respect to the application of section 52(4) the appellant submits as follows:

> Section 54(4)2 is satisfied because the severance agreement between the City (the employer) and the affected person (the employee) ends a proceeding between the employee and the employer (and their respective lawyers) to employment-related matters, such matters otherwise to be argued in a court proceeding under wrongful dismissal. Please refer to what has been previously indicated and quoted herein, pertaining to concerns surrounding wrongful dismissal.
>
> With reference to submissions offered herein, which speak to the nature, content, and circumstances surrounding this severance agreement, and recognizing that the employee was still employed up and until March 25th, 2002 [i.e. severance agreement was passed by open Council on March 25th 2002, for later signing], the appellant submits that section 52(4)3 clearly applies.
>
> That this severance agreement offers up to $3,000 worth of employment counselling, implies that some kind of expense account exists. Proof of this expense, is validated through some kind of receipt(s), likely submitted along with a City expense form, for subsequent City reimbursement. Therefore, Section 52(4)4 applies where it can be demonstrated that the employees received such money, through submitting such receipt(s), for such counselling, all while still employed. In the third alternative, where such counselling was received after employment ceased, there may be sufficient argument supporting section 52(4)4, simply because such reimbursement was offered before employment ended.

> Furthermore, if the employer, on behalf of the Canada Customs and Revenue Agency, has made employee source deductions from this reimbursement, Section 52(4)4 may apply. Also, if the employer, on behalf of the Workplace Safety and Insurance Board, has made contribution based on this reimbursement, or similar contribution, Section 52(4)4 may apply.
>
> The appellant can find little under *interpretation* or *ruling* as to just how "in his or her employment" is to be taken or understood. The City and/or the affected person may wish to explain the facts surrounding these events, for the Adjudicator to then make a decision as to the applicability of Section 52(4)4; notwithstanding the appellant's alternative arguments herein may already support the application of section 52(4)2 and 52(4)3.

In Order MO-1622, Adjudicator Donald Hale made certain findings with respect to the application of section 52(4)3 to severance agreements involving former employees of the City of London, Ontario. Adjudicator Hale found that:

> In my view, the fully executed Agreements and Release which form part of Record 1 and all of Record 13 represent "agreements between an institution and one or more employees". The records reflect the fact that the information contained in these documents was arrived at following negotiations between the individuals involved and the City. In addition, I have found above that the agreements and the negotiations which gave rise to them were "about employment-related matters between the institution and the employees". In my view, the Agreements which comprise part of Record 1 and all of Record 13 fall within the ambit of the exception in section 52(4)3.
>
> I find support for this view in the decision in Order M-797 where Assistant Commissioner Tom Mitchinson found as follows:
>
> > Sections 52(3) and (4) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 52(3) falls within one of the exceptions enumerated in section 52(4), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in Part 1 of the *Act* apply.
> >
> > The Board's representations state:
> >
> > > Although this document constitutes a communication made in the course of negotiations relating to [the Superintendent's] employment, it also constitutes the final agreement between the

> school Board and [the Superintendent] resulting from those negotiations. The document requested by the appellant would appear to fall within the ambit of paragraph 52(4)3 of the *Act*, and is therefore subject to the application of the *Act*.

> Having reviewed the records and the Board's representations, I agree. In my view, the two records at issue in this appeal, considered together, constitute the agreement between the Board and the Superintendent with respect to his early retirement. This agreement resulted from negotiations about a matter which clearly relates to the Superintendent's employment with the Board. I find that the records fall within the scope of the exception to the section 52(3) exclusion found in paragraph 3 of section 52(4), and are therefore subject to the *Act*. Accordingly, I have jurisdiction to consider the issue of denial of access by the Board, and I will now determine whether these records qualify for exemption under section 14(1) as claimed by the Board.

> I adopt the reasoning expressed by the Assistant Commissioner in Order M-797 for the purposes of this appeal. I find, therefore, that the Agreements which comprise part of Record 1 and all of Record 13 fall within the exception in section 52(4)3 and that I have jurisdiction to determine whether these records are properly exempt under the *Act*. I will, accordingly, order the City to issue a decision letter to the appellant with respect to access to the Agreements.

I agree with the preceding analysis and adopt the reasoning expressed in Orders MO-1622 and M-797 for the purpose of this appeal. Having reviewed the record at issue, I find that it is an agreement between the City and an employee resulting from negotiations about employment-related matters between the City and that employee, and therefore section 52(4)3 applies. The *Act* therefore applies to this record. Accordingly, I have jurisdiction to consider the issue of denial of access by the City, and I will now determine whether the settlement agreement qualifies for exemption under section 14(1) as claimed by the City.

PERSONAL INFORMATION

General principles

The personal privacy exemption in section 14 applies only to information which qualifies as personal information, as defined in section 2(1) of the *Act*. Therefore, in order to determine whether section 14 might apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. The definition in section 2(1) reads, in part, as follows:

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

…

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

…

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[Emphasis added]

Analysis and findings

Previous orders of this office have considered the contents of various types of agreements, such as employment contracts or settlement and/or severance agreements (Orders M-173, M-797, MO-1184, MO-1332, MO-1405, MO-1622, MO-1796 and P-1348). These orders have consistently held that information about the individuals named in such agreements, including name, address, terms, date of termination and terms of settlement, concern these individuals in their personal capacity and thus qualifies as personal information. I am satisfied that the same considerations apply in the circumstances of this appeal. The record contains the affected party's name, along with other personal information relating to him and possibly information concerning his former employment with the City as well as financial transactions involving his departure from his position with the City. As such, I find that the information falls within the scope of the definition of personal information in section 2(1) of the *Act* as the personal information of the affected party.

The record does not contain personal information of any other identifiable individuals, including the appellant.

INVASION OF PRIVACY

General principles

Where an appellant seeks the personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs

(a) through (f) of section 14(1) applies.

In my view, the only exception which may apply in the present appeal is that set out in 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.

Section 14(1)(f) is an exception to the mandatory exemption at section 14(1) regarding personal information. In order to establish that section 14(1)(f) applies, it must be shown that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy (see, for example, order MO-1212).

In applying section 14(1)(f), sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. The specific provisions of these sections that are relevant in the circumstances of this appeal provide, as follows:

> (2) 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;
> >
> > …
> >
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> (a) relates to eligibility for social services or welfare benefits or to the determination of benefit levels;
>
> (b) was complied and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> …
>
> (d) relates to employment or educational history;
>
> …
>
> (f) describes an individual's finance, income, assets, liabilities, net worth, bank balances, financial history or activities or creditworthiness; and
>
> (g) consists of personal recommendations or evaluations, character references or personal evaluations;
>
> …
>
> (4) 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;
>
> …

Section 14(2) lists criteria for the institution to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information the disclosure of which 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.

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

If a presumption listed in section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2). A presumption can, however, be overcome if the personal information is found to fall under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record that clearly outweighs the purpose of the section 14 exemption. [*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

I will first turn to consider whether any of the information does not constitute an unjustified invasion of privacy under section 14(4)(a). If any of the information falls under section 14(4)(a), the exemption at section 14(1) does not apply.

Representations, analysis and findings

Section 14(4)(a): Exception for certain employment information

Under section 14(4)(a), quoted above, disclosure of the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution does not constitute an unjustified invasion of personal privacy.

The appellant relies on section 14(4)(a) and submits generally in his representations:

> In his capacity as [a senior official with] the Corporation of the City of Waterloo, some of the information contained within the record being sought does not constitute an unjustified invasion of personal privacy according to section 14(4)(a) and so that information is not exempt under section 14.

The City chose not to respond to the appellant's submission that section 14(4)(a) applies to some of information contained in the record at issue

Having reviewed the settlement agreement at issue, it clearly does not contain the classification, salary range or the employment responsibilities of the affected party. What remains to be determined for the application of section 14(4)(a) to the settlement agreement then is whether it contains information that could properly be considered a "benefit".

This office has interpreted "benefits" to include entitlements that an officer or employee receives, in addition to base salary that an employee receives as a result of being employed by the institution (Order M-23). Order M-23 lists the following as examples of "benefits":

- insurance-related benefits
- sick leave, vacation
- leaves of absence
- termination allowance
- death and pension benefits
- right to reimbursement for moving expenses

In subsequent orders, adjudicators have found that "benefits" can include:

- incentives and assistance given as inducements to enter into a contract of employment [Order PO-1885]
- all entitlements provided as part of employment or upon conclusion of employment [Order P-1212]

These principles and this reasoning have been applied in previous orders issued by this office including MO-1405, MO-1749, and MO-1796.

It has also been held, however, that the exception in section 14(4)(a) does not apply to entitlements that have been *negotiated* as part of a retirement or termination package (see for example Orders M-173, M-204, M-419, M-797 and MO-1332) except where it can be found that the information reflects benefits to which the individual was entitled as a result of being employed (Orders PO-1885, PO-2050, and MO-1749). The common thread in these orders appears to be that section 14(4)(a) does apply to benefits contained in negotiated termination agreements so long as they are benefits the individual received while employed and are continuing post-employment.

I accept the interpretation of "benefits" as established by previous orders and having considered these principles in light of the record before me, I find that the information in provision 2(b) pertains to the continuation of specific benefits and I find that this information is clearly about "benefits" within the meaning of section 14(4)(a) of the *Act*. Provision 2(b) describes the affected party's vacation benefits. Although included as part of the settlement agreement, the affected party's vacation benefits have not been negotiated as part of the agreement but reflect benefits to which the affected party was entitled as a result of his employment by the City. Having reviewed this provision, I find that as discussed in previous orders, the affected party's vacation entitlement is a "benefit" within the meaning of section 14(4)(a). Disclosure of this information is therefore not an unjustified invasion of privacy and it is not exempt under section 14(1). Since no other exemption has been claimed for it, provision 2(b) is to be disclosed to the appellant.

I have found that section 14(4)(a) applies to provision 2(b) of the settlement agreement. I do not find that section 14(4) applies to any of the other portions of the settlement agreement. I will now consider whether the disclosure of the remaining information, which does not fall under section 14(4), is presumed to be an unjustified invasion of privacy under section 14(3).

Section 14(3): Presumptions against disclosure

In its representations, the City submits that disclosure of the settlement agreement can be presumed to be an unjustified invasion of privacy under sections 14(3) (c), (d), (f), and/or (g). The City provides no further detail or explanation as to how these sections might apply in the circumstances of this appeal.

In his representations, the appellant points to the City's lack of detailed submissions on the section 14(3) presumptions and submits that the absence of such representations is "notable" and cause him to question whether this indicates that the affected party consents to the release of the settlement agreement. In this regard, the affected party has indicated clearly to this office during both the mediation and adjudication stages of the appeal process that he does not consent to the disclosure of the information at issue.

Previous orders have reviewed the approach this office has taken with respect to information taken in the context of severance agreements. In Order PO-2050, Adjudicator Laurel Cropley examined this issue in detail under section 21 of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent to section 14 of the *Act*). She states:

> Generally, previous orders have found that although **one-time or lump-sum payments or entitlements** do not fall under the presumption found at sections 21(3)(f) or (d) (orders M-173, MO-1184, and MO-1469), information such as start and finish dates of a salary continuation agreement fall within the presumption in section 21(3)(d) and **references to the specific salary** to be paid to an individual over that period of time fall within the presumption in section 21(3)(f) (Order P-1348).
>
> In addition, information which reveals the dates on which former employees are eligible for early retirement, the **start and end dates of employment**, 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, entitlement to and the number of sick leave and annual leave days used and **restrictive covenants** in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption (Orders M-173, P-1348, MO-1332, and PO-1885). Contributions to a pension plan have also been found to fall within the presumption in section 21(3) (f) (Orders M-173 and P-1348).
>
> Previous orders have found, however, that the address of an affected party, **releases,** agreements about the potential availability of early retirement, payment of independent legal fees and continued use of equipment, for example, do not fall within any of the presumptions in section 21(3) (Orders MO-1184 and MO-1332). In Order M-173, former Assistant Commissioner Irwin Glasberg found that much of the information in these types of agreements did not pertain to the "employment history" of the individuals for the purposes of section 14(3)(d), but could more accurately be described as relating to arrangements put in place to end the employment connection.
>
> I agree with the reasoning in these orders and find that the termination date in clause 1(i), references to the benefits the affected person was entitled to as an

> employee and which were to be continued or not upon termination in clause 2(iii) [Note: Adjudicator Cropley finds later in her order that despite the application of the presumption in section 12(3), the benefits in clause 2(iii) fall under the exception in 21(4)(a) and accordingly, that disclosure of that information did not constitute an unjustified invasion of privacy] and clause 3(iii) which makes references to the affected person's obligations arising from his previous employment fall within the presumption in section 21(3)(d). In addition, a portion of clause 2(iii) also makes reference to the affected person's actual salary and thus, describing his income, falls within the presumption in section 21(3)(f).
>
> I find that none of the presumptions in section 21(3) apply to the remaining information in this record, including information describing lump sum or one time payments relating to the affected person's termination and in relation to legal fees (in clauses 2(i), (ii) and (viii)).
>
> [Emphasis added]

This approach taken by Adjudicator Cropley was followed by Adjudicator Frank DeVries in Order MO-1749. I agree with the approach taken and principles set out in Order PO-2050 and adopt them for the purpose of this appeal.

This office has also found the following information *not* to qualify under any of the section 14(3) presumptions:

- releases
- out-placement counselling.

[See orders MO-1160, MO 1184, MO-1332 and MO-1405]

Applying the principles and approaches outlined above, I find that some of the information contained in the settlement agreement falls within the presumptions in section 14(3). First, I find that the end date of employment found in the preamble to the agreement, as well as in provision 1, falls within the presumption in section 14(3)(d). Second, although provision 2(a) refers to the exact amount of a one-time lump sum payment to be conferred immediately to the affected party (which previous orders have found not to fall under section 14(3)(f)), in the present case, the dollar amount of the lump sum payment is coupled with other information from which the affected party's exact salary could be calculated (which previous orders have found does fall under section 14(3)(f)). I therefore find that the information from which the affected party's exact salary could be calculated falls within the presumption in section 14(3)(f) as information describing the affected party's finances or income. However, when the information from which a calculation can be made is severed, the dollar amount of the lump sum payment itself does not reveal the affected party's exact salary. Accordingly, consistent with previous orders described

above, I find that that the dollar amount of the lump sum payment does not fall within the presumption in section 14(3)(f).

In my view, and consistent with previous orders, the remaining information contained in the severance agreement does not fall within the ambit of the section 14(3) presumptions. The information that does not fall under section 14(3) includes the preamble and provision 1 (other than the end date of employment, as previously discussed), provision 2(a) (with the exception of the information from which the affected party's exact salary can be calculated, as previously discussed), provisions 2(c) to 7 which deal with specific terms of the affected party's termination, provisions 8 and 9 concerning injunctive relief, provision 10 detailing the affected party's resignation and return of property, and provisions 11, 12, 13 and 14, regarding respectively, severability, the seeking of independent legal advice, the governing law, and interpretation.

The City also submits that disclosure of the record is presumed to be an unjustified invasion of privacy under section 14(3)(c) because it relates to the affected party's eligibility for social service benefits and under section 14(3)(g) because it consists of personal recommendations or evaluations, character references or personal evaluations. As explained below, I have concluded that neither of these presumptions have application in the circumstances of this appeal.

I will deal first with the possible application presumption in section 14(3)(c). Unemployment does not automatically lead to eligibility for social services and does not in itself trigger a presumption that the affected party applied for or was in receipt of social assistance benefits. There is no other basis for applying section 14(3)(c) in the circumstances of this appeal, and accordingly, the presumption section 14(3)(c) does not apply.

Regarding section 14(3)(g), previous orders have established that information consisting of reviews and recommendations about the job performance of individuals falls within the definition of a "personal evaluation" within the meaning of this section (Order P-348). Such "personal evaluations" or "personnel evaluations" have been interpreted to refer to assessments made according to measurable standards (Order P-447).

Without submissions from the City on this issue it is difficult to determine which portions of the settlement agreement the City views as subject to the section 14(3)(g) presumption. On my review of the record it appears that provision 2(e) of the settlement is most likely the portion of the record for which section 14(3)(g) is being claimed. Having reviewed provision 2(e), as well as the remaining provisions of the agreement, in my view, none of them contain information that might properly be considered as personal recommendations or evaluations, character references or personnel evaluations within the meaning of section 14(3)(g). While it is clear from the wording of provision 2(e) of the settlement agreement why the City might have claimed section 14(3)(g) to exempt the information, in my view it does not apply in this circumstance. The provision itself does not detail, in any manner, any type of review or recommendations about the job performance of the affected party, nor does it contain any character references. I find that section 14(3)(g) does not apply to any of the information contained in the settlement agreement.

In summary, I have found that the presumption in section 14(3)(d) applies to the end date of employment and section 14(3)(f) applies to the information from which the affected party's exact salary can be calculated. Subject to the possible application of section 16, disclosure of this information constitutes an unjustified invasion of personal privacy and it is therefore exempt from disclosure under section 14(1).

Section 14(2): Factors and considerations

I have found above that certain information contained in the severance agreement falls within the presumptions under section 14(3), and that other information fits within the exception under section 14(4). I must now review the remaining information contained in the severance agreement to determine whether any of the listed factors found in section 14(2), as well as all other considerations that are relevant in the circumstances of the case, apply to that information.

Based on my review of the contents of the severance agreement I find that the considerations listed in sections 14(2)(a), (e), (f) and (i) are applicable in the circumstances of this appeal, as explained below. They are therefore to be considered in balancing the privacy interests of the affected party against the appellant's right of access under section 14(2).

Section 14(2)(a): Public scrutiny

Section 14(2)(a) 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,
>
> > The disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

In his representations the appellant provides some explanation as to why the disclosure of the information he is requesting is desirable for the purpose of subjecting the activities of the institution to public scrutiny. The appellant explains that the settlement agreement concerns a former senior officer of the City who has been found by a judicial inquiry to have shared in a responsibility to do more than he did in order to "ascertain the true extent and nature of the financial agreements entered into with respect to the RIM Park financing matter which resulted in a multi-million dollar financial hardship to the City and its taxpayers". The appellant goes on to explain that prior to the commencement of the judicial inquiry into the RIM Park matter, City Council entered into a "settlement agreement" with the affected party. The appellant submits:

> Release of this "settlement agreement" information is germane and necessary to reaching an arms-length determination as to whether or not this "settlement agreement" was entered into in good faith; whether it truly had the best interest of

> the City and Taxpayers at heart, and whether it permits the City and/or the Taxpayers to recover their losses through an insurance claim, or any other means of civil liability action which may or may not remain open to the City and/or its Taxpayers as a direct result of this "settlement agreement".
>
> It has already been discovered that a separate employment "settlement agreement" reached between that same City Council and [another named senior city official] severely limits the City's ability to now act against [that named senior city official]. The same aforementioned Judicial Inquiry has since found that [named senior city official], too, shared responsibility to do more than he did in order to ascertain the true extent and nature of this same financing.

In Order PO-1984, former Assistant Commissioner Tom Mitchinson noted that, "the public scrutiny consideration relates directly to issues of public accountability in the operation of the government's planning and development approval process, which falls squarely within the purposes outlined in section 1(a) of the *Act*".

Previous orders have also found that the contents of agreements entered into between institution and senior employees represent the sort of records for which a high degree of public scrutiny is warranted as identified in section 14(2)(a) of the *Act* (Orders M-173, MO-1184). This is because "all government institutions are obliged to ensure that tax dollars are being spent wisely" (Orders MO-1184, MO-1332 and MO-1405).

In Order MO-1469, Adjudicator Donald Hale followed these Orders in his consideration of the section 14(2)(a) factor in relation to the disclosure of information contained in a severance agreement:

> It has been well established in a number of previous decisions that 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, M-953). Based on this, and the appellant's desire to scrutinize how the Municipality compensated a senior management employee upon his termination, I find that section 14(2)(a) is a relevant consideration in the circumstances of the present appeal. I further find that this is a significant factor favouring the disclosure of the information contained in the record.

I adopt the approach outlined in Order MO-1469 for the purposes of the present appeal.

The appellant has provided detailed information supporting the position that the issue of compensation for this particular City senior management employee has been the subject of public attention. Taking into consideration the appellant's representations and the circumstances of this appeal, I am satisfied that disclosure of the information in the agreement that I have not found to be subject to a presumption is desirable for the purpose of shedding some light on the details of this particular agreement and would address the "public scrutiny" concerns identified.

Accordingly, I find that the consideration under section 14(2)(a) is a relevant and significant factor that weighs heavily in favour of the disclosure of the remaining information in the settlement agreement, including the appellant's name, which has previously been disclosed at the public judicial inquiry into the RIM Park Financing matter.

Relevant consideration: Public confidence

Section 14(2) indicates that "all the relevant circumstances" are to be considered in determining whether a disclosure would constitute an unjustified invasion of personal privacy. In appeals involving requests for severance agreements, previous orders have recognized that "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution". As Adjudicator Hale noted in order MO-1469:

> 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, M-129, M-173, P-1348 and M-953)
>
> The severance agreement which forms the record at issue involved a significant expenditure of public funds on behalf of a senior employee. Further, the climate of spending restraints in which these agreements were negotiated placed an obligation on the Municipality's officials to ensure that tax dollars were spent wisely. On this basis, I conclude that the public confidence consideration also applies in the present circumstances.

As discussed above, in the current appeal, the severance agreement between the City and the affected party, a senior City official, resulted in a termination payment to that official who was later found to be involved in the RIM Park financing matter. As previously noted, the RIM Park matter resulted in multi-million dollar financial hardship to the City and its taxpayers. Given these circumstances, I find that the public confidence consideration applies and carries significant weight in favour of the disclosure of the remaining information contained in the severance agreement relating to the affected person.

Sections 14(2)(e),(f) and (i): Unfair harm; highly sensitive; and/or damage to reputation

Despite their objection to the disclosure of the information contained in the severance agreement, neither the City nor the affected party has made submissions on the application of any of the factors in section 14(2), including those favouring non-disclosure. In the circumstances of this appeal, sections 14(2)(e), (f) and (i) are all factors favouring non-disclosure that might be relevant to a determination of whether disclosure of the remaining information in the severance agreement would result in an unjustified invasion of the affected party's personal privacy.

In his representations, the appellant refers specifically to the possible application of the factor listed in section 14(2)(i) and submits:

> As to 14(2)(i) whether "the disclosure may unfairly damage the reputation of any person referred to in the record", [the affected party] has already completely damaged his own reputation through his own actions, as amply conveyed within the Judicial Inquiry Report. It is more of interest for the public to discern just what was on Council's mind when it accepted [the affected party's] terms of resignation within the employment/settlement agreement. Subsequently, it is Council's actions here that are more the matter of public concern now.

I do acknowledge that, once disclosed, the remaining information in the severance agreement might be used by the appellant and/or others in an attempt to recover losses through an insurance claim, a civil liability action before the courts, or other such methods. I also acknowledge that disclosure of the settlement agreement may ultimately provide further details about the end of the affected party's employment with the City that might cause some damage to his reputation. However, I agree with the appellant's arguments with respect to the factor in section 14(2)(i), and, in my view, any "harm" or "damage to the reputation" of the affected person would be directly connected to his employment and subsequent termination from employment with the City rather than to the disclosure of the remaining information contained in the settlement agreement itself. In these circumstances, I am not persuaded that any consequence of disclosure would result in "unfair harm" or that disclosure of the information in and of itself would "unfairly damage" the affected party's reputation. Accordingly, I find that the factors in section 14(2)(e) and (i) carry little weight in the balancing of interests.

With respect to the factor listed in section 14(2)(f), that "the information is highly sensitive", prior orders have established that for information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual [see Orders M-1053, P-1681 and PO-1736]. I do agree that disclosure might cause the affected party some personal distress and that this factor is to be afforded some weight in balancing the privacy interests of the affected party against the appellant's right of access but as neither the affected party nor the City has specifically commented on this, I can only speculate. Accordingly, in my view the factor in section 14(2)(f) carries little weight in the balancing of interests.

I have reviewed the other factors in section 14(2) and find that none apply in the circumstances.

I have found that disclosure of the affected party's end date of employment and the information from which the affected party's exact salary can be calculated would result in presumed unjustified invasions of privacy under section 14(3). I must now weigh the factors listed in section 14(2) and any other relevant considerations, as outlined above, to determine whether the disclosure of the remaining information would be an unjustified invasion of privacy. In weighing the affected party's right to privacy against the requester's interest in disclosure, I find that the factor favouring disclosure in section 14(2)(a) and the unlisted consideration pertaining

to public confidence outweigh any factors favouring privacy protection. I therefore find that disclosure of the remaining information would not constitute an unjustified invasion of privacy. Accordingly, it is not exempt under section 14(1) and should be disclosed to the appellant.

In summary, I find that only the information that is subject to the presumptions in sections 14(3)(d) or (f) (the affected party's end date of employment and the information from which the affected party's exact salary can be calculated) is exempt under section 14(1). I will now consider whether the public interest override in section 16 applies to the information I have found to be exempt**.**

PUBLIC INTEREST OVERRIDE

General principles

Section 16 of the *Act* provides:

> 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]

Section 16 is commonly referred as the "public interest override" since it permits information which is otherwise exempt from disclosure under specified part of the *Act*, to be disclosed in the public interest. For section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption (in this case, section 14) [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

The appellant raised the possible application of section 16 during the mediation stage of this appeal.

In Order P-984, Adjudicator Holly Big Canoe discussed the meaning of the phrase "compelling public interest":

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 14. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

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. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption. [Order PO-1705]

Representations, analysis, and findings

In addition to the portions of the appellant's representations (quoted above in my discussion of the application of section 14(2)(a)) in which he explains why, in his view, the disclosure of the information he is requesting is desirable for the purpose of subjecting the activities of the institution to public scrutiny, the appellant also provides more detailed information as to why he feels that there is a compelling public interest in the disclosure of the settlement agreement that outweighs the purpose of section 14. In describing the compelling public interest, the appellant provides greater detail about the RIM Park financing matter including the consequences to the City, the City's out of court settlement, and the subsequent public judicial inquiry. These details also include information on how the affected party was connected to the RIM Park financing matter, information about the circumstances in which the settlement agreements were signed between the City and several senior management employees, one of which was the affected party. The appellant also refers to the findings of the judicial inquiry, its recommendations and the fallout connected to the RIM Park financing matter. In addition, he points to Justice Ronald C. Sills' report published on October 20th, 2003, for further detailed information. The appellant also explains that disclosure of the settlement agreement reached between the affected party and the City might allow the public to more fully understand the circumstances of the termination of the affected party's employment with the City in light of his involvement in the matter.

I accept that the disclosure of the specifics of employment settlements or severance agreements in general might serve the purpose of informing the citizens of a City about the activities of their government, adding to the information they have available and upon which they may base political choices. In the particular circumstances of this appeal, I accept that disclosure of certain information in the affected party's settlement agreement would serve the purpose of providing citizens with further information about actions taken by the City before the details of the costly RIM Park financing matter came to light. Earlier in this order I found that the consideration under section 14(2)(a), that disclosure of the information is desirable for the purpose of subjecting the activities of the institution to public scrutiny, is a relevant and significant factor weighing in favour of the disclosure of much of the information contained in the settlement

agreement and that disclosure is desirable for the purpose of shedding some light on the details of this particular agreement.

Based on my findings with respect to section 14, only certain personal information in the settlement agreement (the affected party's end date of employment and the information from which his exact salary can be calculated) qualifies for exemption from disclosure because it is a presumed invasion of privacy under section 14(3). Although I accept the appellant's position that the public has an interest in the disclosure of some of the information contained in the record, I am not persuaded that there is a *compelling* public interest in the disclosure of the specific information remaining at issue in this appeal. In my view, the remaining information, namely, the affected party's end date of employment and the information from which his exact salary can be calculated, would not sufficiently illuminate the circumstances of the affected party's termination of employment with the City for there to be a compelling public interest in its disclosure. The level of disclosure which will be made in compliance with this order will, in my view, address the public interest issues raised by the appellant.

Therefore, I find that there is no compelling public interest in the disclosure of the affected party's end date of employment and the information from which his exact salary can be calculated. Accordingly, I find that the public interest override provision in section 16 does not apply in the circumstances of this appeal.

ORDER:

1. I order the City to disclose the settlement agreement, with severances made to the end date of employment and the information from which the affected party's exact salary can be calculated, to the appellant by **November 1, 2005** but not earlier than **October 27, 2005**. For greater certainty, I have provided the City with a highlighted copy of the settlement agreement indicating those portions that should be severed.

2. In order to verify compliance with the provisions of the order, I reserve the right to require the City to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: September 26, 2005
Catherine Corban
Adjudicator