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

ORDER MO-2027

Appeal MA-040193-1

City of Ottawa

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NATURE OF THE APPEAL:

The City of Ottawa (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to personal information relating to the requester. More specifically, the requester sought access to the following information:

a) Access to all my "Personal Information Banks" collected by the City of Ottawa; before and since amalgamation (January 2001), including Occupational Health file;

b) In particular, access to any emails, correspondence, notes of telephone conversations identifying me by name, SIN, employee I.D #, race, country of origin or by any other manner; under my names [family name and maiden name].

The City identified 1083 pages of records. It granted access in full to the first 953 pages of records. It granted partial access to pages 954 to 999 of the records, exempting some portions on the basis of the exemption in section 38(a) in conjunction with section 7 (advice and recommendations), as well as section 38(b) (invasion of privacy) in conjunction with factors set out in sections 14(2)(e), (f) and (h) and the presumption in section 14(3)(a). The City refused access in full to pages 1000 to 1012 based on the exemption in section 38(b) in conjunction with section 14. The City refused access to pages 1013 to 1075 in full based on the exclusions at section 52(3)1 and 52(3)3 of the *Act*. The City also refused to disclose portions of pages 954 to 956, 961, 969, 970, and 984 of the records, and pages 1076 to 1083 in full, on the ground that they were not responsive to the requester's request.

The requester (now the appellant) appealed the City's decision.

This office assigned a mediator to assist the parties to resolve the issues. The mediator discussed the appeal with the appellant and sent her several orders previously issued by this office that appeared to be relevant to the issues in this appeal.

Also during mediation, the City explained its position that some of the information had not been disclosed because the City considered it non-responsive to the request. The appellant did not accept the City's view that this information is not responsive to her request.

The appellant requested that her appeal be placed on hold until a proceeding was completed. The appeal was placed on hold for four months, after which the appellant confirmed her decision to pursue this appeal.

As mediation did not resolve the appeal, it entered the adjudication stage of the process. Initially, I sent a Notice of Inquiry to the City, setting out the facts and issues in the appeal and inviting the City to provide representations. The City did this. I then sent a copy of the non-confidential portions of the City's representations to the appellant with a Notice of Inquiry and invited her to provide representations.

The appellant provided representations. As these representations included information to which I considered the City should have an opportunity to reply, I sent the City a copy of the appellant's representations with a request to reply to them, which the City did.

RECORDS:

The records consist of handwritten notes, emails, memoranda and correspondence prepared by and about the appellant and other employees of the City. The records at issue are pages 954 to 1083 of the records identified by the City as responsive to the request.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

As indicated above, the City claims that portions of pages 954 to 956, 961, 969, and 984 of the records and pages 1076 to 1083 in full are not responsive to the appellant's request. As well, on page 970, the City has withheld two paragraphs. The first paragraph is withheld under section 38(b) and the City claims that the second paragraph is not responsive.

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose of spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Representations, analysis and findings

The City claims that certain portions of pages 954 to 956, 961, 969, 970, and 984 of the records are not responsive to the request because "they include references to other employees of the City,

as further described below. Therefore, the other employees' information has been removed as non-responsive". The City later states that "[i]n the past, it appears to have been 'Human Resources practice' to deal with employment-related matters for more than one employee in one record", a practice which has since been discontinued.

The City's representations also state that pages 1076 to 1083 in their entirety are not responsive to the appellant's request as they are meeting notes referring to other matters that do not relate to the appellant. The City states that these are pages from a manager's notebook relating to a meeting that included a discussion about the appellant.

The appellant takes the position that all references in her employee records are reasonably related to her request and asks that I review the records to determine whether the position taken by the City is correct.

Having reviewed the records, I am satisfied that although pages 954, 955, 956 and 969 contain information about both the appellant and other employees, the information about the other employees is not related in any way to the appellant, and is therefore not responsive to the request.

However, there is wording on page 961 that suggests a reference to the appellant and another employee. In my view, that information would likely be responsive to the request. Since the City is in a better position to advise whether this is the case than the appellant and has not done so, the ambiguity should be resolved in the appellant's favour. I find that the severed information on page 961 is responsive to the appellant's request.

Page 970 consists of an email from the appellant to a supervisor and an email written in response. The City has severed the second paragraph of text as non-responsive. The email is in part about the appellant and her co-workers. However, I agree that the second paragraph does not relate to the appellant and is not responsive to the request.

Page 984 is an email chain dealing with an issue involving the appellant. Although the City claims that the name of an employee that has been severed is not related to the request, it provides no explanation of why this particular employee's name is found in this record relating to the appellant, other than the vague explanation set out above. The ambiguity should be resolved in the appellant's favour, and therefore, I find that the severed information is responsive to the request.

I have reviewed pages 1076 to 1083. The appellant's name does not appear in these records and I do not recognize in them any matter that appears to relate to the appellant's concerns. However, the City states that these are pages from a manager's notebook relating to a meeting *that included a discussion about the appellant*. In the absence of any indication of which notes relate to the discussion about the appellant and which do not, I am not able to conclude that this information does not relate to the appellant. This ambiguity, which is of the City's making, should be resolved in the appellant's favour. I find, therefore, that pages 1076 to 1083 are responsive to the request.

In summary, I find that the severed information on pages 954, 955, 956, and 969 and the second paragraph of page 970 are not responsive to the appellant's request and therefore need not be disclosed. I am not satisfied that the withheld information on pages 961 and 984 and all of pages 1076 to 1083 are not responsive, and I find that this information is responsive to the request.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Do sections 52(3) 1 and 3 exclude the records from the *Act*?

The City claims that the following information is excluded from the *Act* because it falls under sections 52(3) 1 and 3: portions of pages 983, 985, 987, 989, 990, 992, 994, 996 and 998, and pages 1013 to 1075 in their entirety.

In its representations, the City states that the records are from the appellant's Human Resources Personnel file, Labour Relations file, Employee Health and Wellness (Occupational Health) file, Human Rights and Employment Equity file, and various managers' files relating to the appellant.

General Principles

Section 52(3) states, in part:

> 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.
>
> . . . . .
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

Section 52(3)1: court or tribunal proceedings

For section 52(3)1 to apply, the City must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Part 1: collected, prepared, maintained or used

The City submits that pages 1025 to 1075 are excluded under section 52(3)1. It states that pages 1025 to 1053 were collected, prepared, maintained and used by the City's Program Manager, Development Review (South). These pages consist of emails between the Program Manager and other managers, as well as staff from Labour Relations and Human Rights and Employment Equity. The information also contains handwritten notes of a meeting with staff from Human Rights and Employment Equity.

The City submits that pages 1054 to 1075 were collected, prepared, maintained and used by the City's Senior Labour Relations Consultant, and consist of correspondence and e-mails between the Consultant and CUPE, the appellant's union, Human Rights and Employment Equity staff as well as the consultant's handwritten notes. The appellant does not dispute this.

Having reviewed pages 1025 to 1975 of the records, I am satisfied that the City's representations accurately describe the situation, and each of them was collected, prepared, maintained or used by the City. Therefore, they meet the first requirement.

Part 2: proceedings before a court or tribunal

The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223, PO-2105-F].

For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223, PO-2105-F].

The word "court" means a judicial body presided over by a judge [Order M-815].

A "tribunal" is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or obligations [Order M-815]. "Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity", the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue [Order M-815].

The City submits that all of these records have been collected, prepared, or maintained and are being used in relation to a grievance filed by the appellant under the collective agreement between the City and the appellant's union on November 25, 3003, in response to a letter that the appellant received from her manager on November 7, 2003. At the time of the City's initial representations, two stages of the grievance process had been completed and the grievance was awaiting arbitration. The records at issue begin with emails in June, 2003 discussing concerns about the appellant's conduct. Records prepared in October and November deal with complaints by the appellant.

The appellant points out that the City has not told her the dates of the records at issue. Accordingly, she cannot determine whether the records were prepared and/or collected before or after the City was aware that her grievance proceedings were a reasonable prospect.

It is clear from my review of the records that the ones prepared after November 25, 2003, were prepared in response to this grievance and have been collected, maintained and used in that context. Regardless of whether they were prepared in anticipation of the grievance, it is clear that the records prepared before November 25, 2003 have been maintained and used in relation to this grievance process since it was initiated.

The City has provided very little information about the grievance process to assist in determining whether it involves a proceeding before a "tribunal" or a similar entity. For example, I have not been provided with the relevant provisions of the collective agreement in question or statutory provisions, if any, governing this process. Nevertheless, the information provided to me, in particular the letter of December 17, 2004 referring to "submissions" and a "hearing", the letter of December 21, 2004, both provided by the appellant, and the reference to arbitration in the

representations and the letter of December 21, 2004, support a finding that this grievance process constitutes proceedings before a tribunal or other similar entity.

I find therefore, that the second requirement is met.

Part 3: labour relations or employment

As stated earlier, the proceedings in question relate to a grievance proceeding, including arbitration, under a collective agreement between the City and a union. The proceedings are between the City and one of its employees, represented by her union. As such, I find that the proceedings relate to labour relations and/or to the employment of a person by the City.

As pages 1025 to 1075 meet all three parts of the test, I find that they are excluded from the *Act* under section 52(3)1, and therefore need not be disclosed to the appellant, unless they are subject to an exception under section 52(4), which I will discuss under the heading "Section 52(4): exceptions to section 52(3)", below.

Section 52(3)3: matters in which the institution has an interest

The City claims that portions of pages 983, 985, 987, 989, 990, 992, 994, 996 and 998, and pages 1013 to 1075 in their entirety are excluded from the *Act* by section 52(3)3. As I have found that pages 1025 to 1075 are excluded by section 52(3)1, it is unnecessary to consider them further.

The City states that section 52(3)3 has been applied to records that were collected, prepared, maintained and used by management of the City in labour relations and employment-related matters for meetings, consultations, discussions or communications throughout the appellant's career with the City. These pages consist of handwritten meeting notes and e-mails between the appellant's managers, Labour Relations, and Human Rights and Employment Equity staff at the City.

For section 52(3)3 to apply, the City must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

collected, prepared, maintained or used

The City submits that the records and portions of records in question are handwritten meeting notes and emails between the appellant's managers, Labour Relations, and Human Rights and

Employment Equity staff at the City, and were collected, prepared, maintained and used by the City.

The appellant does not dispute this, but points out the effect of such a broad exclusion:

> On this basis, the City has effectively denied [the appellant] access to any information relating to her employment with the City over the course of her years of employment. It is submitted that this "blanket" denial by the City precludes her from having an understanding of her performance during the course of her employment with the City.

Having reviewed the records at issue, I find that all of them have been collected, prepared, maintained and/or used by the City, meeting requirement 1.

meetings, consultations, discussions or communications

Having reviewed the records and portions of records for which this exclusion is claimed, I agree with the City's description of them under requirement 1, above. I am satisfied that all of them were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications.

labour relations or employment-related matters in which the institution has an interest

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]

- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above].

The City states that the meetings, consultations, discussions or communications matters in relation to which the records were collected, prepared, maintained and used relate to several aspects of the appellant's work and performance described by the City. The City states that the records include information about various meetings with the appellant, her union representative and city staff regarding these issues.

From my review of the records, I am satisfied that this is an accurate description of the purpose of these meetings, consultations, discussions and communications, and that these are "labour relations or employment-related matters". I am also satisfied that they are matters in which the City has an interest. I find therefore that the records meet the third requirement.

As I have found that the records meet all three parts of the test, I find that the portions of pages 983, 985, 987, 989, 990, 992, 994, 996 and 998 for which this exclusion is claimed and pages 1013 to 1024 in their entirety are excluded from the *Act* under section 52(3)3, unless they are subject to an exception under section 52(4).

Section 52(4): exceptions to section 52(3)

If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

> 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.

I find that none of the information for which the City claims the exclusions in section 52(3)1 and 3 fall within any of the exceptions listed in section 52(4). Therefore, the following information is excluded from the scope of the *Act* under sections 52(3)1 and 3: the portions of pages 983, 985, 987, 989, 990, 992, 994, 996 and 998 withheld by the City, and pages 1013 to 1075 in their entirety.

I will proceed to consider whether the remaining records, pages 957, 959, 960, 962 to 967, 968, 970, 973, 975, 981, 982, and 1000 to 1012, are properly withheld under any of the exemptions claimed by the City.

PERSONAL INFORMATION

The City alleges that the records at issue contain the personal information of the appellant as well as the personal information of a number of the appellant's co-workers, the appellant's managers, and other managers. The City claims that pages 957, 959, 960, 962 to 966, 968, 970, 975, 981, 982, and 1000 to 1012 contain the personal information of individuals other than the appellant.

Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,

> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of "about" the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The meaning of "identifiable"

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

Having reviewed the records together with the submissions of the parties, I find that that all of the responsive records contain the personal information of the appellant, and pages 957, 959, 960, 962 to 966, 968, 970, 975, 981, 982, and 1000 to 1012 contain the personal information of both the appellant and other individuals other than the appellant.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/ADVICE AND RECOMMENDATIONS

Does the discretionary exemption at section 38(a) in conjunction with the section 7 exemption apply to the information at issue?

Introduction

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

In this case, the institution relies on section 38(a) in conjunction with section 7 to exempt portions of pages 967, 971, and 985. In its decision, the City denied access to this information based on section 7. However, in its representations, the City states that section 38(a) should have been claimed in conjunction with section 7. I have previously found that the same portion of page 985 may be withheld under section 52(3). Accordingly, I will only consider pages 967 and 971.

As stated above, the information withheld on pages 967 and 973 relates to the appellant. It is associated with her in an official or professional capacity, but reveals something of a personal nature about her, and therefore still qualifies as her personal information.

ADVICE TO GOVERNMENT

General principles

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will

ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)]

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted (Court of Appeal Doc. M30913, June 30, 2004)]

I have reviewed the withheld information and find that in both cases, it reveals a proposed course of action and qualifies as advice. As none of the exceptions to the exemption found in sections 7(2) and (3) apply, I find that the information withheld on pages 967 and 973 is exempt from disclosure under section 38(a) in conjunction with section 7(1).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

As stated above, pages 957, 959, 960, 962, 964 to 966, 968, 970, 975, 981, 982, and 1000 to 1112 contain the personal information of both the appellant and other employees. Therefore, I will consider whether section 38(b) applies to this information.

General principles

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met. If any of paragraphs 14(1)(a) through (e), or 14(4)(a) or (b) applies, disclosure is not an unjustified invasion of personal privacy. Section 14(3) identifies information whose disclosure is *presumed* to be an unjustified invasion of personal privacy. If no section 14(3) presumption applies, section 14(2) outlines factors and circumstances to be considered in determining whether disclosure is an unjustified invasion of personal privacy.

If the information fits within any of paragraphs (a) to (e) of section 14(1), it is not exempt from disclosure under section 38(b).

Section 14(1)(a) to (e) provide:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
>
> (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;

> (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;
>
> (e) for a research purpose if,
>
> (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
>
> (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
>
> (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations;

I find that paragraphs (a) to (e) of section 14(1) do not apply. Therefore, I will consider whether any of the presumptions in section 14(3) apply.

Does the presumption in paragraph (d) of section 14(3) apply?

Introduction

Subject to sections 14(4) and 16, if any of paragraphs (a) to (h) of section 14(3) apply, disclosure is an unjustified invasion of privacy under section 38(b) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The City claims that the presumption in section 14(3)(a) applies to page 1010 and section 14(3)(d) applies to pages 957, 959, 960, 962, and 963.

Subsections (a) and (d) of section 14(3) provide:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (d) relates to employment or educational history;

Information contained in resumes [Orders M 7, M 319, M 1084] and work histories [Order M 1087] falls within the scope of section 14(3)(d) [Order MO-1257].

A person's name and professional title, without more, does not constitute "employment history" [Order P-216].

Page 1010 describes an individual's medical and psychological condition. I find that the presumption in section 14(1)(a) applies and it is exempt unless sections 14(4) or 16 apply.

Pages 957, 959, 960, 962, and 963 describe the seniority levels, employment start dates, and related "bumping rights" of various employees of the City. This information constitutes the employment history of those individuals. Accordingly, it is subject to the section 14(3)(d) presumption and is exempt unless sections 14(4) or 16 apply. The appellant does not claim that either of these sections apply, and having reviewed the records, I am satisfied that neither section applies.

Accordingly, I find that the information withheld on pages 957, 959, 960, 962, and 963 and page 1010 in its entirety are exempt under section 38(b).

As the City does not claim that section 14(3) presumptions apply to any of the other information for which it claims the section 14 exemption, I will consider the application of the section 14(2) factors to that information.

Do any of the section 14(2) factors apply to the other records for which the section 14 exemption is claimed?

If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The list of factors under section 14(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2) [Order P-99].

The City claims that the factors in sections 14(2) (e), (f) and (h) are relevant. The City claims that the factors in sections 14(2) (e), (f) and (h) are relevant, and weigh against disclosure. The appellant claims that the factor in section 14(2)(d) is relevant, and weighs in favour of disclosure.

Sections 14(2) (d), (e), (f) and (h) provide:

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

I shall first consider whether section 14(2)(d) applies.

The appellant had initiated a grievance against the City. At the time the City submitted its initial representations, this grievance was to be heard by an arbitrator. In her representations, the appellant states that the personal information requested is relevant to a fair determination of her rights through the grievance process. She states:

> It is submitted that parties affected by a potential decision or action must have sufficient knowledge of what is at stake to enable them and their representatives to provide evidence and argument in support of their own position and to counter what is being alleged in opposition to their interests. Effective participation demands that those affected are aware of the issues and at least the nature of the contrary evidence.
>
> At the very least the pertinent allegations should be disclosed to enable [the appellant] to respond to them. The names of the complainants need not be provided but at least the information which they provided.
>
> It is submitted that these records should have [been] disclosed to [the appellant] in order for her and her representatives to have effectively participated in any grievance process. A high standard of fairness is required when an individual's career is involved.

However, the appellant's representations also state that "the decision not to proceed any further with [the appellant's] grievance has already been reached".

The City does not dispute the claim that section 14(2)(d) applies. Rather, the City states that, "notwithstanding the factor set out in section 14(2)(d), were the exempted portions to be disclosed, the complainants could be exposed unfairly to harm, the complainants' information is highly sensitive, and it is reasonable to expect that the complainants supplied their information in confidence."

In its reply representations, the City challenges the appellant's claim that the proceedings are at an end, stating that the City's Labour Relations Division "has confirmed that they have yet to receive notice of the withdrawal of the appellant's grievance. As such, the City must assume that the grievance is still in effect and arbitration still possible until such time as a formal withdrawal in writing has been received".

For section 14(2)(d) to be applied, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

In light of the City's assertion that it considers the grievance proceedings to be ongoing and the fact that it does not dispute the application of section 14(2)(d), I find that section 14(2)(d) is a relevant factor that weighs in favour of disclosure. Similar to section 14(2)(d) is the need for a degree of disclosure to parties to an administrative process that is consistent with the principles of natural justice. This factor, which arises as a result of the preamble to section 14(2), which requires consideration of "all the relevant circumstances", favours disclosure. [Order P-1014].

However, I give these factors very low weight in light of the appellant's representations that the proceedings are at an end, the lack of any evidence that the disclosure or discovery mechanisms in the grievance process are inadequate to protect the appellant's right to a fair hearing, and the lack of any evidence in the representations or in my review of the records themselves that the information at issue would assist the appellant in these proceedings.

In regard to section 14(2)(e), having reviewed the records and representations, I am not persuaded that this factor has any application. The City has provided no cogent evidence that any of the individuals to whom the information relates will be exposed - fairly or unfairly - to pecuniary or other harm if their personal information is disclosed to the appellant. The fact that disclosure might be uncomfortable does not by itself mean that these individuals will be exposed to any pecuniary or other harm [Order PO-2230]. I find that this is not a factor weighing against disclosure.

For section 14(2)(f) to apply and information 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 [Orders M 1053, P 1681, PO-1736]. I am satisfied, based on my review of the records and for the reasons set out in the confidential portion of the City's representations relating to section 14(2)(f), that the information for which the City claims section

14(2)(f) is in fact highly sensitive. I find that this factor weighs strongly against disclosure of the information withheld on pages 964, 965, 966, 968, the information on 970 withheld under this exemption, the information withheld on pages 975, 981, 982, and pages 1000 to 1012 in their entirety.

The City claims that section 14(2)(h) applies to information found on pages 964 to 966, 968, 970, 975, 981, 982, and 1000 to 1012, identifying individuals who have complained about the appellant's conduct. Having reviewed the records and representations, I agree with the City that given the nature of the matters discussed in the records, it is reasonable to infer that the complainants supplied their information to City officials in confidence. I find that in relation to these records, the factor in section 14(2)(h) weighs moderately against disclosure of the information withheld on pages 964, 965, 966, 968, 970, 975, 981, 982, and 1000 to 1012.

On balance, I find, taking into account the application of the various factors favouring disclosure and non-disclosure, that the disclosure of the information withheld under section 14(1) that is not exempt as a result of section 14(3) would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. The appellant has already been provided with the information that pertains only to her. What remains at issue is highly sensitive, and was provided in confidence, and in this case these are the most important considerations. I find, therefore, that the information withheld on pages 957, 959, 960, 962, 964 to 966, 968, the information withheld on page 970 under this exemption, the information withheld on pages 975, 981, and 982, and pages 1000 to 1112 in their entirety are exempt from disclosure under section 38(b).

EXERCISE OF DISCRETION

Did the institution exercise its discretion under sections 7 in conjunction with s. 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

General principles

The section 7 and 38(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The appellant alleges that the City failed to consider all relevant circumstances when weighing her right of access to her own personal information against the other individuals' rights to privacy. Specifically, the appellant alleges, as outlined earlier in my discussion of section 14, that the City failed to consider the appellant's need for this information to participate effectively

in the grievance process. The appellant claims that the City did not properly balance the competing interests, placing too much emphasis on the principle that the privacy of individuals should be protected and overlooking the principle that individuals have a right to their own personal information.

The City submits that it did balance these rights, taking into account the factors set out in section 14(2), in light of the fact that the appellant has had conflicts in her relationships with the complainants whose personal information is found in the records and with other employees.

Taking into account the substantial amount of information disclosed to the appellant and the selective and focussed severances conducted by the City, I do not find any error in the manner in which the City exercised its discretion.

ORDER:

1. I uphold the decision of the City, except the decision that the withheld information on pages 961 and 984 and pages 1076 to 1083 in their entirety are not responsive to the request.

2. I order the City to issue a final access decision regarding the withheld information on pages 961 and 984 and regarding pages 1076 to 1083, without recourse to a time extension, in accordance with the requirements of sections 19, 21 and 22 of the *Act*, as applicable, treating the date of this order as the date of the request, and to send this office a copy of the decision letter when it is sent to the appellant.

Original signed by: March 16, 2006
John Swaigen
Adjudicator