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

ORDER MO-2477

Appeal MA06-421

Regional Municipality of Durham

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NATURE OF THE APPEAL:

The Regional Municipality of Durham (the Region) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> In 2005, an audit was commissioned by [a named individual] and prepared by [a second named individual] for [a named organization] relating to the procurement practices and purchase/renovation of the Region's Traffic Operations Centre (Works Department) located at 101 Consumers Drive in Whitby.
>
> …Therefore, pursuant to the Act, I hereby request copies of and/or access to the following:
>
> - All information relating to the commissioning of the audit;
> - Full audit report including findings and recommendations;
> - All related audit notes; and
> - Responses by Regional staff and Council, including but not limited to the Audit Committee, Commissioners of Works and Finance, Regional Chair; and all names of those parties that were granted access to the information.
>
> **Please ensure that both PAPER and ELECTRONIC files are subject to the search.** … [emphasis in the original]

The Region identified three groups of records (the original group of records) and grouped them under the following headings, based on the Department in which they originated: "Works," "Finance" and "Office of the Regional Chair and C.A.O." The Region provided the requester with an Index of Records with its decision letter whereby it granted partial access to the responsive records, applying the exemptions in sections 7(1) (advice or recommendations), 10(1) (third party information) and 14(1) (personal privacy) of the *Act* to the withheld portions. In addition, the Region applied a fee of $10.60 for photocopying charges, which the appellant paid.

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

During the mediation stage of the appeal process, the following transpired:

- The appellant initially identified three issues:
  - application of the exemptions claimed to the records
  - reasonable search, and
  - public interest in disclosure (section 16 of the *Act*).
- The Region notified four third parties whose interests may be affected by the disclosure of information contained in the records and, subsequently, disclosed to the appellant certain information pertaining to them.

- The appellant provided a written basis for her view that additional records exist, which was forwarded to the Region by the mediator.

- The appellant narrowed the scope of the information at issue in the original group of records.

- A third party appeal (MA07-96) was resolved as a result of the appellant narrowing the scope of the information at issue in this appeal.

- The Region obtained additional responsive records from a third party (the new group of records).

- With regard to the new group of records, the Region issued an access decision granting partial access to some records while denying access to others, in whole or in part, pursuant to the discretionary exemptions in sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) and the mandatory exemptions in sections 10(1) and 14 of the *Act*. In addition, the Region provided the appellant with a fee estimate in the amount of $1,437.20 for severing and photocopy charges and provided an Index of Records for the new group of records.

- The appellant indicated that she was no longer claiming that additional responsive records exist and this issue is no longer to be determined in the appeal.

- The payment of a fee for photocopying was resolved.

As a result of the above, the following "Finance" and "Office of the Regional Chair and C.A.O." records from the original group of records remain subject to a claim for exemption under section 14(1):

- "Finance" records - Records 1, 4 and 6

- "Office of the Regional Chair and C.A.O." records - the severed portion in the middle of page 4 of Record 5 that contains a suggestion of disciplinary action

With respect to the records in the "Works" category, three documents were identified, two of which are duplicates of records that are contained in the other two groupings and one of which was disclosed in its entirety. Accordingly, the "Works" records are not at issue as a separate group in this appeal and I will not be addressing them further in this order. With regard to the new group of records, the appellant narrowed the scope of her appeal to include only the following documents:

Batch 1: Records 1, 2, 4, 7, 8
Batch 2: Records 12, 14, 18
Batch 3: Records 25, 27, 29, 33

Batch 4: Records 40, 43
Batch 5: Records 49, 51, 60, 64, 68, 82
Batch 6: Records 85, 88, 91, 93, 98, 108, 111, 114, 115, 116, 117, 120, 125, 129, 130
Batch 7: Records 145, 172, 176, 177
Batch 8: Record 197
Batch 10: Records 246, 250, 253, 259, 260, 261, 264, 265, 267
Batch 11: Record 279
Batch 12: Records 289, 293, 309

As a result of the appellant's narrowing of the scope of her appeal to the new group of records, the Region's application of section 7(1) of the *Act* was no longer at issue.

The appellant confirmed that the following issues remained unresolved at the conclusion of mediation:

- the application of the exemptions to the information at issue; and
- the application of the public interest override in section 16 of the *Act* to the information at issue.

Because the parties were unable to resolve the remaining issues in mediation, the file was transferred to an Adjudicator to conduct an inquiry under the *Act*.

During the course of reviewing the file in anticipation of commencing the inquiry, the Adjudicator initially assigned to the file questioned whether the exclusionary provision in section 52(3) (labour relations and employment records) may apply to exclude some or all of the records from the operation of the *Act*. Since this is a jurisdiction issue, the Adjudicator decided to also seek representations on the application of the exclusion in section 52(3) to the records at issue.

The Adjudicator commenced his inquiry by issuing a Notice of Inquiry, seeking representations from the Region on the application of the exclusion in section 52(3) to the records that remain at issue from both the original and new groups of records and on the application of the exemptions in sections 10, 12 and 14 to those records. He also asked for representations on the possible application of the "public interest override" provision in section 16. In addition, the Adjudicator sought representations on the application of section 14(1) from three individuals whose rights may be affected by the disclosure of the information in the records (the affected persons), as their names appear prominently in many of the records.

In response, representations were received from the Region, on its own behalf and on behalf of the three affected parties. The Region also included with its representations a copy of a new decision letter, dated April 18, 2008, that it issued to the appellant, in which it confirmed the release of one of the records at issue, identified as Batch 6, Record 98. Accordingly, this record is no longer at issue in this inquiry.

The Adjudicator then sought representations from the appellant and included with his Notice of Inquiry a complete copy of the Region's submissions. In response, the appellant also provided

representations. Following his receipt of the appellant's submissions, the Adjudicator sought and received additional representations from the Region by way of reply.

The Adjudicator then determined that he needed to seek representations from six additional affected parties (the affected parties) on the application of section 10(1) to the information contained in the records. One of these affected parties consented to the disclosure of information relating to it that may be contained in the records. Another responded by requesting that none of the information relating to it be disclosed to the appellant. The remaining four affected parties did not reply to the Notice of Inquiry.

Finally, the Adjudicator sought and received additional representations by way of sur-reply from the appellant based on the information contained in the Region's reply submissions. The appeal file was subsequently assigned to me to complete the inquiry.

RECORDS:

From the original group of records, the undisclosed portions of the following records remain at issue:

> "Finance" - Records 1, 4 and 6 consisting of an audit report and several emails;
>
> "Office of the Regional Chair and C.A.O." - Record 5 (the severed portion in the middle of page 4 of this interoffice memorandum suggesting disciplinary action).

From the new group of records, which consist mainly of documents relating to the actual construction project, including invoices, Regional employee time sheets, meeting minutes, and various email correspondence. Access to these documents was denied, in whole or in part, under the mandatory third party information exemption at section 10(1):

> Batch 1: Records 1, 2, 7, 8
> Batch 2: Records 12, 14, 18
> Batch 3: Records 27, 29, 33
> Batch 4: Records 40, 43
> Batch 5: Records 51, 64, 68, 82
> Batch 6: Records 88, 93, 115
> Batch 7: Records 145, 172
> Batch 8: Record 197
> Batch 10: Records 253, 261, 265,
> Batch 11: Record 279
> Batch 12: Record 309

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General Principles

Section 52(3) states:

> 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.

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 *Act* [Orders P-1560, PO-2106].

The Region submits that section 52(3)3 applies to the information contained in the "Finance" Records 4 and 6, as well as Record 5 from the "Office of the Regional Chair" and Records 1 and 2 from Batch 1 (pages 3 to 158) of the "new" group of records, which is comprised of what are essentially attendance records in the form of time sheets for a number of the Region's employees.

For section 52(3)3 to apply, the Region 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.

Representations of the parties

The Region submits that the exclusionary provision in section 52(3)3 operates to remove the records described above from the ambit of the *Act*. It states that:

> These documents all contain the names of the individuals and any discipline they received or did not receive based on employment related matters in which the Region was directly affected and had an interest.
>
> The Region submits that s.52(3)3 applies to these records such that the Region's decisions on whom it disciplines and how it disciplines them is an employment related matter and as such should not be disclosed. The IPC has stated in Order PO-2157 that the term "employment related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employee that do not arise out of collective bargaining. The discipline or non-discipline of an employee of the region, which all individuals are employees of the Region should therefore be covered by this exemption and MFIPPA should not apply to this information. The Region both created this information and collected it in the pursuance of employment related matters. The IPC has found that this exception does apply in regards to disciplinary proceedings (Order MO-1433-F).

In her representations, the appellant submits:

> . . . MFIPPA applies to any record in the custody or under the control of an institution. These documents [referring to Records 4 and 6 from Finance and Record 5 from the Office of the Regional Chair] are under the control of the institution.

In addition, the appellant points out that she is aware of the contents of many of the records as a result of the disclosures already made to her, and that:

> . . . since I have already received the severed document indicating that unnamed persons received disciplinary action (Record #5 – Office of the Regional Chair and C.A.O. batch) I am aware that those unnamed individuals were assigned discipline. In effect, the bulk of the employment history has already been revealed to me. In revealing details about the nature of the discipline, no additional identifiable information will be gleaned by me. The sole effect in receiving the disciplinary information will be an opportunity for the Region to provide some degree of reassurance that the Region has taken the violation of policies seriously. To this point, the Region's actions and documents indicate that it is not terribly concerned with the wrongdoings.
>
> Therefore, I submit that the records are not about individual employees, but about the larger institutional transgression. This is far more of a public interest/trust matter than a matter relating to the employment of any individual employee of the Region.
>
> . . .
>
> The Region created this information not in pursuance of employment related matters, but as part of the investigation of a larger, systemic failure by the institution to follow prescribed business practices and generally accepted accounting principles and fulfill its accountability to ensure public safety and prudent use of public funds and overall good governance.

The appellant acknowledges that the undisclosed information contained in the records designated as Batch 1, Records 1 and 2, which are comprised of what are essentially timesheets for Region employees, "may fall within the application of subsection 52(3)."

In its reply representations, the Region further submits that:

> . . . regardless of the public interest, MFIPPA does not apply to employment related records. The IPC has concluded that the term 'employment related matters' refers to human resources or staff relations issues arising from the relationship between an employer and employee that do not arise out of collective bargaining. The Region submits that this perfectly describes 'discipline' and as

> such, these actions taken by the Region should not be subject to MFIPPA and as such, should not be revealed.

In her sur-reply submissions, the appellant essentially repeats the position expressed in her earlier representations made in response to the Notice of Inquiry.

Analysis and Findings

As noted above, the Region claims that Records 4 and 6 from the Region's "Finance" documents, as well as Record 5 from the "Office of the Regional Chair" and Records 1 and 2 from Batch 1 (pages 3 to 158) of the "new" group of records, which is comprised of what are essentially attendance records in the form of time sheets for a number of the Region's employees, fall outside the scope of the *Act* due to the operation of the exclusionary provision in section 52(3)3. I will first address the application of the exclusion in section 52(3)3 to the attendance records in Batch 1.

In Order MO-2457, Adjudicator Frank DeVries determined a similar issue relating to the application of section 52(3)3 to an attendance record of an employee of an institution. He found that all three elements of the exclusion were satisfied as:

> 1. The attendance record was collected, prepared, maintained and/or used by the institution.
>
> 2. The attendance record at issue was used within the institution to communicate information relating to attendance and to calculate the appropriate compensation and benefits due to the employee.
>
> 3. The attendance record is employment-related as it involves human resources or staff relations issues arising from the relationship between employer and employee.

As a result, Adjudicator DeVries held that the attendance record at issue in that appeal fell within the ambit of the exclusion in section 52(3)3.

In the present appeal, the documents comprising Records 1 and 2 of Batch 1 found at pages 3 to 158 are also attendance records. I adopt the findings of Adjudicator DeVries in Order MO-2457 and will apply them to the present circumstances. In doing so, I also conclude that the attendance records fall outside the scope of the *Act* owing to the operation of section 52(3)3.

With respect to Records 4 and 6 from the Region's "Finance" documents, as well as Record 5 from the "Office of the Regional Chair," the Region argues that these records are similarly not subject to the *Act* due to the operation of section 52(3)3.

Based upon my review of these records, it is clear that they were prepared and used by the Region's staff. Each document was sent to and was received by a member of the Region's staff who used it relation to meetings, consultations, discussions or communications that took place

regarding the Region's disciplinary actions against several of its employees. Accordingly, I find that parts 1 and 2 of the test under section 52(3)3 have been satisfied. Finally, I find that the discipline of employees is an "employment-related matter" for the purposes of the third part of the section 52(3)3 test. Further, I conclude that the Region had the requisite degree of interest in the records owing to the fact that it is the employer of the individuals who were subject to discipline and are referred to in Records 4 and 6 from the Region's "Finance" documents, as well as Record 5 from the "Office of the Regional Chair."

As all three parts of the test under section 52(3)3 have been satisfied with respect to these documents, I find that they fall outside the ambit of the application of the *Act*.

As an additional matter, I note that portions of these records were disclosed to the appellant, who takes the position that, because portions of the records were disclosed to her, the exclusion in section 52(3) cannot apply. I do not agree. The determination of whether a record is excluded from the scope of the *Act* is conducted on a record-by-record basis. I have found that these records are excluded from the scope of the *Act*. The fact that the Region chose to disclose portions of them to the appellant does not affect that finding, however.

PERSONAL INFORMATION

The Region submits that Record 1 from its Finance documents is exempt from disclosure, in its entirety, pursuant to the mandatory personal privacy exemption in section 14(1). Record 1 consists of an Audit Report dated December 2005 that was prepared by a consulting firm following its retention by the Region to examine allegations of impropriety in the manner in which the Region completed the renovation of a building. In order for me to find that the section 14(1) exemption applies to this document, I must first determine whether it contains "personal information" as that term is defined in section 2(1) of the *Act*.

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].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity." These amendments apply only to appeals involving requests that were received by institutions after that date. The request which gave rise to the present appeal was filed with the Region on October 2, 2006 so the amendments made to the *Act* have no application in the present case.

However, previous decisions of this office (involving appeals from requests made prior to April 1, 2007) have drawn a distinction between an individual's personal, and their professional or official capacity, and found that in some circumstances, information associated with a person in his or her professional capacity will not be considered to be "about the individual" within the meaning of the definition of the term "personal information" found in section 2(1) (see Orders P-

257, P-427, P-1412 and P-1621). For example, information associated with the names of individuals contained in records relating to them in their capacities of officials with organizations which employ them is not personal in nature but is more appropriately described as being related to the employment or professional responsibilities of the individuals (see Order R-980015).

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 appellant takes the position that the information in Record 1 does not constitute "personal information," but rather represents "professional information regarding non-unionized management staff who, along with the institution, should be held accountable for their wrongdoings."

In Order PO-2225, former Assistant Commissioner Tom Mitchinson reviewed a number of decisions of the Commissioner's office which addressed the distinction between information relating to individuals in their personal, as opposed to their professional capacities. He found:

> Previous decisions of this office have drawn a distinction between an individual's personal and professional or official government capacity, and found that in some circumstances, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (Orders P-257, P-427, P-1412, P-1621). While many of these orders deal with individuals acting as employees or representatives of organizations (Orders 80, P-257, P427, P-1412), other orders have described the distinction more generally as one between individuals acting in a personal or business capacity:
>
> - In Order M-118, former Commissioner Tom Wright ordered the partial disclosure of mailing lists compiled by the City of Toronto that included the names and addresses of individuals who had expressed an interest in certain municipal properties. Commissioner Wright distinguished between the personal or business capacity of the named individual. The distinction did not turn on whether or not the name as it appeared on the list was that of an individual, but rather on whether there was evidence indicating that the individual was acting in a personal or business capacity.
>
> - In Order M-454, former Adjudicator John Higgins found that the name of the owner of a dog kennel, and an address that was both the business and residential address of that owner was not personal information but "information [that] relates to the ordinary operation of the business".

- Order P-710 dealt with records that contained the names of individuals and corporations who were vendors of goods and services to the Liquor Control Board of Ontario. Adjudicator Donald Hale found that the names of individuals should be disclosed as the identifying information related to "the business activities of these individuals" and as such did not qualify as their personal information.

- In Order P-729, former Adjudicator Anita Fineberg found that the amount of financial assistance received from the Ontario Film Development Corporation received by a named individual applicant (as opposed to a corporation, sole proprietorship or partnership) related to the business activities of that individual and could not be characterized as personal information.

> Based on the principles expressed in these orders, the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

He then went on to add the following to assist in making this determination:

> The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature? [emphasis in the original]

I adopt the approach outlined by the former Assistant Commissioner for the purposes of making a similar determination in this case.

In Order PO-2570, Adjudicator Diane Smith reviewed several other decisions of the Commissioner's office which address the question of what circumstances might allow information about an individual's performance of their professional or employment duties to be properly characterized as the "personal information" of that individual. She wrote that:

> In assessing whether this type of information qualifies as "personal information," the following cases are of assistance. An examination of an individual's job performance has been found to be "personal information". In Order P-1180, former Inquiry Officer Anita Fineberg stated:
>
> > Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these

> references are considered to be the individual's personal information.

Statements provided to investigators by potential witnesses has also been found to be "personal information". In Order PO-2271, Senior Adjudicator David Goodis stated:

> When an individual in a professional capacity provides a statement about his or her actions and observations to an investigator, in a context where there is a reasonable prospect that the individual may be found at fault, the information "crosses the line" from the purely professional to the personal realm. The fact that the incident took place in the course of these individuals doing their job in no way undermines this conclusion.

Although the personal information in the records is about the individuals other than the appellant in their professional capacity, this information relates to an investigation into or assessment of the performance or alleged improper conduct of these individuals. As such, I find that the characterization of this information changed and is more appropriately described as personal information about these individuals.

The audit report which is referred to as Record 1 includes the names of several individuals who were later disciplined by the Region for their involvement in the subject matter of the consultant's investigation and makes findings regarding the propriety of the actions of these individuals. In my view, applying the principles set out in the decisions above, I conclude that:

- the information in the audit report relates to the individuals named therein in their professional, as opposed to their personal, capacities, however the information about them relates to an investigation by the consulting firm into allegations of improper conduct or an assessment of their performance in the completion of the renovations to the Region's building;

- the disclosure of this information *would reveal something of a personal nature about the individuals*, specifically that their work performance had been assessed and findings of improper conduct were made by the consultants;

- the information contained in the audit report that relates to these three individuals qualifies as their personal information, as that term is defined in paragraph (h) of section 2(1) since it includes "the individual's name" along with "other personal information relating to the individual"; the fact that their performance had been assessed and commented upon in the audit report; and

- the individual's name, along with any other identifying information relating to them, which is contained in the audit report, qualifies as the personal information of the three individuals.

Accordingly, while I conclude that certain portions of the audit report contain information that qualifies as the "personal information" of certain identifiable individuals, the majority of that document does not contain such information. Only information that qualifies as "personal information" can be subject to the personal privacy exemption in section 14(1), which is the only exemption claimed for the audit report. As no other exemptions have been claimed and no mandatory exemptions apply to it, I find that the remaining portions of the audit report that comprises Record 1 are not subject to any exemption and must be disclosed. I will now determine whether the personal information in the audit report is subject to the personal privacy exemption in section 14(1).

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, as is the case in this appeal, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

Section 14(1)(f)

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14(1). In the circumstances of this appeal, one exception that could apply is paragraph (f). This provision states:

> 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.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f).

Representations

In support of its contention that the personal information in the records is exempt from disclosure under section 14(1), in its initial representations the Region submitted that "the provision of this information does not meet any of the exceptions to s.14(1) and in fact would be an unjustified invasion of the personal privacy of these individuals."

The appellant provided me with lengthy and detailed submissions which address many of her concerns about the matter which was the subject of the audit report. Her representations may be summarized as follows:

- disclosure of the personal information in the records would not represent an unjustified invasion of the personal privacy of the individuals to whom the information relates;

- the factors favouring disclosure in sections 14(2)(a) (public scrutiny of the institution) and (b) (promotion of public health and safety) apply; and

- disclosure would not unfairly damage the reputation of the individuals who are referred to in the audit report, rebutting the possible application of the factor favouring non-disclosure in section 14(2)(i).

In its reply representations, the Region takes the position that the disclosure of information surrounding these events which have already taken place satisfy the need for public scrutiny of its handling of this matter, and that section 14(2)(a) has no application. It also points out that the disclosure of information pertaining to the discipline of its employees has no bearing whatsoever on issues relating to the promotion of public health and safety.

Findings

Based on my review of those portions of the audit report which contain the personal information of the affected persons and the representations of the parties, I find that none of the presumptions in section 14(3) have any application to this information; nor do any of the exceptions contained in section 14(4). Accordingly, in order to determine whether disclosure of this personal information would not result in an unjustified invasion of personal privacy, as is required under section 14(1)(f), I will examine the considerations listed under section 14(2) which are referred to in the parties' representations.

Sections 14(2)(a) and (b) state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;

14(2)(a): public scrutiny

This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny [Order P-1134].

The public has a right to expect that expenditures of employees of government institutions during the course of performing their employment-related responsibilities are made in accordance with established policies and procedures, carefully developed in accordance with sound and responsible administrative principles [Orders P-256 and PO-2536].

Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 14(2)(a) [Order P-256].

In my view, the appellant has not satisfied me that the disclosure of the personal information contained in the audit report is desirable for the purposes of subjecting the Region to public scrutiny. The audit report as a whole outlines in a detailed fashion the allegations and findings of the consultants and makes a number of recommendations to the Region to remedy the shortcomings identified therein. I have no hesitation in finding that there is a need for public scrutiny of those portions of this document which do not contain personal information as it reviews the manner in which the Region's staff conducted itself and expended public funds. I entirely agree that public scrutiny of such a document is important and necessary.

In my view, the same need for public scrutiny of the personal information contained in this record does not exist, unlike those portions of the record which do not contain personal information. The privacy interests of the individuals who are primarily identified in the records must be considered and balanced against the public's right to information about how the Region conducted itself. In my view, the need for public scrutiny will be met through the disclosure of those portions of the audit report which do not include the personal information of the individuals whose conduct was the subject of the consultants' approbation. Through the disclosure of the vast majority of the audit report, which does not contain personal information, the appellant and other members of the public will be able to scrutinize thoroughly the Region's actions and the recommendations of the consultants. In so doing, I find that the need for public scrutiny identified by section 14(2)(a) will be met. In my view, the disclosure of the personal information contained in the record is not, however, desirable for the purpose of subjecting the activities of the Region to public scrutiny. Accordingly, I conclude that this consideration has no application in the present appeal.

14(2)(b): public health and safety

I agree with the position taken by the Region with respect to the application of this factor to the personal information contained in the audit report that comprises Record 1, which is still at issue. In my view, the disclosure of the personal information in Record 1 will not serve to promote public health or safety in any conceivable way. Accordingly, I find that this consideration has no application to this document.

Accordingly, as the factors favouring disclosure in sections 14(2)(a) and (b) have no application to the personal information of the individuals whose actions were criticized in the report, I find that this information is exempt from disclosure under section 14(1). I will provide the Region with a highlighted copy of Record 1 indicating those portions that contain personal information and which are **not** to be disclosed.

THIRD PARTY INFORMATION

The Region takes the position that a number of the other records at issue from the "new group of records" are exempt from disclosure under the mandatory exemption in section 10(1)(a) of the *Act*. These records were described in the Notices of Inquiry circulated to the parties as follows:

Batch 1: Records 7, 8
Batch 2: Records 12, 14, 18
Batch 3: Records 27, 29, 33
Batch 4: Records 40, 43
Batch 5: Records 51, 64, 68, 82
Batch 6: Records 88, 93, 115
Batch 7: Records 145, 172
Batch 8: Record 197
Batch 10: Records 253, 261, 265,
Batch 11: Record 279
Batch 12: Record 309

and consist of invoices, time sheets, meeting minutes, and various email correspondence.

Section 10(1)(a) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the Region and/or the affected parties must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harms specified in paragraph (a) of section 10(1) will occur.

I will begin my analysis of the application of section 10(1) to the records by examining the harms component in the third part of the test. As noted above, all three parts of the test under section 10(1) must be satisfied in order for the exemption to apply.

Part 3: harms

The undisclosed information remaining at issue consists of the unit prices and dollar amounts charged by the contractors and suppliers of various goods and services to the Region relating to the construction project. This information consists of dollar amounts for unit prices, hourly rates, mark-ups and other charges severed from various invoices, change notice breakdowns and other project-related documentation pertaining to certain aspects of the construction. The appellant was granted access to the remainder of the information in the invoices, including the "bottom-line" figures in each.

The adjudicator who initially conducted the inquiry sought the representations of a total of six affected parties on the application of section 10(1) to the information contained in the records. One of the affected parties responded by providing a highlighted copy of those records which it objected to disclosing to the appellant. Another affected party indicated that it consented to the disclosure of any information relating to it to the appellant. The remaining four affected parties did not respond to the Notice.

As a result, I have not been provided with any substantive representations on the application of this exemption beyond the limited submissions made by the Region. The Region argues that section 10(1) applies for the following reasons:

> The information severed is the price breakdown of all the contracts. This is not information the Region would ever supply. The Purchasing By-law explicitly indicates that the only financial information to be revealed is the amount of the contract as a whole . . .

The Region goes on to state that it does not have the consent of the affected parties to disclose the requested information but that the third parties themselves would be in the best position to make effective representations on "how such release would affect their competitive position (especially when it comes to other similar tenders with other municipalities)." None of the affected parties provided me with submissions on this aspect of the section 10(1) test, however.

In my view, I have not been provided with sufficiently detailed information which would enable me to make a finding that the third part of the test under section 10(1) has been satisfied in this case. I further find that the records themselves do not on their face contain information whose

disclosure could reasonably be expected to give rise to the harms contemplated by section 10(1). In addition, I note that the records describe pricing and cost levels that were in place some four or five years ago and conclude that it is unlikely that those figures would still be in effect for the type of work performed under these contracts. In my view, the type of harm to the affected parties' competitive position posited by the Region in its representations could not reasonably be expected to result from the disclosure of this information.

As all three parts of the test under section 10(1) must be satisfied, I find that this exemption has no application to the information contained in the records remaining at issue which comprise Batches 1 through 12.

PUBLIC INTEREST IN DISCLOSURE

The appellant has made extensive submissions in support of her contention that the public interest override provision in section 16 applies to the information contained in the records. I will review the possible application of this provision only to the information which I found to be exempt from disclosure under section 14(1) above.

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

A compelling public interest has been found *not* to exist where a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614].

Purpose of the exemption

The existence of a compelling public interest alone is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Appellant's representations

In support of her arguments in favour of a finding that a compelling public interest exists, the appellant maintains that the information contained in the records relates to a matter of public safety. She submits that the Region's personnel were diverted from traffic light installation, maintenance and repair work during the time that they were working on the construction project which is described in the records. For this public safety reason, the appellant argues that the disclosure of these shortcomings, as well as a litany of other allegations contained in her representations, is required in order to address a public safety concern around the diversion of the Region's staff from their normal duties to assist in the construction work in question.

Further, the appellant strenuously argues that the disclosure of the contents of the records will serve to expose what she views as fiscal wrongdoing, corruption and evidence of mismanagement at the Region. She maintains that public accountability and transparency require the disclosure of all of the records at issue, particularly the complete audit report that comprises Record 1 from the Finance documents. I note that as a result of my findings above, all of Record 1 will be disclosed to the appellant with the exception of those portions containing the personal information of certain identifiable individuals.

Findings

In my view, any public interest that exists in the disclosure of the information in the records will be satisfied by the release of the audit report which comprises Record 1, even with the removal of the personal information of certain individuals. As a result of this disclosure, I find that the public interest in insuring scrutiny and accountability of the Region's Traffic Operations section will be satisfied. In my view, the disclosure of the personal information which is to be withheld would not assist in adding to the public's understanding of activities of the Region's government or its agencies; nor would it add in some way to the information available to the public to assist it in making effective use of the means of expressing public opinion or to make political choices. Further, I find that there is no public safety component in the information which is found to be exempt under section 14(1) above.

As a result, I find that the public interest override provision in section 16 has no application to the limited information that has been found to be exempt under the personal privacy exemption in section 14(1).

ORDER:

1. I uphold the Region's decision to deny access to the personal information contained in the audit report that comprises Record 1 (Finance). I have provided the Region with a highlighted copy of Record 1 in which I have marked those portions of this document which are **not** to be disclosed.

2. I also uphold the Region's decision to deny access to Records 4 and 6 from the Region's "Finance" documents, as well as Record 5 from the Office of the Regional Chair and Records 1 and 2 of Batch 1 found at pages 3 to 158 on the basis that they fall outside the scope of the *Act* under section 52(3)3.

3. I order the Region to disclose all of the remaining records, or parts of records, to the appellant by providing her with copies by **January 4, 2010,** but not before **December 30, 2009.**

4. In order to verify compliance with the order, I reserve the right to require the Region to provide me with copies of the records that are disclosed to the appellant pursuant to Order Provision 3.

Original signed by: November 26, 2009
Donald Hale
Adjudicator