



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

ORDER MO-2478

Appeal MA08-225

Toronto Police Services Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a four-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the Chief of Police's employment agreement and disclosure of any and all expense claims submitted by the Chief and Deputy Chiefs. The request also sought access to specified legal expense information. Before the Police issued its decision, the requester wrote to them and requested additional information regarding legal fees paid to a specified law firm. As a result, the request now consisted of five parts.

The Police located the responsive records and granted the requester partial access to them. The Police claimed that the remaining responsive records were publicly available, were not in its custody and control or were excluded from the scope of the *Act* under section 52(3).

The requester (now the appellant) appealed the Police's decision to this office.

During mediation, the Police issued a revised decision granting the appellant partial access to the Chief of Police's employment agreement, which the Police previously claimed was excluded from the scope of the *Act* under section 52(3). The Police withheld portions of section 3 of the agreement claiming that disclosure would constitute an unjustified invasion of personal privacy under section 14(1) of the *Act*.

At the end of mediation, the appellant confirmed that he continued to seek access to the Deputy Chief's expense claims and legal fees paid to a specified law firm the Police claim were not in their custody or control. The appellant also confirmed that she seeks access to the withheld portions of the Chief's employment agreement. The appellant argues that if this record qualifies for exemption under section 14(1), the public interest override at section 16 of the *Act* applies in the circumstances of this appeal.

The appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues and seeking the representations of the Police, initially. I received representations from the Police and provided a copy of the non-confidential portions of them to the appellant with a Notice of Inquiry. The appellant provided representations in response. The appellant's representations indicated that she no longer sought access to the records the Police claim are not in its custody or control. Accordingly, the issue of whether the Police have custody or control of these records is moot and I will not address it further in this order. The appellant's representations were provided to the Police, who in turn, provided reply representations.

The only issue remaining in dispute is whether disclosure of the withheld portions of the Chief's Employment Agreement would constitute an unjustified invasion of personal privacy under section 14(1), and if so, whether the public interest override at section 16 applies in the circumstances of this appeal.

RECORDS:

The information at issue is the withheld portions of sections 3.01, 3.02 and part of 3.03 of the Chief's Employment Agreement, dated April 25, 2008. These portions of the agreement appear under the title "Renewal of Appointment & Employment".

The withheld portions of sections 3.01, 3.02 and 3.03 describe the process the Police and the Chief are to follow to renew his appointment and employment.

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether section 14(1) 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 if 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 where 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].

Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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 and 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 and MO-2344].

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.)].

Representations of the parties

The Police submit that the withheld portions of the employment agreement constitute the Chief's employment history and thus qualifies as "personal information" as that term is defined in paragraph (b) of section 2(1). The Police also submit:

... that [the Information and Privacy Commissioner/Ontario] has recognized that the definition of personal information in [section 2(1)] is not exhaustive of all of the information which may be considered as "personal information." Therefore, the [Police] submits, in the alternative, that the redacted portion of the

employment contract of [the Chief] contains information, although not included in the articulated categories of [section 2(1)] would still reveal information about [the Chief] of a personal nature.

The Police submit that the withheld information is analogous to information which this office in the past has found constitutes “personal information” for the purposes of section 2(1). The Police argue that Orders M-173, M-797, P-1348, MO-1184, MO-1332, MO-1405, MO-1622, MO-1749, MO-1970, MO-2174 and PO-2159 found that the terms and date of termination and/or terms of settlement/severance constitute the personal information of an individual, “touching upon matters of both an individual’s employment history and financial transactions”.

The appellant argues that the withheld information cannot be described as constituting the Chief’s “employment history” as this term relates only to past employment. In support of its position, the appellant refers to Reconsideration Order R-980015, in which Adjudicator Donald Hale stated:

The term “employment history” refers only to past employment and not to aspects of current employment such as an employee’s current salary or job position (Orders 61 and P-399); it does not include information about an employee’s expense claims (Order P-256); it does not include a person’s name, without more (Order M-32); and it does not generically refer to all employment-related incidents (Orders P-360 and P-357).

The appellant goes on to state:

The withheld portion of [the Chief’s] employment agreement falls under the heading, “Renewal of Appointment & Employment”. The second half of section 3.03, which has not been withheld, relates to [the Chief’s] entitlements upon termination of his employment.

In this light, [the appellant] submits that the withheld portion does not contain information relating to [the Chief’s] past employment. To the contrary, it contains information relating to the circumstances of [the Chief’s] renewal of his current appointment. It is thus information relating to his future employment.

As the withheld portion of the agreement reveals nothing about [the Chief’s] past employment – and thus nothing about his employment history – it does not contain an enumerated category of “personal information” as alleged by the [Toronto Police Service Board].

[Emphasis in Original]

In addition, the appellant argues that the information at issue cannot be described as “personal information” as it does not reveal information of a personal nature about the Chief. The appellant submits that the withheld information relates to the Chief only in his professional, official or business capacity and states:

The impugned record is a portion of [the Chief’s] employment agreement. Any information contained within that portion of the agreement relates to the Chief’s employment responsibilities, and the circumstances of the renewal of the Chief’s employment.

Such information is not “about” [the Chief] as an individual, but instead relates to the circumstances of his re-appointment as Chief of Police.

As a result, the withheld portion of the employment agreement does not contain “personal information” for the purposes of [the *Act*]. [Emphasis in Original]

As noted above, the Police were provided with a copy of the appellant’s representations and given an opportunity to reply. The Police responded that the appellant’s interpretation of Reconsideration Order R-980015 “is not in keeping with the extensive jurisprudence of the [Information and Privacy Commissioner/Ontario] on this matter, nor it is consistent with Reconsideration Order R-980015 considered as a whole”. The Police argues that Reconsideration Order R-980015 only establishes that basic information concerning “day-to-day” aspects of an individual’s current employment such as contact information, professional title, current salary, job position, expense claims, or other similar matters would not be information relating to one’s employment history. The Police argue that this type of information is not at issue in this appeal and in any event Adjudicator Hale also stated in Reconsideration Order R-980015 that:

[t]he term employment history does not refer to an individual’s particular employment activities at a given point in time. It comprises instead a more comprehensive overview of the job or work activities which an individual has undertaken in the course of his or her professional life. This interpretation is in keeping with the previous orders of this office which address the application of the presumption in section 21(3)(d) [Orders 170, P-235, P-611 and P-1180].

The Police argue that the information at issue in this appeal is “the very sort of information relating to a comprehensive overview of the job or work activities of an individual”. The Police then referred me to Orders M-173, MO-1332, P-432, P-1348, PO-1885 and PO-2050, which they argue is in keeping with this office’s jurisprudence and treatment of analogous personal information. In support of its position, the Police states that:

- in Order M-173, the former Assistant Commissioner Irwin Glasberg found that information relating to potential retirement of the employee, such as the date employees are eligible for early retirement, the date of earliest retirement, and the possible dates for the commencement of pensions

under different formulas constituted an individual's "personal information".

- in Order P-432, the former Assistant Commissioner Tom Mitchinson found that a "four line section" in a document outlining an individual's reasons for terminating their service with a police service constituted an individual's "personal information".
- in Orders P-1348, MO-1332, PO-1885 and PO-2050, this office found that information which reveals information concerning the potential conclusion of a term of employment or information relating [to] restrictive covenants in which individuals agree not to engage in certain work for a specified duration upon termination of employment may constitute information relating to employment history constitutes "personal information".

The Police also submit that the above-referenced orders also demonstrate "that events do not need to have occurred to constitute information relating to an individual's employment history, rather the information need only relate to information, which would constitute matters of employment history at the point the term of employment concludes".

Finally, the Police's reply representations attached an affidavit prepared by the Chief. The Chief's affidavit supports the Police's position that the withheld portions of the employment agreement constitutes "personal information" as described in section 2(1) of the *Act*.

Decision and Analysis

In Order PO-2050, which was relied upon by the Police, Adjudicator Laurel Cropley found that the contents of a record entitled "Agreement and Release" met the definition of "personal information" as it contained specific information about an individual's termination from employment, such as termination date, termination payments, general terms and some standard contract terms. Adjudicator Cropley stated:

Previous orders of this office have considered the contents of various types of agreements, such as settlement and/or severance agreements and retirement packages (Orders M-173, MO-1184, MO-1332, MO-1405 and P-1348). These orders have consistently held that information about the individuals named in the agreements, which include, *inter alia*, name, address, date of termination and terms of settlement concern these individuals in their personal capacity and thus qualifies as personal information.

I accept Adjudicator Cropley's reasoning and note that it has been adopted in other decisions from this office. In particular, I note that Orders M-173, P-432, P-1348, MO-1332, PO-1885 and PO-2050 relied upon the Police have consistently found that specific information about individuals in employment contracts or severance agreements generally constitutes their "personal information". I also note that previous decisions found that information relating to an individual's future entitlements, such as termination and retirement benefits constitutes

“employment history” for the purposes of sections 2(1)(b) and/or 14(3)(d).[Orders M-173, MO-1322 and P-1348] Accordingly, I am satisfied that since the issuance of Reconsideration Order R-980015, this office has consistently found that the term “employment history” does not just refer to past employment [Orders M-173, MO-1332, P-432, P-1348, PO-1885 and PO-2050].

Accordingly, I agree with the Police’s submission that previous decisions from this office have found that information which describes the specifics about an individual’s potential retirement date or conclusion of their employment or actual termination date constitutes “personal information” as defined in section 2(1). However, I do not agree with the Police’s characterization of the information at issue. In my view, the information at issue in this appeal is not analogous to information specifying the terms of an individual’s retirement, severance or termination.

As noted above, 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 and PO-2225]. Following the analysis set forth in Order PO-2225 the first question I must ask is: “*in what context do the names of the individuals appear*”? The second question I must ask is: “*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*”?

With respect to the first question, I am satisfied that the withheld portions of the agreement relate to the Chief in a professional or business context. The employment agreement specifies the terms of the Chief’s employment with the Police. As noted above, the withheld portions of the Chief’s employment agreement comprise of sections 3.01, 3.02 and a portion of section 3.03 which describes the process the Police and the Chief are to follow to renew his appointment and employment. This portion of the agreement is entitled “Renewal of Appointment & Employment”.

As a result of this finding, the next question I must ask is whether there is anything about this information which, if disclosed, would reveal something of a personal nature about the Chief.

I have carefully reviewed the representations of the parties along with the record and find that the withheld portions of the agreement do not contain specific information of a personal nature about the Chief. In my view, the only information in section 3 of the agreement which contains information of a personal nature about the Chief is the amount of severance pay he is to receive on the termination of his employment. However, this information is contained in the portion of section 3.03 which was released to the appellant and is not at issue in this appeal. Also released to the appellant in another section of the agreement is the commencement and termination date of the Chief’s employment. Accordingly, the appellant is already aware of the severance pay the Chief is to receive and the start and end date of his current employment term with the Police.

In my view, the disclosure of the withheld portions of the agreement would not reveal something of a personal nature about the Chief as it does not contain specific information which would describe employment-related benefits or entitlements he is to receive as a result of his employment with the Police or describe the reasons for his renewal, appointment or termination.

Instead, the withheld portions of section 3.01, 3.02 and 3.03 simply describe the renewal and appointment process the parties agree to undertake. Also included are the timeframes the parties agree each step should take. I am also not satisfied that this information describes a comprehensive overview of the Chief's job or work activities he has undertaken in the course of his professional life as contemplated in Reconsideration Order R-980015.

Having regard to the nature of the information at issue, I find that the withheld portions of the Chief's employment agreement do not qualify as "personal information" under section 2(1).

As the exemption at section 14(1) can only apply to "personal information" and the Police have not claimed that any further exemptions apply to this information, I will order them to disclose the withheld portions of section 3 of the Chief's agreement to the appellant.

ORDER:

1. I order the Police to disclose to the appellant the withheld portions of the Chief's employment agreement to the appellant by **January 4, 2010** but not before **December 29, 2009**.
2. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Police pursuant to order provision 1 to be provided to me.

Original signed by: _____
Jennifer James
Adjudicator

November 27, 2009