

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

FINAL ORDER MO-3191-F

Appeal MA11-73

City of Greater Sudbury

April 30, 2015

Summary: This is a final order following Interim Order MO-2964-I. The city received six requests for the “current and any previous” employment contracts of six named city employees. The city granted access to portions of some of the records, but denied access to other portions on the basis of the exemptions in sections 6(1)(b) (closed meetings), 14(1) (personal privacy) and 15(a) (information published or available). The city also took the position that two records fell outside the scope of the *Act* because the exclusionary provision in section 52(3) of the *Act* applied to them.

Interim Order MO-2964-I addressed access issues relating to the six current employment contracts, finding that they did not qualify for exemption under section 6(1)(b) and that portions did not qualify under section 14(1), and ordered that those portions be disclosed. This final order determines that two letters, which are not contracts, are excluded from the scope of the *Act* on the basis of the exclusion in section 52(3). It also determines that most of the remaining records and portions of records do not qualify for exemption under the claimed sections, and that the public interest override applies to the salary information in the contracts. The contracts are ordered disclosed, except for a few small excerpts.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 6(1)(b), 14(1), 15(a), 16, 52(3).

Orders and Investigation Reports Considered: MO-2174, MO-2470, MO-2563, MO-2964-I, MO-3044 and PO-2641.

Cases Considered: *York (Police Services Board) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 6175 (Div. Ct.).

OVERVIEW:

[1] This is my final order disposing of the issues remaining from Interim Order MO-2964-I.

[2] The City of Greater Sudbury (the city) received six requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the “current and any previous” employment contracts for six named employees of the city.

[3] After notifying six individuals whose interests may be affected by the request (the affected parties) as required by section 21 of the *Act*, the city issued a decision in which it identified 11 records responsive to the request. In the decision, the city indicated that access was granted, in part, to nine records, and access was denied in full to two records. It also identified that access was denied to the withheld records and portions of records on the basis of the exemptions in sections 6(1)(b) (closed meetings), 14(1) (personal privacy) and 15 (information published or available). In addition, the city indicated that the two records which were denied in full fell outside the scope of the *Act* on the basis of the exclusionary provision in section 52(3) of the *Act*.

[4] The appellant appealed the city’s decision.

[5] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeal process. I sent a Notice of Inquiry to the city and the six affected parties, initially, and received representations from the city and two affected parties.

[6] After reviewing the city’s representations, I issued a sharing decision on them. In the circumstances, I also invited the city to provide additional representations on a number of issues, all of which related to the application of section 6(1)(b). The city provided supplementary representations in response.

Interim Order MO-2964-I

[7] After reviewing the city’s representations, I issued Interim Order MO-2964-I, which addressed the application of the exemptions in sections 6(1)(b) and 14(1) to certain portions of six of the records at issue (the six current contracts). That interim order determined that the six current contracts did not qualify for exemption under section 6(1)(b), and that portions of them did not qualify for exemption under section 14(1). It ordered the city to disclose certain portions of those six records to the appellant.

[8] I remained seized of the issues in this appeal pending my final determination of all of the outstanding issues.

[9] In the sub-heading "Additional Note: Salaries" in Interim Order MO-2964-I, I also stated:

As a final matter in this Interim Order, I note that the records at issue contain exact salaries and do not contain a "salary range" for the purposes of the section 14(4). The salaries of the six named individuals have not been disclosed.

In Order MO-2563, a recent decision of this office, adjudicator Bernard Morrow had to determine access issues relating to the exact salaries (including prospective salaries) of identified employees. In that order, the adjudicator considered a number of factors and determined that, based on the nature of the information at issue and the fact that the named individual employees were subject to the *Public Sector Salary Disclosure Act*¹ (the PSSDA), the exact salary information in the employment contracts ought to be disclosed. He found that there existed a compelling public interest in the disclosure of the information. With respect to whether the public interest clearly outweighed the purpose of the section 14(1) exemption, adjudicator Morrow stated:

In my view, the compelling public interest in disclosure of the withheld portions of the records at issue clearly outweighs the purpose of the section 14 exemption in this case. The public has a right to know to the fullest extent possible how taxpayer dollars have been allocated to public servants' salaries, and this has particular force with respect to public servants at senior levels who earn significant amounts of money paid out of the public purse. Certainly, the PSSDA is one important tool for ensuring such openness and transparency. However, in my view, to limit disclosure to only those amounts that are disclosed under the PSSDA seems incongruent with the government's commitment to openness and transparency and, in turn, accountability for the allocation of public resources. In my view, when an individual enters the public service he/she accepts that his/her salary may be exposed to public scrutiny. In this case, the amounts at issue exceed the PSSDA \$100,000 threshold and the impact on the affected parties' privacy is

¹ S.O. 1996, c. 1.

limited to the amounts provided for pay for performance in 2009, which can be extrapolated from a comparison of the base salary amounts in the records with the salaries published under the PSSDA for that year. In my view, the need for complete transparency in this case outweighs the limited privacy interests of the affected parties.

In short, I find that the public interest override in section 16 of the *Act* applies to the withheld portions of the records at issue. Consequently, with the exception of those portions that have been removed from the scope of the appeal, the remaining information that has been withheld by the Police (the specific salary amounts for the Deputy Chiefs for 2009 through 2012 and the specific salary amounts for the Chief for the period December 12, 2008 through December 11, 2009, along with the percentage increase over the previous period, and for the period December 12, 2009 through December 11, 2010) must be disclosed to the appellant.

The Divisional Court upheld adjudicator Morrow's decision.²

In material provided to this office in the course of this appeal, the appellant has indicated his position that the public ought to have access to records relating to the employment contracts of public employees, thus raising the possible application of the "public interest override" in section 16 of the *Act*. I will be inviting the parties to address this issue and the possible impact of order MO-2563 as it relates to the remaining information, including the salary information contained in the records at issue in this appeal.

Further processing of this appeal

[10] After issuing Interim Order MO-2964-I and resolving additional issues regarding the sharing of portions of the city's representations, I sent a Notice of Inquiry, along with the non-confidential portions of the city's representations, to the appellant. The Notice of Inquiry identified the facts and issues remaining in this appeal. It also noted that, in the course of this appeal, the appellant had identified a public interest in the records at issue. As a result, I invited the appellant to address the possible application of the public interest override in section 16 of the *Act* to the records at issue.

² *York (Police Services Board) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 6175 (Div. Ct.).

[11] The appellant provided brief representations in response. In them, he identifies his view that taxpayers have the right to know how their tax dollars are being spent. He also takes the position that the contracts of public servants ought to be made public, as city employees work for the taxpayer not because of them. In addition, the appellant notes that information about payouts and benefits ought to be available to the public, and not hidden from them.

[12] I then sent a Supplementary Notice of Inquiry to the city and the affected parties, inviting them to address the possible application of the public interest override to the records at issue. In addition, as indicated in Interim Order MO-2964-I, I invited the parties to address the possible impact of the finding in Order MO-2563 and the Divisional Court's decision to uphold that order.³ In response to the Supplementary Notice of Inquiry, I only received representations from the city.

[13] In addition to addressing the issues in the Notice of Inquiry, the city identified a concern regarding the disclosure of home addresses or telephone number of the affected parties; however, this information was either never at issue in this appeal or had been removed from the scope of the request and is not at issue in this appeal. As a result, I will not address these concerns in this order.

[14] In this final order, I find that two records are excluded from the scope of the *Act* on the basis of the exclusion in section 52(3). I also find that the remaining records and portions of records do not qualify for exemption under section 6(1)(b) or 15(a), and that only portions qualify under section 14(1). In addition, I find that the public interest override applies to the salary information in the contracts. The contracts are ordered disclosed, except for a few small excerpts.

RECORDS:

[15] The 11 records at issue consist of the remaining withheld portions of nine current or former employment contracts, as well as two other records (Records 6 and 7 - two letters).

ISSUES:

- A. Are Records 6 and 7 excluded from the scope of the *Act* on the basis of section 52(3)?
- B. Do Records 2, 4 and 9 qualify for exemption under section 6(1)(b) of the *Act*?
- C. Do the portions of the records remaining at issue contain "personal information" as defined in section 2(1)?

³ *York (Police Services Board) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 6175.

- D. Would disclosure of the personal information constitute an unjustified invasion of personal privacy under the mandatory exemption in section 14(1)?
- E. Does the discretionary exemption at section 15(a) apply to the information?
- F. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 14(1) exemption?

DISCUSSION:

Issue A. Are Records 6 and 7 excluded from the scope of the *Act* on the basis of section 52(3)?

[16] The city takes the position that Records 6 and 7, which consist of two letters, are confidential communications and are excluded from the scope of the *Act* on the basis of section 52(3)3, which reads:

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:

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

[17] If section 52(3)3 applies to the record, and none of the exceptions found in section 52(4) apply, the record is excluded from the scope of the *Act*.

[18] For the collection, preparation, maintenance or use of a record to be "in relation to" the subject mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.⁴

[19] 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. The meaning of "labour relations" is not restricted to employer-employee relationships.⁵

⁴ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁵ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.

[20] 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.⁶

[21] If section 52(3)3 applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.⁷

[22] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees’ actions.⁸

[23] The appellant does not address this issue in his representations.

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

Introduction

[24] 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.

Requirement 1 and 2: Were records 6 and 7 collected, prepared, maintained or used by the city in relation to meetings, consultations, discussions or communications?

[25] The city states that Records 6 and 7 are two letters stored in the city’s Human Resources files, and that they are confidential communications collected and used by the Chief Administrative Officer (CAO) of the city in his capacity of negotiating the contracts for the city.

⁶ Order PO-2157.

⁷ *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].

⁸ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

[26] The city then refers to each of the two records and provides confidential representations identifying how these two letters were used in relation to certain discussions and communications.

[27] Based on my review of the records and the representations of the city, I am satisfied that they were collected and used by the city in relation to certain discussions and communications. As a result, the first two requirements for section 52(3)3 are met.

Part 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which the city has an interest?

[28] The types of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context.⁹

[29] 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.¹⁰

[30] With respect to the scope of the exclusionary provision, Swinton J. for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis*¹¹ that:

In *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, this Court applied [section 52(3)] to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,

It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

⁹ (See, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 Div. Ct.).

¹⁰ *Solicitor General* (cited above).

¹¹ Cited above.

[31] Justice Swinton also pointed out that “(w)hether or not a particular record is ‘employment related’ will turn on an examination of the particular document.”

[32] I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal.

[33] In its representations, the city confirms that the individual to whom Records 6 and 7 relate is an individual who was an employee of the city. The city then provides representations, some of which are confidential, which confirm that the discussions and communications relating to these records were about employment-related matters in which the city has an interest.

[34] Based on the city’s representations and my review of Records 6 and 7, I am satisfied that these two records were collected and maintained by the city with regard to consultations and communications about employment-related matters in which the city has an interest. In my view, these records, maintained by the city’s human resource department, are directly related to the city’s relations with its own workforce (one of its employees). I find that the records are about employment-related matters for the purpose of section 52(3)3. In addition, I am satisfied that the city clearly has an interest in these records, as they relate to matters involving its own workforce. In these circumstances, I find that the exclusionary wording in section 52(3)3 applies to the records, and they fall outside the scope of the *Act*.

[35] I have also considered whether the exception to section 52(3) found in section 52(4) may apply to these records. If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4)3 reads:

This Act applies to the following records:

3. An agreement between an institution and one or more employees

[36] Based on my review of Records 6 and 7, I find that they do not fit within the exception found in section 52(4), as neither of these records is an agreement between the city and an employee. Although the wording of the request would suggest that all responsive records would fit within section 52(4)3, on my review of the records, I agree with the city that these records are not agreements entered between the city and an employee. As a result, I find that Records 6 and 7 are excluded from the scope of the *Act*.

Issue B: Do Records 2, 4 and 9 qualify for exemption under section 6(1)(b) of the *Act*?

[37] The city took the position that Records 1-5 and 8-11 qualify for exemption under section 6(1)(b) of the *Act* (closed meetings). Records 1, 3, 5, 8, 10 and 11 are the

current employment contracts of six employees, and in Interim Order MO-2964-I I found that those final, executed contracts did not qualify for exemption under section 6(1)(b). However, in that interim order I did not address the application of the section 6(1)(b) exemption to the three former employment contracts (Records 2, 4 and 9). I will do so in this order.

[38] The city took the position that all of the contracts at issue, including Records 2, 4 and 9, are exempt under section 6(1)(b). That section states:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[39] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting¹²

[40] All three parts of the three-part test set out above must be established in order for the records to qualify for exemption under section 6(1)(b).

[41] The city provided detailed representations on all three parts of the test.

[42] In Interim Order MO-2964-I, I found that the six current contracts did not qualify for exemption under section 6(1)(b) on the basis that disclosure of them would not reveal the actual substance of the deliberations of the in-camera meetings in which they were discussed. I reviewed the application of this exemption to the employment contracts of employees in considerable detail, and stated as follows:

In the circumstances of this appeal, ... background documents or the minutes of the in-camera meetings would, in my view, be precisely the kind of records which would reveal the "substance of the deliberations" of the in-camera meetings. However, these minutes and documents are not

¹² Orders M-64, M-102, MO-1248.

the records at issue in this appeal. The records at issue are the six executed agreements entered into between the city and the six individuals. In my view, disclosure of these records would not reveal the substance of the deliberations. Rather, disclosure of the final executed contracts would reveal the subject or the "product" of the deliberations.

[43] I also reviewed in some detail the arguments made by the city that proper statutory interpretation and previous orders of this office support the application of section 6(1)(b) to the employment contracts, and did not accept those arguments. I then stated:

After taking into account all of the arguments and evidence put forth by the city, previous orders of this office and the records at issue, I conclude that disclosure of the records at issue in this discussion would not reveal the substance of the deliberations of council (or the committee) on matters to which the records relate.

[44] I adopt the approach I took in Interim Order MO-2964-I, and apply it to Records 2, 4 and 9, which are also final, executed contracts. As a result, I find that disclosure of these three records would not reveal the substance of the deliberations of council (or the committee) on matters to which these three records relate. Accordingly, I find that these three records do not qualify for exemption under section 6(1)(b) of the *Act*.

Issue C. Do the portions of the records remaining at issue contain "personal information" as defined in section 2(1)?

[45] The city has claimed that the mandatory personal privacy exemption in section 14(1) applies to the records. This exemption only applies if the information at issue constitutes the "personal information" of an identifiable individual.

[46] 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 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;

[47] 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.¹³

[48] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁴

[49] The city states that the information remaining at issue constitutes the personal information of the individuals to whom it relates. The city states:

Previous orders ... have considered the contents of employment contracts and have consistently held that information about the individuals named

¹³ Order 11.

¹⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

in the agreements, which include their name, dates of termination and terms of settlement, concerns these individuals in their personal capacity and thus qualify as personal information. ...

The majority of the clauses in the employment contracts are personal in nature. The severed information appears in the context of each Affected Person privately contracting with the City in the circumstance of accepting employment with the City. This information reflects the compensation, benefits and other negotiated terms under which the Affected Persons, as private individuals, have engaged in this employment.

[50] The city also provides detailed representations referring to the specific provisions of the employment contracts, in support of its position that this information qualifies as the personal information of the affected parties.

[51] The two affected parties who provided representations in response to the initial Notice of Inquiry also take the position that the records relating to them contain their personal information.

[52] I note that portions of each of these employment contracts have been disclosed to the appellant, either at the time the city issued its initial decision granting partial access to portions of the records, or as a result of Interim Order MO-2964-I.

[53] In Interim Order MO-2964-I I found that for the purposes of that Interim Order, the six current employment contracts contained the personal information of the affected parties. On my review of the records at issue before me, including the three previous employments contracts that I did not consider in Interim Order MO-2964-I, I am satisfied that the portions of the employment contracts remaining at issue contain the personal information of the affected parties.

Issue D. Would disclosure of the personal information constitute an unjustified invasion of personal privacy under the mandatory exemption in section 14(1)?

Introduction

[54] I have found that the records do not qualify for exemption under section 6(1)(b). The city takes the position that the mandatory personal privacy exemption in section 14(1) applies to the records.

[55] In Interim Order MO-2964-I, I found that certain information in the six current contracts was not exempt under section 14(1), and reserved my decision on the application of section 14(1) to some portions of those records. I will now review the remaining portions of all of the records at issue to determine whether the information qualifies for exemption under section 14(1).

Section 14(1)

[56] Where a record contains only the personal information of other individuals and not the appellant, as is the case here, section 14(1) prohibits the disclosure of this information unless one of the exceptions listed in paragraphs (a) to (f) of section 14(1) applies. If the information fits within any of those paragraphs, it is not exempt from disclosure under section 14(1).

[57] The exception which might apply in the circumstances of this appeal is section 14(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy."

[58] 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). If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.¹⁵

Section 14(4): disclosure not an unjustified invasion of personal privacy

[59] Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. Section 14(4)(a) reads:

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution;

[60] As noted in Interim Order MO-2964-I, the six named individuals are "employees" for the purpose of this section. Furthermore, the city has disclosed to the appellant the employment responsibilities of the six named individuals.

¹⁵ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

Benefits

[61] In Interim Order MO-2964-I I found that certain specific terms in the six current contracts constituted benefits for the purpose of section 14(4)(a) of the *Act*. I will now determine whether the information remaining at issue, including the portions of the three earlier contracts, contain "benefits" for the purpose of that section.

[62] This office has interpreted "benefits" to include entitlements, in addition to base salary, that an employee receives as a result of being employed by the institution. The following have been found to qualify as "benefits":

- insurance-related benefits,
- sick leave, vacation,
- leaves of absence,
- termination allowance,
- death and pension benefits,
- right to reimbursement for moving expenses, and
- incentives and assistance given as inducements to enter into a contract of employment.¹⁶

[63] More recently, in Order MO-2470, adjudicator Colin Bhattacharjee reviewed the terms of two employment agreements between the Essex Police Services Board and their Chief and deputy Chief. He found that the following terms constituted "benefits" for the purpose of section 14(4)(a):

... I am satisfied that the information under the following headings in the Chief's employment contract qualifies as "benefits" for the purposes of section 14(4)(a): court time, other assignments, clothing and equipment, professional development, legal indemnification, vacations, holidays, sick leave, life insurance, workplace safety and insurance, health and welfare, bereavement leave, survivor's pension, separation, incidental expense allowance, membership and participation in professional associations.

Similarly, I am satisfied that the information under the following headings in the Deputy Chief's employment contract qualifies as "benefits" for the purposes of section 14(4)(a): court time, other assignments, uniforms, equipment, clothing and cleaning allowances, professional development, legal indemnification, vacation, holidays, sick leave, life insurance, workplace safety and insurance, health and welfare, bereavement leave, survivor's pension, separation, membership fees, physical fitness, home office expense, and Appendix B (memorandum of understanding with respect to the Deputy Chief's pension).

¹⁶ Orders M-23 and PO-1885.

[64] In Interim Order MO-2964-I, after considering the representations of the city and the two affected parties who provided representations, I applied the approach taken to the term "benefits" as set out in the previous orders and found that specific terms in the six current employment contracts clearly constituted "benefits" for the purpose of section 14(4)(a). Applying the same approach to the information remaining at issue, I find that the following withheld portions of the three earlier employment contracts contain "benefits" for the purpose of section 14(4)(a):

Record 2: Page 1 - the last paragraph in full.
Page 2 - all of paragraphs one through six, except for specific dates.
Page 3 - the third full paragraph.

Record 4: Page 1 - the last paragraph in full.
Page 2 - all of paragraphs one through six, except for specific dates.
Page 3 - the third full paragraph.

Record 9: Page 2 - all of paragraphs one through seven, except for specific dates.
Page 3 - the third paragraph in full.

[65] In addition, I note that parts of one of the current contracts also contain additional information which can be characterized as "benefits" for the purpose of section 14(4)(a), as it relates to termination allowance (Record 8 - all of the remaining portions of page 2 and the first two paragraphs of page 3, except for specified dates).

[66] Having found that these identified terms of the contracts constitute "benefits" for the purpose of section 14(4)(a), I find that they do not qualify for exemption under section 14(1). The city has not claimed that section 15(a) applies to these portions of the records. As these portions of the records do not qualify for exemption under the *Act*, I will order that they be disclosed.

Section 14(3): disclosure presumed to be an unjustified invasion of privacy

[67] In its representations, the city takes the position that disclosure of various types of information contained in the records is presumed to be an unjustified invasion of privacy under section 14(3)(d) and/or (f). Those sections read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(d) relates to employment or educational history; and

- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

14(3)(d): employment or educational history

[68] The city takes the position that the dates contained in the contracts, including offer dates, dates of revocation of offer, dates when the offer was signed, dates of earlier contracts, and references to the types of employment entered into all fall within the presumption in section 14(3)(d). It states:

... all of these dates are reflective of milestones occurring in the course of the Affected Persons' careers. As such, they reflect the Affected Persons' employment histories. Furthermore, references to [the types of employment entered into] refer to the status of the Affected Persons' contract at the time of the offers and refer to the nature of those persons' employment relationship with the city. Finally, provisions in [a number of the contracts] refer to [other specified dates in time] These were milestones which occurred during the terms of the Affected Persons' employment contracts and constitute part of their employment history. Therefore, pursuant to section 14(3)(f), disclosure of this information would constitute a presumed unjustified invasion of privacy

[69] Previous orders have established that the start and end dates of employment contracts, particularly earlier contracts, constitute "employment history" for the purpose of section 14(3)(d).¹⁷ In the circumstances, I find that the start and end dates, and other dates in the contracts which would reveal these start and end dates (for example, the dates by which the offer must be accepted) fall within the presumption in section 14(3)(d).

[70] However, I am not satisfied that the other information identified by the city (references to the types of employment entered into, certain actions the affected parties could have taken, and the relevant dates of those options) qualify as "employment history" for the purpose of section 14(3)(d). These references are general in nature, and simply identify that an individual whose information is requested was an employee of the city, or could have taken certain actions. I am not satisfied that this more general information fits within section 14(3)(d).

¹⁷ PO-2050, MO-3044.

14(3)(f): finances, income, assets, financial history or activities

[71] The city takes the position that the salary, wage increases, salary calculations, and salary payment schedule fit within the presumptions in section 14(3)(f). It states:

Employment contracts setting out the salary of an individual for each of the years of the contract, a clause setting out how an individual's salary will be calculated and the projected salary based on a percentage increase did not constitute a "salary range" for the purposes of section 14(4)(a) and constituted personal financial information pursuant to section 14(3)(f) because the salaries described an individual's income.¹⁸

The salaries, calculation of the salaries and scheduled wage increases describe the Affected Persons' past and future income, in addition to being reflective of the Affected Persons' financial history and activities. As such, this information qualifies as personal information pursuant to section 14(3)(f) meaning that to disclose this information would constitute an unjustified invasion of privacy unless the public interest override provided for in section 16 applies.

[72] The city then reviews in some detail the information in the records that it claims falls within this presumption.

[73] I accept the city's position that the exact salary information, including specific wage increases and information that would allow the calculation of exact salary information fits within the presumption in section 14(3)(f) of the *Act*.¹⁹

[74] In summary, I find that the start and end dates of employment contracts, and specific salary information (as well as information in the contracts which, if disclosed, would reveal this information) fall within the presumptions in section 14(3)(d) and (f).

Section 14(2): factors and considerations

[75] I must now review the remaining information contained in the contracts to determine whether any of the listed factors found in section 14(2), as well as all other considerations that are relevant in the circumstances of this appeal, apply to that information. The city has referred to a number of the factors including 14(2)(a), (e), (f) (h) and (i). These sections state:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

¹⁸ The city refers to Orders MO-2470 and MO-2563 in support.

¹⁹ See Order P-1348 and MO-3044.

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[76] The city submits that disclosure of certain information contained in the employment contracts would constitute an unjustified invasion of privacy pursuant to the criteria in section 14(2) of the *Act*, and identifies three specific types of information. It then states:

The only factor mitigating in favour of releasing [this information] is that disclosure may be desirable for the purpose of subjecting the clauses to public scrutiny.

[77] The city then reviews the specific information and provides its position on why the information ought not to be disclosed. The reasons referred to include that some of the clauses are important "bargaining chips" available to municipalities who compete to obtain the services of senior management staff, and that adverse inferences may be drawn from the disclosure of some information which would be unfair to certain affected persons. In addition, the city argues that the disclosure of a particular portion of one of the employment records would result in "unfair harm" to one of the affected parties, and describes how this may result in its confidential representations. The city then states that:

All of these are factors ..., when balanced with the one factor operating in favour of releasing the information, weigh heavily in favour of withholding access to this information.

[78] To begin, I find that the factor in section 14(2)(a) is a relevant factor favouring disclosure of information contained in employment contracts entered by senior city officials. Previous orders have found that the contents of agreements entered into between institutions and senior employees represent the sort of records for which a high degree of public scrutiny is warranted as identified in section 14(2)(a) of the *Act*.²⁰

²⁰ Orders M-173, MO-1184 and MO-2174.

This is because “all government institutions are obliged to ensure that tax dollars are being spent wisely.”²¹ Accordingly, I find that the consideration in section 14(2)(a) is a relevant factor that weighs significantly in favour of the disclosure of much of the remaining information in the records.

[79] In addition, except for small portions of a few records, I am not satisfied that the factors favouring non-disclosure apply to the remaining information. Most of the information remaining at issue relates to information such as the number of months during which renewal negotiations can commence, the type of employment contract, the tax treatment applied by the city to some of the benefits provided, general information about what policies and procedures apply to the contracts, and references to evaluation procedures and methods. In my view, none of the factors favouring non-disclosure apply to this type of information.

[80] However, there are some small portions of a few records where one or more of the factors favouring non-disclosure apply. Not including the address information in the records (which the appellant is not seeking and is not at issue in this appeal), the other information to which I find the factors in section 14(2)(f) and/or (h) apply include the reference to an individual’s employee number (Page 1 of Record 5), information about an individual’s past pension entitlements (Page 2 of Record 1) and information about an individual’s personal employment decisions (found on page 1 of Record 11). For this information, I find that the factors favouring non-disclosure outweigh the factor favouring disclosure in section 14(2)(a).

[81] To summarize, I find that the following information qualifies for exemption under section 14(1):

- the start and end dates of employment contracts, and specific salary information (as well as information in the contracts which, if disclosed, would reveal this information);
- the reference to an individual’s employee number (in Record 5);
- information about an individual’s past pension entitlements (in Record 1); and
- information about an individual’s personal employment decisions (in Record 11).

[82] I will review the application of the public interest override in section 16 to this information, below.

Issue E. Does the discretionary exemption at section 15(a) apply to the information?

[83] The city takes the position that section 15(a) of the *Act* applies to the salary and tax benefit information in the records. Section 15(a) states:

²¹ Orders MO-1184, MO-1332 and MO-1405 and MO-2174.

A head may refuse to disclose a record if,

the record or the information contained in the record has been published or is currently available to the public;

[84] For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.²²

[85] To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information²³

[86] Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act*.²⁴

[87] In order to rely on the section 15(a) exemption, the institution must take adequate steps to ensure that the record that they allege is publicly available is the record that is responsive to the request.²⁵

[88] Section 15(a) does not permit an institution to sever a small amount of information from a larger record, particularly where the entire record is otherwise subject to disclosure under the *Act*. A requester should not be required to compile small pieces of information from a variety of sources in order to obtain a complete version of a record that could be disclosed.²⁶

²² Orders P-327, P-1387 and MO-1881.

²³ Order MO-1881.

²⁴ Orders P-327, P-1114 and MO-2280.

²⁵ Order MO-2263.

²⁶ Order PO-2641.

[89] The city states that the salary and benefits of employees of the city which exceed \$100,000 is required to be disclosed under Ontario's *Public Sector Salary Disclosure Act* (the PSSDA). It states:

Because the reporting obligations are consistent from year to year and reported on an annual basis, the salaries reported for the purposes of the PSSDA reflect the salary paid to the reported individual on a consistent basis from year to year with salary increases reflected in the reported amount. This is a regularized system of access to City salaries and taxable benefits.

As discussed ..., the City reports the salaries paid to the Affected Persons in this system. The amount reflected each year is the actual amount calculated pursuant to increases provided for in the employment contract.

[90] The city then provides lengthy representations in support of its position.

[91] The appellant did not provide representations on this issue.

Analysis/Findings

[92] The records at issue consist of the employment contracts of named individuals. The city argues that the specific salary and tax benefit information should not be disclosed because it is available through the PSSDA.

[93] In Order PO-2641, Commissioner Brian Beamish addressed a similar argument, and found that this exemption²⁷ does not apply to salary and benefit information contained in a contract. In rejecting the application of this exemption, he stated:

The request in this appeal is for the current contract and terms of employment of the President. The responsive record is the President's contract of employment, and a regularized system of access to this record is not available to the appellant. However, some small portions of the information in the record are publicly available pursuant to the PSSDA. The issue before me therefore is whether or not the University is entitled to sever these "salary" and "benefit" amounts from the contract of employment on the grounds that these amounts are publicly available pursuant to the PSSDA in circumstances where that information is not otherwise exempt under the *Act*.

²⁷ Commissioner Beamish was addressing the application of section 22(a) of the provincial *Freedom of Information and Protection of Privacy Act*, which is identical to the section 15(a) exemption at issue in this appeal.

The impact of a finding that [section 15(a)] applies is that the appellant would be entitled to access to the record, but the University would be entitled to sever the amounts from the record that are available pursuant to the disclosure requirements under the PSSDA. In my opinion, this would be an inappropriate application of the exemption, which is clearly intended to apply to comprehensive information that is available from other sources. In my view, the section does not give rise to a right to sever a small amount of information from a much larger record, particularly where the entire contents of that record are otherwise subject to disclosure under the *Act*. It would be absurd, and contrary to the access purpose clearly articulated in section 1 of the *Act*, to require requesters to gather and compile small snippets of information from a variety of sources in order to obtain a complete version of a record, rather than simply disclosing it.

[94] I adopt the approach taken by the Commissioner to this exemption found in the above quotation, and find that section 15(a) does not apply to the small portions of the record for which it is claimed by the city.

Issue F. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 14(1) exemption?

[95] I will now consider whether there exists a compelling public interest in disclosure of the information that qualifies for exemption under section 14(1), namely, the start and termination dates of the agreements (and information which may reveal these dates), the specific salary information contained in agreements (including possible increases, etc.) and the select items of personal information which I have found qualify under section 14(1) on the basis of the factors in 14(2).

[96] To begin, I note that the salary information at issue relates to the salaries payable for the duration of the nine contracts. In Order MO-3044, Adjudicator Justine Wai also considered whether the public interest override applied to information in an employment contract which consisted of the salary and start and end dates of the contract, and referred to this information as "salary information" because it revealed the salary of an individual for the duration of the contract. I adopt this approach, and will refer to the information relating to the salaries in the contracts (including possible increases, etc.), as well as the start and end dates of the contracts (including any information which may reveal the dates) collectively, as the "salary information."

[97] Section 16 of the *Act* 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.

[98] 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.

[99] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.²⁸

[100] As noted, the appellant takes the position that taxpayers have the right to know how their tax dollars are being spent, and that the contracts of public servants ought to be made public, as city workers work for the taxpayer. The appellant also notes that information about payouts and benefits ought to be available to the public, and not hidden from them.

[101] The city provided initial representations in support of its position that the public interest override does not apply to the information at issue. As a result of my Interim Order MO-2964-I, I also asked the city to address the possible impact of the decision in MO-2563 and the subsequent judicial review of that decision to the information at issue before me. The city provided lengthy representations in response; however, most of those representations relate to information in the records which I have already ordered disclosed, whether as a result of Interim Order MO-2964-I or this order. The city's representations on the application of MO-2563 to the specific salary information in the records are brief. With respect to the dates contained in the contracts, the city points out that it has acknowledged that the affected parties are city employees in identified roles, but argues that these dates would reveal a person's employment status at various identified times. It argues that this information, if disclosed, could give rise to a long-term synopsis of a person's career, and that the nature of the public interest in this information is "unclear." In addition, the city identifies that some of the contracts are previous contracts, and certain contracts are no longer in force, and that the nature of the public interest in those contracts is also unclear.

²⁸ Order P-244.

Compelling public interest

[102] In considering whether there is a “public interest” in disclosure of the records, the first question to ask is whether there is a relationship between the records and the *Act's* central purpose of shedding light on the operations of government.²⁹ 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.³⁰

[103] A public interest does not exist where the interests being advanced are essentially private in nature.³¹ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.³² A public interest is not automatically established where the requester is a member of the media.³³ The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.³⁴

[104] Any public interest in *non*-disclosure that may exist also must be considered.³⁵ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.³⁶

[105] In addition, I invited the city and the affected parties to address the issue of what impact, if any, the decision in Order MO-2563 and the resultant Divisional Court decision have on the issues and information remaining at issue, including the salary information contained in the records at issue in this appeal. In Order MO-2563, Adjudicator Bernard Morrow determined that, based on the nature of the salary information at issue and the fact that the named individual employees were subject to the PSSDA, the exact salary information in the employment contracts for each of a number of years ought to be disclosed. Reviewing the information at issue, Adjudicator Morrow found that there was a compelling public interest in the disclosure of the information. In his decision, Adjudicator Morrow found as follows:

The wording of section 16 makes it clear that any public interest in disclosure must be “compelling”. As noted above, the word “compelling” has been defined in previous orders as “rousing strong interest or

²⁹ Orders P-984 and PO-2607.

³⁰ Orders P-984 and PO-2556.

³¹ Orders P-12, P-347 and P-1439.

³² Order MO-1564.

³³ Orders M-773 and M-1074.

³⁴ Order P-984.

³⁵ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

³⁶ Orders PO-2072-F, PO-2098-R and PO-3197.

attention" [Order P-984]. Moreover, any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. NO. 4636 (Div. Ct.)]. In my view the allocation of taxpayers' money for the payment of senior level public sector salaries "rouses strong interest and attention," which means that the public interest in disclosure is "compelling". In addition, I have considered whether there is any public interest in the non-disclosure of the withheld portions of the record at issue and have concluded that none exists.

[106] The Divisional Court upheld Order MO-2563.

[107] I adopt these findings for the purposes of this analysis, and similarly find that the allocation of taxpayers' money for the payment of the salaries of the named individuals, all of whom hold (or held) senior level positions, "rouses strong interest and attention." As a result, the public interest in disclosure is "compelling".

[108] I also note that, in Order MO-2563, the requester in that appeal appeared to be motivated by a private interest; nevertheless, Adjudicator Morrow found that "the information at issue [was] also of broader interest to all taxpayers as a means of shedding light on the affairs of government and, in particular, ensuring accountability for the allocation of public funds". I agree with Adjudicator Morrow's analysis and adopt it.

[109] Reviewing the salary information in the nine contracts at issue before me (including the dates and possible salary increases, etc.), I find that the public has a right to know to the fullest extent possible how public money has been allocated to the salaries of these senior public servants. Accordingly, I find that there is a compelling interest in this information. I have also considered whether there is any public interest in the non-disclosure of the salary information, and find that none exists.

[110] As a result, I find that the first requirement under section 16 has been met. I will now examine whether this interest clearly outweighs the purpose of the section 14(1) exemption.

Purpose of the Exemption

[111] In my view, the compelling public interest in disclosure of the information that remains at issue clearly outweighs the purpose of the section 14(1) exemption in this case. As Adjudicator Morrow found in Order MO-2563:

The public has a right to know the fullest extent possible how taxpayer dollars have been allocated to public servants' salaries, and this has particular force with respect to public servants at senior levels who earn significant amounts of money paid out of the public purse. Certainly, the

PSSDA is one important tool for ensuring such openness and transparency. However, in my view, to limit disclosure to only those amounts that are disclosed under the *PSSDA* seems incongruent with the government's commitment to openness and transparency and, in turn, accountability for the allocation of public resources. In my view, when an individual enters the public service he/she accepts that his/her salary may be exposed to public scrutiny. In this case, the amounts at issue exceed the *PSSDA* \$100,000 threshold and the impact on the affected parties' privacy is limited to the amounts provided for pay for performance in 2009, which can be extrapolated from a comparison of the base salary amounts in the records with the salaries published under the *PSSDA* for that year. In my view, the need for complete transparency in this case outweighs the limited privacy interests of the affected parties.

[112] On judicial review, the Divisional Court upheld Adjudicator Morrow's decision.³⁷

[113] I adopt Adjudicator Morrow's analysis for the purposes of this appeal. The salary information that remains at issue in this appeal is similar to that considered in Order MO-2563. I agree with Adjudicator Morrow's statement that when an individual enters the public service he/she accepts that his/her salary may be exposed to public scrutiny. As the affected parties' salaries exceed the *PSSDA* \$100,000 threshold and has, therefore, been released to the public, I find that the impact of disclosure on the privacy of the affected parties is limited. In addition, I find that the need for transparency with regard to a high level public sector employees' salaries and the allocation of public funds outweighs the limited privacy rights of the affected parties in this case.

[114] Accordingly, I find that the public interest override in section 16 of the *Act* applies to the salary information contained in the records.

[115] However, I am not satisfied that a compelling public interest exists in the remaining small portions of information which I have found qualify for exemption under section 14(1) (the reference to an individual's employee number, information about an individual's past pension entitlements, and information about an individual's personal employment decisions).

[116] In summary I find that, except for a few severances, the nine employment contracts do not qualify for exemption under the *Act*.

³⁷ *York (Police Services Board) v. (Ontario) Information and Privacy Commissioner*, 2012 ONSC 6175.

ORDER:

1. I uphold the city's decision that Records 6 and 7 are excluded from the *Act* under section 52(3)3.
2. I order the city to disclose the remaining portions of Records 1, 2, 3, 4, 5, 8, 9, 10 and 11 to the appellant, except for the reference to an individual's employee number (Page 1 of Record 5), information about an individual's past pension entitlements (Page 2 of Record 1) and information about an individual's personal employment decisions (found on page 1 of Record 11) and the personal addresses (which were removed from the scope of this appeal). For greater certainty, I am providing the city with a copy of the severed pages, highlighting in green the portions of these pages which ought not to be disclosed. The other portions of the records are to be disclosed to the appellant by **June 4, 2015** but not before **May 29, 2015**.

Original signed by: _____
Frank DeVries
Senior Adjudicator

_____ April 30, 2015