

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3883

Appeal MA17-710

Town of Petrolia

December 19, 2019

**Summary:** The appellant sought access to information related to the end of the employment of a former town Chief Administrative Officer (CAO). After notifying an affected party, access to the former CAO's employment contact was resolved on consent but the town sought to rely on sections 7(1) (advice or recommendations), 14(1) (personal privacy) and 52(3)3 (employment or labour relations) to deny access to an investigation report, an email and a severance agreement. In the course of adjudication, the town sought to raise the possible application of the discretionary exemptions at sections 8(1)(a) and 8(1)(f) (law enforcement) and the affected party sought to raise the possible application of the discretionary exemption at section 13 (danger to safety or health) of the *Act*, to support their position that the information should be withheld. In this order, the adjudicator finds that the investigative report and the email are excluded from the scope of the *Act* under section 52(3)3 but that the severance agreement is not. He also finds only some of the information in the severance agreement qualifies for exemption under section 14(1) of the *Act*, and orders the balance to be disclosed.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 2(1) (definition of personal information) 7(1), 8(1)(a), 8(1)(f), 13, 14(1)(f), 14(2)(a), 14(2)(e), 14(2)(f), 14(2)(h), 14(3)(b), 14(3)(d), 14(3)(g), 14(4)(a), 52(3)3 and 52(4)3.

**Orders Considered:** Orders M-23, MO-1622, MO-1970, MO-2174 and MO-2470.

## **OVERVIEW:**

[1] The requester submitted a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the Town of Petrolia (the town), for access to the following information pertaining to a former Chief Administrative Officer (CAO):

1. The full report from Investigator [named individual] into the actions of CAO [named individual] which town council acted on [specified date].
2. Former CAO [named individual's] contract.
3. Former CAO [named individual's] resignation letter.
4. Details of any settlement package paid to [named individual] after his resignation including cash payouts, the length of payout, options made available to him to continue benefits and commitments made to end any further investigation of his activities during his time as CAO.

[2] The town identified responsive records and issued an initial access decision. Relying on the discretionary exemption at section 7(1) (advice or recommendations) and the exclusion at section 52(3)3 (employment or labour relations), it denied access in full to the record it identified as responsive to item 1 of the request, being the investigator's report. The letter stated that the town would make a decision regarding records that were responsive to items 1, 3 and 4 of the request after notice was provided to an individual whose interests may be affected by disclosure (the affected party).

[3] After receiving the affected party's response, the town then issued a further access decision. The town decided to grant full access to the record it identified as responsive to item 2 of the request (the employment contract), but relying on sections 14(1) (personal privacy) and 52(3)3 of the *Act*, denied access to an email and a severance agreement that it identified as responsive to items 3 and 4 of the request, respectively.

[4] The requester (now the appellant) and the affected party appealed the town's access decisions. The appellant's appeal was assigned file number MA17-710. The affected party's appeal was assigned file number MA18-85.

[5] Access to the former CAO's contract (item 2 of the request) was resolved at the mediation of Appeal MA18-85 and that appeal file was closed. Accordingly, access to that record is no longer at issue.

[6] In her appeal letter and at the mediation of this appeal, the appellant raised the possible application of the public interest override at section 16 of the *Act*. Accordingly, the possible application of that section was added as an issue in the appeal.

[7] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[8] I began my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the town and the affected party. Both the town and the affected party provided responding representations. In support of its position, the town also provided an affidavit of its Clerk/Operations Clerk.

[9] In its representations, the town raised, for the first time, the possible application of the discretionary exemptions at sections 8(1)(a) and 8(1)(f) of the *Act* (law enforcement). The late raising of these discretionary exemptions by the town is addressed below.

[10] The affected party asked that none of his representations be shared, due to confidentiality concerns. In his representations, he sets out the potential harm he asserts would arise from disclosure of the information at issue. He takes the position that the public interest override at section 16 of the *Act* does not apply.

[11] I then sought representations from the appellant on the facts and issues set out in a Notice of Inquiry as well as the town's non-confidential representations. The appellant provided representations that were shared with the town and affected party for reply. Both the town and affected party provided reply representations. In his reply representations, the affected party sought to raise, for the first time, the application of the discretionary exemption at section 13 (danger to safety or health) of the *Act*. The late raising of this additional discretionary exemption by the affected party is also addressed below.

[12] In this order, I find that the investigation report and the email are excluded from the scope of the *Act* under section 52(3)3 but that the severance agreement is not. I also find that only some of the information in the severance agreement qualifies for exemption under section 14(1) of the *Act* and order the balance to be disclosed.

## **RECORDS:**

[13] Remaining at issue in this appeal is an investigation report, an email and a severance agreement (which includes an Appendix A).

## **ISSUES:**

- A. Does section 52(3)3 exclude the investigation report, email and/or severance agreement from the scope of the *Act*?
- B. Does the discretionary exemption at section 7(1) apply to the severance agreement?

- C. Does the severance agreement contain “personal information” and does it qualify for exemption under section 14(1) of the *Act*?
- D. Does the public interest override at section 16 of the *Act* apply in the circumstances of this appeal?

## **DISCUSSION:**

### **Preliminary matters**

[14] In its representations, the town raised, for the first time, the possible application of the discretionary law enforcement exemptions at sections 8(1)(a) and 8(1)(f) of the *Act*. This was based on its position that there was a criminal charge involving the affected party that was still before the court.

[15] Sections 8(1)(a) and (f) state:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(f) deprive a person of the right to a fair trial or impartial adjudication;

[16] In her representations, the appellant asserted that the criminal matter was at an end, which was not denied by the town in reply. Leaving aside whether the town could have been able to claim the application of these discretionary exemptions at a later stage of the proceedings<sup>1</sup>, I accept that the town’s avowed basis for claiming them no longer exists. Accordingly, I will address the late raising of these exemptions or their possible application no further in this appeal.

[17] In his reply representations, the affected party also sought to raise the possible application of section 13 of the *Act*. The town did not initially claim the application of that exemption. That section reads:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[18] For this exemption to apply, a risk of harm must be demonstrated that is well beyond the merely possible or speculative although it need not be proven that

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<sup>1</sup> See in this regard section 11.01 of this office’s *Code of Procedure*.

disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>2</sup> An individual's subjective fear, while relevant, may not be enough to justify the exemption.<sup>3</sup>

[19] Leaving aside whether the affected party should be permitted at this late stage (or at all) to claim the application of this discretionary exemption that was not claimed by the town, in my view it does not apply. I have considered the affected party's submissions on section 13. I acknowledge that the matters he sets out are of concern to him and his family. However, his representations focus on the investigation report, which I find below to be excluded from the *Act*, rather than the severance agreement, which is the only remaining record at issue that is subject to the *Act*. In my view, he has failed to provide sufficient evidence to establish that the disclosure of the information in the severance agreement that I order to be disclosed below, would fall within the scope of section 13. Accordingly, I will address the affected party's ability to claim the application of this exemption, or the late raising of this exemption or its possible application no further in this appeal.

**Issue A: Does section 52(3)3 exclude the investigation report, email and/or severance agreement from the scope of the *Act*?**

[20] Section 52(3) states in part:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

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

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

[22] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.<sup>4</sup>

[23] The term "employment-related matters" refers to human resources or staff

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<sup>2</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>3</sup> Order PO-2003.

<sup>4</sup> Order MO-2589; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991.

relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.<sup>5</sup> 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.<sup>6</sup> The phrase "labour relations or employment-related matters" has also been found not to apply in the context of an organizational or operational review.<sup>7</sup>

[24] 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.<sup>8</sup>

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

[25] For section 52(3)3 to apply, the town 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.

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

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

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

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<sup>5</sup> Order PO-2157.

<sup>6</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

<sup>7</sup> Orders M-941 and P-1369.

<sup>8</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2001 CanLII 8582 (ON CA), application for leave to appeal to the Supreme Court of Canada dismissed June 13, 2002 (Gonthier, Major and LeBel JJ.). S.C.C. File No. 28853. S.C.C. Bulletin, 2002, p. 781.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

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

### ***The town's representations***

[27] The town submits that the records at issue relate to the affected party's employment with the town and his subsequent termination. The town explains that the investigation report was generated by an outside consultant hired by the town to investigate and prepare a report for the town's Council and its lawyers regarding the appellant's alleged conflict of interest. The town submits that following the receipt and review of the investigation report, the affected party's employment ended.

[28] The town submits that:

The documentation is all encompassing in that the consultant's report and the related documentation formed part and parcel of the town's investigation into the actions of a non-union employee in the context of whether or not there was breach of the terms of an employment contract and Conflict of Interest Policy and, if so, what form of discipline was merited.

[29] The town submits that none of the exceptions in section 52(4) apply because:

- the employee was not in a union
- there was no outstanding proceeding before a court, tribunal or other entity
- there were no negotiations involving employment-related matters
- there was no expense account involved.

### ***The appellant's representations***

[30] The appellant submits that while the report's findings may have led to employment consequences for the affected party, "it is not clear that the document was prepared solely for that purpose".

[31] The appellant submits that the report was commissioned as a fact-finding mission after reports in a newspaper of "irregularities" engaged in by the affected party. Referring to a year-end address by the town's mayor, the appellant submits that:

The report clearly made recommendations beyond the employment of the [former CAO] - according to the mayor - speaking directly to how the town's administration was working and therefore the investigator's report should be considered as, in part, an operational review.

*Part 1 and 2: collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications*

[32] I am satisfied that the town used the investigation report for discussions at a meeting and that the email qualifies as a communication. Both were used by the town to inform its decisions regarding the affected party. In light of my finding below that the severance agreement falls within the scope of the section 52(4) exception, it is not necessary for me to specifically address it here. I find that Parts 1 and 2 of the section 52(3) test are met with respect to the investigation report and the email.

*Part 3: labour relations or employment-related matters in which the institution has an interest*

[33] As noted above, 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.<sup>9</sup> 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.

[34] 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.<sup>10</sup> The records collected, prepared, maintained or used by the institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[35] I am satisfied that the investigation report is employment-related for the purposes of section 52(3)3 because it is about the affected party's conduct. In that regard, I do not view the report as being in any way an operational review as alleged by the appellant. The email relates to the negotiation of matters pertaining to the end of the affected party's employment. Both the investigation report and email arise out of the town's employment relationship with its employee.

[36] Finally, the town clearly had an interest in this matter because the affected party was an employee of the town and the investigation report and email related to his employment and/or its termination.

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<sup>9</sup> Order PO-2157.

<sup>10</sup> *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.



[37] Consequently, all three parts of the section 52(3) test are met for the email and investigation report. I find that the exception in section 52(4)3 does not apply to them and they are excluded from the scope of the *Act*. In light of my conclusion, I will consider them no further.

[38] I now turn to the severance agreement. Assuming, but without deciding, that it meets all the parts of the section 52(3) test, I find that the exception in section 52(4)3 applies to it.

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

In my view, the fully executed Agreements and Release which form part of Record 1 and all of Record 13 represent "agreements between an institution and one or more employees". The records reflect the fact that the information contained in these documents was arrived at following negotiations between the individuals involved and the City. In addition, I have found above that the agreements and the negotiations which gave rise to them were "about employment-related matters between the institution and the employees". In my view, the Agreements which comprise part of Record 1 and all of Record 13 fall within the ambit of the exception in section 52(4)3.

[40] I agree with Adjudicator Hale's analysis, and apply it to the severance agreement remaining at issue in this appeal.<sup>11</sup> On my review of the record, it appears on its face to be a signed agreement between the affected party and the town. This agreement appears to have been arrived at following negotiations between the affected party and the town, and is executed by both of them. In my view, the severance agreement falls within the ambit of the exception in section 52(4)3. Accordingly, the record is not excluded from the scope of the *Act* under section 52(3)3, if I had found that it applied.

[41] I will now consider whether the severance agreement qualifies for exemption under sections 7(1) and/or 14(1) of the *Act*.

**Issue B: Does the discretionary exemption at section 7(1) apply to the severance agreement?**

[42] Section 7(1) states:

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<sup>11</sup> See also Orders MO-2318 and MO-2536-I.

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

[43] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>12</sup>

[44] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[45] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.<sup>13</sup>

[46] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[47] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>14</sup>

[48] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.<sup>15</sup>

[49] The town's representations on section 7(1) focus on the investigation report

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<sup>12</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

<sup>13</sup> See above at paras. 26 and 47.

<sup>14</sup> Order P-1054

<sup>15</sup> *John Doe v. Ontario (Finance)*, cited above, at para. 51.

rather than the severance agreement:

The outside consultant's role was to conduct an internal investigation into the actions and conduct of the [affected party] and to report to the Council. Following the consultant's investigation and consideration of the information, advice and recommended courses of were provided for consideration of Council which involved the appropriateness of the C.A.O.'s employment with the town.

[50] The appellant submits that factual materials fall within the exception at section 7(2) and should therefore be released.

[51] I found above that the *Act* does not apply to the investigation report. The information remaining at issue is contained in a severance agreement. The town made no specific submissions about what advice or recommendations would be revealed if the severance agreement were disclosed. The severance agreement itself does not consist of advice or recommendations. Nor in my view would disclosing the severance agreement permit the drawing of accurate inferences as to the nature of actual advice or recommendations provided, as defined in the above-cited orders. As a result, I find that this information does not qualify for exemption under section 7(1) of the *Act*.

**Issue C: Does the severance agreement contain "personal information" and does it qualify for exemption under section 14(1) of the *Act*?**

***Personal information***

[52] Under section 2(1) of the *Act*, the term "personal information" is defined as recorded information about an identifiable individual, including information relating to the employment history of the individual or information relating to financial transactions in which the individual has been involved (paragraph (b) of the definition) and the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual (paragraph (h) of the definition).

[53] The town states that the severance agreement contains the personal information of the affected party, as defined in section 2(1) of the *Act*. The appellant acknowledges that privacy commissioners have a long history of protecting the personal information of individuals in these types of records, but that the public interest override should apply and the information be disclosed.

[54] Previous orders of this office have considered the contents of various types of agreements, such as employment contracts or settlement and/or severance

agreements.<sup>16</sup> These orders have consistently held that information about the individuals named in the agreements, which include, *inter alia*, their name, date of termination and terms of settlement, concern these individuals in their personal capacity and thus qualifies as personal information. I am satisfied that the same considerations apply in the circumstances of this appeal, and that the severance agreement contains the personal information of the affected party.

### **Section 14(1)**

[55] Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception that may apply in the present appeal is that set out in section 14(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, if the disclosure does not constitute an unjustified invasion of personal privacy.

[56] Section 14(1)(f) is an exception to the section 14(1) prohibition against the disclosure of personal information. In order to establish that section 14(1)(f) applies, it must be shown that disclosure of the personal information at issue in this appeal would **not** constitute an unjustified invasion of personal privacy.<sup>17</sup>

[57] In applying section 14(1)(f), sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

[58] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).<sup>18</sup> If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>19</sup> In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances

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<sup>16</sup> See Orders MO-1184, MO-1332, MO-1405 and P-1348.

<sup>17</sup> See, for example, Order MO-1212.

<sup>18</sup> *John Doe v. Ontario (Information and Privacy Commissioner)*, (1993) 13 O.R. (3d) 767 (Div. Ct.).

<sup>19</sup> Order P-239.

favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.<sup>20</sup>

[59] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).<sup>21</sup>

[60] I will first consider whether any of the information in the record falls within the exceptions in section 14(4). If any of the information falls under the section 14(4) exception, disclosure would not be an unjustified invasion of personal privacy and the exemption at section 14(1) does not apply.

***Section 14(4)(a) - Classification, salary range, benefits, employment responsibilities***

[61] Section 14(4) refers to certain types of information, the disclosure of which does not constitute an unjustified invasion of personal privacy. Section 14(4)(a) may apply in the circumstances. It reads:

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

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

[62] None of the parties to the appeal directly address the potential application of the section 14(4)(a) exception.

[63] Under section 14(4)(a), a disclosure of personal information does not constitute an unjustified invasion of personal privacy if it discloses the "employment responsibilities" of the affected party. In Order MO-2470, Adjudicator Colin Bhattacharjee found that the information under the following headings of a Chief and Deputy Chief of Police's employment contract qualified as "employment responsibilities" for the purposes of section 14(4)(a): preamble, position, duration, hours of work and the organizational responsibilities of the Chief and Deputy Chief. Adopting the reasoning of Adjudicator Bhattacharjee, I am satisfied that information in the severance agreement which appears in the preamble, clauses 1 and 3, and Appendix "A" qualifies as "employment responsibilities" for the purposes of section 14(4)(a). Since section 14(4)(a) applies to this information, its disclosure is not considered to be an unjustified

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<sup>20</sup> Orders PO-2267 and PO-2733.

<sup>21</sup> Order P-99.

invasion of personal privacy under section 14(1)(f) and the section 14(1) exemption does not apply. Therefore, I find that this information is not exempt under section 14(1) and I will order it disclosed.

[64] 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.<sup>22</sup> Order M-23 lists the following as examples of "benefits":

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

[65] Subsequent orders have also found that "benefits" can include:

- incentives and assistance given as inducements to enter into a contract of employment<sup>23</sup>
- all entitlements provided as part of employment or upon conclusion of employment<sup>24</sup>

[66] Furthermore, this office has also held that the exception in section 14(4)(a) does not apply to entitlements that have been negotiated as part of a retirement or termination package<sup>25</sup> except where it can be shown that the information reflects benefits to which the individual was entitled as a result of being employed.<sup>26</sup> As Adjudicator Catherine Corban stated in Order MO-1970:

[T]he common thread in these orders appears to be that section 14(4)(a) applies to benefits negotiated as part of a retirement or termination agreement, so long as they are benefits the individual received while employed and are continuing post-employment.

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<sup>22</sup> Order M-23.

<sup>23</sup> Order PO-1885.

<sup>24</sup> Order P-1212.

<sup>25</sup> See for example, Orders M-173, M-204, M-797, MO-1332 and PO-2519.

<sup>26</sup> Orders MO-1749 and PO-2050.

[67] On my review of the severance agreement, I am satisfied that clause 1 contains information that may be characterized as “benefits” for the purpose of section 14(4)(a), and the exception in this section therefore applies to it. Since section 14(4)(a) applies to this information, its disclosure is not considered to be an unjustified invasion of personal privacy under section 14(1)(f) and the section 14(1) exemption does not apply. Therefore, I find that this information is not exempt under section 14(1) and I will order it disclosed.

[68] I am satisfied that the remaining information in the severance agreement does not qualify as “employment responsibilities” or “benefits” under section 14(4)(a).<sup>27</sup>

[69] Having found that the exception in section 14(4)(a) does not apply to the remaining information at issue, I will now consider whether the disclosure of any of the remaining information, which does not fall under section 14(4), represents a presumed unjustified invasion of privacy under section 14(3).

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

[70] Section 14(3) of the *Act* lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. As identified above, once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).

[71] The town takes the position that disclosure of the severance agreement is presumed to be an unjustified invasion of privacy under sections 14(3)(b) and (g) of the *Act*. The appellant does not make specific reference to any of the presumptions. The issues in this appeal may also raise the possible application of the presumption at section 14(3)(d). These sections read:

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

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(d) relates to employment or educational history;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations;

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<sup>27</sup> Orders M-173, M-204, M-419, M-797, MO-1332, MO-2174 and MO-2536-I.

[72] The town takes the position that the presumption in section 14(3)(b) applies in the circumstances of this appeal. The town also states that section 14(3)(g) applies, as the severance agreement relates to aspects of "evaluations".

*Section 14(3)(b)*

[73] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>28</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>29</sup> Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.<sup>30</sup>

[74] In my view, the presumption at section 14(3)(b) has no application here. The record is a severance agreement in the hands of a former employer, not a record compiled and identifiable as part of an investigation into a possible violation of law.

*Section 14(3)(d)*

[75] Previous orders have established that information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used, and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 14(3)(d) presumption.<sup>31</sup>

[76] Information in the preamble and clauses 1, 3 and 9 of the severance agreement identifies the affected party's start date or number of years of service with the town or references the date of the affected party's last day worked, as well as other dates which, if disclosed, would reveal the affected party's last day worked. Additionally, the date of the agreement and the date that it was signed by various parties might also reveal the affected party's last day worked. Similarly, Appendix A to the severance agreement contains similar information that would fall within the scope of section 14(3)(d).

[77] In keeping with previous orders issued by this office as identified above, I find that all this information qualifies as "employment history" as described in section

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<sup>28</sup> Orders P-242 and MO-2235.

<sup>29</sup> Orders MO-2213 and PO-1849.

<sup>30</sup> Orders M-734, M-841, M-1086 and PO-1819.

<sup>31</sup> Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders MO-2174 and MO-2344 and PO-2598.



14(3)(d) and its disclosure is presumed to amount to an unjustified invasion of the affected party's personal privacy. I have highlighted this information in green on a copy of the severance agreement that I have provided to the town along with a copy of this order.

*Section 14(3)(g)*

[78] I find that Appendix A to the severance agreement contains information that qualifies as personal evaluations. This information describes views about the affected party and his performance of some of the tasks required of the position that he held with the city. I find that this information falls under the presumption at section 14(3)(g) as personal evaluations and its disclosure is presumed to amount to an unjustified invasion of his personal privacy. I have highlighted this information in green on a copy of the severance agreement that I have provided to the town along with a copy of this order.

*Conclusion on the section 14(3) presumptions*

[79] I have found above that information in the severance agreement falls within sections 14(3)(d) and 14(3)(g), and its disclosure is thereby presumed to amount to an unjustified invasion of the appellant's personal privacy. Accordingly, it qualifies for exemption under section 14(1). As set out above, once a presumption against disclosure has been established under section 14(3), it cannot be rebutted or outweighed by one or more factors or circumstances under section 14(2). I will consider in Issue D below whether the public override at section 16 of the *Act* applies to this information. I will now address the remaining information in the severance agreement.

*Section 14(2) - factors and considerations*

[80] I found above that certain information fits within the exception under 14(4)(a) and that therefore this information does not qualify for exemption under section 14(1), but that other information falls within the presumptions at sections 14(3)(d) and (g) and is therefore exempt under section 14(1). I must now review the remaining information to determine whether any of the listed factors found in section 14(2), as well as all other considerations that are relevant in the circumstances of the case, apply to the information remaining at issue.

[81] Section 14(2) reads, in part:

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

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive; [and]

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[82] The town has taken the position that the factors favouring non-disclosure in sections 14(2)(e), (f), and (i) apply. The appellant argues that the factor weighing in favour of disclosure in section 14(2)(a) applies. The affected party's submissions appear to raise the possible application of the factors at sections 14(2)(e) and (i). I will now review the factors relied on by the parties to determine whether they apply to the remaining portions of the record.

*Section 14(2)(a): subjecting the activities of the institution to public scrutiny*

[83] 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.<sup>32</sup>

[84] In order for this section to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application.<sup>33</sup>

[85] 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).<sup>34</sup>

[86] The appellant states that this factor applies and has significant weight. She recounts actions of the affected party that she asserts were in direct violation of the town's Conflict of Interest Guidelines and discusses the aftermath of his actions. She submits this is the type of situation that merits the application of section 14(2)(a). The appellant provides confidential submissions on why this is not a relevant factor.

[87] In Order MO-2174, Adjudicator Catherine Corban discussed the principles behind the public scrutiny considerations of section 14(2)(a):

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<sup>32</sup> Order P-1134.

<sup>33</sup> Order PO-2905.

<sup>34</sup> Order P-256.

Previous orders have also found that the content 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*.<sup>35</sup> This is because "all government institutions are obliged to ensure that tax dollars are being spent wisely."<sup>36</sup>

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

It has been well established in a number of previous decisions that the contents of agreements entered into between institutions and senior employees represent the sort of records for which a high degree of public scrutiny is warranted.<sup>37</sup> Based on this, and the appellant's desire to scrutinize how the Municipality compensated a senior management employee upon his termination, I find that section 14(2)(a) is a relevant consideration in the circumstances of the present appeal. I further find that this is a significant factor favouring the disclosure of the information contained in the record.

[88] The principles and approach that Adjudicator Corban outlined in Order MO-2174 are applicable to the circumstances of the present appeal. The severance agreement relates to the end of the affected party's employment with the town. I have identified the personal information contained within it that falls within section 14(4)(a) or the disclosure of which would amount to a presumed unjustified invasion of the affected party's personal privacy. Taking into consideration the information that remains at issue and all the circumstances of this appeal, I am satisfied that the disclosure of the remaining information in the severance agreement and the Appendix is desirable for the purpose of shedding light on the details of this particular agreement and would address "public scrutiny" concerns that the appellant, or any other member of the public, might have.

[89] I find that the consideration under section 14(2)(a) favouring the disclosure of the information remaining at issue is a relevant and significant factor. The information relates to the severance of a high-ranking official with the town. The appellant has indicated that the issue of the conduct of the affected party has been the subject of public attention. In my view, the disclosure of the information would serve the purpose

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<sup>35</sup> Adjudicator Corban referred to Orders M-173 and MO-1184.

<sup>36</sup> Adjudicator Corban referred to Orders MO-1184, MO-1332, and MO-1405.

<sup>37</sup> Adjudicator Hale referred to Orders M-173 and M-953.

of shedding some light on the details of this agreement. In my view, disclosure of this information is desirable for the purpose of subjecting the activities of the town to public scrutiny.

*Section 14(2)(e): unfair exposure to pecuniary or other harm*

[90] In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned is present or foreseeable, and that this damage or harm would be “unfair” to the individual involved. The issue is whether disclosure of the remaining information in the severance agreement would expose the individual to whom the information relates to pecuniary or other harm that is “unfair”. Only the severance agreement, which is a negotiated agreement in the context of an end to employment, remains at issue. The investigation report is not. Based on my review of the record and the representations, I am not satisfied that disclosure of the information remaining at issue could result in “unfair” damage to the reputation of the affected party.

*Section 14(2)(f): highly sensitive*

[91] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>38</sup> In all the circumstances of the appeal, considering the submissions of the affected party and the nature of the information remaining at issue in the severance agreement, I am satisfied that the information that remains at issue can be considered to be “highly sensitive” and is a factor favouring non-disclosure that carries some weight.

*Section 14(2)(h): unfair damage to reputation*

[92] The factor in section (h) relates to the reputation of “any person referred to in the record” and, in this regard, it is the affected person’s reputation that this section could apply to. The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be “unfair” to the individual involved.<sup>39</sup>

[93] As I wrote above, only the severance agreement, which is a negotiated agreement in the context of an end to employment, remains at issue. The investigation report is not. Based on my review of the information remaining at issue in the severance agreement and the representations, I am not satisfied that disclosure of the remaining information at issue could result in “unfair” damage to the reputation of the affected party.

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<sup>38</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>39</sup> Order P-256.

*Finding on the section 14(2) factors*

[94] Weighing the factor favouring non-disclosure in section 14(2)(f) against the factor favouring disclosure in section 14(2)(a), I find that, in all the circumstances of this appeal the factor favouring disclosure which applies to the information remaining at issue outweighs the factor favouring non-disclosure for this information, except for certain information in clause 11 that I have highlighted in green on a copy of the severance agreement that I have provided to the town along with a copy of this order. Therefore, I find that the disclosure of the non-highlighted information remaining at issue would not be an unjustified invasion of personal privacy and as a result, this information does not qualify for exemption under section 14(1).

[95] Conversely, I find that the factor favouring non-disclosure at section 14(2)(f) outweighs the factor favouring disclosure at section 14(2)(a) regarding the information in clause 11 that I have highlighted in green on a copy of the severance agreement that I have provided to the town along with a copy of this order. Accordingly, I find that this information qualifies for exemption under section 14(1) of the *Act*.

**Issue D: Does the public interest override at section 16 of the *Act* apply in the circumstances of this appeal?**

[96] I found above that information in the severance agreement qualifies for exemption under section 14(1) of the *Act*, either because it falls within the section 14(3)(d) or 14(3)(g) presumptions or because the factor favouring non-disclosure at section 14(2)(f) outweighs the factor favouring disclosure at section 14(2)(a). I have highlighted this information in green on a copy of the severance agreement that I have provided to the town along with a copy of this order.

[97] The appellant takes the position that it is in the public interest that this highlighted information be disclosed. In support of her position, she recounts actions of the affected party that she asserts were in direct violation of the town's Conflict of Interest Guidelines and discusses the aftermath, supplemented by newspaper articles on the matter.

[98] The town submits that there has been wide media coverage and debate surrounding the matter and that disclosing the small amount of information remaining at issue would not serve the public interest. The appellant takes the position that the public interest override does not apply.

[99] Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 9.1, 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.

[100] 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.

[101] 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.<sup>40</sup>

### ***Compelling public interest***

[102] 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.<sup>41</sup> 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.<sup>42</sup>

[103] A public interest does not exist where the interests being advanced are essentially private in nature.<sup>43</sup> Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.<sup>44</sup>

[104] A public interest is not automatically established where the requester is a member of the media.<sup>45</sup>

[105] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.<sup>46</sup>

[106] Any public interest in *non*-disclosure that may exist also must be considered.<sup>47</sup> A public interest in the non-disclosure of the record may bring the public interest in

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<sup>40</sup> Order P-244.

<sup>41</sup> Orders P-984 and PO-2607.

<sup>42</sup> Orders P-984 and PO-2556.

<sup>43</sup> Orders P-12, P-347 and P-1439.

<sup>44</sup> Order MO-1564.

<sup>45</sup> Orders M-773 and M-1074.

<sup>46</sup> Order P-984.

<sup>47</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

disclosure below the threshold of “compelling”.<sup>48</sup>

***Purpose of the exemption***

[107] The existence of a compelling public interest 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.

[108] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.<sup>49</sup>

***Analysis and finding***

[109] I have found that a small amount of personal information of the affected party in the severance agreement qualifies for exemption under section 14(1) of the *Act*.

[110] Section 14(1) is a mandatory exemption with the fundamental purpose of ensuring that the personal privacy of individuals is maintained except where infringements on this interest are justified.<sup>50</sup> The exemption reflects one of the two key purposes of the *Act*: to protect the privacy of individuals with respect to personal information about themselves held by institutions.<sup>51</sup> Therefore, it is important to carefully balance the public interest against the privacy interests of the affected party.

[111] After reviewing the parties’ representations, I am not satisfied that there is a compelling public interest in the disclosure of the small amount of personal information that I have found to qualify for exemption under section 14(1) of the *Act*.

[112] I find that in light of the amount of information already publicly available, and the amount of information in the severance agreement that I have ordered disclosed, there is sufficient information to satisfy any public interest in the information in the severance agreement.

[113] For these reasons, I find that the public interest override in section 16 of the *Act* does not apply to the information that I have found to be exempt under section 14(1) of the *Act*.

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<sup>48</sup> Orders PO-2072-F, PO-2098-R and PO-3197.

<sup>49</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

<sup>50</sup> Order P-568.

<sup>51</sup> Order P-2805.

**ORDER:**

1. I uphold the town's decision that section 52(3)3 applies to exclude the investigation report and email from the scope of the *Act*.
2. I order the town to disclose the severance agreement, except for the portions highlighted on the copy I have provided to the town, along with a copy of this order by sending it to the appellant by **January 30, 2020**, but not before **January 25, 2020**. For greater certainty, I uphold the decision of the town to withhold the portions that I highlighted on the copy of the severance agreement.
3. In order to ensure compliance with paragraph 2 of this order, I reserve the right to require the town to provide me with a copy of the severance agreement as disclosed to the appellant.

Original signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

December 19, 2019 \_\_\_\_\_