

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4335

Appeal MA20-00587

Township of Carling

February 22, 2023

Summary: The appellant requested the employment contracts of the CAO, CBO, planner and treasurer from the Township of Carling (the township). Specifically, the appellant sought the clauses relating to termination or severance. The township withheld, in full, the responsive information, relying on the mandatory personal privacy exemption at section 14(1). In this order, the adjudicator finds that the information at issue is not exempt under section 14(1) and orders the township to disclose it to the appellant.

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"), 14(1), and 14(4)(a).

Orders Considered: Orders M-23, MO-1332, MO-4026 and MO-4060.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Township of Carling (the township) for a copy of the employment contracts between the township and four individuals: the chief administrative officer (CAO), the chief building official (CBO), the planner and the treasurer. The appellant stated she was particularly interested in obtaining access to amendments or attachments relating to termination (with or without cause) or severance amounts due.

[2] The township located the responsive records and notified four individuals whose interests may be affected by the disclosure of the records (the affected parties) of the request. None of the affected parties consented to the disclosure of the information relating to them. The township then issued an access decision to the appellant, denying access to the records, in full. The township claimed the mandatory personal privacy exemption in section 14(1).¹

[3] The appellant appealed the township's decision to the Information and Privacy Commissioner of Ontario (the IPC). Mediation did not resolve the issues under appeal. As such, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[4] During the inquiry, the adjudicator initially assigned added the issue of conflict of interest to the scope of the appeal upon reviewing the records at issue. She invited the township, the appellant and four affected parties to provide representations. She received representations from the township, the appellant and two affected parties. In their separate representations, the two affected parties stated they do not consent to the disclosure of any of their personal information or their employment contracts.

[5] This appeal was subsequently transferred to me to continue the adjudication. I have reviewed the parties' representations and decided that I do not require further submissions before making my decision.

[6] In this order, I find that the information at issue is not exempt under section 14(1) and order the township to disclose it to the appellant.

RECORDS:

[7] During the inquiry, the township confirmed that the following termination clauses of the employment contracts are at issue:

- For the CAO, subsection 10(e).
- For the CBO, subsection 10(d) and the clause that follows numbered "clause a" at pages 32-33 of the records.
- For the planner, subsection 10(e) and the clause that follows numbered "clause h" at pages 17-18 of the records.
- For the treasurer, subsection 10(g) and the clause that follows numbered "clause a" at pages 24-25 of the records.

¹ The township also relied on the discretionary exemption in section 15 (soon to be published). However, during mediation, the appellant confirmed she is not pursuing any information withheld under section 15.

ISSUES:

- A. Was the township clerk in a conflict of interest in making a decision on the appellant's access request?
- B. Do the termination clauses at issue contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- C. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?

DISCUSSION:

Issue A: Was the township clerk in a conflict of interest in making a decision on the appellant's access request?

[8] The township's clerk is also the CAO. Since the township's decision is signed by the clerk, the issue is whether the clerk was in a conflict of interest in deciding to withhold his own contract from disclosure. I find there was no conflict of interest in the clerk's decision to not disclose his contract and the contract of the other three individuals.

[9] Previous IPC orders have considered the issue of conflict of interest or bias.² In determining whether there is a conflict of interest, these orders posed the following questions:

- a. Did the decision-maker have a personal or special interest in the records?
- b. Could a well-informed person, considering all of the circumstances, reasonably perceive a conflict of interest on the part of the decision- maker?

[10] These questions are not intended to provide a precise standard for measuring whether or not a conflict of interest exists in a given situation. Rather, they reflect the kinds of issues which need to be considered in making such a determination.

Representations

[11] As way of background, the township explains that it is a small municipality in terms of population. It has a very limited number of employees³ and, in particular, it has a limited number of employees who have the qualifications within the township to address "freedom of information" requests.

[12] The township submits that the clerk/CAO's direct involvement in the request did

² See for example Orders M-640, MO-1285, MO-2605, MO-3208, MO-2867, and PO-2381.

³ Excluding the Public Works Department and Fire Chief, the township only has seven employees.

not materially affect the decision that was issued. It submits that the decision was aided by and based upon advice from the township's solicitor and is entirely based upon previous IPC orders. The township also submits that the decision made by the clerk/CAO, had it not involved the clerk/CAO's own contract, would have been no different in substance.

[13] The appellant's representations did not address this issue except to state that she has no conflict of any kind in this appeal.

Analysis and findings

[14] In Order MO-1285, Adjudicator Laurel Cropley discussed the factors to consider when addressing whether a conflict of interest exists. She states:

Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example: Order M-640).

[15] I agree with and adopt the reasoning stated above for this appeal.

[16] Having considered the representations of all the parties and having reviewed the request, the decision letter, and the records, I find that the clerk/CAO was not in a conflict of interest in deciding not to disclose his contract.

[17] I acknowledge that the clerk/CAO had a personal interest in one of the records as it is his employment contract. However, as stated in Order MO-3208, individuals in a small municipality may be required to undertake a number of roles. Such situations alone are not sufficient to establish a conflict of interest.

[18] Moreover, I find that a well-informed person, considering all of the circumstances, would not reasonably perceive a conflict of interest on the part of the CAO/clerk. I accept the clerk/CAO's explanation that the township is a small municipality in terms of population, and, as such, it has a limited number of employees who are qualified to process freedom of information requests. I also accept the township's submissions that the access decision was largely based on the advice by the municipality's solicitor and previous IPC orders.

[19] Therefore, despite the clerk/CAO's role in making the access decision, I find that he was not in a conflict of interest with respect to it.

Issue B: Do the termination clauses contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?

[20] In order to determine whether section 14(1) of the *Act* applies, it is necessary to decide whether the termination clauses at issue contain “personal information” and, if so, to whom it relates.

[21] Paragraphs (b) and (h) of the definition of “personal information” in section 2(1) of the *Act* are relevant to this appeal. They read as follows:

“personal information” means recorded information about an identifiable individual, including,

(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,

(h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[22] The list in section 2(1) is not exhaustive and IPC adjudicators have held that other types of information may also qualify as personal information.⁴

[23] The *Act* states that the name, title, contact information or designation of an individual in a business, professional or official capacity is not personal information under section 2(2.1). This applies even if the individual carries out their business responsibilities from their dwelling and their contact information relates to the dwelling (section 2(2.2)). Nevertheless, if this type of information reveals something of a personal nature about the individual, it may still qualify as personal information.⁵

[24] The township submits that the termination clauses contain personal information of four employees. It relies on IPC Order MO-2478, where Adjudicator Jennifer James found that an individual’s future entitlements, such as termination and retirement benefits, constitute *employment history* for the purposes of paragraph (b) of the section 2(1) definition of personal information.

[25] The appellant submits that the termination clauses at issue do not contain personal information. She submits that the requested information does not relate to the identifiable individuals in a personal capacity but applies to them as new hires to the four stated roles. The appellant reiterates that section 2(2.1) of the *Act* sets out what

⁴ Order 11.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

personal information does not include. She finally submits that the requested information does not contain personal information or would not reveal something of a personal nature of any of the four individuals.

[26] With the exception of two subsections in each of the four contracts,⁶ I find that the termination clauses contain personal information of identifiable individuals. The termination clauses contain information about the financial arrangements related to these employees' departure from the township which qualifies as their personal information within the meaning of paragraphs (b) and (h) of the definition of personal information in section 2(1) of the *Act*.

[27] I find that two subsections in each of the four contracts do not contain information that qualifies as the personal information of an identifiable individual. The information in these subsections could apply to any township employee. The township concedes that these subsections contain no personal information but argues that disclosing the subsections would serve no meaningful purpose. As only personal information can be withheld under section 14(1) and the township has not claimed any other discretionary exemption for this information, I will order it to be disclosed to the appellant.

[28] I will now consider whether the mandatory exemption at section 14(1) applies to the information remaining in the termination clauses that I have found to be personal information.

Issue C: Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?

[29] Section 14(1) of the *Act* requires institutions to withhold personal information unless an exception applies. The only exception relevant to this appeal is section 14(1)(f) which says that personal information can be disclosed if its disclosure would not constitute an unjustified invasion of personal privacy.

[30] Sections 14(2) and (3) help in determining whether disclosure would constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy under section 14(1). Section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[31] 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" in

⁶ For the CAO, these two subsections are 10(g) and (h). For the CBO, these two subsections are 10(d)(vi) and (vii). For the treasurer, these two subsections are 10(g)(vi) and (vii). For the planner, these two subsections are 10(f) and 10(g).

section 16 applies.⁷

[32] Where no section 14(3) presumption applies, the factors in section 14(2) assist in determining whether disclosure would constitute an unjustified invasion of personal privacy. Some of the section 14(2) factors, if present, weigh against disclosure while others weigh in favour of disclosure.

Analysis and findings

[33] The issue I must determine is whether section 14(1)(f) applies to the personal information at issue. That is, whether disclosure of the personal information constitutes an unjustified invasion of personal privacy. If so, the section 14(1)(f) exception does not apply and the township is required to withhold the personal information under section 14(1) of the *Act*. As described above, disclosure of certain type of personal information described in section 14(3) is presumed to be an unjustified invasion of personal privacy, while disclosure of some types of personal information set out in section 14(4) is not an unjustified invasion of personal privacy. If the exceptions in section 14(4) applies, it overrides any of the presumptions at section 14(3) and any factors weighing against disclosure at section 14(2).

[34] I will first consider whether any of the personal information falls within the exceptions in section 14(4), specifically section 14(4)(a) as it is the only exception potentially applicable in this appeal.

[35] Section 14(4)(a) 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;

[36] The IPC has interpreted “benefits” to include entitlements, in addition to base salary, that an employee receives as a result of being employed by the institution.⁸ In Order M-23, former Assistant Commissioner Tom Wright lists the following as examples of “benefits”:

- insurance-related benefits
- sick leave, vacation
- leaves of absence

⁷ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

⁸ Order M-23.

- termination allowance
- death and pension benefits
- right to reimbursement for moving expenses

[37] The appellant submits that section 14(4)(a) applies so that disclosure of the termination clauses would not be an unjustified invasion. In particular she cites Order MO-4060, where Adjudicator Valerie Jepson ordered the Tay Valley Township to disclose information pertaining to vacation, rights on termination and minimum work week hours.

[38] The township submits that subsection 14(4)(a) must be given a strict interpretation given that it overrides a deemed invasion of privacy. It submits that the benefits of an employee are not listed separately in subsection 14(4)(a) as revealed by the placement of commas in that subsection. The township points out that there is no "and/or" between the words "salary range" and the word "benefits". As such, it submits that only if the employment contract contains a salary range and a statement of benefits does subsection 14(4)(a) become operative to require disclosure of such salary range and benefits. As three of the employment contracts do not contain a salary range, subsection 14(4)(a) is not triggered. According to the township, only the CAO's employment contract would meet the requirements of section 14(4)(a) and only with respect to clause 3(a) and (b) (which are not at issue in this appeal).

[39] The township relies on Order M-23, where former Commissioner Wright noted the following:

... In my opinion, the word "benefits" as it is used in section 14(4)(a), means entitlement that an officer or employee receives as a result of being employed by an institution. Generally speaking, these entitlements will be in addition to a base salary.

[40] The township cites the above paragraph in support of its argument that termination provisions would not qualify as a "benefit" as they are not entitlements that an employee receives as a result of being employed. The township submits that the termination provisions are entitlements that the employee receives as a result of being terminated. As such, the township argues that they only become effective after a termination has occurred and, therefore, does not constitute as a "benefit".

[41] I disagree with the township. It cites the portion of Order M-23 that supports its strict interpretation of section 14(4)(a). However, if one continues to read the remainder of this paragraph, former Commissioner Wright states that "benefits" include sick leave, vacation, leaves of absence, termination allowance, death and pension benefits. I note that "death and pension benefits" (besides termination allowance) are also entitlements that the employee receives after their employment has ended but was found to be a "benefit" by former Commissioner Wright.

[42] With respect to the township's argument that section 14(4)(a) be given a strict interpretation, I note that former Commissioner Wright states at the beginning of the above cited paragraph that "benefits" should be given a fairly expansive interpretation as "benefits" are being paid from the "public purse".

[43] I also note that in Order M-23 the salary (which former Commissioner Wright found to be in a "salary range" for the purposes of section 14(4)(a)) was contained in clause 9 of the employment contract in question while the benefits were contained in clauses 1, 7, 10-16. As such, contrary to the township's argument above, the salary and benefits do not need to be in the same clause for section 14(4)(a) to be triggered. In my view, the township's strict interpretation of section 14(4)(a) would lead to an absurd result. Very few employment contracts contain the salary range (or salary) and benefits within the same clause. Benefits are an expansive category and, as such, rightfully so deserve their own clause. To require benefits and salary to be in the same clause for section 14(4)(a) to be triggered would lead to less transparency about monies being paid from the public purse.

[44] In addition, the township relies on Order MO-1332 in support of its argument that termination clauses are not entitlements that the employee receives as a result of being employed. It cites the following statements in Order MO-1332 from former Assistant Commissioner Sherry Liang:

I am satisfied that the reasoning in Order M-173 applies here. On my review of the records, I conclude that to the extent they contain information about benefits these benefits were negotiated as part of early retirement packages. In this sense, instead of being benefits "received as a result of being employed" by the City, they are benefits received as a result of having employment terminated...

[45] I disagree with the township. Orders M-173 and MO-1332 are distinguishable from the current appeal on the basis that in both those orders the termination entitlements in question were negotiated as part of early retirement packages. They did not derive from the original contracts of employment entered into between the parties. In this appeal, the termination entitlements in question derive from the original employment contracts of the affected parties.

[46] On my review of the termination clauses, I am satisfied that they constitute "benefits" for the purpose of section 14(4)(a). I agree with and follow the reasoning stated in Orders M-23 and MO-4060. The termination clauses for the four affected parties contain information about the financial arrangements related to these employees' departure from the township. Since section 14(4)(a) applies to this personal 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. Accordingly, I will order this information disclosed to the appellant.

ORDER:

1. I order the township to disclose to the appellant the information I have found not exempt under section 14(1) by providing her with a copy of the records by **March 29, 2023** but not before **March 24, 2023**. I have provided a highlighted copy of the records with the township's copy of this order. To be clear, only the highlighted information should be disclosed to the appellant.
2. In order to verify compliance with this order, I reserve the right to require the township to provide me with a copy of the information disclosed to the appellant.

Original signed by: _____

February 22, 2023 _____

Lan An
Adjudicator