



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

ORDER M-102

Appeal M-910417

Regional Municipality of York Police Services Board



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ORDER

BACKGROUND:

The Regional Municipality of York Police Services Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to information respecting the salary and benefits of the Chief of Police and the Deputy Chief of Police (the affected parties). The Board denied access pursuant to sections 6(1)(b), 7(1) and 14(3)(f) of the Act.

During mediation, the appellant indicated that he was only interested in the salary and benefits information for 1991. Since section 14(4)(a) provides that the disclosure of salary ranges does not constitute an unjustified invasion of personal privacy, the Appeals Officer asked the Board to consider disclosing salary ranges for the affected parties' positions as a means of settling the appeal. The Board indicated that there were no salary ranges for the two positions and, after the matter was considered at a Board meeting, refused to establish salary ranges.

Further mediation was not possible, and notice that an inquiry was being conducted to review the Board's decision was sent to the appellant, the Board, and the affected parties. Written representations were received from all parties.

During the inquiry stage of the appeal, the Board agreed to disclose the benefits information. Therefore, the records which remain at issue are those that reveal the affected parties' exact salaries for 1991.

The Board identified several responsive records. Since the appellant is only interested in the 1991 information, only the following records are at issue:

1. Excerpt from 1991 Board meeting;
2. Letter from Chief of Police to Board dated August 1, 1991;
3. Memorandum from Board secretary to Payroll Department regarding salaries, dated August 22, 1991.

ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemption provided by section 6(1)(b) of the Act applies to the records.
- B. Whether the discretionary exemption provided by section 7(1) of the Act applies to Record 2.
- C. Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.
- D. If the answer to Issue C is yes, whether the mandatory exemption provided by section 14 of the Act applies to the records.
- E. If the answer to Issue D is yes, whether there is a compelling public interest in the disclosure of the personal information which clearly outweighs the purpose of the section 14 exemption.

ISSUE A: Whether the discretionary exemption provided by section 6(1)(b) of the Act applies to the records.

Section 6(1)(b) of the Act reads as follows:

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.

In order to qualify for exemption under section 6(1)(b), the Board must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. a statute authorizes the holding of this meeting in the absence of the public; **and**
3. disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64 and M-71]

In my view, the first and second parts of the test for exemption under section 6(1)(b) require the Board to establish that a meeting was held **and** that it was held in camera. There is no doubt that a meeting of the Board took place.

The Board states that it met on August 1, 1991 to discuss the affected parties' salaries and that, "Documents submitted for your consideration from the Chief of Police to the Board of Commissioners were stamped 'IN CAMERA' at the time they were being discussed." The Board provided a complete copy of the minutes of the meeting of August 21, 1991. (The date of August 1 set out in the Board's representations would appear to be an error as the minutes are dated August 21, 1991.)

Section 35(4) of the Police Services Act gives the Board the discretion to exclude members of the public from all or part of a meeting. In particular, section 35(4)(b) provides that:

The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,

- (b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.

Since meetings in the absence of the public are such a departure from the norm, in my opinion, there must be clear and tangible evidence that the meeting or parts of it were actually held in camera. For example, evidence could consist of a notation in the minutes of a meeting that a decision was made that the public be excluded from the meeting while a particular agenda item was discussed.

The agenda for the August 21 meeting indicates that certain "private" and "personnel" matters were to be discussed, however there is no indication in the minutes themselves that the meeting, or any part of it, was actually held in camera. I note that this is notwithstanding the fact that section 35(4)(b) sets clear parameters around the situations in which the Board can meet in the absence of the public and what the Board must consider before it decides to meet in the absence of the public. Finally, in my opinion, the fact that some of the records have been stamped "in camera", in itself, is not sufficient to establish that the meeting or part of it was held in camera.

In summary, I find that the exemption does not apply.

ISSUE B: Whether the discretionary exemption provided by section 7(1) of the Act applies to Record 2.

The Board submits that section 7(1) of the Act applies to Record 2. That section reads:

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

"Advice" pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient in the deliberative process [Order 118]. "Recommendations" should be viewed in the same vein [Order P-348].

In addition, in Order 94, dated September 12, 1989, former Commissioner Sidney B. Linden, in discussing the provincial equivalent of section 7, stated:

[i]n my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

The Board submits that:

If one examines correspondence written by the Chief of Police [which is at issue in this appeal] the Chief, an officer of the institution, uses language that clearly indicates he is recommending a wage scale and that members of the Board consider the information in their deliberations in relation to the matter of salary.

I have carefully reviewed Record 2 and the Board's representations. In my view, the information contained in the record does not constitute advice or recommendations within the meaning of section 7 of the Act. In my view, a decision about two individuals' salaries is not part of the "deliberative process of government decision-making [or] policy-making"; rather, it is a routine decision about an employee or group of employees. Such a decision does not involve policy considerations or the consideration of alternative courses of action.

In my view, Record 2 is more appropriately characterized as a request by an employee regarding his salary and that of a fellow employee. Although the persons responsible for approving the salaries may have considered the employee's request, such a request does not, in my view, constitute "advice" or "recommendations" in the requisite sense.

Accordingly, I find that Record 2 does not qualify for exemption under section 7(1).

ISSUE C: Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual,

In my view, information about the affected parties' salary is clearly information about those individuals and comes within the definition of personal information contained in section 2(1) of the Act.

ISSUE D. If the answer to Issue C is yes, whether the mandatory exemption provided by section 14 of the Act applies to the records.

Section 14(1) of the Act prohibits the disclosure of personal information except in certain circumstances. One such circumstance is described in section 14(1)(f) of the Act, which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. Section 14(3) lists the types of information, the disclosure of which, is presumed to constitute an unjustified invasion of personal privacy. In particular, section 14(3)(f) states:

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

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness; [emphasis added]

In its representations, the Board states that the "salaries ... are not identified in a range format" and addresses its submissions to the exact salary figures as follows:

I submit that the information regarding the Chief's and Deputy Chief's salaries are personal information and must benefit from the protection afforded by section 14(1).

In my view, the personal information contained in the records describes an individual's income and, therefore, disclosure of the personal information would constitute a presumed unjustified invasion of personal privacy.

Section 14(4) of the Act outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 14(3). Section 14(4)(a) states:

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;

In this appeal, section 14(4)(a) does not apply to rebut the presumption contained in section 14(3)(f) as the information at issue is the actual salary of each affected party, not their range of salary. The remainder of section 14(4) is not relevant in the circumstances of this appeal.

As section 14 is similar in wording to section 21 of the provincial Freedom of Information and Protection of Privacy Act (the provincial Act), orders issued under section 21 of the provincial Act give guidance in the interpretation and application of section 14 of the municipal Act. In Order 20, dated October 7, 1988, former Commissioner Linden considered the rebuttal of a presumed unjustified invasion of personal privacy

under section 21 of the provincial Act. He stated that, "... a combination of the circumstances set out in section 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view, such a case would be extremely unusual".

At a very late stage in this appeal, the appellant sent a letter to this office, which purported to contain the very information that he was requesting. In the circumstances, I am of the view that the information contained in the letter is not a relevant consideration.

In his representations, the appellant states that "... public figures (sic) salary should be available to the public ...", thus raising the possible application of section 14(2)(a). Without considering whether that section applies, I am of the view that the application of this factor alone would not be sufficient to rebut the presumption.

I have carefully reviewed the records at issue, the representations of the parties and the provisions of the Act which may rebut the presumption of an unjustified invasion of personal privacy. In my view, the presumption raised by section 14(3)(f) has not been rebutted.

ISSUE E: If the answer to Issue D is yes, whether there is a compelling public interest in the disclosure of the personal information which clearly outweighs the purpose of the section 14 exemption.

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. [emphasis added]

It has been stated in a number of previous orders that in order to satisfy the requirements of this section, there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption [Orders M-6, M-7, M-69, P-352, P-332].

While not specifically making reference to section 16 of the Act, the appellant does, in essence, raise section 16 as a consideration when he states:

I have addressed the issues as openly and honestly as possible and I feel that in no way are we violating the Chief or Deputy Chief of Police's privacy. In our view, public figures (sic) salary should be available to the public just as are the salaries of Mayors, Regional and

Provincial politicians and persons who are appointed to head publicly financed operations like Ontario Hydro.

The Board states:

There has been no clear countervailing arguments advanced which would require the Board to consider a public interest override.

In Order M-18, I considered the application of the section 16 public interest override in the context of an appeal involving salary information. On pages 6 and 7 of that Order, I stated:

The intent of the legislature is clear on the balancing of rights - the right to access must be balanced by the right of an individual to the protection of his/her personal privacy. Neither right is without limits, which limits are also provided for in the Act.

I am mindful of the current economic environment which places an even greater value on the prudent use of public funds. I agree that the operations of public institutions should be open to public scrutiny. I also agree that the public has a right to know how public funds are being spent. However, these principles have limitations in the context of the Act itself. I am not convinced that a compelling public interest in the disclosure of the exact salaries exists, such as to outweigh the purpose of the exemption.

This is not to say that a public interest does not exist nor that the public has no right to know. In my view, the provisions of section 14 themselves recognize the intricate balance between the right to know and the right to privacy of personal information. Section 14(3)(f) provides for a presumed unjustified invasion of personal privacy for information such as the exact salary of an employee of an institution. However, I believe that section 14(4)(a) reflects the fact that even though disclosure of an exact salary is a presumed unjustified invasion of personal privacy, disclosure of a salary range is not.

In my view, section 14(4)(a) is a clear indication by the legislature that the disclosure of salary ranges is in the public interest. As well, I feel that section 14(4)(a) is a reflection of the views of the legislature as to where the appropriate balance between the right to know and the right to privacy should be struck in the case of the salaries of employees of taxpayer-funded entities.

To say it a bit differently, section 14(4)(a) itself incorporates the public interest as it permits

members of the public to obtain information about the salaries of public employees to the extent of salary ranges. As to the requirement of section 16 that there be a compelling public interest which clearly outweighs the purpose of the exemption, in my view, the purpose of section 14 includes making the salary ranges of employees of the institution available to the public.

I believe that the appellant should be allowed access to some information relating to the salaries of the affected parties. In my view, to do otherwise would create an absurdity. It would mean that if an institution wanted to be less open in the area of salary information, it could achieve this by the simple expedient of not having salary ranges for its employees. In saying this, I am in no way suggesting that this is the situation in this appeal. Since exact salaries have the benefit of a presumed unjustified invasion of personal privacy, it is unlikely, in most circumstances, that any salary-related information would be available to the public. In my view, this is not the result which was intended by the legislature.

In that Order I directed the institution to establish and disclose salary ranges.

I remain of the view that section 14(4)(a) is a clear indication by the legislature that the disclosure of salary ranges is in the public interest and, in the circumstances of this appeal, I am of the opinion that information about the affected parties' salaries for 1991 should be available.

As was the case in Order M-18, salary ranges do not exist for the positions occupied by the affected parties. Therefore, pursuant to section 43(3) of the Act, as I did in Order M-18, I order the Board to prepare salary ranges for the affected parties for the year 1991. In establishing the ranges, I ask that the Board keep in mind the purpose of section 14(4)(a) and my comments about salary ranges in Orders M-5 and M-18.

ORDER:

1. I order the Board to prepare a salary range for the positions occupied by the affected parties during 1991 and to disclose them to the appellant within 35 days following the date of this order and **not** earlier than the thirtieth day following the date of this order.
2. The Board is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
3. In order to verify compliance with the provisions of this order, I order the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon

request.

Original signed by: _____
Tom Wright
Commissioner

March 11, 1993