



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER M-204**

**Appeal M-9200284**

**Town of Gananoque**



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# ORDER

## BACKGROUND:

The Town of Gananoque (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a release agreement entered into between the Town and a former employee (the employee). The requester also sought access to the monies paid to this individual which arose out of this agreement.

The Town denied access to the agreement based on the exemption contained in section 14(3)(f) of the Act. The requester appealed the Town's decision.

In his letter of appeal, the requester stated that the circumstances surrounding the departure of the employee were well-publicized and represent a matter of community concern. The requester has, therefore, indirectly raised the issue of whether section 16 of the Act (the so-called public interest override) applies to the facts of this case.

The records which the Town originally identified as being responsive to the request consist of a three page document entitled "Release Agreement" and a one page appendix. This appendix specifies the time period during which the employee is to receive a continuation of his salary, the percentage of salary to be paid should the individual obtain alternative employment and the other entitlements which the employee will receive.

During the course of mediation, and at the request of the Appeals Officer, the Town also agreed to create a third record entitled "Information Regarding Payments Made or to Be Made for [a named individual's] Settlement". The Town further agreed to treat this document as if it had existed on the date that the request was received. This record, which more specifically responds to the appellant's request, indicates the dollar value of the entitlements to be paid to the employee and the time periods over which these payments will be made. These amounts had originally been contained in a number of separate documents. The Town then took the position that this record is also exempt from disclosure under section 14(3)(f) of the Act.

The further mediation of this appeal was not successful and notice that an inquiry was being conducted to review the Town's decision was sent to the Town, the appellant, and to the employee (the affected person). In this document, the requester and the employee were advised of the third record which had been prepared by the Town. Representations were received from the Town and the employee only.

On August 6, 1993, while these representations were being considered, Commissioner Tom Wright issued Order M-170 which interpreted several statutory provisions of the Municipal Freedom of Information and Protection of Privacy Act in a way which differed from the interpretation developed in previous orders. Since a new approach to the operation of the Act was being adopted and because similar statutory provisions are at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the appellant, the Ministry and the employee. The parties were then afforded the opportunity to state whether the contents of Order M-170 would cause them to change or to supplement the representations which they had previously made. No further representations were received.

**ISSUES:**

The issues arising in this appeal may be summarized as follows:

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

**SUBMISSIONS/CONCLUSIONS:**

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

The term "personal information" is defined in section 2(1) of the Act, in part, as recorded information about an identifiable individual ...". In my view, all of the information contained in the agreement, the appendix and the additional record created by the Town, with the exception of two clauses found in the agreement, fits within the definition of "personal information". The clauses which do not contain information about an identifiable individual, and which are better described as boilerplate, are one which releases the employer from contractual liability and a standard closing clause.

Since these two clauses do not contain personal information, I order them to be disclosed to the appellant.

**ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies to the personal information contained in the records.**

Once it has been determined that a record contains personal information, section 14 of the Act provides a general rule of non-disclosure of the personal information to any person other than the individual to whom the personal information relates. Section 14(1) provides some exceptions to this general rule of non-disclosure, one of which is section 14(1)(f) of the Act. This provision reads as follows:

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.

In order for section 14(1)(f) to apply, I must find that the release of the personal information at issue would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. In Order M-170, Commissioner Wright addressed the interrelationship between sections 14(2), (3) and (4) of the Act in the following way:

... [W]here personal information falls within one of the presumptions found in section 14(3) of the Act, a combination of the circumstances set out in section 14(2) of the Act which weigh in favour of disclosure, cannot collectively operate to rebut the presumption.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

I adopt this approach for the purposes of this order.

**(i) Do sections 14(4)(a) and (b) of the Act apply to the personal information contained in the release agreement?**

In making its decision to withhold the contents of the release agreement and the associated records in their entirety, the Town did not consider whether sections 14(4)(a) and (b) of the Act might apply to these documents. Since the Appeals Officer assigned to the case considered that these provisions could be relevant to the disposition of the appeal, these sections were raised in the Notice of Inquiry. Owing to the nature of the information contained in the records, I will begin my analysis by discussing the application of these provisions.

Sections 14(4)(a) and (b) read as follows:

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

- (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was  
[IPC Order M-204/October 22, 1993]

an officer or employee of an institution; or

- (b) discloses financial or other details of a contract for personal services between an individual and an institution.

I have reviewed the information contained in the three records. In my view, none of the information found in these documents could be characterized as relating to the former employee's classification, salary range or employment responsibilities.

In Order M-173, I considered whether the term "benefits" which is referred to in section 14(4)(a) of the Act, might apply to the entitlements contained in a number of early retirement agreements. These documents were similar in nature to the records at issue in this appeal. In that order, I dealt with the issue in the following manner:

In my view, these clauses confer entitlements to the three former employees which are not dissimilar from those which the individuals would have received had they continued to be employed by the City. However, the entitlements reflected in the retirement agreements were not received by the former employees as a result of being employed by the City. Rather, they were negotiated by the three individuals in exchange for the acceptance by them of early retirement packages from the City. On the basis that these entitlements did not derive from the original contracts of employment entered into between the parties, nor from periodic changes made to these contracts, I must conclude that these entitlements do not constitute benefits ... Consequently, I find that the personal information contained in these agreements does not fall within the ambit of section 14(4)(a) of the Act.

Based on the same rationale that I expressed in Order M-173, I find that the portions of the records in this appeal which relate to the continuation of current salary, alternate employment, sick leave, vacation credits, life insurance, health, dental and other entitlements do not constitute benefits for the purposes of section 14(4)(a) of the Act.

In Order M-173, I also found that section 14(4)(b) of the Act did not apply to the personal information contained in the retirement agreement because the former staff members were hired pursuant to contracts of employment rather than as independent contractors. This is also the case with respect to the employee whose agreement is the subject of this appeal. Therefore, section 14(4)(b) does not apply to the personal information contained in the records.

- (ii) Do the presumptions contained in sections 14(3)(d) and (f) of the Act apply to the personal information contained in the release agreement?**

It will now be necessary for me to review the presumptions contained in section 14(3) of the Act to determine whether the release of the personal information in the records would constitute a presumed

unjustified invasion of the personal privacy of the employee. A section 14(3) presumption can only be rebutted by one of the factors set out in section 14(4) of the Act (which is not the case here) or by the application of section 16 of the Act. I will address the applicability of section 16 to the release agreement later in this order.

In their representations, both the Town and the employee submit that section 14(3)(f) of the Act applies to the personal information contained in the records. Because section 14 is a mandatory exemption, I will also consider the potential applicability of section 14(3)(d) of the Act to the information in question. These two provisions read as follows:

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

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

I have carefully reviewed the release agreement, the attached appendix and the record created by the Town. In my view, the great majority of the personal information recited in these documents falls outside the wording of the two presumptions. While it is true that the agreement confers monetary entitlements on the employee, with one exception, the description of these entitlements cannot be said to describe the individual's "finances, income, net worth, financial history or financial activities for the purposes of section 14(3)(f). Rather, these entitlements represent one time payments to be conferred immediately or over a defined period of time that arise directly from the acceptance by the employee of a release package.

In my view, there is only one reference contained in the records which falls within the ambit of section 14(3)(f) of the Act. That reference, which is found in the record created by the Town, refers to the specific salary to be paid to the employee for a prescribed period of time. I find that this information, when read in conjunction with certain other parts of the records, would permit a person reviewing the documents to calculate the exact salary which the employee earned when he left the Town. On this basis, the disclosure of this information would describe the employee's income for the purposes of section 14(3)(f) of the Act, and its release would constitute a presumed unjustified invasion of personal privacy.

I have also reviewed the other monetary sums referred to in the records and find that they cannot be said to circumscribe income for the purposes of section 14(3)(f) of the Act.

I will now consider the application of section 14(3)(d) of the Act to the personal information at issue. While it is true that the release agreement arose out of a pre-existing employment relationship, I find that the contents of the records, with one exception, do not pertain to the employment history of the employee for

the purposes of section 14(3)(d) of the Act. Rather, this information more accurately relates to the arrangements which have been put in place to end the employment connection.

In my view, there is only one category of personal information recited in the records which falls within the ambit of section 14(3)(d) of the Act. This information, which appears in several places in the records, relates to the date on which the employee last worked for the Town. In my view, this information comes within the definition of employment history for the purposes of the presumption.

I have highlighted the personal information which is subject to the section 14(3)(d) and (f) presumptions in yellow in the copy of the records which I will provide to the Town with this order.

**(c) Which of the circumstances contemplated by section 14(2) of the Act apply to the personal information contained in the release agreement?**

The remainder of the personal information contained in the records does not meet the requirements for a presumed unjustified invasion of personal privacy. Based on the approach adopted in Order M-170, I must now consider the application of section 14(2) of the Act to this personal information. This provision reads, in part, as follows:

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;
- ...
- (f) the personal information is highly sensitive;
- ...
- (h) the personal information has been supplied by the individual to whom the information relates in confidence.
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

In interpreting section 14(2), all the relevant circumstances of the case must be considered not only the factors enumerated in the section (Order M-170).

Both the Town and the former employee submit that the agreement was entered into on a confidential basis. That expectation, they argue, is evidenced by the following contractual term which appears in the  
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agreement:

In further consideration of the payments referred to herein, both myself and the Town ... do solemnly promise that the terms of this agreement will be kept strictly confidential ...

On this basis, the parties have implicitly raised the application of section 14(2)(h) of the Act to the personal information contained in the release agreement (i.e. that the personal information has been supplied by the individuals to whom the information relates in confidence).

In Order M-173, I had occasion to interpret a similar confidentiality provision for the purposes of the balancing exercise contemplated under section 14(2) of the Act. I addressed the issue in the following fashion:

A number of orders decided under section 17 of the provincial Freedom of Information and Protection of Privacy Act have addressed the question of whether information contained in a contract entered into between an institution and an affected person was **supplied** by the affected person. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the affected person (Orders 87, 179, 203, 204 and P-251).

Based on my review of the retirement agreements, there is no evidence that the personal information contained in the final contractual provisions was originally supplied by the former employees. Rather, the strong inference is that the terms were arrived at through a process of negotiation undertaken between the parties and that the agreements reflect compromise positions. On this basis, it cannot be said that this information was **supplied** by the former employees to the City for the purpose of section 14(2)(h) of the Act.

I believe, however, that despite the fact that section 14(2)(h) does not apply to the facts of the case (and that it is not possible to contract out of the provisions of the Act), the three former employees did have an expectation that the terms of the agreements would not be released to the public. In my opinion, that expectation is a relevant circumstance which would weigh in favour of protecting the privacy interests of the former employees.

On the facts of this case, I find that the employee also had an expectation that the contents of the agreement would not be publicized. This expectation, therefore, is a relevant consideration in determining whether or not to release the personal information.

The employee also submits that the "confidentiality clause" set out in the agreement suggests that the personal information contained in the records is "highly sensitive" for the purposes of section 14(2)(f) of the Act. He also states that, had a separation agreement not been signed, the resulting litigation would have been detrimental to both sides.



In order for personal information to be considered "highly sensitive", the party relying on this proposition must establish that disclosure of the information would cause excessive personal distress to the affected person (Order P-434). I have considered the representations provided along with the records at issue in this appeal. In my view, the release of the information contained in the document could not reasonably be expected to produce the excessive personal distress required for section 14(2)(f) to apply. Consequently, I find that this factor does not weigh in favour of protecting the privacy interests of the former employee.

The employee also submits that section 14(2)(i) of the Act applies to the personal information contained in the records (the disclosure of the information may unfairly damage the reputation of any person referred to in the record). He expresses a concern that his resignation may incorrectly be associated with an unrelated event which was reported by the media. The employee also indicates that the manner in which the one media outlet reported on his departure from the Town lacked balance and objectivity. While the employee feels strongly about these matters, the evidence with which I have been provided is insufficient to demonstrate that the release of the information contained in the records would unfairly damage the employee's reputation.

On this basis, I find that section 14(2)(i) is not a relevant consideration in determining whether the disclosure of the information found in the agreements would constitute an unjustified invasion of personal privacy.

To summarize, therefore, of the three considerations raised by the Town and/or the former employee which I consider to be relevant, only one (the expectation of confidentiality) weighs in favour of **not** releasing the personal information at issue in this appeal.

I now wish to explore the considerations outlined in section 14(2) of the Act and any other relevant circumstances which weigh in favour of disclosing the personal information contained in the release agreement.

The appellant submits in his letter of appeal that the circumstances surrounding the departure of the former employee were well-publicized and represented a matter of community concern. Based on the circumstances surrounding this case, I find that the appellant has implicitly raised the application of section 14(2)(a) of the Act. (The disclosure of information is desirable for the purpose of subjecting the activities of the institution to public scrutiny).

In his representations, the employee states:

... the Notice of Inquiry makes reference to the request being "a well publicized issue of community concern". I would say this is clearly not the case. That issue related to [another] action ... the press used misquotes ... to create an impression of wrong doing, an independent committee investigation found no evidence of wrong doing ...

In order to establish the relevance of section 14(2)(a), the appellant must provide evidence demonstrating that the activities of the Town have been publicly called into question, necessitating disclosure of the

personal information of an affected person in order to subject the activities of the Town to public scrutiny (Order M-84).

Based on the evidence which has been provided to me, the departure of this senior municipal employee generated considerable public interest at the time that the event occurred. In addition, as I indicated in Order M-173, the contents of agreements entered into between institutions and high ranking civic employees represent the sort of records for which a high degree of public scrutiny is warranted. On this basis, I find that section 14(2)(a) of the Act is a relevant consideration which weighs in favour of releasing the personal information found in the records.

Previous orders issued by the Commissioner's office have also identified another circumstance which should be considered in balancing access and privacy interests under section 14(2) of the Act. This consideration is that "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution".

In Order M-173, I considered the potential applicability of this factor to a similar set of records in the following way:

In determining whether the public confidence consideration is relevant in the context of the present appeal, I have considered the following factors. First, the retirement agreements involve large amounts of public funds. Second, the agreements involve senior municipal employees with a high profile within the community. Third, the current recessionary climate places an unparalleled obligation on officials at all levels of government to ensure that tax dollars are spent wisely. Based on an evaluation of these factors, I have concluded that the public confidence consideration is applicable in this appeal.

Given that the factual context surrounding Order M-173 was very similar to that which applies to the present appeal, I also find that the public confidence consideration is relevant in this case.

After balancing the competing interests of public scrutiny, public confidence in the integrity of an institution and the expectation of confidentiality held by the employee, I find that the considerations which favour disclosure outweigh those which would protect the privacy interests of the employee. On this basis, I find that, subject to the following caveat, the release of the personal information contained in the records would not constitute an unjustified invasion of the personal privacy of the employee.

In my view, an adequate level of public scrutiny respecting the terms of the agreement can be achieved without disclosing the name or other identifying information of the former employee. While I appreciate that knowledgeable individuals may still be able to link the individual to this agreement, the disclosure of this additional information would not be warranted in the circumstances. On this basis, I find that the release of this identifiable information would constitute an unjustified invasion of the privacy interests of the employee.

I have highlighted the personal information in this category in blue in the copy of the records which I will  
[IPC Order M-204/October 22, 1993]

provide to the Town with this order.

**ISSUE C: If the answer to Issue B is yes, whether there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the exemption provided by section 14 of the Act.**

I have found under Issue B that the disclosure of some personal information found in the records would constitute an unjustified invasion of personal privacy either under sections 14(3)(d) or (f) of the Act, or as a result of the balancing process undertaken through section 14(2).

In his letter of appeal, the appellant submits that the circumstances surrounding the departure of the former employee were well-publicized and represent a matter of community concern. The appellant has, thereby, indirectly raised the application of section 16 of the Act.

That being the case, I must now consider whether the personal information which I have previously exempted from disclosure should be released pursuant to the public interest override found in section 16 of the Act. This provision states as follows:

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]

In order for section 16 of the Act to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this compelling interest must clearly outweigh the purpose of the exemption (Order M-6). Based on the facts of this appeal, I must, therefore, determine whether there is a compelling public interest in the disclosure of the remaining personal information in the records which clearly outweighs the purpose of the section 14 exemption.

In undertaking this analysis, I am mindful of the fact that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. Further, in the context of the present appeal, I have already directed that almost all of the information found in the records be released. In my view, this level of disclosure should permit the appellant to adequately address the public interest concerns which he has expressed.

Based on these considerations, I find that there does not exist a compelling public interest in the disclosure of the remaining personal information that clearly outweighs the purpose of the section 14 exemption. On this basis, my decision is that section 16 does not apply in the circumstances of this appeal.

**ORDER:**

1. I uphold the Town's decision not to disclose to the appellant the highlighted portions of the three records which will accompany this order.
2. I order the Town to disclose the portions of the records which have **not** been highlighted in the copy of the records which will accompany this order to the appellant within 35 days following the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Town to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: \_\_\_\_\_  
Irwin Glasberg  
Assistant Commissioner

\_\_\_\_\_ October 22, 1993