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

ORDER M-441

Appeal M-9400381

Barrie Public Library Board

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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). A newspaper reporter requested that the Barrie Library Board (the Board) provide him with a copy of the financial documents and other records related to the out-of-court settlement between the Board and a former Board employee (the former employee). The settlement resulted from the termination of the former employee from the Board. No court action was involved.

The Board denied access to the records in their entirety, relying on the following exemptions in the Act:

- third party information - section 10(1)
- solicitor-client privilege - section 12
- invasion of privacy - section 14(1).

The reporter appealed the denial of access. During mediation, the scope of the appeal was limited to one record, namely the Minutes of Settlement. This document consists of five pages to which are attached three Schedules. One schedule is a list of documents the Board is to forward to the former employee. The second is a letter of reference and the third is a release.

A Notice of Inquiry was sent to the parties to the appeal, namely, the Board, the reporter and the former employee. Representations were received from all the parties. In his submissions, the reporter claimed that there exists a public interest in disclosure of the requested documentation, thus raising the possible application of section 16 of the Act.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 10(1)(a), (b) or (c) of the Act the institution and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

[Order 36. See also Orders M-29 and M-37]

I will first consider the second part of the test. This element requires that the information has been supplied

to the Board by an affected party, in this case the former employee, either explicitly or implicitly in confidence.

Past orders of the Commissioner's office have generally concluded that information contained in contracts entered into between an institution and another party is not "supplied" for the purposes of section 10(1) of the Act. Rather, the strong inference in these cases is that the information is a product of negotiations between the parties.

In this case, the Board has provided no submissions as to how the information contained in the Minutes of Settlement could be said to have been "supplied" by the former employee. In fact, in its discussion of the application of section 12 of the Act, the Board states that:

> The Minutes of Settlement were the direct result of employment of counsel and **were the final result of the negotiation process between legal counsels**. [my emphasis]

Accordingly, I find that the second part of the section 10(1) test has not been satisfied. As all elements must be present in order for the exemption to apply, I conclude that the third party information exemption does not apply to the Minutes of Settlement.

SOLICITOR-CLIENT PRIVILEGE

Section 12 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Board's submissions are limited. In addition to the statement I have referred to above, the Board merely states that if a settlement had not been reached, the Minutes of Settlement would have been part of contemplated litigation. In this regard the Board has referred to certain documentation it has provided to this office. This information merely sets out various provisions dealing with the release of claims by the former employee against the Board. It does not indicate anything about contemplated litigation.

The question of what constitutes "in contemplation of litigation" was considered by former Assistant Commissioner Tom Mitchinson in Order M-86. There, he indicated that for a record to qualify as being prepared in contemplation of litigation:

> ... the **dominant** purpose for the preparation of the document must be in contemplation of litigation; **and** ... there must be a reasonable prospect of litigation at the time of the

preparation of the record - litigation must be more than a vague or theoretical possibility.

I adopt this approach for the purposes of this order.

Having reviewed the submissions of the Board I am not persuaded that, at the time the Minutes of Settlement were entered into, the Board could have reasonably contemplated that litigation would occur respecting the terms of the agreement. In fact, I would consider that such an outcome would be most unlikely given that the parties to the Minutes of Settlement had endorsed its contents.

Accordingly, I find that the second branch of the section 12 exemption does not apply to the Minutes of Settlement.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Having reviewed the Minutes of Settlement and the schedules, I find that they contain the personal information of the former employee.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions in section 14(3) apply, the Board must consider the application of the factors listed in section 14(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

The former employee does not claim that there exist any circumstances favouring privacy protection. However, the Board maintains that Schedule B, the letter of reference, constitutes personal recommendations or evaluations, character references or personnel evaluations so as to satisfy the presumption in section 14(3)(g) of the Act. The Board also submits that all credits from the Minutes of Settlement and the attached Schedules constitute employment history for the purposes of section 14(3)(d).

I agree that the letter of reference satisfies the presumption in section 14(3)(g) of the Act. However, in my

view, there is no information contained in the Minutes of Settlement or Schedules A and C that relates to the former employee's employment history.

I will now consider the balance of the Minutes of Settlement, excluding the letter of reference. The Board maintains that the following factors contained in section 14(2) of the Act weigh in favour of privacy protection:

- the individual to whom the information relates will be exposed unfairly to harm (section 14(2)(e));
- the personal information is highly sensitive (section 14(2)(f)); and
- the personal information has been supplied by the individual to whom the information relates in confidence (section 14(2)(h)).

The Board explains that the Minutes of Settlement contain a confidentiality clause in which the former employee agreed not to disclose any of the terms and conditions of the settlement. Breach of this clause entitles the Board to terminate the severance package. Therefore, the Board argues that disclosure of the record would expose the former employee unfairly to harm.

I do not agree. The confidentiality provision applies to disclosure **by the former employee**. If disclosure is ordered by the Commissioner's office, it is the Board which must release the Minutes of Settlement. In these circumstances it can hardly be said that the former employee has disclosed the information. I find, therefore, that section 14(2)(e) is not a relevant factor in the circumstances of this appeal.

The Board has provided no evidence to support its position that the information is highly sensitive. Accordingly, I find that section 14(2)(f) has no application.

Section 14(2)(h) is not a relevant consideration in this appeal because, as the Board itself has stated, the information contained in the Minutes of Settlement resulted from negotiations between counsel for the Board and the former employee (see the quote from the Board's representations under "Third Party Information", above). Therefore, the information was not supplied to the Board.

In summary, I have found no factors in section 14(2) of the Act which weigh in favour of privacy protection.

The reporter's position may be characterized as raising the application of section 14(2)(a) of the Act. In order for section 14(2)(a) to apply in the circumstances of an appeal, it must be established through evidence provided by the reporter, and a review of the relevant records, that disclosure of the personal information found in these records is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

In this case, the reporter's representations indicate that the settlement the former employee received came from public money, namely municipal property taxes. Thus he argues that the taxpayers have a right to know how much the former employee was paid. In addition, he believes that the monies used for the

settlement were originally intended to be applied to other purchases for the Library. If this was the case, then all the Library users were affected by the settlement. The reporter has, however, provided no evidence to this effect.

In its submissions with respect to section 16 of the Act, the Board has made some comments which I believe are relevant in the context of this section 14(2)(a) discussion. It maintains that the general public has not requested this information. The Board also notes that the monetary difference between the former employee's salary and the amount of the settlement represent a relatively small percentage of its operating budget.

In my view, the number of requests for such information filed under the Act is not determinative of whether an institution's activities should be subject to public scrutiny; nor is the fact that the Board does not feel that the monetary amount is substantial.

Having reviewed the record and the representations of the parties I conclude that it is desirable that the activities of the Board be subject to public scrutiny. It appears from the evidence before me that there have been questions asked not only about the amount of money contained in the Minutes of Settlement but also about the other terms and conditions.

Previous orders of 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 "disclosure of the personal information could be desirable for ensuring public confidence in the institution".

In Order M-173, Assistant Commissioner Irwin Glasberg considered the potential applicability of this factor in the following way:

> In considering 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.

I recognize that the factual context surrounding Order M-173 was somewhat different to that which applies in this case. In that case, the employees receiving retirement benefits were commissioner-level city employees. The amount of money at issue was considerably more than is the case here. However, I do not believe that the dollar amounts and the level of the employee are determinative of the issue. The public's concerns over the prudent use of public funds is based on the use to which and the manner in which

an institution applies monies, such as tax dollars, received from the public. In my view, this should be the relevant consideration in each case. Accordingly, I believe that the public confidence consideration is applicable in this appeal.

In summary, I have found no factors which would protect the privacy interests of the former employee while the considerations of public scrutiny and public confidence in the Board favour disclosure. On this basis, I find that, subject to the following caveat, the release of the personal information contained in the record would not constitute an unjustified invasion of the personal privacy of the former employee.

In my view, an adequate level of public scrutiny respecting the terms of the Minutes of Settlement 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 information, 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 former employee.

I have highlighted the personal information in this category in yellow on the copy of the record which I will provide to the Board's Freedom of Information and Privacy Co-ordinator with a copy of this order.

PUBLIC INTEREST IN DISCLOSURE

The reporter's submissions may also be viewed as maintaining that there exists a compelling public interest in disclosure of the record under section 16 of the Act. I have described these submissions in my discussion of section 14(2).

In order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption which otherwise applies to the record.

In addressing this issue, it is important to note that the only information I have held to be exempt under section 14(1) is the name and other identifying information of the former employee, as well as the letter of reference. In my view, the disclosure of the remainder of the Minutes of Settlement will provide the reporter with sufficient information to adequately address the public interest concerns which he has expressed.

On this basis, 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. Therefore, section 16 does not apply in the circumstances of this appeal.

ORDER:

1. I uphold the decision of the Board not to disclose to the appellant Schedule B of the Minutes of Settlement (which consists of the letter of reference), and the highlighted portions of the balance of

the Minutes of Settlement on the copy of this record which I have provided to the Freedom of Information and Privacy Co-ordinator of the Board with a copy of this order.

2. I order the Board to disclose the portions of the record which have **not** been highlighted to the appellant within thirty-five (35) days of the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the record which is provided to the appellant in accordance with Provision 2.

Original signed by: January 10, 1995
Anita Fineberg
Inquiry Officer

POSTSCRIPT:

The former employee **did not** object to the disclosure of the Minutes of Settlement. However, given the confidentiality provision in the agreement and the severe consequences of a breach, she felt that she could not consent to its release unless the Board agreed to waive the confidentiality provision with respect to some or all of the agreement. The Board declined to do so. In these circumstances, I do not believe that the former employee could be said to have consented to the disclosure of the record within the meaning of section 14(1)(a) of the Act. Thus, I undertook the preceding analysis.

Because of certain provisions of the Act, I did not order the release of the entire document, and, in particular, the letter of reference. When the Board discloses those portions of the Minutes of Settlement pursuant to Provision 2 of the order, it may be that certain questions will arise which may be addressed by the remaining parts of the agreement. The Board may then wish to consider disclosing the entire document if the former employee consents.