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

ORDER MO-1184

Appeal MA-980148-1

City of Hamilton

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NATURE OF THE APPEAL:

The City of Hamilton (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) from a member of the media for the following information:

> Records including, but not restricted to, reports and documents regarding the motion adopted by city council on May 21/98 respecting the settlement of Ontario Court Action #11893-96, the result of mediation on May 19 & 20/98 with Mr. Justice John White. Specifically, the terms & conditions, including financial payments, of the settlement with [a named individual] in his wrongful dismissal action against the City of Hamilton, [and named employees or former employees].

The City identified one responsive record, consisting of the five-page handwritten Minutes of Settlement (the Settlement Agreement) between the City, the named individual and other named employees/former employees, together with three handwritten or typewritten schedules totalling an additional six pages. The record is dated May 20, 1998.

The City denied access to this record in its entirety on the basis of the following exemptions contained in the Act:

- economic and other interests - sections 11(c) and (d)
- solicitor-client privilege - section 12
- invasion of privacy - section 14(1)

The requester, now the appellant, appealed the City's decision, and also raised the possible application of the "public interest override" contained in section 16 of the Act in support of her position that the record should be disclosed.

A Notice of Inquiry was provided to the City, the appellant, the named individual, and the five named employees/former employees who were parties to the settlement.

Representations were received from the City, the appellant, and one of the former employees (the affected party), but not from the named individual and the other four employees/former employees.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Sections 11(c) and (d) state respectively:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

To establish a valid exemption claim under section 11(c), the City must demonstrate a reasonable expectation of prejudice to its economic interests or competitive position arising from disclosure of the Settlement Agreement.

Similarly, to establish a valid exemption claim under section 11(d), the City must demonstrate a reasonable expectation of injury to its financial interests arising from disclosure.

The City's representations on the "economic interest" component of section 11(c) and the 11(d) exemption claim are the same. As the City states, "there seems to be no distinction in fact between economic interests and financial interests, at least in this case". I concur.

The City bases its "economic interests" argument on the existence of a confidentiality clause in the settlement agreement, and the linkage of the agreement to the withdrawal of a civil lawsuit launched by the named individual against the City and certain named employees for wrongful dismissal. The City states that:

> ... if the City discloses the record, the plaintiff [the named individual] would consider this a breach of the agreed settlement, entitling him to reopen his court action, thus voiding the settlement, or he may claim some new monetary damages arising from that unauthorized disclosure.
>
> If that happened, the financial exposure of the City to a higher money payout to [the named individual] follows. Accordingly, it is clearly not in the economic (or financial) interests of the City to disclose the record to anyone. Not only might there be a successful claim for more money because of this, but there may also be some claim against the City for punitive or other extraordinary damages for the apparently deliberate breach of the signed agreement. There would also be further legal fees incurred by the City for [the named City's solicitor's] services to further defend it, as well as court costs probably awarded to the plaintiff against the City, if the plaintiff succeeded in that reopened action.

The City further submits that the expectation of the adverse impact to the City is a reasonable one based on the opinion and advice of its solicitor that the record should not be disclosed, which was "adopted unanimously by City Council ...".

The named individual did not provide representations in response to the Notice of Inquiry. However, the City states that he "maintains the position that he wants the confidentiality of the entire record preserved intact."

The affected party disagrees with the City. She states:

> There is no economic interest of the City of Hamilton involved in this application, save and except that of the taxpayers and their legitimate desire to know how and to what extent their taxes are being spent. Disclosure of this amount cannot adversely affect the economic interest of the City, particularly since the legal action by [the named individual] has now been dismissed against the City.
>
> The financial interests of the City are simply to resolve the claim of [the named individual] at as little cost as possible to the taxpayers. If the settlement figure paid to [the named individual] is unreasonably low, that could only advantage the City. If it is excessively high then the City, through its taxpayers, have a legitimate interest in knowing that.

The appellant's representations on the "economic interests" component of section 11(c) and the "financial interests" element of section 11(d) are brief. She submits:

> ... it is difficult to fathom how confirming that amount [the speculated settlement figure] or revealing the correct one, could prejudice the city in any way financially.

Turning to the "competitive position" component of section 11(c), the City submits that:

> [It] does have a "competitive position" in regard to hiring or appointments of all employees, in particular, but not limited to senior level (Department Head) employees. This is in competition with other municipalities, other levels of government, and private sector employers.
> ...
>
> It is not unusual for a current City employee to be hired away by a competing municipality at a higher salary when a position is open elsewhere. There have been past and recent instances of this. Accordingly, the City does compete with other municipalities, other governments and the private sector to attract and retain the best personnel it can obtain from the available "talent pool".

The City also submits that disclosure of the record would affect its reputation with its current employees, in that "... its supposedly legally binding word cannot be trusted, even in a court document signed by its authorised agents and representatives ...". The City contends that this would have an adverse impact on employee morale, and would in turn deter applicants for future positions with the City.

The City also submits that disclosure would damage the reputation of the politicians who make up City Council, both individually and collectively. In the City's view, this would "... ruin their collective and personal credibility with the voters and potential local investors and all contractors."

The affected party's representations do not deal specifically with the "competitive position" portion of section 11(c).
The appellant submits that:

> Similarly, it is not reasonable to conclude that the competitive position of a multi-million dollar corporation could or would be prejudiced by the release of such information.

In Order P-1190, I stated:

> In my view, the purpose of section 18(1)(c) [the provincial equivalent of section 11(c)] is to protect the ability of institutions to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

Although I acknowledge that there is a difference in wording between "prejudice the economic interests" and "be injurious to the financial interests" in sections 11(c) and (d), in my view, any difference is irrelevant to the consideration of these two exemptions in the circumstances of this particular appeal.

In the present case, I am not persuaded that disclosure of the record could reasonably be expected to result in either of the types of harm outlined in section 11(c), or the harm envisioned by section 11(d). A confidentiality clause is common to agreements of this nature which settle civil lawsuits, and indicates the sensitivity of arrangements regarding the termination or separation of employment relationships between an institution such as the City and its employees. However, in my view, the presence of a confidentiality clause in and of itself is not sufficient to bring the record within the scope of sections 11(c) or (d); this or any other term of a settlement agreement, such as the one at issue in this appeal, cannot take precedence over the statutory right of access provided in the Act. Any increased costs to the City which would result from disclosure are speculative at best, and the evidence provided by the City is insufficient to establish a reasonable expectation of **prejudice** to the City's economic interest or **injury** to its financial interest.

Similarly, I am not persuaded that disclosure could reasonably be expected to prejudice the City's competitive position. It is widely recognized that government institutions are held to a high standard of accountability for the use of public funds, and that records in the custody or control of these organizations are governed by legislation which is based on a public right of access. I do not accept the City's position that disclosure of a record through this statutory scheme could reasonably be expected to impact on the level of trust that current and future employees would have in the City's ability to negotiate future agreements. Agreements of this nature are negotiated on the basis of individual circumstances, and in an

atmosphere where all parties have an interest in settlement. In my view, the potential harm envisioned by the City is simply too remote to satisfy the requirements of a reasonable expectation of prejudice to the City's competitive position.

Finally, it is also important to state that the circumstances of this appeal bear little or no relationship to the purpose of the sections 11(c) and (d) exemption claims described earlier in this order.

In summary, I find that the record does not qualify for exemption under either section 11(c) or section 11(d) of the Act.

SOLICITOR-CLIENT PRIVILEGE

Section 12 consists of two branches, which provide the City 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 the City for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the City must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders 49, M-2 and M-19]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by the City; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Communications privilege

A common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The record at issue in this appeal was shared by all parties to the settlement discussions, and does not qualify as a confidential communication between the City and its solicitor. Therefore, the requirements of communications privilege are not present.

Litigation privilege

The scope of litigation privilege was described by Adjudicator Holly Big Canoe in Order P-1551 as follows:

> Litigation privilege, often referred to as the "work product" or "lawyer's brief" rule, protects documents which are not direct solicitor-client communications, but which are "derivative" of that relationship. This includes communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation. Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation.
> ...
>
> Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [Boulianne v. Flynn, [1970] 3 O.R. 84 at 90 (Co. Ct.); Meaney v. Busby (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy

> reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [Carleton Condominium Corp. v. Shenkman Corp. (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while the purpose for its recognition continues to be served. Unlike solicitor-client communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor-client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter.

The City's representations include the following statement:

> ... there is no question that the record was prepared in the course of litigation and thus would ordinarily be privileged as such as exemption under both section 12 and section 52(3) paragraph 3; the fact that the document is intended to end the litigation would ordinarily except it from privilege the fact that disclosing it may well revive the litigation brings back the litigation document privilege, it is submitted.

The appellant states:

> ... litigation privilege does not apply to the documents we are seeking, as the documents do not pertain to pending litigation. In fact, the documents we seek have prevented litigation.

The affected party's representation support the appellant's position:

> ... the settlement document was not made for use in the litigation but to end it and by its terms
>
> end it in secrecy.
> ...
>
> Accepting the dominant purpose test of the lawyer's works as its product as being privileged is not the issue here for the dominant purpose of the settlement document was to resolve the case.

In Order P-1348, Adjudicator Laurel Cropley found that litigation privilege did not apply to an agreement that concluded the employment relationship of Deputy Ministers and Assistant Deputy Ministers of the provincial government. She stated:

> A severance agreement is a contract, executed by the parties, to conclude the employment relationship in an orderly fashion and to determine the rights of the parties. It is perhaps arguable that settlement privilege might exist with respect to discussions leading up to the agreement. However, in my view, once an agreement has been reached and executed by the parties, the privilege would not attach to this agreement.

I agree with Adjudicator Cropley, and find that, for similar reasons, the Settlement Agreement is not privileged within the meaning of section 12. The Settlement Agreement is a contract, executed by the parties following the mediation of the named individual's unfair dismissal claim against the City and the named employees/former employees. Once agreement was reached and the document was executed by the parties, no litigation privilege for this record was possible. As all parties agree, the Settlement Agreement was intended to end the litigation, and I am not persuaded, based on the evidence provided to me by the City, that disclosure of this record would necessarily revive the litigation. However, more importantly, confidentiality is integral to litigation privilege, and I find that a record which has been executed by all parties to an existing litigation and shared among them cannot qualify for exemption under "litigation privilege".

Therefore, I find that the record does not qualify for exemption under section 12 of the Act.

PERSONAL INFORMATION/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 the individual's name where it appears with other personal information relating to the individual, information relating to the employment history of an individual, or information relating to financial transactions in which the individual has been involved.

The City submits that the Settlement Agreement contains the personal information of the named individual, specifically his employment history, and financial and other details relating to the termination of his employment with the City.

The appellant submits that the information does not qualify as personal information. She states:

> We are not looking for information about [the named individual's] employment history--that has already, to a great extent, been published. We are not looking for any information that describes his finances, income or financial history or activities. [The named individual's] salary range as a city employee was already public knowledge. Past personal recommendation or evaluations are not relevant.
>
> We are seeking the document detailing the settlement of the wrongful dismissal lawsuit. We have no reason to believe there is any personal information, as defined in the act, in that

> document. It is possible the agreement contains not only a financial settlement, but also an undertaking to assist [the named individual] in finding employment and/or to provide letters of reference. It is our submission that such information does not constitute personal information as defined by the act.

The affected party simply states that none of the information in the record qualifies as personal information.

In a recent reconsideration order (Order R-980015), Adjudicator Donald Hale considered the distinction between personal and other information associated with an identifiable individual in the context of information relating to an individual's professional, employment or official government capacity in both public and private sector settings. Adjudicator Hale found that:

> ... information associated with the names of the affected persons which is contained in the records at issue relates to them in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may more appropriately be described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.

This is not the case in the present appeal. The Settlement Agreement clearly contains information about the named individual. It includes details of the terms of the settlement of his wrongful dismissal suit, both financial and otherwise. This information does not relate to his normal employment activities, but rather concerns him in his personal capacity.

As far as the other employees or former employees are concerned, I find that the record also contains their personal information. They were named defendants in the wrongful dismissal lawsuit, which more accurately relates to them in their personal, rather than their employment or professional capacities.

Accordingly, I find that the Settlement Agreement contains the personal information of the named individual and the other employees/former employees. It does not contain the personal information of the appellant.

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. Specifically, section 14(1)(f) of the Act 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.

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 head 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. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2).

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.

Section 14(3) presumptions:

The City submits that the presumptions in sections 14(3)(d), (f) and (g) apply. These sections state:

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

The City submits that:

> The agreement called the Minutes of Settlement arises out of a court action which arises from [the named individual's] former employment by the City and deals with, among other things, the ending of that employment on a financial, agreed basis. In particular, Schedule A deals with such matters as his personal legal costs, his re-employment expenses, and his retiring allowances. Schedule B contains certain dates and other facts of his employment history, his occupational reputation and his involvement in various activities and

> organisations. Schedule C contains more personal financial settlement information, promises by him, and confidential agreements.

Previous orders of this office have dealt with monetary entitlements relating to retirement agreements. These orders found that "one time payments to be conferred immediately or over a defined period of time that arise directly from the acceptance by the former employees of the retirement packages" cannot be described as an individual's "finances, income, assets, net worth, financial history or financial activities for the purpose of section 14(3)(f) of the Act." (See Orders M-173 and M-1082). In Order M-1160, I found that section 14(3)(f) also did not apply to the one-time amount agreed to in the settlement of an individual's human rights complaint against a municipality. Similarly, I find that in the present case, with respect to the one-time amounts agreed to in the settlement of the named individual's claim of wrongful dismissal against the City, the presumption in section 14(3)(f) does not apply. This would include not only the total amount found in both Schedules A and C, but also the breakdown of this amount found in Schedule A for legal costs, out-placement counselling etc.

Schedule B is a letter of reference. It contains information relating to dates of the named individual's employment with the City, including the date of his appointment to his last position. Schedule B also contains an evaluation of his work, and his professional contributions to the City and the stakeholder community. I find that the information contained in Schedule B "relates to employment history" and/or "consists of personal recommendations or evaluations", and the presumptions in sections 14(3)(d) and/or (g) apply. In the absence of consent from the named individual, I find that disclosure of Schedule B would constitute an unjustified invasion of his personal privacy.

Section 14(2) - criteria and unlisted factors

The appellant submits that section 14(2)(a), "subjecting the activities of the institution to public scrutiny", is a relevant factor favouring disclosure. She states that the newspaper she works for "published a series of stories that attempted to get past the shroud of secrecy surrounding the settlement, so the use of taxpayers' money could be held up to public scrutiny." In the appellant's view:

> The secret settlement must also be viewed with an understanding of recent events in our municipality. Included among the factors that heightened sensitivities were a number of lawsuits ... which left taxpayers in the city of Hamilton on the hook for substantial amounts of money both in awards and legal costs.

The appellant also includes representations which point to an unlisted consideration that has been recognized in previous orders, specifically that "disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution" (Order M-173). In this regard, the appellant states that:

> ... it is essential to the integrity of the institution that such settlements be open to scrutiny.

...

> While the news media have an understanding of the need to have certain discussions take place without the glare of publicity, the results of those discussions must be open to public scrutiny. If they are not, public trust begins to falter. Particularly in the case of a high-profile bureaucrat whose termination was the subject of intense publicity, disclosure is crucial to the maintenance of public confidence in both elected officials and the municipal civil service.

The City disputes the relevance of section 14(2)(a), claiming that "there has been no clamour from taxpayers." The City submits:

> ... not every court case involving the City or anyone else is reported in the requester's newspaper, and in this case, the parties agreed to put the matter behind them and not reopen their dispute. Yes, public funds are involved, but public funds are involved daily in thousands of matters handled by the City. The City is certainly and forcefully made aware of those in which taxpayers display interest.

In its representations, the City raises the application of section 14(2)(f) – "information is highly sensitive":

> The personal information referred to above is considered highly sensitive ... It deals with the financial and other conditions of settlement of a litigious matter, which the parties clearly agree, concerns them alone. The litigation arose out of an alleged wrongful dismissal claim by [the named individual] against his employer. The underlying reasons given by the defendant City for the wrongful dismissal are very serious, detailed and personal. Law enforcement authorities and criminal charges were involved and those charges, though ultimately withdrawn by the Crown, did proceed to the completion of a lengthy preliminary hearing in court.

The City also points to the existence of the confidentiality clause contained in the record as evidence that the named individual does not want the Settlement Agreement disclosed. The named individual did not make representations in response to the Notice of Inquiry, but, according to the City, advised its Director of Human Resources that he objected to disclosure of the record.

After carefully considering all representations and reviewing the contents of the record, I make the following findings:

1. 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 (Order M-173). In the

circumstances of this appeal, I find that section 14(2)(a) is a relevant consideration, and should be accorded significant weight.

2. The Settlement Agreement involves a significant amount of public funds and a senior municipal employee with a high profile in the community. All government institutions are obliged to ensure that tax dollars are being spent wisely. Therefore, public confidence in the integrity of the institution is also a relevant consideration favouring disclosure.

3. Although the City states that the information is highly sensitive and that the named individual has expressed his desire for the Settlement Agreement to remain confidential, this position was not confirmed by the named individual himself. I accept that details of financial settlement such as this are highly sensitive, and that section 14(2)(f) is a relevant consideration favouring privacy protection. However, I find that the weight given to this factor is reduced in the absence of corroboration by the named individual, and the fact that the circumstances surrounding his lawsuit for wrongful dismissal, including the criminal charges, are generally known and were reported in the media.

4. The existence of the confidentiality clause in the record is an unlisted factor weighing in favour of privacy protection.

5. The City's position that disclosure of the record could lead to the reopening of court proceedings is speculative and is not a relevant consideration in the circumstances of this appeal.

On balance, I find that the considerations favouring disclosure outweigh those favouring privacy protection of the named individual, the affected party and the other employees/former employees of the City. Therefore, I find that, with the exception of Schedule B, disclosure of the Settlement Agreement, including the other schedules, would not constitute an unjustified invasion of any individual's personal privacy.

As far as Schedule B is concerned, I find that its disclosure would result in a presumed unjustified invasion of the named individual's personal privacy under sections 14(3)(d) and/or (g). As stated earlier, a presumed unjustified invasion of personal privacy cannot be rebutted by factors favouring disclosure under section 14(2), and I find that section 14(4) does not apply in the circumstances of this appeal.

PUBLIC INTEREST

Because of my findings above, only Schedule B remains at issue.

Two requirements contained in section 16 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this

compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question [Order 24].

The appellant's representations do not deal specifically with Schedule B, and focus more generally on the Settlement Agreement itself.

In my view, the level of disclosure which will be made to the appellant in compliance with this order satisfactorily addresses any public interest issues raised by the appellant. I am not persuaded that there exists a compelling public interest in the disclosure of the letter of reference reflected in Schedule B, which contains the type of personal information of the named individual which the legislation has categorized as a presumed invasion of privacy; nor that any such public interest would clearly outweigh the purpose of the mandatory section 14 exemption.

Accordingly, I find that section 16 of the Act does not apply in the circumstances of this appeal.

ORDER:

1. I uphold the City's decision not to disclose Schedule B.

2. I order the City to disclose the Settlement Agreement itself, and Schedules A and C, to the appellant by **February 25, 1999** but not earlier than **February 23, 1999**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: January 21, 1999
Tom Mitchinson
Assistant Commissioner