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

# ORDER MO-1332

## Appeal MA-990193-1

## City of Hamilton

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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), from a decision of the City of Hamilton (the City). The requester (now the appellant) made a request to the City for access to a copy of the severance agreements for nine named individuals formerly employed by either the City or by the Regional Municipality of Hamilton-Wentworth. This appeal deals with the severance agreements relating to the five individuals formerly employed by the City.

Upon receipt of the request, the City contacted the five individuals (also called the "affected parties") and invited them to submit written representations expressing their views on the release of the information. Upon receipt of the submissions, the City sent a decision to the appellant denying access to the agreements in their entirety. The City cited a concern that the release of the agreements would constitute an unjustified invasion of the individuals' personal privacy, relying on the factors found in sections 14(2)(f) (highly sensitive personal information), 14(2)(h) (information supplied in confidence) and 14(2)(i) (damage to reputation) of the Act and the presumptions found in sections 14(3)(c) (social service or welfare benefits), (14)(3)(d) (employment history), and 14(3)(f) (finances, income etc.).

The City also relied on the discretionary exemptions found in sections 11(a) (trade secrets and other information), 11(c) (prejudice to economic interests) and 11(d) (financial interests) of the Act.

The appellant has appealed the decision of the City. Further to Notices of Inquiry sent out by this office, I have before me the representations of two of the affected parties, of the appellant in response to those, and further representations from the affected parties in response to the appellant's submissions. The City was invited to submit representations, but did not submit any.

## RECORDS:

There are five records at issue. Four of the records consist of typewritten agreements on the termination of employment of four of the affected parties, and are signed by a representative of the City and the individual. One of the records is a letter from the City to one of the affected parties setting out the details of a severance package. All of the records contain numbered terms. There are provisions for the continuation of the salary of the individuals, in specified biweekly payments for a specified duration. There are provisions which detail the amount of outstanding vacation entitlements and outstanding sick leave credits. Some of the provisions deal with the continuation of contributions to the Ontario Municipal Employees Retirement Fund (OMERS) for a specified period, and disclose the number of years of credited service in the fund. As well, some provisions deal with the continuation of benefit coverage to the individuals for a specified period. The agreements also cover such matters as payment of legal fees, restrictive covenants, the continued use of City equipment, and releases by the individuals. One of the agreements refers to the future provision of consulting services to the City, by one of the individuals. The record which is in letter form contains the address of the affected person to whom it relates.

The dates of the records span the period from April of 1998 to March of 1999.

## CONCLUSION:

I have decided to uphold the City's decision with respect to the information in the records, with one exception.

## DISCUSSION:

### INTRODUCTION

Before I turn to the legal issues raised by this case, I wish to address a misconception which was contained in one of the representations I received. One of the affected parties strongly objects to the appeal on the basis that this office is Are-opening" a matter which he had understood had been finally decided by the City. It should be noted that section 39 of the Act permits a person who has been denied access to a record by the City to appeal the decision by the City to this office. In this case, the requester has appealed the City's decision to deny access to the severance agreements. It was not the decision of the Information and Privacy Commissioner to initiate this appeal; it was initiated by the requester, as he is entitled to do under the Act.

### ECONOMIC AND OTHER INTERESTS

Sections 11(a), (c) and (d) of the Act state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> ....
>
> (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;

Where the circumstances described in sections 11(a), (c) or (d) are established, they provide a basis for the City to decide to exempt information from disclosure.

#### Section 11(a): Information that belongs to an institution and has monetary value

In discussing the meaning of section 11(a), and in particular, the meaning of the phrase "belongs to", Senior Adjudicator David Goodis stated, in Order MO-1282, that:

> [f]or information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information...

Here, in its decision letter, the City has referred to section 11(a), but has not provided any further detail which could provide a basis for a conclusion that there is any monetary value in the information in the records. The City has not provided any representations, and in the circumstances, I am unable to conclude that the records contain the sort of information specified in section 11(a) of the Act.

**Section 11(c) and (d): Prejudice to economic interests or competitive position or injury 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 severance agreements: see, for instance, Order MO-1184.

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: Order MO-1184.

In its decision letter, the City states that the current and probable future economic and financial constraints which are being placed on local government organizations have resulted in the restructuring and downsizing of its workforce. For this reason, it states, there is a real and tangible concern that the City's competitive position in the marketplace may be adversely affected in attempting to recruit the most highly qualified prospective employees if these agreements were released.

As I have stated, the City has not provided representations in this appeal. As a result, I am left to guess as to the substance of the City's assertions. It is not clear to me whether the City claims that prospective employees will be deterred by knowing of the details of these severance agreements, that its negotiating position with prospective employees will be affected, or that some other adverse effect will result from disclosure. In the absence of greater detail, the City's claim that disclosure of the information will have an adverse effect on its economic or financial interests is speculative at best. I am unable to conclude that the City has established a reasonable basis for the application of sections 11(c) and (d).

My conclusion is consistent with that in Order MO-1184, which also dealt with a settlement agreement relating to a former employee of a City (indeed, the same City which issued the decision here). In that Order, whose facts on this issue resemble those in this case, Assistant Commissioner Tom Mitchinson noted that the circumstances before him bore "little or no relationship to the purpose of the sections 11(c) and (d) exemption claims".

Therefore, I conclude that the records do not qualify for exemption under sections 11(a), (c) or (d) of the Act.

## PERSONAL INFORMATION/INVASION OF PRIVACY

### Personal Information

Under section 2(1) of the Act, "personal information" is defined as recorded information about an identifiable individual, and includes the individual's name if it appears with other personal information such as information relating to employment history or financial transactions in which the individual has been involved.

The appellant has not specifically addressed whether any of the information in the records qualifies as personal information, save to state that he "doubts it".

In Order MO-1184 which, as I have indicated above, also related to a former employee of this City, it is noted that:

> [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.

I am satisfied that the same applies here, and that all of the terms of the agreements contain personal information of the affected parties. Although there are some differences between the various records, in general, they contain provisions which reveal personal information about the named individuals such as: residential address, the date of the termination of employment, the length of time during which salary will continue to be paid, the value of the salary, the number of years of credited service in the OMERS, and the value of outstanding sick leave credits and vacation credits.

The records do not contain any personal information of the appellant.

### Invasion of Privacy

Where a requester seeks access to records which contain the personal information of other individuals, but not of himself or herself, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances. Section 14(1)(f), which is particularly relevant here, 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.

Section 14(1)(f) is an exception to the section 14(1) prohibition against the disclosure of personal

information. In order to establish that section 14(1)(f) applies, it must be shown that disclosure of the personal information at issue in this appeal would **not** constitute an unjustified invasion of personal privacy: see, for instance, Order MO-1212.

In applying section 14(1)(f), 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 the personal privacy of the individual to whom the information relates. These sections provide, in part:

> 14(2) 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,
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> (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; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
>
> (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;
>
> (4) 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 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.

Section 14(2) provides some criteria for the head to consider in making a determination as to 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(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 14(3), the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767]. In other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to in favour of disclosure.

**Representations of the Parties**

In this case, two of the affected parties have provided representations on the issues before me. One has stated, among other things, that the severance arrangements directly relate to "my personal financial position, my cash flow situation, my credit rating and my ability of [sic] obtain loans." This individual also submits that if this information were disclosed, then every severance arrangement by any public organization would be eligible for publication.

The other affected party who has submitted representations points out that although a lump sum payment was awarded to him to be paid over a period of time, the result of the agreement was that he was to remain an employee with "a salary defined to the penny and not a >salary range'". In prior correspondence with the City, this affected party had indicated that he consented to partial release of the information relating to him, insofar as he understood that section 14(4) permitted disclosure of information relating to a "benefit package." I will return to this below.

The appellant's representations refer to Order M-1184 in support of his position, which order, as I have indicated above, deals with a severance agreement entered into by the City. The appellant submits that agreements such as these should be open to the public for political accountability, because they concern public servants. He states that, in the context of numerous such agreements, he wishes to know how they will affect his public services and what it will cost in his taxes. He also states that "some" of the agreements he is asking for refer to senior government officials. The appellant submits that the information is neither highly sensitive, nor would its release unfairly damage the reputation of any person referred to in the record. He also denies that it relates to "employment history". In summary, the appellant states: "I want my appeal upheld and to be given those severance agreements I asked for, so I can make a good decision on what to do in the next election".

**Analysis**

***Sections 14(4)(a) and (b)***

Although section 14(4)(a) was not addressed in the representations of the appellant, I will briefly deal with it since it was cited in correspondence from one of the affected persons. Section 14(4)(a) provides that the disclosure of information about "benefits" does not constitute an unjustified invasion of personal privacy. In my view, section 14(4)(a) does not assist the appellant in this case. The term "benefits" as used in section 14(4)(a) has been defined to mean those entitlements that an officer or employee receives as a result of being employed by an institution, which are generally in addition to base salary: see Order M-23. In Order M-173, former Assistant Commissioner Irwin Glasberg examined the issue further, concluding that the term "benefits" does **not** include entitlements which have been negotiated as part of an early retirement package:

> 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 as defined in Order M-23. 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.

I am satisfied that the reasoning in Order M-173 applies here. On my review of the records, I conclude that to the extent they contain information about benefits, these benefits were negotiated as part of early retirement packages. In this sense, instead of being benefits "received as a result of being employed" by the City, they are benefits received as a result of having employment terminated: see also Orders M-797 and M-419.

I will also deal with the application of section 14(4)(b) since, although it was not addressed in any of the representations, I am satisfied that it is applicable to part of the information sought in this case. As I have set out above, section 14(4)(b) provides that a disclosure does not constitute an unjustified invasion of personal privacy if it "discloses financial or other details of a contract for personal services between an individual and an institution". In my view, the arrangement found in one of the severance agreements for the provision of consulting services after the end of employment qualifies as the type of information described in this section. Its disclosure would therefore not constitute an unjustified invasion of personal privacy.

***Section 14(3)***

A number of decisions of this office have considered the application of this section of the Act, or its provincial equivalent, to severance agreements entered into by former public officials or employees. In Order M-173, which dealt with severance agreements between the City of Ottawa and three former high-ranking employees, the monetary entitlements under those agreements was found not to fall under the presumption in section 14(3)(f) (finances, income etc.) of the Act, insofar as they represented "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 retirement packages." Further, in the same order, Assistant

Commissioner Irwin Glasberg found that much of the information in those agreements did not pertain to the "employment history" of the individuals for the purposes of section 14(3)(d) of the Act, but could more accurately be described as relating to arrangements put in place to end the employment connection.

The above order has been followed in other decisions of this office, including Order M-1184, cited by the appellant, which found that the one-time amounts agreed to in the settlement of the wrongful dismissal suit of a former employee against the City did not fall under the presumption in section 14(3)(f) (finances, income etc.). Thus, the total amount agreed to between the City and the former employee, as well as the breakdown of this amount for legal costs and out-placement counselling, did not give rise to the presumption in that section.

The decisions about "one time payments" can be distinguished from those which deal with salary continuation agreements. In Order P-1348, which dealt with the application of the provincial equivalent to sections 14(3)(d) and (f) to severance agreements, Inquiry Officer Laurel Cropley reviewed other decisions in this area, and concluded that the start and finish dates of a salary continuation agreement have been found to fall within the presumption in section 14(3)(d) (employment history), and references to the specific salary to be paid to an individual over that period of time, within the presumption in section 14(3)(f) (finances, income, etc.).

Further, information which reveals the dates on which former employees are eligible for early retirement, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, and the number of sick leave and annual leave days used has been found to fall within the section 14(3)(d) presumption: Orders M-173 and P-1348. Contributions made to a pension plan have been found to fall within the section 14(3)(f) presumption: see Orders M-173 and P-1348.

I agree with the reasoning in the above cases. Applying that reasoning to the facts before me, I am satisfied that the information in the severance agreements which sets out the period during which the salaries of the individuals will continue to be paid is covered by the presumption in section 14(3)(d), and the amount of those bi-weekly payments, by the presumption in section 14(3)(f). Further, information as to the amount of vacation entitlement, sick leave entitlement, credited service in the OMERS, and dates on which individuals may be entitled to draw a pension, also fall within the ambit of section 14(3)(d).

Four of the five severance agreements also contain restrictive covenants in which the individuals agree not to engage in certain work for a specified duration. I am satisfied that these provisions reveal information about the individuals' employment history, and are also covered by the presumption in section 14(3)(d).

Because of my findings, the disclosure of the information in the severance agreements I have described above is *presumed* to be an unjustified invasion of the personal privacy of the individuals to whom it relates.

The information in the records which remains for me to consider consists of: the address of one of the affected parties, releases by the individuals, agreements about the potential availability of early retirement, the payment by the City of independent legal fees, and the continued use of City equipment.

I am satisfied that none of the presumptions in section 14(3) cited by the City in its decision apply to this remaining information. I turn, therefore, to consider whether the factors listed in section 14(2), and relied on by the City or by the affected parties, assists in a determination of whether the disclosure of this remaining information would constitute an unjustified invasion of personal privacy, and whether there are any other factors which may also assist.

***Section 14(2)***

Having reviewed the records and the representations of the parties, and the relevant decisions in this area, I make the following findings with respect to the remaining information:

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: see Orders M-173 and MO-1184. However, to the extent I have any evidence on this factor, it is only contained in the submission of the appellant that "some" of the affected parties were "senior" officials of the City. Given the absence of better evidence on this issue, I find that section 14(2)(a) is relevant, but should be accorded little weight.

2. In Order MO-1184, relating to this City, it was noted that all government institutions are obliged to ensure that tax dollars are being spent wisely. The appellant has also submitted that his interest in the information is related to concerns as a taxpayer to know how these severance agreements may affect his taxes. In my view, this is a relevant consideration, but given the nature of the information which remains for me to consider, I am not persuaded that the link between the disclosure of that information and these interests is highly significant. Further, I find that there is no link between these interests and the disclosure of the address of one of the affected parties.

3. The factor described in section 14(2)(f) (highly sensitive personal information) was relied upon by the City in its decision. Without using the specific words of this section, one of the affected parties has vigorously objected to the release of any of his personal information in the records, and I take his objections to reflect a view that the information is highly sensitive. For information to be considered highly sensitive, its disclosure must reasonably be expected to cause excessive personal distress to the affected parties: see Orders M-1053, P-1681 and PO-1736. Given the information which is under consideration in this part of my order (the releases, restrictive covenants etc. described above), and the fairly generic nature of that information, I am not convinced that its disclosure could reasonably be expected to cause excessive personal distress.

4. In its decision, the City also relied on section 14(2)(h) (information supplied in confidence). The City has not supplied any evidence in support of its position here, and this factor was not addressed in the representations of the affected parties. I accordingly do not find it applicable.

5. Likewise, although the City also relied on 14(2)(i) in its decision, no evidence was supplied by it in support of this factor and after reviewing the representations, I am not convinced that it is relevant here.

In sum, the factors which favour the conclusion that disclosure of this information would not constitute an unjustified invasion of personal privacy are not very strong. Neither, however, are the factors which would favour the opposite conclusion. I conclude that it has not been established that the disclosure of the remaining information would **not** constitute an unjustified invasion of the personal privacy of the affected parties. Section 14(1)(f) does not apply, therefore, to permit the disclosure of the personal information of the affected parties.

***Consent of Affected Party***

Section 14(1)(a) of the Act provides:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

Section 14(1)(a) may be applicable since in the original correspondence between the City and the affected parties, one of the affected parties indicated that he consented to partial release of the information pertaining to him, specifying that:

> [a]s per [section 14(4) of the Act] the benefit package can be made available. Not too familiar with this but this is how I read it.

In the same correspondence, the individual stated that he objected to the provision of any specific monetary amounts, on the basis that they were directly linked to his salary package. The Notice of Inquiry notified the parties of the consent to partial release. In my view, the consent provided by the affected party does not justify disclosure of any more information than that which I have decided ought to be released. Not only is this consent premised on the affected person's misapprehension as to the effect of section 14(4) of the Act (see my discussion on this above), but it must also be read together with his objection to the release of information about specific monetary amounts.

***Section 16: Public Interest Override***

Section 16 of the Act provides:

> 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]

Section 16 is commonly referred as the "public interest override" since it permits information which is otherwise exempt from disclosure under specified parts of the Act, to be disclosed in the public interest. For section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption (in

this case, section 14) [Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1999] O.J. No. 488 (C.A.)].

The parties have not specifically referred to section 16 in the material before me, but I take the appellant's submissions on the importance of "political accountability" to be a reference to a public interest in disclosure. However, I am not satisfied that the requirements of section 16 have been established in this case.

In Order P-984, Adjudicator Holly Big Canoe discussed the meaning of the phrase "compelling public interest":

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

I accept that the disclosure of the specifics of the severance agreements might serve the purpose of informing the citizens of this City about the activities of their government, adding to the information they have available and upon which they may base political choices. I am not convinced that this interest is particularly "compelling". The evidence suggests that the affected parties are merely several of many employees (perhaps hundreds) whose employment has or is in the process of being terminated. There is nothing to suggest that the details of the salary continuance arrangements and other payments for **these** employees has roused strong interest or attention. There is nothing to suggest that there is anything particularly noteworthy about the affected parties, their employment with the City, or their severance arrangements. I conclude, therefore, that there is no compelling public interest in disclosure which would clearly outweigh the personal privacy rights of the affected parties protected by section 14 of the Act.

### *Conclusion*

Before I conclude, I wish to address the assumption underlying the appellant's request and representations, that the result in Order MO-1184 will govern the result in this case. I have referred to some of the facts in that case, and the conclusions drawn from those facts. The principles which were applied in Order MO-1184 are consistent with the principles applied in the case before me, but the facts are different, hence, the conclusions different.

In the result, I am satisfied that the provisions in the agreements disclosing the period during which the salaries of the individuals will be continued, the amount of vacation entitlement, sick leave entitlement, credited service in the OMERS, dates on which individuals may be entitled to draw a pension, and the terms of the restrictive covenants, are covered by the presumption in section 14(3)(d). The amount of salary to be received by the individuals during the salary continuation period is covered by the presumption in section 14(3)(f).

I am also satisfied, on balance, that it has not been shown that disclosure of the address of one of the affected parties, and the provisions relating to releases by the individuals, availability of early retirement, payment by the City of independent legal fees, and the continued use of City equipment would not constitute an unjustified invasion of personal privacy. The exception in section 14(1)(f) accordingly does not apply. Finally, disclosure of the terms for the provision of consulting services by one of the affected parties would not constitute an unjustified invasion of personal privacy, because of the application of section 14(4)(b).

## ORDER:

1. I uphold the City's decision to deny access to the severance agreements, with the exception of the term found in one of the agreements relating to the provision of consulting services by one of the affected parties. I order the City to disclose this term to the appellant. For greater certainty, attached to the copy of my order to be sent to the City is a copy of the relevant record with the portions to be disclosed **highlighted**.

2. I order disclosure to be made by sending the appellant a copy of the relevant record, excluding the exempted portions, by no later than **October 4, 2000**, but not before **September 29, 2000.**

3. In order to verify compliance with the provisions above, I reserve the right to require the City to provide me with a copy of the material sent to the appellant.

Original signed by: August 30, 2000
Sherry Liang
Adjudicator