



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2050

Appeal PA-010186-1 and PA-010198-1

Ontario Northland Transportation Commission



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The requester submitted the following request to the Ontario Northland Transportation Commission (the Commission) under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

I request any and all information pertaining to the salary, wages, separation payments, auto allowances, corporate related credit card expenses, and personal expenses submitted for reimbursement or payment by [a named individual] to Ontario Northland, between March 1, 2000 and January 15, 2001.

The request was then clarified as follows:

Could you please forward to me any and all staff alteration forms (form 1361), and copies of all expense forms submitted by [a named individual] for the period indicated. As well any and all pension applications submitted by [a named individual], and all vacation payouts and details pertaining to same, all correspondence dealing with a transitional agreement or arrangement, including the use by [a named individual] of a company leased automobile, all employment agreements or arrangements between the O.N.T.C. or its agents and [a named individual] or his agents. All Commission correspondence, documents, and resolutions including electronic versions, dealing with [a named individual's] departure from the O.N.T.C. on or about December 4, 2000.

The Commission divided the clarified request into seven parts. Following notification of the individual named in the request (the affected person) and receipt of his representations, the Commission responded to each of the seven parts as follows:

Part one

You requested “any and all staff alteration forms (form 1361).”

Access is denied to this request under section 21(3)(d) and (f) and section 65(6)(3) of the *Act*. These provisions apply because they relate to the individual's employment or educational history and further describes an individual's finances. We have already supplied the individual's salary as originally requested pursuant to the *Public Sector Salary Disclosure Act*.

Part two

You requested “copies of all expense forms submitted by [a named individual] for the period indicated.”

Access will be granted to the expense accounts as requested but I propose to sever the names of third party individuals.

Part three

You requested "...any and all pension applications submitted by [a named individual]."

Access is denied to this request under section 21(3)(d) and (f). These provisions apply as release of the individual's finances constitutes an unjustified invasion of personal privacy.

Part four

You requested "all vacation pay outs and details pertaining to same."

I believe I already provided you with this information.

Part five

You requested "all correspondence dealing with a transitional agreement, or arrangement including the use by [a named individual] of a company leased vehicle."

At present, no written transitional agreement exists. In any event, access would be denied under sections 21(2)(f) and (i), 21(3)(d) and (f) and 65(6).

Part six

You requested "all employment agreements or arrangements between ONTC or its agents and [a named individual] or his agents."

At present, no employment agreement exists. In any event, access would be denied under sections 21(2)(f) and (i), 21(3)(d) and (f) and 65(6).

Part seven

You requested "all Commission correspondence documents and resolutions, including electronic versions, dealing with [a named individual's] departure from the ONTC on or about 4 December 2000."

Apart from public notice, of which you are aware, there is no correspondence. In any event, access would be denied under sections 21(2)(f) and (i), 21(3)(d) and (f) and 65(6).

The requester appealed the Commission's decision to deny full or partial access to the responsive records, and this office opened appeal number PA-010186-1 to address the issues in this appeal.

The affected person appealed the Commission's decision to grant access to portions of the responsive records, and this office opened appeal number PA-010198-1 to deal with the issues in the "third party appeal". For ease of reference, I will refer to the individual who is objecting to disclosure (the affected person in Appeal PA-010186-1 and the appellant in Appeal PA-010198-1) simply as the affected person throughout this Order.

As noted above, the Commission's original decision with respect to parts five, six and seven stated that no responsive records exist. However, during the mediation stage of these appeals, the Commission identified a number of records, some of which were created after the date of the request. The Commission provided these records to this office and agreed to incorporate them into these appeals. These records are responsive to parts five, six and seven of the original request, as outlined above.

Also during mediation, after discussing all of the responsive records, the requester advised the Mediator that he is no longer pursuing access to the records responsive to parts three, four and five of his request, as numbered by the Commission. Therefore, his appeal has been narrowed to parts one, two, six and seven. In addition, with respect to part two of the request, the requester advised that he is not pursuing access to the names of third parties, any credit card numbers and any personal addresses contained in the responsive records. Therefore, this information is no longer at issue in these appeals.

The Commission issued a revised decision letter dated March 18, 2002, to each of the requester and the affected person, with respect to parts one, two, six and seven. The decision letters read as follows:

Part 1

"Request for any and all staff alteration forms (form 1361)."

I again confirm that the requester was provided a list outlining the salary and wages for the period requested. I reiterate my initial position that the request for staff alteration forms is denied under s.21(1) of the *Freedom of Information and Protection of Privacy Act* taking into account the criteria regarding invasion of privacy outlined in sections 21(2)(f) and the terms of presumed invasion of privacy outlined in sections [21(3)(d)] and [21(3)(f)].

Part 2

"Copies of all expense forms submitted by [a named individual] for the period indicated."

As previously outlined, the details of the expense forms for the relevant period have been provided. I would further submit that copies of all expense forms requested should be released excluding the names of third parties, any credit card numbers and any

personal addresses which I understand are not an issue in the appeal.

Part 6

“All employment agreements or arrangements between ONTC or its agents and [a named individual] and his agents.”

At the time of the request, there were no employment agreements nor was there any severance agreement. Subsequent to the request, a severance agreement was executed as of 1 June 2001 and in light of section 65(7), my decision is that the separation agreement should be disclosed.

Part 7

“All Commission correspondence, documents and resolutions, including electronic versions dealing with [a named individual’s] departure from the ONTC on or about December 2000.”

As mentioned previously, a public statement was provided and at the time of the request there was no other public correspondence. So far as I am aware, there has been no other correspondence. However, a Commission minute does exist relating to [a named individual’s] removal as President and my decision is that the resolution should be disclosed.

As a result of the revised decision letter, the requester is appealing the Commission’s decision to deny access to the records responsive to part one (Appeal Number PA-010186-1), and the affected person is appealing the Commission’s decision to disclose the records responsive to parts two, six and seven (Appeal Number PA-010198-1). In addition, the affected person takes the position that the request is vexatious and claims that section 27.1 (frivolous or vexatious request) applies in the circumstances.

Further mediation could not be effected and these appeals were moved into adjudication. Because both appeals arise from the same request and decisions, I have decided to dispose of both in the same order.

I decided to seek representations, initially, from the Commission and the affected person as the first parties in Appeal PA-010186-1 and from the affected person alone as the first party in Appeal PA-010198-1 and sent them a Notice of Inquiry setting out the facts and issues to be adjudicated. Both the Commission and the affected person submitted representations in response. In his representations, the affected person withdrew his objection to the disclosure of the Commission minute (which is the only record responsive to Part 7 of the request). The Commission had decided that this record should be disclosed to the requester. Since there remain no further objections to its disclosure, the Commission minute is no longer at issue in Appeal PA-010198-1 and should be disclosed to the requester. It does not appear that the

Commission has disclosed this record to the requester. I will, therefore, include an order provision (below) for it to do so.

I then decided to seek representations from the requester (the appellant in Appeal PA-010186-1) on why he believes that the records at issue in both appeals should be disclosed. In addition, I sought representations from the Commission regarding its decision to disclose the records at issue in Appeal PA-010198-1. At that time, I decided that it was not necessary for the requester or the Commission to respond to the affected person's allegation that the request is vexatious. I attached the Commission's submissions (with respect to the records at issue in Appeal PA-010186-1) to the Notice of Inquiry that I sent to the requester, and I summarized the affected person's representations as they relate to all of the records at issue. Both the Commission and the requester submitted representations in response.

RECORDS:

The record at issue in Appeal PA-010186-1 consists of Staff alteration forms (form 1361) (Record 1, pages 1 and 2). The Commission has denied access to this record (and the affected person, presumably, supports this decision).

The records at issue in Appeal PA-010198-1 consist of expense forms (Record 2, pages 3-82) and a severance agreement and release (Record 3, pages 83-88). The Commission has made a decision granting access to these records and the affected person objects to their disclosure.

PRELIMINARY MATTER:

FRIVOLOUS OR VEXATIOUS

In his representations, the affected person notes that, pursuant to the *Act*, it is up to the "head" of the institution to rely on the frivolous and vexatious provisions of the *Act* to refuse access to requested records. However, he takes the position that "it will be my family and myself, not the 'head', who will suffer the consequences if such information is released". He, therefore, asks that I consider the overall circumstances of this case and determine whether the request itself is vexatious. This raises the question of whether an affected person can rely on the application of the frivolous or vexatious provisions to claim that access to a record should be denied in circumstances where the institution has not made this claim.

Section 10(1)(b) of the *Act* provides:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

In Order P-257, Assistant Commissioner Tom Mitchinson considered whether an affected person ought to be entitled to rely on the application of a discretionary exemption which was not claimed by the institution. At page 5 of that order, he found:

The first issue in this appeal concerns the possible application of subsections 14(1) and (2) of the *Act*. These subsections were raised by the appellant following his notification of the request by the institution pursuant to section 28 of the *Act*.

Section 28(1) states:

Before a head grants a request for access to a record,

- (a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information; or
- (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

This section requires the head to notify affected persons in order to provide them with an opportunity to make comments with respect to the application of sections 17(1) and 21(1)(f). The *Act* does not require the head to notify an affected person in respect of any other exemption, nor does it provide for an affected person to raise any other exemption for consideration during the appeal process. The *Act* acknowledges that the views of an affected person are a valuable component of the head's decision-making process with respect to the specific types of information covered by sections 17(1) and 21(1). However, the *Act* makes no similar acknowledgement with respect to other exemptions and, in the absence of the circumstances which give rise to the application of section 28(1), an affected person would have no knowledge of the head's intention to release records prior to the actual release.

As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released. If, during the course of an appeal, a head indicated a change in position in favour of release of information not covered by sections 17(1) or 21(1), again, this would almost always be an acceptable course of action, consistent with the purposes of the *Act*. In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare

occasions when the Commissioner decides it is necessary to consider the application of a particular section of the *Act* not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act*. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

In the circumstances of this appeal, I feel that the interests of the appellant and the affected persons have been recognized and addressed through the issuance of the appropriate notices during the course of considering how to respond to the original request. In my view, a consideration of the proper application of sections 17(1) and 21(1) will address those interests, and it is not necessary or appropriate for me to consider the appellant's arguments with respect to sections 14(1) and (2) of the *Act*.

In my view, the rationale for not permitting an affected person to raise a discretionary exemption (in most cases) is similarly applicable to a claim by the affected person that the request is vexatious. This is not to say that an affected party may never raise an issue of "harm" in the particular circumstances relating to a request. In previous orders of this office, adjudicators have considered the discretionary exemptions in sections 14(1)(e) (danger to life or safety) (Order PO-1787) and 20 (danger to safety or health) (Reconsideration Order R-980015) in circumstances where the affected person raised their application. However, these remain the very rare case.

In the circumstances of the current appeal, the concerns raised by the affected person pertain to the harm to personal privacy, which he believes he and his family will suffer as a result of disclosure. In part, these concerns are connected to the identity of the requester. In my view, the various provisions under sections 21(2) and (3) are specifically intended to address concerns of this nature. In particular, section 21(2)(e) (unfair exposure to pecuniary or other harm), 21(2)(f) (the information is highly sensitive) and 21(2)(i) (disclosure may unfairly damage the reputation of any person referred to in the record) are all factors weighing against disclosure of personal information.

Even if the provisions of the *Act* are not available to prevent disclosure of the information in the records, I am not persuaded that the affected person should be permitted to raise the frivolous or vexatious provisions of the *Act*. In Order M-850, Assistant Commissioner Tom Mitchinson commented on the implications of a finding that a request is frivolous or vexatious:

In January 1996, the Legislature amended section 4 of the *Act*, thereby providing institutions with a summary mechanism to deal with requests which the institution views as frivolous or vexatious. These legislative provisions confer a significant discretionary power on institutions which can have serious implications on the

ability of a requester to obtain information under the *Act*. In my view, this power should not be exercised lightly.

...

Section 42 of the *Act* places a burden on institutions to demonstrate the application of exemptions. It does not offer specific guidance on the burden of proof regarding decisions that a request is frivolous or vexatious. However, the general law is that the burden of proving an assertion falls on the party making the assertion. On this basis, I find that an institution invoking section 4(1)(b) of the *Act* has the burden of proof.

In considering the manner in which this provision should be interpreted, previous orders of this office have consistently held that the application of the frivolous and vexatious provisions is only relevant to the use of the “processes” of the *Act* (see, for example: Order MO-1488). Essentially, once it is determined that a request has been made for the purpose of obtaining access (or for legitimate reasons), this purpose is not contradicted by the possibility that the requester may also intend to use the documents against the institution (or any other party) (see: Orders MO-1269, P-1534 and MO-1488, for example). In my view, the frivolous and vexatious provisions of the *Act* were enacted to provide institutions with a tool to enable them to address abuses of the processes of the *Act*. I cannot see how such abuses would impact on affected persons in a way that would trigger the application of this provision. In the circumstances of these appeals, I find that the affected person has not made the case for such a conclusion.

Moreover, the frivolous and vexatious provisions were not intended to be used by institutions or individuals to prevent disclosure of records that would otherwise be available under the *Act* because these parties do not like the nature of the request or the person requesting the information. As I noted above, the focus of the affected person’s concerns is the use to which the requester may put the records if they are disclosed. In my view, this concern is more appropriately dealt with under the “harms” provisions of various exemptions set out in the *Act* (see: Interim Order MO-1168-I).

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined, in part, as “recorded information about an identifiable individual, including:

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

...

(h) the individual's name if 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.

Without addressing specific records, the affected person appears to take the position that all of the records at issue contain his personal information. I will address each record below.

Record 1

Record 1 consists of two "staff alteration forms". These are forms used by the human resources and/or payroll departments of the Commission and contain details relating to the employment status and changes thereto of the individual named therein. They contain information such as name, position and category, employee number, salary rate, status, ie. off work/returned and reason, termination reason, and so on.

The Commission submits that Record 1 qualifies as personal information in accordance with paragraphs (b) and (h) "insofar as it deals with information concerning the individual's personal employment". The requester does not specifically address this issue.

In general, this record documents the current (for the time period recorded in any event) status of an employee, including salary, whether or not the individual is actively working, and if not, the reason such as illness or injury, the reason for termination, whether the individual is suitable for rehire and information about unused vacation days due to the employee. In my view, this information pertains to the employee as an individual, and is, therefore, recorded information about an identifiable individual, in this case, the affected person.

Record 2

Record 2 comprises a variety of documents relating to expenses incurred by the affected person while employed by the Commission, such as completed "Statement of Employee Travelling Expenses" (Form 1320) and receipts for restaurant, hotel, travel service companies, car rentals, etc. The only portions of this record that the Commission has withheld are the names and addresses of individuals and credit card numbers, which are not at issue in this appeal.

The Commission takes the position that these records qualify as personal information "insofar as the information deals with employment history and relates to financial transactions in which the individual was involved".

The requester does not address this record.

None of the parties indicate that the records relate to "personal" expenses of the affected person. Rather, the request was for, and the records appear to relate to, expenses incurred by the affected person in his employment capacity. It has been established in a number of previous orders that information provided by, or relating to, an individual in a professional capacity or in the

execution of employment responsibilities is not "personal information" (Orders P-257, P-427, P-1412, P-1621, M-262).

Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447, M-122, P-1124, P-1344 and MO-1285). In these cases, the records must be viewed contextually (see, for example: Orders MO-1524-I and PO-1983).

None of the parties suggest, nor do the records indicate, that the affected person's activities have been called into question in respect of his expense claims (see: Order P-256, for example). In my view, the considerations underlying the first line of orders (referred to above) apply in the circumstances of the current appeals, and I find that information about costs incurred for travel, food and accommodation by the affected person during the course of his employment as a public employee does not qualify as personal information for the purposes of the *Act* (Order M-262).

Once the information that is not at issue has been removed from this record, the remaining portions do not contain personal information, and section 21(1), therefore, cannot apply to them. No other exemptions have been claimed for this record, and in my view, none of the exemptions in the *Act* are applicable. Accordingly, Record 2 should be disclosed to the requester with the names and addresses of individuals and credit card numbers removed.

Record 3

Record 3 is entitled "Agreement and Release" between the Commission and the affected person. It contains specifics relating to the affected person's termination from employment with the Commission, such as termination date, termination payments, general terms and some standard contract terms.

The Commission states that in its view, this record contains the affected person's personal information as defined in section 2(1)(b) of the *Act*. The requester does not address this issue.

Previous orders of this office have considered the contents of various types of agreements, such as settlement and/or severance agreements and retirement packages (Orders M-173, MO-1184, MO-1332, MO-1405 and P-1348). These orders have consistently held that information about the individuals named in the agreements, which include, *inter alia*, name, address, date of termination and terms of settlement concern these individuals in their personal capacity and thus qualifies as personal information. I am satisfied that the same considerations apply in the circumstances of these appeals and Record 3, therefore, contains the personal information of the affected person. This record does not contain any personal information of the requester.

INVASION OF PRIVACY

Introduction

Where a requester seeks access to records which contain the personal information of other individuals, but not of himself or herself, section 21(1) of the *Act* prohibits the disclosure of this information except in certain circumstances. Section 21(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 21(1)(f) is an exception to the section 21(1) prohibition against the disclosure of personal information. In order to establish that section 21(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 example, Order MO-1212).

In applying section 21(1)(f), sections 21(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:

(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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (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,

- (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

Section 21(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 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 21(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 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 21(3) is found to apply, the factors in section 21(2) cannot be resorted to in favour of disclosure.

Affected person's representations

In his representations, the affected person expresses concern about the use to which the requester intends to put the information that he ultimately receives. Although the affected person states that he accepts and respects the intent behind the *Act*, he takes the position that the rights and privacy of individuals should not be unduly harmed through the use of the *Act* by others.

The affected person points out that he consented to the disclosure of certain information and believes that his concerns are reinforced by the fact that the requester is pursuing the remaining information. In essence, the affected person believes that the requester is seeking this information as an official of a named union in order to assist its "campaign in opposing the Ontario Government's initiative to divest itself of the [Commission]". The affected person explains the union's "very public campaign throughout North-eastern Ontario opposing the efforts by the Ontario Government to seek alternative models for the delivery of services ...". The affected person believes that the union would use information relating to his departure as an official with the Commission in whatever way would serve its purpose in this regard, which he believes would be an infringement of his personal privacy and the privacy of his family.

In support of this position, the affected person notes that, in his many years at the Commission, this type of information had never been requested and that it has only become an issue "now that the Ontario Government has launched its divestiture initiative that all Unions at [the Commission] are actively and publicly opposing".

In my view, the affected person's representations raise the possible application of the factors in sections 21(2)(e) and (i) (cited above).

I will set out the representations of the other parties, along with my findings for each record below.

Record 1 – staff alteration form

With respect to Record 1, the requester states:

This is a standard company form used every day at Ontario Northland, and it is seen by a multitude of people. The company has no standards or procedures in place when dealing with these forms to protect an individual's privacy. They are quite accessible by anyone at Ontario Northland. The company wishes to have it both ways in regards to this issue. First it denies access to me on my request, then presents [certain named employees'] staff alteration forms at arbitration cases before arbitrators... I know the company did not get these individuals' prior approval to use these forms before presenting them at the arbitration hearings.

In my view, the fact that the requester is unable to access this record somewhat detracts from the credibility of his argument that they are "quite accessible by anyone". Moreover, the fact that the staff alteration forms are standard company forms used on a regular basis does not, in itself, support a finding that their disclosure would not constitute an unjustified invasion of privacy. I would suspect that a large number of "personnel" documents held in employees' human resources files are of a similar nature, yet these documents would, arguably, contain some of the most sensitive and personal information pertaining to employees.

With respect to their use at arbitration hearings, I note that pursuant to sections 64(1) and (2), the *Act* does not impose any limitation on the information otherwise available by law to a party to litigation, nor does it affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document. In other words, the *Act* establishes a regime and process for obtaining access to records, which is separate and distinct from the processes which apply to matters before courts or tribunals (see: Orders 48, P-609, PO-1688, M-982, M-1109, MO-1192, MO-1477 and MO-1488). In my view, use of this document by the Commission at arbitration hearings does not support a conclusion that disclosure under the *Act* does or does not constitute an unjustified invasion of privacy.

Finally, the purpose of the *Public Sector Salary Disclosure Act, 1996* (the *PSSDA*) as stated in section 1 of that *Act* is to "assure the public disclosure of the salary and benefits paid in respect of employment in the public sector to employees who are paid a salary of \$100,000 or more in a year." Section 3 of the *PSSDA* establishes the disclosure requirements. This section reads, in part:

(1) Not later than March 31 of each year beginning with the year 1996, every employer shall make available for inspection by the public without charge a written record of the amount of salary and benefits paid in the previous year by the employer to or in respect of an employee to whom the employer paid at least \$100,000 as salary.

(2) The record shall indicate the year to which the information on it relates, shall list employees alphabetically by surname, and shall show for each employee,

(a) the employee's name as shown on the employer's payroll records;

(b) the office or position last held by the employee with the employer in the year;

(c) the amount of salary paid by the employer to the employee in the year;

(d) the amount of benefits reported to Revenue Canada, Taxation, under the Income Tax Act (Canada) by the employer for the employee in the year.

(4) An employer required by this section to make a record or statement available to the public by March 31 in a given year shall allow the public to **inspect it** without charge at a suitable location on the employer's premises at any time during the employer's normal working hours throughout the period beginning on March 31 and ending on December 31 of the same year.

The Commission states:

It should also be pointed out that information regarding salary and wages has already been provided to the requester pursuant to the [PSSDA] and it is submitted that any relevant information which may necessitate public scrutiny has been provided.

I agree. Once the specific and limited requirements of the *PSSDA* have been met, public sector employees thereafter retain their privacy rights with respect to their personal employment and financial information (unless the information falls within the exceptions in section 21(4) of the *Act*, or the disclosure of the information is determined not to constitute an unjustified invasion of privacy).

As I noted above, Section 21(4)(a) of the *Act* provides:

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

discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution.

The Commission takes the position that this record "does not disclose the salary range, the benefits and/or the employment responsibilities" of the affected person. I do not entirely agree. This record essentially confirms that the affected person was employed at the Commission in a

certain capacity and contains information relating to his classification and employment responsibilities, such as the employment group he belongs to. In my view, disclosure of this information would not constitute an unjustified invasion of privacy in accordance with section 21(4)(a). I agree with the Commission that the remaining information does not fall within this exception.

On the basis of the above discussion, with certain exceptions, which I have highlighted on the copies of this record that I am sending to the Commission's Freedom of Information and Privacy Co-ordinator with the copy of this order, I find that the requester has not raised any factors or considerations that are relevant to a finding that disclosure of the information in Record 1 would **not** constitute an unjustified invasion of privacy.

Record 3 – severance agreement and release

Insofar as Record 3 is concerned, the requester believes that the concerns raised by the affected person are irrelevant. He continues:

[T]his is information that is accessible to anyone in Ontario. Their reasons for requesting the information are not the issue here, disclosure under the *Act* is. So whether an individual citizen, news outlet or MPP request this information, it should be granted access. As to the third parties' statement that his privacy could be unduly harmed, this information is not different than that posted on the government web site every year on compensation over hundred thousand dollars a year.

As I noted above, a number of previous decisions of this office have considered the application of sections 21(2)(3) and (4) of the *Act* and their municipal *Act* counterparts to severance, termination and/or retirement agreements. These orders are discussed below.

Section 21(3) – presumptions against disclosure

Sections 21(3)(d) and (f) – employment and financial information

Generally, previous orders have found that although one-time or lump sum payments or entitlements do not fall under the presumption found at sections 21(3)(f) or (d) (Orders M-173, MO-1184 and MO-1469), information such as start and finish dates of a salary continuation agreement fall within the presumption in section 21(3)(d) and references to the specific salary to be paid to an individual over that period of time fall within the presumption in section 21(3)(f) (Order P-1348).

In addition, information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, 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, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption (Orders M-173, P-1348,

MO-1332, and PO-1885). Contributions to a pension plan have been found to fall within the presumption in section 21(2)(f) (Orders M-173 and P-1348).

Previous orders have found, however, that the address of an affected party, releases, agreements about the potential availability of early retirement, payment of independent legal fees and continued use of equipment, for example, do not fall within any of the presumptions in section 21(3) (Orders MO-1184 and MO-1332). In Order M-173, former Assistant Commissioner Irwin Glasberg found that much of the information in these types of agreements did not pertain to the "employment history" of the individuals for the purposes of section 14(3)(d) (of the municipal *Act*), but could more accurately be described as relating to arrangements put in place to end the employment connection.

I agree with the reasoning in these orders and find that the termination date in clause 1(i), references to the benefits the affected person was entitled to as an employee and which were to be continued or not upon termination in clause 2(iii) and clause 3(iii) which makes references to the affected person's obligations arising from his previous employment fall within the presumption in section 21(3)(d). In addition, a portion of clause 2(iii) also makes reference to the affected person's actual salary and thus describing his income, falls within the presumption in section 21(3)(f).

I find that none of the presumptions in section 21(3) apply to the remaining information in this record, including information describing lump sum or one time payments relating to the affected person's termination and in relation to legal fees (in clauses 2(i), (ii) and (viii)).

Section 21(4) – exceptions to the personal privacy exemption

In Order M-23, Commissioner Tom Wright discussed the meaning of "benefits" under the municipal equivalent of section 21(4)(a) of the *Act*:

Since the "benefits" that are available to officers or employees of an institution are paid from the "public purse", either directly or indirectly, I believe that it is consistent with the intent of section 14(4)(a) and the purposes of the *Act* that "benefits" be given a fairly expansive interpretation. In my opinion, the word "benefits" as it is used in section 14(4)(a), means entitlements that an officer or employee receives as a result of being employed by the institution. Generally speaking, these entitlements will be in addition to a base salary. They will include insurance-related benefits such as, life, health, hospital, dental and disability coverage. They will also include sick leave, vacation, leaves of absence, termination allowance, death and pension benefits. As well, a right to reimbursement from the institution for moving expenses will come within the meaning of "benefits".

The information in clause 2(iii) pertains to the continuation of specific benefits and I find that this information is clearly about "benefits" within the meaning of section 21(4)(a) of the *Act*. In general, previous orders have held that the exception in section 21(4)(a) does not apply to entitlements which have been negotiated as part of a retirement or termination package (Orders

M-173, M-419, M-797 and MO-1332). In Order PO-1885, however, Adjudicator Sherry Liang considered this issue from a somewhat different perspective:

Record 3 consists of a statement of the pension available to the primary affected party as of a given retirement date, under the ROM's pension plan and supplemental pension plan for executive employees. This document contains information such as the social insurance number and date of birth of the primary affected party, dates of commencement and termination of employment, normal retirement and early retirement dates, name of spouse, date of birth of spouse, beneficiary, amount of monthly and supplemental monthly pension and commuted value of pension and supplemental pension.

It is true that the statement was generated as a result of the termination of employment, and that the amount of the benefits is limited by the date of termination. However, participation in the pension plans was specifically provided for in the original contract of employment, as part of a package of entitlements in return for services. To this extent, I am satisfied that the pension benefits described in Record 3 are benefits to which the primary affected party is entitled "as a result of being employed" by the ROM.

My finding is supported by the conclusions reached in Order P-1212, in which all of the entitlements provided to a former president of a college "as part of his employment or upon conclusion of his employment" were found to constitute "benefits" for the purpose of section 21(4)(a). It is also consistent with Order M-23, excerpted above, which refers to "pension benefits".

In my view, the information contained in clause 2(iii) is similar in nature to that described by Adjudicator Liang. Therefore, although included as part of the severance agreement, this information simply reflects benefits to which the affected person was entitled and was receiving while he was employed with the Commission. I find that in these circumstances, with one exception, this information constitutes "benefits" for the purpose of section 21(4)(a) and its disclosure would, accordingly, not constitute an unjustified invasion of privacy.

As I noted above, clause 2(iii) makes reference to an exact salary amount. Although connected to the benefit entitlement provided for in this part of the agreement, in my view, disclosure of the affected person's exact salary goes beyond the intent of the exception in section 21(4)(a) as evidenced by the wording of this section to apply only to "salary range". As I found above, the salary information in this clause falls within the presumption in section 21(3)(f) and its disclosure would, therefore, constitute a presumed unjustified invasion of privacy.

Section 21(2) - factors and considerations

Section 21(2)(a) – public scrutiny

Section 21(2)(a) states:

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,

the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

In Order PO-1984, Assistant Commissioner Tom Mitchinson noted that, “the public scrutiny consideration relates directly to issues of public accountability in the operation of the government’s planning and development approval process, which falls squarely within the purposes outlined in section 1(a) of the *Act*”.

Previous orders have also found that 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 as identified in section 21(2)(a) of the *Act* (Orders M-173, MO-1184). This is because “all government institutions are obliged to ensure that tax dollars are being spent wisely” (Orders MO-1184, MO-1332 and MO-1405).

In the circumstances of these appeals, I find that the factor in section 21(2)(a) weighs heavily in favour of disclosure of the remaining information in the severance agreement and release. The affected person held a senior position at the Commission, and the circumstances of his termination engage the application of this section. Moreover, in this position, he no doubt actively directed and participated in labour-related matters, service delivery and very possibly discussions relating to the government’s divestiture initiative. In my view, the union’s interest in his termination can be directly linked to its interest in holding the Commission accountable to the public (which includes the union and the employees it represents) with respect to its service delivery initiatives.

Unlisted consideration – public confidence

Previous orders have also held that an unlisted consideration is also relevant in appeals involving requests for severance agreements (Order MO-1469). This consideration, which also weighs in favour of disclosure, recognizes that “the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution” (Orders 99, P-237, M-129, M-173 and P-1348). As Adjudicator Donald Hale noted in Order MO-1469:

The severance agreement which forms the record at issue involved a significant expenditure of public funds on behalf of a senior employee. Further, the climate of spending restraints in which these agreements were negotiated placed an obligation on the Municipality’s officials to ensure that tax dollars were spent wisely. On this basis, I conclude that the public confidence consideration also applies in the present circumstances.

In the current appeals, the termination of the affected person appears to coincide with the exploration of alternate service delivery models for the Commission, which would likely impact on the Commission’s employees as well as the general public. In these circumstances, I find that

the public confidence consideration applies and carries significant weight in respect of records pertaining to the affected person's termination.

Sections 21(2)(e) and (i) – unfair harm and/or damage to reputation

The affected person believes that disclosure of this record will unfairly expose him and his family to harm or unfairly damage his reputation, especially now that he is no longer with the Commission. Although I appreciate that the affected person would like to move on with his life now that he is no longer employed by the Commission, he did hold a senior position in the Commission, and the request relates to him in that position and to the arrangements surrounding his termination from that employment.

The affected person has not indicated the nature of the "harm" he envisions as a result of disclosure but has, rather, based his objection to disclosure on speculation, disagreement with the union's activities relating to the possible divestiture of the Commission, and a desire not to be involved in the dispute.

It is entirely possible that once disclosed, the remaining information in the severance agreement and release might be used by the requester in the union's "public campaign in opposing the Ontario Government's divestiture initiative". In my view, any "harm" to the affected person and his family would be directly connected to his employment and subsequent termination from employment with the Commission. In these circumstances, I am not persuaded that any consequences of disclosure, as speculated by the affected person, would be "unfair". Accordingly, I find that the factors in sections 21(2)(e) and (i) are not relevant.

I have reviewed the other factors in section 21(2) and find that none apply in the circumstances. In weighing the affected person's right to privacy against the requester's interest in disclosure, I find that the factor favouring disclosure in section 21(2)(a) and the unlisted consideration pertaining to public confidence strongly support a conclusion that disclosure would not constitute an unjustified invasion of privacy. Accordingly, the information in the severance agreement and release which does not fall within the presumptions in sections 21(3)(d) or (f) is not exempt under section 21(1)(f), and should be disclosed. For greater clarity, I have highlighted in green, those portions of Record 3 that should not be disclosed.

ORDER:

Appeal PA-010186-1

1. I uphold the Commission's decision to withhold Record 1 from disclosure with the exception of the information that I have highlighted in yellow on the copy of this record that I am sending to the Commission's Freedom of Information and Privacy Co-ordinator with the copy of this order.
2. I order the Commission to disclose the portions of Record 1 that are highlighted in yellow to the requester by providing him with a copy of this record in severed form by **November 5, 2002 but not before October 31, 2002.**

Appeal PA-010198-1

3. I uphold the Commission's decision to disclose Record 2 to the requester with the names, addresses and credit card numbers removed.
4. I order the Commission to disclose Record 2 to the requester by providing him with a copy of this record in severed form by **November 5, 2002 but not before October 31, 2002.**
5. I uphold the Commission's decision to disclose the Commission minute (responsive to Part 7 of the request) and order it to disclose this record to the requester by providing him with a copy of it by **November 5, 2002 but not before October 31, 2002.**
6. I do not uphold the Commission's decision to disclose the portions of the Agreement and Release (Record 3) that I have highlighted in green on the copy of this record that I am sending to the Commission's Freedom of Information and Privacy Co-ordinator with the copy of this order.
7. I order the Commission to withhold from disclosure the portions of Record 3 that are highlighted in green.
8. I order the Commission to disclose the remaining portions of Record 3 to the requester by providing him with a copy of this record in severed form by **November 5, 2002 but not before October 31, 2002.**

General

9. In order to verify compliance with the provisions of this order, I reserve the right to require the Commission to provide me with a copy of the material sent to the appellant.

Original signed by: _____
Laurel Cropley
Adjudicator

September 30, 2002 _____