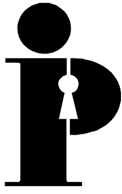

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1666

Appeal MA-020233-1

The City of London

NATURE OF THE APPEAL:

The City of London (the City) received a 36-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a number of issues involving personnel employed by the City. I have not set out the request in its entirety as it is very lengthy and it is unnecessary to reproduce it in this order.

The 36-part request is comprised of the following six categories of records:

A. By-laws and policies regarding remuneration for the City's officers and other management personnel
B. By-laws, decisions, and contracts regarding remuneration for certain named individuals
C. Records of specific payments made to officers and the named individuals
D. Specific claims and authorization for overtime pay, acting pay and/or pay in lieu of vacation not taken for officers and the named individuals
E. Records relating to overtime worked, work done in an "acting" capacity, and vacation taken by the named individuals
F. Miscellaneous

The City identified 123 records as responsive to the request and granted access to 43 records in their entirety. Access to the remaining 80 records was denied, on the basis that some were subject to the exclusionary provision in section 52(3) of the *Act*, or otherwise exempt under the following exemptions in the *Act*:

- advice or recommendations - section 7(1)
- solicitor-client privilege – section 12
- invasion of privacy – section 14(1) with reliance on the presumptions in sections 14(3)(d) (employment or educational history), (f) (the information describes an individual's finances, assets, income etc.) and (g) (personnel evaluations)

In its decision letter, the City also indicated that the majority of the records requested were collected, prepared and maintained or used in relation to a "Fairness Hearing" conducted by City Council into the activities of a former employee. The City decided that a fee of $78.00 for the cost of search and photocopying was warranted.

The requester, now the appellant, appealed the City's decision.

During the mediation stage of the appeal, the appellant stated that he was satisfied with the records identified as responsive and disclosed in response to Parts1 through 4 of the request, with the exception of one record titled Administrative Policy and Directive B35. The appellant also stated that he no longer wishes to pursue Part 31 of the request.

For the remainder of the request, the appellant indicated that he is not satisfied that the City has identified all the records that are responsive to the request, and provided evidence that further records exist. The appellant also argued that where the City is claiming exclusion under section 52(3) of the *Act*, it has not identified the records with sufficient precision to enable him to determine whether the *Act* applies. The appellant is of the belief that the City is in breach of its obligation, under section 22 of the *Act*, to adequately identify the records which it has found to

be responsive to the requests. For many of the records, the appellant states that the *Act* applies by virtue of the exceptions to section 52(3) contained in section 52(4) of the *Act*, and that the records should be disclosed due to a compelling public interest in the records, as contemplated by section 16 of the *Act*. The appellant also raised the application of section 14(4)(b) of the *Act* to some of the records, as it permits access to personal service contracts between an individual and an institution.

Based on information provided by the appellant, the City conducted an additional search and located an additional responsive record, which was disclosed to him. As further mediation was not possible, the matter was moved to the adjudication stage of the appeal process.

I provided a Notice of Inquiry to the City setting out the facts and issues in the appeal and seeking its representations. The City provided me with its submissions which were shared, with two minor severances, with the appellant. The appellant also provided representations in response to the Notice. I then afforded the City the opportunity to submit representations by way of reply but it declined to do so.

RECORDS:

- Information relating to the "fairness hearing" (Records 15-49, 51-57, 59-65, 67-71, 94, 107-108, 112-113 and 115);
- Emails related to legal opinion (Records 73-75)
- Analysis of Draft Overtime Policy (Record 76)
- Council Resolution with handwritten notes (Record 97);
- Management Overtime Payouts, dated 2002-04-04 (Record 99);
- Weekly Attendance Exceptions, June 25 – August 15, 2001 (Record 100);
- Management Vacation Payouts dated 2002-04-04 for the years 2002, 2001 and 2000 (Records 101-103);
- Management Overtime Details for 2001 T4s, dated 2002-06-20 (Record 104);
- Management Vacation Payouts Details for 2001 T4s, dated 2002-06-20 (Record 105);
- Management Acting Pay Details for 2001 T4s, dated 2002-06-20 (Record 106);
- Letter Re: Agreement and Release, dated October 17, 2000 (Record 107);
- Letter Re: Agreement and Release, dated October 16, 2000 (Record 108);
- Fax cover sheet and draft reference letter dated October 16, 2000 (Record 111);
- Letter Re: employment released and agreement, dated October 6, 2000 (Record 112);
- Letter Re: notice of intent to resign, dated October 3, 2000 (Record 113);
- Draft agreement and release, undated (Record 114);
- Fax re: review draft of agreement, dated October 13, 2000 (Record 115);
- Draft letter re: reference letter, dated October 16, 2000 (Record 116);
- Letter re: discontinuation of benefits, January 9, 2002 (Record 117);
- Management Overtime Details, dated 2002-03-27 (Record 121);
- Management Overtime Payouts, dated 2002-03-27 (Record 122).

DISCUSSION:

APPLICATION OF THE *ACT*

The City claims that Records 15-49, 51-57, 59-65, 67-71 and 94 are subject to the exclusionary provisions in section 52(3). If section 52(3) applies to these records, and none of the exceptions found in section 52(4) applies, section 52(3) has the effect of excluding records from the scope of the *Act*.

Section 52(3) has no application outside the employment or labour relations context. Therefore, unless the City establishes that the anticipated proceedings for which the records are being maintained arises in an employment or labour relations context, the records do not relate to "labour relations or to the employment of a person by the institution", and section 52(3) does not apply. [Orders P-1545, P-1563, P-1564 and PO-1772]

Section 52(3)3

General

In order for a record to fall within the scope of section 52(3)3, the City must establish that:

1. the records were collected, prepared, maintained or used by the institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The City's representations on this issue state:

> These records were collected by the City and the collection of this information was utilized in relation to discussions on an employment related matter i.e., Tribunal Hearing for [a named individual]. . .
>
> As a result of this employment related matter, information on other employees and their overtime payouts, severance packages, was collected and used by the institution.

I have no difficulty in finding that Records 15-49, 51-57, 59-65, 67-71 and 94 were collected and used by the City, in relation to meetings, discussions and communications surrounding the "fairness hearing" conducted by City Council, thereby meeting the first and second parts of the test under section 52(3)3.

In addition, the meetings, communications and discussions clearly related to an "employment-related matter" in which the City had an interest. The records were compiled and distributed in order to assist City Council in reaching a decision as to the continued employment of a particular individual. In my view, the City "has an interest" in the subject matter of the records as they outline allegations of impropriety flowing from the actions of one of its senior employees. Accordingly, I find that the third part of the test under section 52(3)3 has been established and that Records 15-49, 51-57, 59-65, 67-71 and 94 fall outside the ambit of the *Act* as a result of the operation of this section.

On March 11, 2003, I issued Order MO-1622 which addressed the application of section 52(3)3 to certain records which are also at issue in the present appeal. In that order, I found that section 52(3)3 applied to exclude from the operation of the *Act* Records 107, 108, 111, 112, 113, 114, 115, 116 and the undisclosed portion of Record 117, which were numbered Records 1, 2, 5, 6, 7, 8, 9, 10 and 11 in that decision. In addition, I found that the exception contained in section 52(3)4 applied to Record 107, which was designated as Record 1 in Order MO-1622.

Accordingly, as I have made this determination in an earlier decision, I find that Records 108, 111, 112, 113, 114, 115, 116 and the undisclosed portion of Record 117 fall outside the ambit of the *Act* as a result of the operation of section 52(3)3. I also find that Record 107 is subject to the *Act* as it falls within the exception in section 52(4).

ADVICE OR RECOMMENDATIONS

The City has applied the discretionary exemption in section 7(1) of the *Act* to Record 76, a 62-page analysis of the City's "Employment and Compensation Policy for Management Employees" prepared for it by an outside consultant and dated January 1, 2002. Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders P-1037, P-1631, PO-2028, PO-2115]

The City submits that Record 76 was prepared for City Council by an outside consultant for the purpose of reviewing the City's "Employment and Compensation Policy for Management Employees". The City states that Record 76 is a draft of a final report adopted by Council in September of 2002. It indicates that a similar review of the City's management employees' compensation policy was prepared by another consulting firm and was made public "as part of the new City Manager's Corporate Renewal Program".

Record 76 represents a comprehensive set of policies governing the employment relationship between the City and its management employees. It outlines certain compensation schemes for various employee benefits and sets out in great detail the methods for calculating salary, annual assessments and a variety of other employment-related considerations. The report also addresses the evaluation techniques to be employed by the City and the performance management system to be implemented.

In Order PO-2028, Assistant Commissioner Tom Mitchinson, referring to the equivalent provision in the provincial *Act* to section 7(1), stated that:

> What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains "advice" for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain "mere information" and what, if any, contain information that actually "advises" the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing "mere information", then section 13(1) applies.

Applying the principles set forth in Order PO-2028 and later adopted in Order PO-2115, I find that Record 76 contains "mere information" as opposed to information that actually advises the City on a suggested course of action. I specifically find that the City has not provided me with sufficient evidence to make a finding that Record 76 contains "advice or recommendations" as to a suggested course of action to be undertaken by the decision makers as part of the deliberative process. The record contains a great deal of factual information pertaining to the calculation and determination of employee benefits and salary but it does not make specific recommendations or

provide advice to the City's decision makers. I note that Record 76 is a draft document and that a different version of it was ultimately presented to and approved by City Council in September 2002. I further find that disclosing the information in Record 76 would not allow one to accurately infer any "advice or recommendations" given.

As I have found that Record 76 does not qualify for exemption under section 7(1) and no mandatory exemptions apply to it, I will order that it be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

The City submits that Records 73, 74, 75 and 97 are exempt from disclosure under the discretionary exemption in section 12 of the *Act*.

General principles

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches as described below. The City must establish that one or the other (or both) branches apply. In the circumstances, it is only necessary for me to discuss the common law solicitor-client communication privilege under Branch 1.

Solicitor-client communication privilege under Branch 1

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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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 privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Findings

The City submits that Records 73, 74, 75 and 97 "deal with information that was prepared by or for counsel employed by the institution for use in giving legal advice." Records 73, 74 and 75 are emails passing between the City's counsel and administrative staff in which counsel requests certain information and City staff reply. At the time of the email exchanges, counsel was preparing a legal opinion on the issue of overtime payments for management staff at the request of City Council. The City argues that these records form part of and reflect the "continuum of communications" passing between counsel and City staff.

In my view, Records 73, 74 and 75 are exempt from disclosure under Branch 1 solicitor-client communication privilege. The records represent confidential communications between a solicitor and client made for the purpose of giving legal advice. Record 97 is a copy of a by-law that has been annotated with handwriting. I have not been provided with any evidence to indicate the origin of these notes or the reason why the City has applied the exemption in section 12 to it; nor is this information evident from the record itself. Accordingly, I find that the City has not established the application of section 12 to Record 97 and I will order that it be disclosed to the appellant.

PERSONAL INFORMATION

The personal privacy exemption in section 14(1) applies only to information which qualifies as personal information, as defined in section 2(1) of the *Act,* which defines personal information, in part, to mean recorded information about an identifiable individual, including 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 (section 2(1)(h)). [Order PO-1706]

The City submits that Records 99-106, 121 and 122 contain the personal information of several City employees. It argues that the disclosure of the contents of these records would reveal the exact dollar amount of certain payments made by the City to these employees for overtime, vacation time and payments for assuming acting positions and that this information constitutes the personal information of these individuals.

The City also indicates that Records 107, 108 and 111-116 contain the personal information of a former City employee. I have found above that Records 108, 111-116 and the undisclosed portion of Record 117 fall outside the ambit of the *Act* because of the operation of section 52(3). The City contends that Record 107, a severance agreement between the City and a former employee, contains information relating to the payments made to the employee upon his leaving the City's employ and that this information qualifies as the personal information of this individual. I find that Record 107 contains the personal information of the former employee as it

includes the individual's name along with other personal information relating to him (section 2(1)(h)).

Records 99-106, 121 and 122 contain the names of certain individuals along with their employee numbers, the overtime hours worked and the amount of the payout made by the City for overtime, vacation time or an upgrade payment. I find that this information meets the definition of personal information under section 2(1)(c) and (h).

INVASION OF PRIVACY

Section 14(1) - Introduction

Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies.

In my view, the only exception which may apply in the present appeal is that set out in section 14(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (f) 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 institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. 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].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if 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.

[See Orders PO-2017, 2033-I and PO-2056-I]

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

Application of the presumptions in section 14(3)

The City indicates that it is no longer relying on the presumption in section 14(3)(g). However, it continues to rely on the "presumed unjustified invasion of personal privacy" in sections 14(3)(d) and (f) of the *Act,* which read:

> 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;

The City's submissions on this issue state, in their entirety, the following:

> These records contain the employee name, the hours worked and the gross payout. This information relates to the employment history which is identified as section [14](3)(d) of the Act. Subsection (f) is also applicable as this information describes an individual's finances. The hours worked and gross payout information makes it easy to determine the work rate per hour of the employees. These amounts are not simply one-time or lump sum payments or entitlements, but rather the payment of overtime is ongoing.

Section 14(3)(d)

Certain principles have emerged from previous decisions of the Commissioner's office regarding the application of the section 14(3)(d) presumption to records of a similar nature to those at issue in the present appeal. These include:

> Generally, previous orders have found that 'one-time or lump sum payments to be conferred immediately or over a defined period of time that arise directly from the acceptance by the employees of the retirement packages do not fall under the presumption found at sections 14(3)(f) or (d) (Orders M-173, MO-1184 and MO-1469) while references to the specific salary to be paid to an individual over that period of time fall within the presumption in section 14(3)(f) [Order 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). [Order PO-2050]

In my view, the presumption in section 14(3)(d) has no application to Records 99-106, 121 and 122 or to Record 107. Records 99-106, 121 and 122 refer to certain payouts made for a discrete period of time to its management employees for work performed while the City's unionized staff were on strike. In my view, this information cannot qualify as information relating to the employment history of these individuals as it refers only to the overtime hours each individual claimed for during a brief period. I find that the payments made were in the nature of a lump sum amount for overtime worked during the City labour dispute and are not related to ongoing payments due to staff.

Similarly, I find that Record 107 does not contain information relating to the employment history of the individual who is the subject of the record.

As a result, I find that the presumption in section 14(3)(d) does not apply to Records 99-106, 107, 121 and 122.

Section 14(3)(f)

Previous decisions dealing with the interpretation to be placed on the language in section 14(3)(f) have found as follows:

> 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 21(3)(f) of the Act." [Orders M-173, M-1082 and MO-1184]

I agree with this interpretation and find that the information contained in Record 107 that relates to the payments to be made to an individual following the conclusion of his employment with the City does not constitute information which describes this employee's finances, income, assets or financial activities.

However, I find that the references in Records 99-106, 121 and 122 to the amounts paid to City employees as overtime, "in lieu of" vacation time and "acting upgrade" payments fall within the ambit of the term "income" for the purposes of section 14(3)(f). The payments are based on the employee's hourly rates and describe the amounts of money paid as salary to these individuals for this additional work. I find that this information qualifies as information relating to their income within the meaning of section 14(3)(f). As noted above, the only way in which a presumption under section 14(3) can be overcome is if the information is subject to one of the exceptions in section 14(4), which is not the case with respect to Records 99-106, 121 and 122, or if the information is subject to the "public interest override" provision in section 16. I will address the possible application of section 16 to these records below.

Application of the considerations in section 14(2)

The City submits that the personal information contained in Record 107, a severance agreement between the City and one of its employees, is subject to the confidentiality undertaking contained therein. Without referring specifically to it, I assume this to mean that the City is relying on the consideration listed in section 14(2)(h). Based on my review of the contents of Record 107, I find that the consideration listed in section 14(2)(f) (the personal information is highly sensitive) may also apply. I find that each of these factors are applicable in the circumstances and are to be afforded significant weight in balancing the privacy interests of the former employee against the appellant's right of access.

The appellant argues that the consideration in section 14(2)(a) which favours the disclosure of the personal information in Record 107 applies. These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

I find that the consideration under section 14(2)(a) favouring the disclosure of the personal information in Record 107 is a relevant and significant factor. The appellant has provided persuasive evidence of the fact that the issue of compensation for senior City employees upon their retirement or termination has been the subject of a great deal of media and public attention. In my view, the disclosure of the information contained in Record 107 is desirable for the purposes of shedding some light on the details of this particular agreement.

In Order MO-1469, I applied the consideration in section 14(2)(a) to a similar record in the following manner:

> It has been well-established in a number of previous decisions 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 (Order M-173, M-953). Based on this, and the appellant's desire to scrutinize how the Municipality compensated a senior management employee upon his termination, I find that section 14(2)(a) is a relevant consideration in the circumstances of the present appeal. I further find that this is a significant factor favouring the disclosure of the information contained in the record.
>
> Previous orders issued by the Commissioner's office have identified another circumstance which should be considered in balancing access and privacy interests under section 14(2). This consideration is 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, P-1348 and M-953).
>
> 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.
>
> While the information at issue qualifies as the personal information of the affected person, I find that, on balance, the considerations favouring disclosure, particularly section 14(2)(a), outweigh any factors weighing in favour of the non-disclosure of this information. Accordingly, I find that the disclosure of information which relates only to the method of calculation of the severance payment to the affected person would not constitute an unjustified invasion of his personal privacy. This information, contained in paragraph two of the Agreement, is not exempt under section 14(1) and it should be disclosed.

I adopt the approach outlined in Order MO-1469 for the purposes of the present appeal. In my view, the same principles ought to be applied in determining the disposition of the personal information in Record 107. Weighing the considerations favouring the non-disclosure of Record 107 in sections 14(2)(f) and (h) against the factor favouring disclosure in section 14(2)(a), I find that the disclosure of Article 2 of the Agreement, with the dollar value on line 3 deleted, will disclose only the method of calculation used to arrive at the settlement payment to the former employee. This approach is consistent with that taken in Order MO-1469 and ensures that the appellant's interest in disclosure, which is reflected in section 14(2)(a) is met, without infringing the former employee's interest in non-disclosure with respect to the factors listed in sections 14(2)(f) and (h). Disclosing only Article 2, with the dollar amount on line 3 omitted, the remainder of the Agreement comprising Record 107 can, thereby, be disclosed.

By way of summary, I uphold the City's decision to deny access to the information contained in Records 99-106, 121 and 122 as well as all of Record 107 with the exception of Article 2, (severing the dollar amount on line 3 of Article 2) under section 14(1).

PUBLIC INTEREST OVERRIDE

General principles

The public interest override provided by section 16 does not apply to records which qualify for exemption under sections 6, 8, or 12 of the *Act*.

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 [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.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "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.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

It is important to note that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption. [Order PO-1705]

Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. It is important to note that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that "[a]s the personal information subject to the request becomes more sensitive in nature ... the effect of the proposed exemption is to tip the scale in favour of non-disclosure". [Order MO-1254]

The appellant submits that "the exit arrangements of the four (4) named officials in paragraph eight (8) [of the request] has garnered much public attention."

In my view, the disclosure of the method used to calculate the payment made to the former employee by the City which is set forth in Article 2 of Record 107 will adequately address the public interest which may exist in the disclosure of this record. Balancing the privacy rights of the former employee against the public's right to know the details of the Agreement reflected in Record 107, I find that the disclosure of Article 2, less the dollar amount on line 3, will serve the public interest in disclosure expressed in the appellant's representations.

The appellant also refers to the "prominent news coverage" given to the issue of the payment of overtime to senior City employees during the 2001 strike of unionized City employees. I find that there exists a public interest in the whole issue of payments made to senior City staff as a result of the labour dispute in 2001. I cannot agree, however, that this issue is sufficiently compelling to require the disclosure of the personal information of the senior employees. As a result, I find that the public interest override provisions in section 16 do not apply to the personal information contained in Records 99-106, 121 and 122.

REASONABLENESS OF SEARCH

The appellant takes the position that the City has failed to identify all of the documents in its record-holdings that are responsive to his request. As noted above, the appellant submitted a 36-part request for records. The request sets out in great detail the records he is seeking. Many of the records referred to in the appellant's representations in support of his argument that the search was not sufficiently thorough have, in fact, been identified as being at issue in this appeal. Some of these records were categorized by the City as falling within the rubric of "Fairness Hearing Information". These records were included in the documents provided to this office as being responsive to the request but were not individually described in the City's Index of Records or in the Notice of Inquiry.

Other requested records, however, have not been included in the responsive records identified by the City; nor has the City indicated that such records do not exist in its record-holdings. The appellant has identified some of these records in his representations. They include:

- the 'letter of direction on overtime' referred to in the third full paragraph of page 3 of a letter dated April 12, 2002 to the Mayor and Council from a named City official;
- the termination agreements of four individuals referred to in the request (one of which has been addressed in this order);
- the employment agreements relating to these four individuals as specified in item 4 of the request; and
- records relating to one individual's participation in all benefit plans after he left the City's employ

While the appellant's request as originally framed was voluminous and often confusing in its scope, the City is obliged under section 17(2) of the *Act* to offer a requester assistance in reformulating or clarifying the scope of the request. In the present case, some of this difficulty may have been avoided had the parties made more of an effort to identify the records at issue.

I will order the City to conduct a search for the records specified by the appellant and to provide him with a decision letter respecting access to these records, if they exist.

ADEQUACY OF THE DECISION LETTER

The appellant is of the view that the decision letter provided to him by the City was deficient in that it failed to reveal the reasons behind the City's decision not to disclose certain records, as is required by section 22(1)(b)(ii). He also suggests that the City failed to notify certain third parties in a timely fashion under section 21 of the *Act*.

In Order M-913, former Adjudicator Anita Fineberg addressed a similar submission by a requester in the following manner:

> In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). In this case, I agree with the appellant that the decision letter of the Police should have provided him with **reasons** for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 22(1)(b)(ii) of the *Act*. It does not provide an explanation of why the exemptions claimed by the Police apply to the record. Section 22(1)(b)(i) already requires that the notice contain the provision of the *Act* under which access is refused.
>
> Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations which I have referred to in my disposition of all the issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellant.

I agree with the analysis of section 22(1)(b)(ii) in Order M-913 and similarly conclude that no useful purpose would be served by requiring the City to issue another decision letter with respect to all of the records disposed of in this appeal. As noted above however, I will order the City to issue a decision letter respecting access to the records described above in my discussion of the "reasonable search" issue.

ORDER:

1. I find that the City's search for records responsive to the request was not reasonable. Accordingly, I order the City to provide the appellant with a decision letter respecting access to the records, if they exist, which are referred to in my discussion of the "reasonable search" issue in accordance with the requirements of section 22 of the *Act* and without recourse to a time extension under section 20 of the *Act*, using the date of this order as the date of the request.

2. I order the City to disclose to the appellant Records 76 and 97 and Article 2 of Record 107 (without disclosing the dollar value on line 3) by providing him with copies by **August 11, 2003,** but not before **August 5, 2003.**

3. I uphold the City's decision to deny access to Records 15-49, 51-57, 67-71, 73-75, 94, 99-106, 107 (with the exception of Article 2), 108, 111-117, 121 and 122.

4. In order to verify compliance with the terms of Order Provision 2, I reserve the right to require the City to provide me with copies of the records which are disclosed to the appellant.

Original signed by: July 4, 2003
Donald Hale
Adjudicator