ORDER MO-1796

Appeal MA-020204-1

City of Elliot Lake

NATURE OF THE APPEAL:

The appellant made a detailed request to the City of Elliot Lake (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to numerous records related to the employment and/or termination of employment of various individuals (the affected parties).

The City's first decision provided a fee estimate of $1,316 for compiling some of the information. In addition, the City sought a further 60 days to respond to the appellant's request, as it needed to prepare the records for disclosure and to contact the affected parties. The appellant requested a fee waiver that was denied.

The appellant appealed the City's decision.

During the course of mediation of the appeal, the City issued a detailed access decision that granted access to the records only in part and denied access on the basis of sections 14 (personal privacy) and 6 (closed meeting). The City also refused to confirm/deny the existence of records pursuant to section 14(5). The appellant then narrowed his request. The appellant continued to take issue with the fee and reiterated his request for a fee waiver, which the City denied. The appellant also indicated that he believed there were further responsive records with respect to the affected parties for which he had requested severance information.

The City then informed the appellant that three of the individuals had consented to the release of their information.

The appeal moved to adjudication. I sought and received representations from the City, which I then shared with the appellant. The appellant provided a very brief response. I also sought the representations of the thirteen affected parties. I received only two direct responses in return.

RECORDS:

I have assigned numbers to each item of the request and have indicated the exemptions applied as follows:

1. Agreement between a named individual and the Elliot Lake Police Services Board – section 14(5)
2. Termination letter and severance package for named individual – section 14(5) and 6(1)(b)
3. Termination letter and severance package for named individual – section 6(1)(b)
4. Employment agreement between a named individual and the City – section 6(1)(b)
5. Employment agreement (Schedule A to By-law No. 90-5/01) between a named individual and the City – section 14
6. Calculation of severance pay letters for 8 named individuals – access and additional records at issue – section 14

7. Calculation of severance pay letters for 3 named individuals – additional records only issue here as named individuals have consented to release of information – section 17

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS AND THE PERSONAL INFORMATION EXEMPTION

Introduction

The City relies on section 14(5) of the *Act* as the basis for its decision to refuse to confirm or deny whether items 1 and 2 of the request exist. Section 14(5) reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

By invoking section 14(5), the City is denying the appellant the right to know whether a record exists, even when one does not. This section of the *Act* provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339]. An institution that relies on section 14(5) must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. It must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested record would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy [Orders P-339, P-808 upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)]

Therefore, the first question that I must determine is whether the City properly exercised its discretion under section 14(5).

In its representations, the City argues that any agreements entered into would have been highly sensitive to the parties and would have included significant confidentiality provisions. Consequently, the confirmation of the existence of such agreements would have been inappropriate and would be an unjustified invasion of personal privacy as contemplated by the *Act*.

In order to conclude that it properly exercised its discretion, I must find that the City provides sufficient evidence to establish that:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy [Order MO-1179].

Thus, if disclosure of the records (if they exist) would not constitute an unjustified invasion of personal privacy, requirement 1 has not been met and the City would not be able to refuse to confirm or deny the existence of records under section 14(5). Because of the wording of section 14(5), the analysis for requirement 1 is identical to that followed in determining whether the mandatory exemption in section 14(1) applies to the records.

Because section 14(1) has also been applied to some of the other records in this appeal, and in order to avoid duplication, I will consider the application of section 14(1) to all records below, under the heading "Invasion of Privacy".

For reasons I outline in that section, I find that disclosure of some of the contents of the items 1 and 2 records, containing the personal information of these affected parties, would *not* constitute an unjustified invasion of their personal privacy. Thus, requirement 1 of section 14(5), noted above, has not been met and the City is not entitled to rely on section 14(5) with respect to these two records.

Further, though section 6(1)(b) was also relied on for the items 2, 3 and 4 records I find that section 6(1)(b) does not apply to any of these records to exempt them from disclosure. In this regard, see my analysis of section 6(1)(b) following the section 14 analysis.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, the term "personal information" is defined, in part, as recorded information about an identifiable individual, including information relating to the employment history of the individual or information relating to financial transactions in which the individual has been involved (paragraph (b) of the definition) and 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 (paragraph (h) of the definition).

Previous orders of this office have considered the contents of various types of agreements, such as employment contracts or settlement and/or severance agreements (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, including name, address, terms, 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 this appeal, and that all of the records in items 1 to 7 of this appeal contain the personal information of the affected parties.

INVASION OF PRIVACY

Introduction

Where an appellant 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.

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,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

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

In applying section 14(1)(f), sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations.

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

14(2) cannot be resorted to in favour of disclosure. 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]

Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy and provides, in part:

> 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.

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. Section 14(2) provides, in part:

> 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; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Representations

The City makes the following representations related to the section 14 exemption.

For the item 1 record, the City argues that it should not be disclosed. It claims that section 14(3)(f) applies as the information describes an individual's financial position in that the record lists payments and dates on which the payments are to be made with respect to continuation of salary, life insurance, retirement planning, vacation entitlement, RRSP contributions and counselling. It also claims that sections 14(2)(f) and (h) are relevant because the information is

highly sensitive and because the record contains a specific provision regarding confidentiality and retention.

For the items 2 and 3 records, the City argues that section 14(3)(d) applies as the record discloses employment history. It also submits that section 14(3)(f) applies because the record contains provisions dealing with vacation entitlement, sick leave, life insurance, retirement planning, and counselling.

For the item 4 record, the City argues that section 14(3)(d) applies in that the record contains information related to outside activities, professional development, severance, and confidentiality. It also argues that section 14(2)(f) is relevant as the information is highly sensitive for the individual.

For the item 5 record, the City reiterates many of the same arguments it has made in respect of the other records.

For the item 6 records, the City submits that the records contain the individual's financial position as described in section 14(3)(f). Further, it says that a number of these individuals have asked that their information remain confidential.

More generally, the City submits that information about the salaries, benefits, and classification and grid levels associated with the various positions is information available to the public through normal channels.

The appellant provides no detailed representations relying instead on the following general statement:

> I strongly believe that the information I have sought from the City is "public information" and is therefore permissible for release under the Act.

I received only two responses from the thirteen affected parties notified.

One party consented to the disclosure of her personal information.

The other affected party objected to the disclosure of his personal information and provided detailed reasons for his position, which due to their confidential nature I am unable to share.

I will now consider the application of section 14(1) to each of the records at issue in this appeal.

Findings

Section 14(4)(a): exception for certain employment information

While I find that large portions of each of the records at issue in this appeal are exempt from disclosure on the basis that disclosure would constitute an unjustified invasion of personal privacy, the section 14(4)(a) exception does apply to permit the disclosure of some parts of each record.

Section 14(4)(a) indicates that the disclosure of the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution does not constitute an unjustified invasion of personal privacy. "Benefits" has been interpreted expansively to include entitlements that an officer or employee receives, in addition to base salary, as a result of being employed by the institution. Order M-23 lists these

- insurance-related benefits
- sick leave, vacation
- leaves of absence
- termination allowance
- death and pension benefits
- right to reimbursement for moving expenses

In subsequent orders, adjudicators have found that "benefits" can include

- incentives and assistance given as inducements to enter into a contract of employment (Order PO-1885)
- all entitlements provided as part of employment or upon conclusion of employment (Order P-1212)

It has also been held, however, that the exception in section 14(4)(a) does not apply to entitlements that have been *negotiated* as part of a retirement or termination package (see for example Orders M-173, M-204, M-419, M-797 and MO-1332) except where it can be found that the information reflects benefits to which the individual was entitled as a result of being employed (Orders PO-1885, PO-2050 and MO-1749). The common thread in these orders (leaving aside Order P-1212, which provides for the most expansive definition of "benefits") would appear to be that section 14(4)(a) does apply to benefits contained in negotiated termination agreements so long as they are benefits the individual received while employed and are continuing post-employment.

Bearing these principles in mind, I have examined the records at issue here and find that all contain some provision for benefits as contemplated by section 14(4)(a). I note below the relevant provisions. These portions of the records are to be disclosed.

I also find that some of the records contain provisions related to the employment responsibilities of the individual as provided for in section 14(4)(a). These provisions also are noted below and should be disclosed.

Item 1 record

I find that the following paragraphs of this record contain information about benefits and should be disclosed: paragraphs 2, 3, 4, and 5.

Item 2 record

I find that the following paragraphs contain information about benefits: paragraphs 1, 2, 3(b), 5 and 7.

Item 3 record

I find that paragraphs 1, 2, 3(b) and portions of 7 contain information about benefits and should be disclosed.

Item 4 record

I find that these paragraphs contain information relating to benefits and should be disclosed: paragraphs 2.02, 2.03, 2.04, 2.05, 5, and 6. Schedule C should also be disclosed, as it is a benefits schedule. Paragraph 1.03 and Schedule A should be disclosed as they describe the individual's job responsibilities. Paragraph 2.01 should be disclosed as it indicates salary range.

Item 5 record

I find that the following paragraphs contain information relating to benefits and should be disclosed: paragraphs 2.02, 2.03, 2.04, 2.05, and 2.06. Furthermore, Schedule B appears to be a salary grid, which should also be disclosed pursuant to the requirements of section 14(4)(a). Finally, both paragraph 1.03 and Schedule A contain information about the individual's employment responsibilities and should be disclosed. Paragraph 2.03 should be disclosed as it indicates salary range.

Item 6 records

In each of the 8 letters indicating a calculation of severance pay, the severance pay amount should be disclosed, as it is a termination allowance.

Four of the letters also include a provision for vacation entitlement, which should be disclosed.

The remainder of the information in the records should not be disclosed as to do so would be an unjustified invasion of personal privacy. Some of this remaining information should not be

disclosed because disclosure of it is presumed to constitute an unjustified invasion of personal privacy pursuant to section 14(3). I consider the application of section 14(3) below.

Section 14(3): presumptions against disclosure

Previous orders of this office have found that the following information falls within the section 14(3)(d) presumption relating to *employment or educational history*:

- start and finish dates of a salary continuation agreement
- dates upon which individuals are eligible for early retirement or entitled to draw a pension
- start and end dates of employment
- number of years of service
- last day worked
- dates upon which notice period begins and ends
- date of earliest retirement
- number of sick leave and annual leave days used
- restrictive covenants in which the individual agrees not to engage in certain work for a specified duration
- information in a severance agreement that sets out the period during which the salary of the individual will continue to be paid
- amount of vacation or sick leave entitlement
- credited service in the OMERS

Previous orders have found that the following information describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness as per the section 14(3)(f) presumption:

- references to an individual's specific salary
- contributions to a pension plan
- amount of salary continuation payments

The following information has been found *not* to qualify under any of the section 14(3) presumptions:

- address of an affected party
- releases
- agreements about the potential availability of early retirement
- payment of independent legal fees
- continued use of equipment
- one-time or lump sum payments or entitlements that arise directly from the acceptance by the individual of retirement packages

Bearing these previous orders in mind, I find that all of the records contain some provisions that fall within the section 14(3) presumptions.

Item 1 record

These paragraphs qualify for the section 14(3)(d) presumption: paragraphs 1 and 2, which contain, respectively, the date of termination and the period during which the individual shall continue to receive his salary.

Item 2 record

Paragraph 1 of this record qualifies for the section 14(3)(d) presumption because it contains the dates upon which the individual's leave of absence begins and ends, the date of vacation commencement and the date of termination.

Item 3 record

Paragraph 7 of this record qualifies for the section 14(3)(d) presumption because it reveals the individual's vacation entitlement and termination date. The introductory paragraph also refers to the termination date.

Item 4 record

Paragraph 1.02 sets out the term of employment and qualifies for the section 14(3)(d) presumption.

Item 5 record

Paragraph 1.02 sets out the term of employment and therefore qualifies for the section 14(3)(d) presumption.

Item 6 records

In all of these records, the indicated employment termination dates and benefit termination dates qualify for the section 14(3)(d) presumption.

Section 14(2): factors and considerations

I now review the remaining information in the records to determine whether any of the listed factors, as well as any other relevant considerations, apply.

The City essentially relies on the factors set out at paragraphs (f) and (h) of section 14(2) as factors that favour the conclusion that disclosure of the records would constitute an unjustified invasion of personal privacy.

The representations of one of the affected parties and the actual contents of some of the records indicate that many of the individuals had a reasonable expectation of the confidentiality of their agreements with the City.

The appellant made no representations on this issue.

My analysis under section 14(2) would normally involve a balancing of the factors weighing against disclosure and those weighing in favour of disclosure. In this case, the appellant has made no argument and has provided no evidence to support a conclusion that the factors in favour of disclosure outweigh those against disclosure.

I have some evidence before me that this information is highly sensitive to the affected parties. I have some evidence of an expectation of confidentiality on the part of the affected parties. Both of these considerations favour privacy protection. Given that I have no other evidence before me, and given that the information at issue is personal information, I find that disclosure of the information not covered by section 14(3) would constitute an unjustified invasion of personal privacy.

SUBSTANCE/DELIBERATIONS OF COUNCIL

Introduction

The City contends that the exemption at section 6(1)(b) applies to the items 2, 3, and 4 records.

Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

Representations

For items 2 and 3, the City makes these representations:

> The severance settlements were considered at a closed meeting of Council under subsection 55(5) of the Municipal Act, being personal matters about identifiable individuals. It is exempt from disclosure under subsection 6(1)(b) of the Act, namely, it is a record that reveals the substance of deliberations of a meeting of council which a statute authorizes holding that meeting in the absence of the public. The exemption has not been removed under subsection 6(2) of the Act.
>
> …
>
> Copies of the minutes of the Council meetings held February 15, 1999 and May 25, 1999 are attached as well as a copy of the section of the municipal act that applies.

For item 4, the City submits these representations:

> All documents relating the [named individual's] employment agreement were discussed in a closed session of Council. Therefore, subsection 6(b) of the Act is applicable to this document to refuse disclosure. The By-law No. 01-17 authorizes entering into an employment agreement, but does not attach the agreement as a schedule to the by-law. By-law 01-17 discloses information related to the salary grid and was passed at an open session of Council. The agreement was discussed in closed session and was not discussed in an open session, and apart from the employment grid, no portions of the agreement have been made public. The information related to duties and responsibilities of the position of CAO are detailed in By-law No. 90-5, which is a public document. By-law 00-49 is a public document which the appellant has accessed in the past through normal channels. The employment agreement (Section 2.01) set out progression through the grid and therefore represents an unjustified invasion of privacy as detailed in Order M-23. By-law 00-49 set out the remuneration for management personnel detailing salary ranges, position banding, grids and benefits.
>
> Copies of the agenda and minutes of the Council meeting held February 12, 2001 are attached.

Findings

I find in the circumstances that the City has demonstrated that meetings were held and that they were held in camera as authorized by section 55(5) of the *Municipal Act*. I also find, however, that the City has not sufficiently shown that disclosure of any of these records would reveal the actual substance of the deliberations of the meetings.

In Order M-184, former Assistant Commissioner Irwin Glasberg made the following comments on the term "deliberations":

> In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view towards making a decision. Having carefully reviewed the contents of the Minutes of Settlement, I am satisfied that the disclosure of this document would reveal the actual substance of the discussions conducted by the Board, hence its deliberations, or would permit the drawing of accurate inferences about the substance of those discussions. On this basis, I find that the institution has established that the third part of the section 6(1)(b) test applies in this case.

The former Assistant Commissioner expanded on his analysis of the interpretation of section 6(1)(b) in Order M-196 as follows:

> The Concise Oxford Dictionary, 8th edition, defines "substance" as the "theme or subject" of a thing. Having reviewed the contents of the agreement and the representations provided to me, it is my view that the "theme or subject" of the in-camera meeting was whether the terms of the retirement agreement were appropriate and whether they should be endorsed.

Having examined the records at issue and taking into consideration the representations of the City, I am not satisfied that the specifics of the three agreements, which are the records at issue here, were the actual subject matter of the in camera meetings. The minutes of these meetings refer to the subject matter in a general sense only and the representations do not provide sufficient detail from which I can conclude that the very agreements themselves were the subject matter of the meetings. Therefore, the City has failed to establish the third part of the section 6(1)(b) test. Consequently, I find that the City has failed to show that section 6(1)(b) applies to exempt these records from disclosure.

FEES AND FEE WAIVER

Fee

During mediation, the City confirmed that it had searched and retrieved the records at issue. The City also advised that the applicable fee in this case, exclusive of disbursement sheets, is $260.

The appellant contended that the amount of time the City had searched for the records is excessive and that, in any event, the fee should be waived.

The *Act* requires an institution to charge a fee for responding to requests. The relevant section states:

> 45. (1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

Sections 6, 7 and 9 of Regulation 823 provide more specific requirements for the calculation and payment of these fees.

This office may review the amount of the fee and may uphold the decision or vary it.

The City calculated its fee based on these considerations:

- 3 hours and 55 minutes for the Manager of Personnel to search for the records
- 4 hours and 15 minutes for the City Clerk to search for the records
- 96 pages of photocopies @ $.20 per page

The City explained the search undertaken and other duties performed to respond to the request. It provided, in part, the following information:

> The requested records are kept in files located in the Personnel Manager's Office, filed under various subjects. The files in the Clerk's area were filed under either current, immediate year past or archive files stored in the basement. Files are not completely purged each year in my department, unless the file is very bulky, hence the need to search in different areas. The records are also kept on a database system based on Resolutions of Council or by by-law number. These records are also available in hard copy files. The database system is used to locate the number that applied to the record in order to access the hard copy.

> ….
>
> There were numerous files to search ie. Restructuring file, police file, ambulance file, Clerk's dept. file, treasury department file, economic development filed, and economic development office file, and committee files for the Economic development and Legal and personnel departments. By-law files were searched as well. The minutes of relevant meetings were reviewed to determine the actions of council with respect to closed or open sessions.
>
> The actual time in a manual action was included in the fee estimate by observing the clock. It was never calculated how long it takes to retrieve a single record; in fact more than one of the requested records may have been located in a single location, but the entire file would be reviewed to ensure all of the relevant information was retrieved. The fee estimate is the actual length of time involved in retrieving the records from their various locations.
>
> ….
>
> The fee has already been drastically reduced through correspondence and the mediation process….

The appellant made no representations in this regard.

I find that the City's fee is reasonable because its representations provide sufficient evidence to support the fee amount charged, including persuasive evidence about

- how the requested records are kept and maintained
- what manual actions were necessary to locate the requested records
- what necessary steps were taken to locate the records from the time of receipt of the request
- what was the amount of time involved in each manual action taken to locate and prepare the records requested
- how much time was required to complete this work

Therefore, I conclude that the City calculated the fee in a reasonable way taking into consideration the *Act* and Regulations and the steps necessary to respond to the appellant's request.

Fee waiver

An institution can waive fees under the provisions of the *Act*. Where an institution decides not to waive fees under section 45(4), an appellant can ask this office to review that decision. This office will consider whether it is fair and equitable to waive fees after considering the criteria set out in section 45(4) which are these

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1)

(b) whether the payment will cause a financial hardship for the person requesting the record

(c) whether dissemination of the record will benefit public health or safety, and

(d) any other matter prescribed in the regulations

Although there is no burden of proof specified in the *Act* with regard to fees, the burden of proof in law generally is that a person who asserts a position must establish it. In Order 31 and subsequent orders, this office has stated that it is the appellant's responsibility to provide adequate evidence to support a claim for a fee waiver.

Even where an appellant can show that he meets one or more of the above listed criteria, he must still show that overall it is *fair and equitable* to waive the fee in the particular circumstances. In this appeal, the appellant made no arguments to support his request for a fee waiver. There is no evidence before me indicating that the appellant meets any of the listed criteria. Moreover, there is no evidence addressing whether it is fair and equitable to waive the fee in the circumstances of this particular appeal. The result is that I am in no position to decide this issue in the appellant's favour. Therefore, I find that a waiver of fees is not appropriate in this case.

REASONABLENESS OF SEARCH

The appellant asserts that there were attachments that accompanied the letters in items 6 and 7 of the request, and that those attachments are also responsive to his request.

The issue to be decided is whether the City has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the City will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that further records do not exist, it is my responsibility to ensure that the

institution has made a reasonable search to identify any records that respond to the request. The *Act* does not require an institution to prove with absolute certainty that further records do not exist. In order to properly discharge its obligations under the *Act*, however, the City must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to this appellant's request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. In this case, during mediation, the appellant indicated that he believed that the severance letters for the named individuals were accompanied by attachments that are responsive to his request. The appellant did not put forward any other evidence in support of his assertion.

The City had this to say about the attachments:

> When the appellant stated there were additional attachments to the letters provided to ambulance employees, the City Clerk approached the Personnel Manager to ascertain that were indeed no missing "attachments" to the letter. The Personnel Manager stated there were none, and recalled that there never had been any attachments included in our records.

And, further:

> No records have been identified that "no longer exist."

I am satisfied, in the circumstances, that the City conducted a reasonable search for the records identified by the appellant. I note, also, that my review of the letters does not reveal any indication that they were to have been accompanied by attachments.

Therefore, the City should disclose the three letters in item 7 of the request to the appellant upon his payment of the fee given that these affected parties have consented to the disclosure of their personal information.

ORDER:

1. I order the City to disclose only those portions of the records in items 1, 2, 3, 4, 5 and 6 that I have not highlighted in the copies of the records I have enclosed with the City's copy of this Order. For more clarity, the City shall **not** disclose the highlighted portions of these records.

2. I order the City to disclose to the appellant all of the records in item 7.

3. I order disclosure to be made by **June 29, 2004** but not before **June 22, 2004**.

4. I uphold the City's decision to deny access to the remainder of the records.

5. In order to verify compliance with the terms of this Order, I reserve the right to require the City to provide me with copies of the records that are disclosed to the appellant, upon request.

Original signed by: May 31, 2004
Rosemary Muzzi
Adjudicator