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

ORDER MO-1994

Appeal MA-040228-1

City of Peterborough

Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) the City of Peterborough (the City) received a request for information regarding a former City employee (the affected party). In particular, the request sought access to the amount of money paid out as the affected party's severance package, the official reason for the affected party's dismissal and the terms of a disclosure agreement relating to the affected party's departure.

The City identified records responsive to the request and in its initial decision letter, denied access under section 14(1) (personal privacy), with reference to sections 14(3)(d), (f) and (g), and under section 12 (solicitor-client privilege).

The requester (now the appellant) appealed the City's decision.

During mediation, the City issued a revised decision letter withdrawing its reliance on sections 14(3)(d) and (g) and section 12 of the *Act*. The City maintained its reliance on the exemption set out at section 14(1) in conjunction with the presumption at section 14(3)(f) to deny access to the requested information. Also during mediation the appellant raised the possible application of the "public interest override" at section 16 of the *Act*.

Mediation did not resolve the appeal and it was moved to the adjudication stage.

This office sent a Notice of Inquiry to the City and the affected party, initially, seeking representations on the issues in the appeal. In the Notice of Inquiry, I pointed out that section 14 is a mandatory exemption, and although the City had withdrawn reliance on sections 14(3)(d) and (g), a review of the appeal file indicated that sections 14(1)(a), 14(1)(f), 14(2)(a), 14(2)(f), 14(2)(h), 14(3)(d), 14(3)(f), 14(4)(a) and 14(4)(b) of the *Act* might apply. Accordingly, I invited representations on those sections.

The City and the affected party provided representations in response. The Notice of Inquiry along with the complete representations of the City and the representations of the affected party (with two names removed) were then sent to the appellant. The appellant then provided representations in response.

After the receipt of representations, I issued Order MO-1941 in an unrelated appeal that shared some similarities with the appeal before me here. In Order MO-1941, I considered the effect of section 52(3) of the *Act* (which can result in the *Act* not being applicable to a record at issue) upon a letter of termination with an offer of settlement. That was the first step in a negotiation process that resulted, in that appeal, in a Memorandum of Agreement and a Release. Because the records and issues in this appeal are similar to those that were considered in Order MO-1941, I sent a copy of that order to the City and the affected party and invited their supplementary representations.

The City responded by advising that its original position remain unchanged and pointing out that, unlike in the appeal that led to Order MO-1941, the affected party here objects to the release of any of his personal information. This was confirmed in the affected party's response.

RECORDS

Record 1 A letter dated February 19, 2004 with an acknowledgement of receipt.

Record 2 An unsigned Final Release and Indemnity Form containing a variety of standard form clauses, which accompanied Record 1.

Record 3 Correspondence from the City to a representative of the appellant.

Record 4 Minutes of Settlement and Release.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Section 52(3) states:

> Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 52(3)2: Negotiations

For section 52(3)2 to apply, it must be established that:

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

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and

3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[Orders M-861, PO-1648]

Part 1: collected, prepared, maintained or used by the City or on its behalf

Based on my review of the contents of the records at issue, I am satisfied that they were prepared or used by the City or on its behalf. The first part of the test under section 52(3)2 has, accordingly, been met with respect to the records.

Part 2: negotiations relating to employment

The records reflect the initiation and conclusion of negotiations of a severance agreement with a former employee of the City. Accordingly, since the preparation and/or use of the records was in relation to negotiations relating to the employment of a person by the City, I find that the second part of the test under section 52(3)2 has also been met.

Part 3: between an institution and a person

The negotiations at issue in this appeal took place between a person and the City. I find that the third part of the test under section 52(3)2 has been met with respect to the records.

Accordingly, I find that all of the elements required for the application of section 52(3)2 have been satisfied.

Section 52(4)

Even if the dispositions in section 52(3)2 (or for that matter, 52(3)1 or 3) apply, if the records fall within any of the exceptions in section 52(4), the *Act* still applies to them.

Section 52(4) states:

> This *Act* applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

As I discussed in Order MO-1941, in Order MO-1622, Adjudicator Donald Hale made certain findings with respect to the application of section 52(4)3 to severance agreements involving former employees of the City of London, Ontario. He found that:

> In my view, the fully executed Agreements and Release which form part of Record 1 and all of Record 13 represent "agreements between an institution and one or more employees". The records reflect the fact that the information contained in these documents was arrived at following negotiations between the individuals involved and the City. In addition, I have found above that the agreements and the negotiations which gave rise to them were "about employment-related matters between the institution and the employees". In my view, the Agreements which comprise part of Record 1 and all of Record 13 fall within the ambit of the exception in section 52(4)3.
>
> I find support for this view in the decision in Order M-797 where Assistant Commissioner Tom Mitchinson found as follows:
>
> > Sections 52(3) and (4) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 52(3) falls within one of the exceptions

> enumerated in section 52(4), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in Part 1 of the *Act* apply.
>
> The Board's representations state:
>
> > Although this document constitutes a communication made in the course of negotiations relating to [the Superintendent's] employment, it also constitutes the final agreement between the school Board and [the Superintendent] resulting from those negotiations. The document requested by the appellant would appear to fall within the ambit of paragraph 52(4)3 of the *Act*, and is therefore subject to the application of the *Act*.
>
> Having reviewed the records and the Board's representations, I agree. In my view, the two records at issue in this appeal, considered together, constitute the agreement between the Board and the Superintendent with respect to his early retirement. This agreement resulted from negotiations about a matter which clearly relates to the Superintendent's employment with the Board. I find that the records fall within the scope of the exception to the section 52(3) exclusion found in paragraph 3 of section 52(4), and are therefore subject to the *Act*. Accordingly, I have jurisdiction to consider the issue of denial of access by the Board, and I will now determine whether these records qualify for exemption under section 14(1) as claimed by the Board.

> I adopt the reasoning expressed by the Assistant Commissioner in Order M-797 for the purposes of this appeal. I find, therefore, that the Agreements which comprise part of Record 1 and all of Record 13 fall within the exception in section 52(4)3 and that I have jurisdiction to determine whether these records are properly exempt under the *Act*. I will, accordingly, order the City to issue a decision letter to the appellant with respect to access to the Agreements.

As set out in Order MO-1941, I agree with the preceding analysis and find nothing material to distinguish Record 4 from the records under consideration in Orders MO-1622 and MO-1941. Based on my review of the record, I therefore find that Record 4 falls within the scope of an "agreement" as discussed in the exception in section 52(4)3, and that the *Act* applies to this record.

Records 1, 2 and 3 however, do not fall within the exception. This is because in my opinion Records 1, 2 and 3 are the steps in the negotiation that led to the creation of Record 4 and do not fall within the scope of an "agreement" discussed in the exception in section 52(4)3, nor do they

otherwise fall within any other part of section 52(4). Therefore, the *Act* does not apply to Records 1, 2 and 3.

As I have found that the *Act* applies to the Minutes of Settlement and Release (Record 4), I must now consider whether this record contains personal information and if so, whether the section 14(1) exemption applies.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, the term "personal information" is defined 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 employment severance agreements (Orders MO-1184, MO-1332, MO-1405, MO-1749, MO-1941 and P-1348). These orders have consistently held that information about the individuals named in such agreements (which includes, amongst other things, the employee's name and address, date of termination and terms of settlement) relate to 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 Record 4 contains the personal information of the affected party who was a former employee of the City.

Record 4 does not contain the appellant's personal information.

INVASION OF PRIVACY

Where an appellant seeks the 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 affected party has opposed the release of any of his personal information. In my view, the only exception to the section 14(1) mandatory exemption which has potential application in the circumstances of this appeal is 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.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must

find that disclosure of the personal information would **not** constitute an unjustified invasion of the affected party's personal privacy.

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. The specific provisions of these sections that are relevant in the circumstances of this appeal provide, as follows:

> (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;
>
> (f) the personal information is highly sensitive;
>
> …
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (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; and
>
> (g) consists of personal recommendations or evaluations, character references or personal evaluations;
>
> …

> (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;
>
> …

Section 14(2) provides some criteria for institutions to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

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 relevant circumstances.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue is caught by section 14(4) or if the "compelling public interest" override at section 16 applies (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

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

Under section 14(4)(a), quoted above, 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.

The representations of the parties do not specifically address the application of section 14(4). I have reviewed Record 4 and find that this record does not contain the classification, salary range or the employment responsibilities of the affected party. The remaining question under section 14(4)(a) is whether it contains information that could properly be considered a "benefit".

This office has interpreted "benefits" to include entitlements that an officer or employee receives, in addition to base salary that an employee receives as a result of being employed by the institution (Order M-23). Order M-23 lists the following as examples of "benefits":

- 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]

These principles and this reasoning have been applied in previous orders issued by this office including MO-1749 and MO-1796.

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-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 MO-1749 and PO-2050). As explained by Adjudicator Catherine Corban in Order MO-1970, the common thread in these orders appears to be that section 14(4)(a) applies to benefits contained in negotiated termination agreements so long as they are benefits the individual received while employed and are continuing post-employment.

I accept the interpretation of "benefits" as established by these previous orders. Having considered these principles in light of the record before me, I find that the information in paragraphs 2 and 6 of the Minutes of Settlement and Release pertains to benefits that the affected party was entitled to at termination, or the continuation of specific benefits he received and that continued after termination, and I find that this information is clearly about "benefits" within the meaning of section 14(4)(a) of the *Act*. Paragraph 2 describes the affected party's vacation benefits. Although included as part of the settlement agreement, the affected party's vacation benefits have not been negotiated as part of the agreement but reflect benefits to which the affected party was entitled as a result of his employment by the City. Paragraph 6 describes the continued payment of a benefit the affected party received while employed and is continuing post-employment. Having reviewed these provisions, I find that as discussed in previous orders, these are each a "benefit" within the meaning of section 14(4)(a). Disclosure of this information is therefore not an unjustified invasion of privacy and it is not exempt under section 14(1). Since no other exemption has been claimed, paragraphs 2 and 6 are to be disclosed to the appellant.

I have found that section 14(4)(a) applies to paragraphs 2 and 6 of the Minutes of Settlement and Release. I do not find that section 14(4)(a) applies to any of the other portions of the Minutes of Settlement and Releases. I will now consider whether the disclosure of the remaining information, which does not fall under section 14(4)(a), is presumed to be an unjustified invasion of privacy under section 14(3).

The Presumptions in Section 14(3) of the *Act*

As noted, the presumptions at sections 14(3)(d), (f) and (g) of the *Act* may apply in this appeal.

The affected party submits that because the information in the records relates directly to his employment history with the City, this constitutes a presumed invasion of his privacy.

Relying on Orders M-173 and M-953, the appellant submits that the Minutes of Settlement and Release does not refer to the employment history of the affected party since the information relates to a period of time after he was terminated. The appellant also submits that the Minutes of Settlement and Release does not contain the type of information found in section 14(3)(f), but if it did, it could be removed. The appellant argues that in Order M-173 former Assistant Commissioner Irwin Glasberg found that section 14(3)(f) of the *Act* did not preclude the disclosure of the severance payments in issue in that appeal.

Orders that followed M-173 and M-953 have reviewed the approach this office has taken to applying the presumptions in section 14(3) of the *Act* to information similar to that contained in the Minutes of Settlement and Release. In Order PO-2050, Adjudicator Cropley examined the presumptions in a setting that is similar to the one before me. Dealing with the equivalent sections in the *Freedom of Information and Protection of Privacy Act* (which corresponds to the *Act* but applies to provincial government institutions), the relevant parts of that order read:

> 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.
>
> …
>
> 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[3](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).
>
> [Adjudicator Cropley finds later in her order that despite the application of the presumption in section 21(3), the benefits in clause 2(iii) fall under the exception in 21(4)(a) and accordingly, that disclosure of that information did not constitute an unjustified invasion of privacy.]
>
> 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).

I adopt the approach taken by Adjudicator Cropley.

This office has also found the following information *not* to qualify under any of the section 14(3) presumptions:

- releases
- out-placement counselling.

[See Orders MO-1184 and MO-1405]

The date that the employment ceased is set out in the preamble to the agreement. That date, I find, falls within the presumption in section 14(3)(d) because it relates to the affected party's employment history. In keeping with Order PO-2050 discussed above, the information in paragraph 1 also falls within the presumption in section 14(3)(d) because it too relates to the employment history of the affected party.

I find that the reference to a specific event in paragraph 3 and the content of paragraphs 4, 5 and 7 do not fall within sections 14(3)(d), (f) or (g). This is because, in my view, the information in those paragraphs does not relate to employment history, describe the affected party's finances, nor consist of personal recommendations or evaluations, character references or personal evaluations.

Paragraph 7 refers to an attached letter of reference. Applying the principles discussed in Orders MO-1184 and MO-1749, I find that this letter contains the type of information identified in the presumptions under sections 14(3)(d) and/or (g) because it contains information relating to dates of the affected party's employment with the City and consists of personal recommendations or evaluations, character references or personal evaluations. Disclosure of this information is presumed to constitute an unjustified invasion of privacy.

The remaining information does not fall within any section 14(3) presumption.

All the Relevant Circumstances in Section 14(2)

I must now consider whether section 14(2) applies to paragraphs 3, 4, 5 and 7 (except for the letter referred to in that paragraph) and the balance of the information in the Minutes of Settlement and Release.

The City submits that the information in record 4 was supplied with mutual assurances of confidentiality (section 14(2)(h) and that disclosing its contents is not desirable, or necessary, for the purpose of subjecting the activities of the City to public scrutiny (section 14(2)(a)). The City states that the personal information in the record is of a highly sensitive nature to the affected party (section 14(2)(f)), and if it is made public it may unfairly expose individuals mentioned in the Minutes of Settlement and Release to harm and/or unfairly damage their reputation (sections 14(2)(e) and (i)).

The affected party states that disclosure of the information in the record would result in his being subjected to public scrutiny while he is trying to get on with his career and has placed the matter behind him. He says that the terms of his severance package are highly sensitive and private and disclosure of the information would cause him personal distress. The affected party does not believe that it would serve any useful public purpose to subject the matter to public scrutiny at this point in time. He is also concerned that disclosure of the requested information may unfairly damage his reputation. Furthermore, he says that the severance package is covered by a binding non-disclosure agreement.

The appellant refers to the decision of Adjudicator Anita Fineberg in Order M-441 to support her position that the existence of a non-disclosure clause in the agreement does not bind this office. The appellant also submits that the terms of the Minutes of Settlement and Release were mutually negotiated and not "supplied" in confidence.

The appellant submits that there is no evidence to support the appellant's "bald" statement that disclosure of the records will expose him unfairly to pecuniary or other harm. The appellant submits that, to the contrary, it is the lack of access to the records which has caused, and likely

will continue to cause, harm to his reputation because the public is left to speculate as to the reasons for his termination.

The appellant submits the fact that the affected party was terminated and that he received a severance package are already public knowledge. In the appellant's view, the precise reasons for the affected party's termination and the details of the severance package are not "highly sensitive". The appellant submits that in past decisions this office has ordered disclosure of similar information.

In support of her position that disclosing the information would not be an unjustified invasion of the affected party's personal privacy, the appellant submits that because he would "typically" be paid at least $100,000.00 annually as a salary, and his severance payment likely exceeded this amount, his salary would be subject to disclosure under section 3(1) of the *Public Sector Salary Disclosure Act*. In the same vein the appellant provided a page from the newspaper "Peterborough This Week" which purports to list the amounts received by the appellant for salary and taxable benefits in 2004. These submissions are apparently intended to make an analogy between the affected person's salary, whose disclosure is apparently mandated by the *Public Sector Salary Disclosure Act*, and the amount paid to him by the City on termination of his employment, in support of the appellant's argument that the termination payment should also be made public.

The appellant submits that as a long-time and highly visible City employee and spokesperson and "point person" on a major project, the timing and circumstances surrounding his termination leaves many questions unanswered. In support of her position that there is a great level of community interest in the information in the Minutes of Settlement and Release, the appellant provided a series of newspaper articles on the major project and the affected party's termination.

The appellant submits that for the City's residents to have faith and confidence in the manner in which the City is run, they must receive assurances that the affected party's termination was conducted fairly and responsibly. Furthermore, the appellant states, the residents also have an interest in knowing the amount of the severance package provided to the affected party, in light of what the appellant describes as "tight" City finances. The appellant argues that if City officials increased that financial burden with a large severance package, it would both add to the tax burden and to the level of interest within the community.

Analysis and Findings

Both the affected party and the City submitted that disclosure of the information "may" unfairly damage the affected party's reputation, although they do not provide any specific details as to how this "may" occur. The assertions made by the affected party and the City are in my view highly speculative and I am not satisfied that they have established a sufficient nexus between disclosure of the information and damage to the affected party's reputation. I am also not satisfied that it has been established that any exposure or damage, which is required to engage sections 14(2)(e) and (i), would be "unfair". Although I appreciate that the affected person would like to move on with his life now that he is no longer employed by the City, he did hold a senior position in the City, and the request relates to him in that position and to the arrangements

surrounding his termination from that employment. In my view, any "harm" to the affected person would be directly connected to his employment and subsequent termination from employment with the City. In these circumstances, I am not persuaded that any consequences of *disclosure*, as mentioned by the affected person and/or the City, would be "unfair". Accordingly, I find that the factors in sections 14(2)(e) and (i) are not relevant.

Notwithstanding the submissions of the City and affected party to the contrary, I also find that section 14(2)(h) does not apply to the information in these paragraphs, because the affected party did not "supply" this information to the City. On the contrary, rather than having been "supplied", they are negotiated terms in the agreement, agreed to by both the City and the affected party. Nevertheless, in the circumstances of this appeal I find that, in light of paragraph 11 of the Minutes of Settlement and Release, the affected party would have a reasonable expectation that these specific terms would be kept confidential. The affected party's expectation of confidentiality vis-à-vis this information, while not specifically listed in section 14(2), is a relevant and important consideration that carries considerable weight.

As set out above, both the City and the affected party took the position that the information was highly sensitive (14(2)(f)). Given the limited information provided to me on this subject, I would accord this factor moderate weight in balancing the privacy interests of the affected party against the appellant's right of access.

The appellant's submissions point to disclosure of the information being desirable for the purpose of subjecting the activities of the City to public scrutiny. The submissions also raise another circumstance which is not listed in the section but is often considered in balancing access and privacy interests under section 14(2) in matters of this nature i.e. that "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution".

In Order MO-1469, Adjudicator Hale stated:

> 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.

I adopt the approach outlined above from Order MO-1469 for the purposes of the present appeal. I find that section 14(2)(a), which favours disclosure, is a relevant factor and has significant weight. I base this conclusion, in part, on the nature of the information and the circumstance that the affected party occupied a senior position with the City. In addition, the appellant has provided information and newspaper articles demonstrating that the affected party's termination has been the subject of public attention. Based principally on these same factors, and also on the appellant's submissions that the termination payment was made in "tight" financial circumstances, I also find that the "public confidence in the integrity of the institution" consideration applies and carries significant weight in respect of information pertaining to the affected person's termination of employment.

To summarize, I have found that the affected party's expectation of confidentiality is a factor favouring privacy protection that carries considerable weight, and the factor favouring privacy protection at section 14(2)(f) (highly sensitive) also applies, and carries moderate weight. I have also found that the factor favouring disclosure at section 14(2)(a), relating to the desirability of subjecting the activities of the institution to public scrutiny, and the consideration relating to "public confidence in the integrity of the institution" both apply, and both carry significant weight.

Balancing these factors is a delicate task. In my view, however, the transparency purposes of the *Act*, (as reflected in section 14(2)(a) and the "public confidence in the integrity of the institution" consideration) are substantial and pressing objectives, and in the circumstances of this appeal, I find they outweigh the factors favouring privacy protection for the remaining information in Minutes of Settlement and Release. I therefore find that disclosure of paragraphs 3, 4, 5 and 7 and the balance of the information in the Minutes of Settlement and Release is not an unjustified invasion of personal privacy, and as such falls within the section 14(1)(f) exception. It is therefore not exempt under section 14 and I will order it disclosed.

In summary, I have determined that date the employment ceased as set out in the preamble to Record 4 and all of paragraph 1 falls within the presumption in section 14(3)(d). I have also determined that the attached letter referred to in paragraph 7 falls within the presumption in sections 14(3)(d) and/or (g). I have determined that section 14(4)(a) applies to paragraphs 2 and 6. I have determined that neither section 14(4), a section 14(3) presumption nor a listed or unlisted circumstance in section 14(2) applies to the balance of the record.

PUBLIC INTEREST OVERRIDE

General principles

The appellant has taken the position that there is a public interest in the disclosure of the Minutes of Settlement and Release. Based on my findings set out above, I must therefore determine whether section 16 applies to the portions of the Minutes of Settlement and Release and the attached letter of reference that I have determined fall within the presumptions in section 14(3).

Section 16 of the *Act* provides as follows:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added]

In support of its position that section 16 is not applicable, the City submits:

> … that there is no compelling public interest to be served by the disclosure of the Records. It is the City's position that the Records concern [the affected party's] employment history with the City. Neither the reasons why, nor details of how [the affected party] came to leave the City's employment override the City's, or his own, expectation of privacy. The matters detailed in the Minutes of Settlement Agreement are private - between the City as an employer and [the affected party] as a former employee.

The affected party submits:

> I do not believe that there is any compelling public interest in disclosing this information which outweighs the exemptions from disclosure to which I am entitled under section 14 of the *Act*, I cannot see that disclosure of this information would shed light on operations of government in any useful way. To the contrary, it is related to an internal personnel matter, and the information being requested by the appellant relates essentially to my private contractual arrangements with the City of Peterborough in connection with the termination of my employment.

In her submissions on the application of section 16, the appellant points to the circumstances surrounding the termination of the affected party, who was a "key and important" figure in the City. For this and other reasons, including scrutinizing the actions of the City and ensuring that the citizens of the City can effectively exercise their democratic rights, the appellant asserts that there is an overriding public interest in releasing Record 4. The appellant relies in that regard on the factors cited in Order P-984.

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]

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]

The appellant submits that the purpose of the request is to provide the public with information relating to the termination of the affected party. The appellant takes the position that the disclosure would provide the public with important information regarding the circumstances surrounding the termination, including the cost to the City's taxpayers.

Although I accept the appellant's position that the public has an interest in some of the information contained in the records, in my view this interest will be satisfied by the level of disclosure required under this order. I find that there is no "compelling" public interest in disclosure of the remaining undisclosed information, and section 16 therefore does not apply.

ORDER:

1. I uphold the City's decision to deny access to Records 1, 2 and 3 and the following portions of Record 4:

    - the date the employment ceased as set out in the preamble
    - paragraph 1
    - the letter referred to in paragraph 7

2. I order the City to disclose to the appellant the remaining portions of Record 4 by providing the appellant with those portions of Record 4 by **December 14, 2005**, but not before **December 9, 2005**.

3. In order to verify compliance with the terms of this Order, I reserve the right to require the City to provide me with a copy of Record 4 as disclosed to the appellant, upon request.

Original Signed by: November 16, 2005
Steven Faughnan
Adjudicator