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

ORDER PO-2536

Appeal PA-060066-1

Ontario Energy Board

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NATURE OF THE APPEAL:

The Ontario Energy Board (the OEB) received four requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to four senior executives of the OEB. The information requested was as follows:

For [Executive 1]-

1. compensation details, including salary and bonus (received and deferred bonus); details should include bonus approval process and letters of approval authorizing all bonus from June 1, 2003 to August 31, 2005;
2. details of pension plan, any enhanced or supplemental pension plans;
3. expense records including, but not limited to office, personal, travel, food, accommodations, hospitality, car or limousine services, club/association memberships, and sundry from June 1, 2003 to August 31, 2005; and
4. expense records for [Executive 1]'s office and [Executive 1]'s Boardroom construction, for renovations from June 1, 2003 to August 31, 2005 including interior design costs, furniture, paint, carpeting/flooring etc.

For [Executive 2] -

1. contract with compensation details for [Executive 2] with OEB from the period between December 2003 to April 2004;
2. compensation details including salary and bonus (received or deferred); details should include bonus approval process, performance measures and letters of approval authorizing bonus from May 1, 2003 to August 31, 2005;
3. details of pension plan, any enhanced or supplemental pension plans; and
4. expense records including, but not limited to office, travel, accommodations, food, hospitality, personal, wardrobe, club/association memberships, car or limousine services, taxi and sundry items from June 1, 2003 to August 31, 2005.

For [Executive 3]-

1. compensation details, including salary and bonus (received and deferred bonus); details should include bonus approval process and letters of approval authorizing all bonus from March 1, 2004 to April 30, 2005;
2. details of pension plan and any enhanced or supplemental pension plan;
3. expense records including, but not limited to, office, personal, travel, food, accommodation, hospitality, car or limousine services, club/association memberships and sundry from March 1, 2004 to April 30, 2005; and,
4. expense records for [Executive 3]'s office and [Executive 3]'s construction and/or renovations from March 1, 2004 to April 30, 2005 including interior design costs, furniture, paint, carpeting/flooring, etc.

For [Executive 4]-

1. compensation details, including salary and bonus (received and deferred bonus); details should include bonus approval process and letters of approval authorizing

all bonus from July 1, 2004 to August 31, 2005;
1. details of pension plan, any enhanced or supplemental pension plans;
2. expense records including, but not limited to office, personal, travel, food, accommodations, hospitality, car or limousine services, club/association memberships, taxi and sundry from July 1, 2004 to August 31, 2005; and
3. expense records for [Executive 4]'s office and [Executive 4]'s construction and/or renovations from June 1, 2004 to August 31, 2005 including interior design costs, furniture, paint, carpeting/flooring, etc.

Following discussions with the OEB, the requester agreed to narrow his request in relation to the expense records to records dated after April 1, 2004.

The OEB issued an interim decision letter (first interim decision) enclosing an index of responsive records and identifying the exemptions claimed. It advised that notice of the request had been given to five affected parties namely, the four senior executives named in the request and the Ontario Securities Commission. The first interim decision letter also provided a fee estimate of $577.00, and indicated that the OEB's final decision would be issued within 30 days. Finally, this letter provided that the Chief Operating Officer (COO) of the OEB was responsible for the decisions made with respect to the request.

The requester wrote to the OEB in response and objected to the designation of the COO as the individual responsible for the decisions on the basis that the COO was in a conflict of interest position.

The affected parties responded to the OEB's notice and consented to the release of some of the records. The OEB then issued a second interim decision letter providing a fee estimate of $1155.00 and requesting payment before releasing the records. It also indicated that in view of the appellant's conflict of interest objection, the OEB's Secretary (the Secretary) was designated as the individual responsible for making the decisions.

The requester paid the fee. Under cover of a final decision letter issued by the Secretary, the requester received access to some records, was denied access to other records in their entirety and was denied access to a portion of the remaining records. In support of its position, the OEB relied upon the exemptions set out in sections 18(1)(e) and (f), 21(1)(f) and 22, and also claims that one record is excluded from the scope of the *Act* under section 65(6).

The requester (now the appellant) appealed that decision on the basis of the fee and the denial of access. During mediation, the appellant broadened the scope of the appeal to include a reasonable search issue as he is of the view that additional records must exist. As well, the appellant provided additional clarification of the scope of the appeal by confirming that he is not seeking access to the credit card and bank account information that was severed from the records released. Mediation was not successful in achieving a settlement of the matter and it proceeded to the adjudication stage of the appeal process.

I issued a Notice of Inquiry to the OEB and the affected parties, initially, requesting representations. The OEB provided representations in response. I also received representations from three of the five affected parties. I then issued a Notice of Inquiry to the appellant and enclosed the severed representations of the OEB and the affected parties. The appellant provided representations and this matter was moved to the order stage of the appeal process.

RECORDS AT ISSUE:

The records that remain at issue and the exemptions claimed by the OEB in respect of those records are as follows:

Record Number	**Exemption/exclusion claimed**	**Description**
1	21(1)(f) 18(1)(e) 18(1)(f)	Supplementary Pension Plan for Executive 1
2	21(1)(f) 22 Non-responsive	Letter dated April 14, 2003 to Executive 1 from Minister of Energy, including proposed remuneration and compensation package for Executive 1 - OEB claims that some information is non-responsive
3	21(1)(f) 22	Order in Council 1057/2003 approving remuneration and compensation package for Executive 1
4	21(3)(g)	Performance Measurement of Executive 1 for 2003-2004 Transition-Audit Report
5	21(3)(e) &(f)	2004 Pension Tax Equalization Payment Letter and Calculation for Executive 1
6	21(1)(f) 65(6)	Clarity Document between Ontario Securities Commission and OEB regarding Executive 1's supplementary pension benefits
7	22	Public Service Pension Plan
8	21(1)(f), 21(3)(d) 22	March 2004 Job Offer for Executive 2
9	21(3)(g) 21(3)(d)	90 day Objectives Year End Review Form for Executive 2
10	21(3)(g)	Annual Performance Appraisal Form for Executive 2
11	21(3)(f) 22 Non-responsive	Letter dated August 8, 2003 to the Minister of Energy from the Vice-Chair of the OEB regarding remuneration of Board Members, other than Executive 1, with attached Minutes of the Management Committee from August 1, 2003-OEB claims that some of the information is non-responsive
12	21(3)(e) & (f)	Pension Tax Equalization Payment for the Executives 3 and 4
13	21(1)(f)	Severed Portions of the Expense Records for all four Executives

DISCUSSION:

CONFLICT OF INTEREST AND AUTHORITY OF THE ACCESS TO INFORMATION DECISION MAKER

The appellant submits that the individual who was originally designated by the OEB to oversee his access to information request was in a conflict of interest position as some of the responsive records contain information relating to her.

Previous orders of this office have found that, in deciding whether or not a conflict of interest exists, the following considerations are relevant: (1) whether or not the decision maker had a personal or special interest in the responsive records and, (2) whether a well informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision maker (see Orders M-705, MO-1283, MO-1285, and PO-1868).

Having reviewed the records, the request, the decision letters and the submissions of the parties in this appeal, I accept the appellant's argument, in part. I find that the original delegated individual was in a conflict of interest position in relation to the first interim decision. That individual had a personal interest in the responsive records and the outcome of the decision, as the request was clearly related to records that were generated by her and that contained information relating to her. In those circumstances, in my view, a well informed person, considering all of the circumstances, could reasonably perceive a conflict of interest. Accordingly, both parts of the test applied in previous orders have been met with respect to the decision making authority of the original delegated individual in the circumstances of this appeal.

However, after the appellant complained about the alleged conflict of interest to the OEB, the Secretary advised that he would be responsible for the further decision making relating to the request. I find, in the circumstances of this appeal, that when the OEB responded to the appellant's objections to the conflict of interest by designating the Secretary as the decision maker, it thereby avoided any conflict that may have existed prior to that point in time.

As noted above, the second interim decision and the final decision with respect to the access to information request were issued following the designation of the Secretary as decision maker. I find that in view of the fact that these two decisions were made following the change in decision maker, any conflict of interest that existed prior to that point in time had no impact on the final decision in this matter.

The appellant also submits that the Secretary does not have the authority under the *Act* to oversee an access to information request. The appellant submits that only the Freedom of Information Co-ordinator (FOIC) at the OEB can assume that responsibility and that when the Secretary purported to assume that authority it did so contrary to the *Act*.

The appellant submits:

> I argued that [named individual] was the FOI coordinator and it was her responsibility to ensure fairness and oversee the process. That e-mail went ignored until I e-mailed [named individual] at the IPC and copied [named individual] on November 10, 2006.
>
> …
>
> I argued that the legislation does not give the OEB Board Secretary authority to oversee an FOI request. I raised this point with the OEB and said it was the responsibility of the OEB's FOI coordinator, [named individual], but again they did not acknowledge my objection.

The authority to make decisions under the *Act* lies with the head of the institution. Regulation 460 names the Chair of the OEB as the head for the purposes of the *Act*. The head of the institution may delegate his or her powers under the *Act* in accordance with section 62(1) of the *Act* which reads:

> A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

The FOIC is an administrative position that is not defined in or created by the *Act*. Although it is possible for a head to delegate decision making powers to a FOIC, it is equally possible for the head to delegate those powers to any other employee. Without that delegation of authority, the FOIC does not have any decision making powers. There is no evidence before me that would suggest that the FOIC had delegated authority in this appeal. Indeed, the only evidence before me is that the authority under the *Act* to make the decision in this appeal was given initially to the original delegated individual, and then to the Secretary.

Having reviewed the representations of the parties, the records, the correspondence exchanged at the time the request was made and in particular, the two interim and the final decisions, I find that the Secretary was the delegated decision maker with respect to this request and not the FOIC.

REASONABLE SEARCH

I now turn to consider the appellant's claim that the OEB failed to conduct a reasonable search for responsive records.

The appellant submits:

> The contents of the attached letter do not support OEB claims that the FOI coordinator [named individual] "determined areas within the Board that would have the records…" With all due respect, [named individual] had little to determine with respect to this FOI request. Again, her signature is not found on any letter from the OEB. I had no contact with her in the past year except to complain via e-mail about the conflict of interest. Also, the OEB submission makes no note of the conflict of interest issue or reference to the Board Secretary as the principal contact for my request.
>
> I am unclear what "There are no records that would have existed but have since been destroyed" means. With respect to the destruction of government records, the Board is required by law to keep records for a period of time – I believe 8 years, yet as a corporation they have existed for less than four years. If record were destroyed those records could have proven damaging to certain parties of the request and should be investigated and revealed to the public.
>
> …
>
> It is my contention that the OEB has not disclosed the existence of all records pertaining to compensation, including salary, bonus/incentives, and supplementary pensions. I noted in the materials from the IPC the memo from the Ontario Securities Commission, which did not object to the release of information pertaining to [named individual]'s supplemental pension plan.
>
> …
>
> Also, the OEB does not include documents in the [appendices] that must exist and are necessary to authorize the [Executives] to receive bonuses or incentives. It is again my contention that these documents need exist to support his receiving incentive monies, either in the form of Minister's letter, OEB management committee letters, or other memorandums [sic]. The OEB does not acknowledge any possible third-party reports from outside firms that may support (or not) a bonus for the [Executives]. It is my contention that those documents exist and are a matter of public record.
>
> …
>
> While the OEB package contained a number of signed affidavits, I noted that the FOI coordinator herself had NO signed affidavit.

The OEB provided the following representations on this issue:

> When the request was received by the Board, the FOI Coordinator determined that the areas within the Board that would have the records that would be responsive to the request were Human Resources and Finance. Representatives from these two groups were contacted and a meeting was arranged to discuss what was being requested so that the employees could know what to search for. It was pointed out to the FOI Coordinator that records from before the Board became an independent crown corporation would not be with the Board but with the Ministry of Energy. The requester was contacted to inform him of this point and the requester agreed to narrow his request to only the timeframe after the Board became an independent crown corporation (namely, April 1, 2004). The employees from Human Resources and Finance were selected because they had expertise in their respective areas and were the most knowledgeable staff at the Board to search for the requested records.
>
> The selected employees searched the files in their respective areas and informed the FOI Coordinator of their results. The records found by the employees searching for the records that were responsive to the request were set out in the index of records provided by the Board to the requester in the Board's November 2, 2005 letter. The requester indicated by email that he did not believe all records had been found. The Board conducted a further search and found one additional record responsive to the request. This was communicated to the requester in the Board's November 2, 2005 letter and the record was added to the Board's index of records.
>
> There are no records that would have existed but have since been destroyed.

Attached to the representations of the OEB are affidavits of four employees who conducted searches for the responsive records. These employees, with experience in relevant departments of the OEB, attest to the fact that a search was conducted for responsive records.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act* [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Having reviewed the representations of the parties and the affidavits provided by the four employees of the OEB, I find that the OEB has conducted a reasonable search for the records responsive to this request. In making my decision, I have taken into account the number and level of experience of employees that the OEB asked to conduct the search for responsive records and the fact that the search was conducted on more than one occasion. I have also taken into account the lack of persuasive evidence that the appellant has submitted to demonstrate that further records exist. I am sensitive to the fact that it is difficult for the appellant to submit evidence in his circumstances. The fact remains, however, that the appellant has not provided any evidence that would persuade me that the OEB has failed to conduct a reasonable search.

I do not accept the appellant's argument that the fact that the FOIC had a minor role to play in the search for responsive records is relevant to the reasonable search issue. The OEB asked four employees with experience with records similar to the records that are at issue in this appeal to conduct searches, and they provided evidence by affidavit to support the fact that those searches were carried out. The role or lack thereof of the FOIC is not relevant to the issue in view of the fact that the appropriate employees conducted the search.

Nor do I agree with the appellant's suggestion that the OEB's reference to "no records that would have existed but have since been destroyed" is unclear. In my view, the OEB is stating that there are no records that have been destroyed by the OEB that may have been responsive to this request.

Accordingly, I find that the OEB has conducted a reasonable search for records as required by section 24 of the *Act*. I now turn to consider the issue of the reasonableness of the fee.

FEES

The appellant claims that the fee charged for access to the responsive records is excessive.

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below. Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> 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.

More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460. Section 6 reads:

> 6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

The appellant did not submit representations on this issue.

The OEB submits that it applied the rules set out in the *Act* and the Regulations to calculate the fee charged to the appellant. The initial estimate of the fee provided by the OEB was $577.00. The fee was calculated as follows:

Search time – 18 hours @ $30.00 per hour	$540.00
Photocopying – approx. 160 pages @ 20 cents per page	$ 32.00
Delivery	$ 5.00
Total	**$577.00**

The first interim decision letter also indicated that there would likely be additional charges for the cost of severing information from any records that might be released and that those charges would be added to the total cost of disclosure. The appellant paid the sum of $577.00 as a deposit in accordance with the request of the OEB. After notice was given to the affected parties, the OEB issued a second interim decision letter in which it provided a revised fee estimate as follows:

Search time – 18 hours @ $30.00 per hour	$540.00
Preparation time – 17 hours @ $30.00 per hour	$510.00
Photocopying – approximately 500 pages @ 20 cents per page	$100.00
Delivery	$ 5.00
Total	**$1155.00**

As previously noted, the OEB asked the appellant to pay the difference between the amount paid pursuant to the first interim decision letter and the amount set out in the second interim decision letter. The appellant made that payment.

The OEB provided this office with affidavits from four employees to support its claim for the amount of time required to search for and sever the responsive records. One of the employees worked in the finance department, one was an accountant, one was the manager of the human resources department and the last one was a public records clerk. As previously noted, these employees were experienced staff who had expertise in dealing with the type of record holdings that were the subject matter of this request.

The fee claimed by the OEB includes an amount of $510.00 for the severance of the responsive records. The OEB claims the cost of severance on the basis of $30.00 per hour for 17 hours of work. Previous orders of this office have found that section 57(1)(b) includes time for severing a record and that generally, it takes two minutes to sever a page that requires multiple severances [Orders MO-1169, PO-1721, PO-1834, PO-1990]. At the rate of 2 minutes per page, the time involved to sever 500 pages of records is 17 hours. It follows that the cost for severing 500 pages of records is $510.00. As multiple severances were made to the records and the records numbered in excess of the 500 estimate, I find that the amount charged by the OEB for severing the records is reasonable.

Having reviewed the affidavits referred to above, the records and the representations, I find that the OEB has submitted sufficient evidence to support its claim for $540.00 for search time and that the amount claimed is reasonable. Given that the records released to the appellant total in excess of 500 pages, I also find that the OEB has accurately calculated the amount of the fee that relates to photocopying charges.

The issue before me is whether the OEB's fee is reasonable and is calculated in accordance with the *Act* and the Regulations. Having carefully reviewed and considered the representations of the parties, the affidavits provided, the records and the correspondence that was exchanged between the parties regarding the fee, I find that the basis for the calculation of the fee by the OEB is reasonable and is in accordance with the provisions of the *Act* and the Regulations. In conclusion, I uphold the total amount of the fee charged by the OEB. I will now turn to consider the issue of the responsiveness of the records.

RESPONSIVENESS

I will consider whether Records 2 and 11 contain unresponsive information as claimed by the OEB. Although the OEB did not make any representations on this issue, it clearly identified the portions of Records 2 and 11 that it considered unresponsive to the request in the copies of the records provided to this office. The appellant did not make any representations on this issue.

Previous orders have established that in order to be responsive, a record must be "reasonably related" to the request [Order P-880]. In light of the wording of the appellant's request, I find that the portions of Records 2 and 11 identified by the Ministry as "non-responsive" fall outside the scope of the appellant's request as they are not reasonably related to the request. For clarity, the responsive and unresponsive portions of these records are identified below.

Record 2

Record 2 is a letter from the Minister of Energy to Executive 1 that sets out the terms and conditions of the employment of Executive 1. I find that this information is responsive to the request. It also contains information relating to plans, procedures or strategies regarding the business operations of the OEB which is not reasonably related to the request and I find that this information is not responsive to the request.

Record 11

This record is a letter from the Vice-Chair of the OEB to the Minister of Energy asking him to approve a resolution of the Management Committee of the OEB with respect to the remuneration of the members of the OEB other than Executive 1. I find that this letter is reasonably related to the request and is responsive.

Attached to the letter is a complete copy of the Minutes of the Committee meeting containing the resolution. I have carefully reviewed the record and find that it contains information that is not reasonably related to the request and it is therefore not responsive. I also find that it contains information on page 4 and in Exhibit B that relates to the remuneration and benefits of Executives 3 and 4 that is responsive to this request.

SECTION 65(6) – EMPLOYMENT RECORDS

The OEB relies upon section 65(6)3 of the *Act* in support of its claim that Record 6 is excluded from the scope of the *Act*. Record 6 is described by the OEB as a "Clarity Document" between the OEB and the Ontario Securities Commission regarding Executive 1's supplementary pension benefits.

If section 65(6)3 applies to the record, and none of the exceptions found in section 65(7) apply, the record is excluded from the scope of the *Act*, and it will not be necessary for me to consider the application of any other exemptions with respect to that record.

Section 65(6) reads, in part:

> Subject to subsection (7), 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:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

The term "in relation to" in section 65(6) 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].

For section 65(6)3 to apply, the institution must establish 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 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.

If the record falls within any of the exceptions in section 65(7), the *Act* applies to them.

Part One: collected, prepared, maintained, used

The OEB's submissions on the application of all three parts of the test for the application of section 65(6)3 are as follows:

> Record 6 is a document between the Board and the Ontario Securities Commission (the "OSC" – also an institution under FIPPA). The record summarizes the respective understandings of the OSC and the Board in relation to [Executive 1]'s supplemental pension arrangements for [Executive 1]'s periods of service with the OSC … and the Board. The document was prepared, maintained and used by the Board (and the Board assumes by the OSC as well) in relation to meetings, consultations, discussions or communications the Board had with the OSC about employment related matters in which the institution has an interest. The term "in relation to" has been held by the IPC to mean "for the purpose of, as a result of, or substantially connected to." The record clearly meets that definition and the record clearly relates to employment related matters. The record reflects the understanding of the two institutions in matters that relate to [Executive 1]. The record clearly meets that definition and the record clearly relates to employment related matters. Clearly the Board has more than a "mere curiosity or concern" in the records as the record relates to one of the Board's own workforce and the record has the capacity to affect the Board's rights and obligations.

The OEB submits that the exceptions set out in section 65(7) do not apply to the record.

As previously noted, the OSC was given notice of the request for access to this record as an affected party and it filed representations. In its representations, the OSC also submits that Record 6 falls outside the scope of the *Act* on the basis of section 65(6)3. The OSC submits that the record satisfies part one of the test under section 65(6)3 because it was both prepared and used by the OEB and the OSC:

> The document is being "used" by both institutions to fulfill two purposes. First, it is intended to clarify the understandings that each has with respect to supplemental pension entitlements for [Executive 1]. It is also being used by each institution to assist in the preparation of financial statements.

The appellant did not submit representations regarding the application of section 65(6)3.

Having reviewed the record and the representations filed, I find that Record 6 was prepared, maintained and used by the OEB and the OSC, and part 1 of the test for the application of section 65(6)3 has been met.

Part Two: meeting, consultations, discussions or communications

The OEB's submissions regarding part two of the test are noted above. The OSC provided the following further comments regarding the applicability of part two of the test:

> The document is clearly the product of "consultations" and "discussions" between the OEB and the OSC. In addition, the fact that it is entitled "Clarity Document" suggests in the strongest terms that it involves "communications" between the two organizations with respect to the understandings each has with respect to its supplementary pension obligations to [Executive 1].

Having reviewed the records and the representations of the parties, I find that Record 6 is an agreement that was entered into as a result of a consultation, discussions or communications between the OSC and the OEB regarding their respective contributions to the supplemental pension plan of Executive 1. Accordingly, I find that part two of the test has also been met.

Part Three: Labour relations or employment related matters in which the OEB has an interest

The OEB submits that part three of the test has also been satisfied as Record 6 "clearly relates to employment related matters".

The OSC submits:

> …the record clearly involves an employment related matter. First, the document is concerned exclusively with the pension entitlements that flow in part out of the Public Service Pension Plan. These pension entitlements are certainly an employment–related matter, a point that was recognized by Assistant Commissioner Mitchinson in Order PO-2212 where he noted that "[p]ension benefits form part of the compensation package provided to employees of the OPS." As he also observed in that case, "[t]he only reason the records exist is because the pension beneficiaries had an employment relationship with the OPS." In that decision, Assistant Commissioner Mitchinson concluded that the pension-related records that had been requested from Management Board of Cabinet fell squarely within section 65(6)3 and, therefore, were excluded from the scope of the Act.
>
> The position of individuals, such as [Executive 1], who are appointed to fixed–term positions within the public service is different from individuals who are in a clearly defined employer-employee relationship. Nonetheless, the courts have acknowledged that fixed-term appointments still involve an employment relationship. This is clear from the court of Appeal's decision in *Hewat v. Ontario*, (1998), 37 O.R. (3d) 161, a case involving the termination of the "employment" of several Vice Chairs of the Ontario Labour Relations Board.

> Therefore, if an employment relationship exists, the "employment–related matters" component of the third part of the test should be satisfied.
>
> Even though [Executive 1] is no longer employed with the OSC this does not change the fact that this is an employment-related matter in which the OSC has an ongoing interest. This conclusion is supported by Order PO-2212 which involved the pension benefits of retired employees. As Assistant Commissioner Mitchinson noted, "records stemming from a previous existing employment agreement also concern "employment-related matters", regardless of the fact that the employment relationship has terminated."
>
> The third part of the test also requires that the institution have an "interest" in the record. As noted previously, the document was drafted to clarify both institutions' understandings with respect to their supplementary pension obligations to [Executive 1] which extend into the future. Therefore, both institutions have an ongoing interest from the pension obligation perspective. But the document is also intended to assist both institutions in fulfilling their financial reporting obligations. In this regard, it is clear that under section 3.9 of the *Securities Act* the OSC has a statutory obligation to prepare financial statements that are subject to audit. The OEB has a similar obligation under section 4.8 of the *Ontario Energy Board Act, 1998*. Therefore, it is submitted that fulfilling these statutory reporting obligations clearly meets the "interest" requirement for both institutions in the third part of the test.

Having reviewed the record and the submissions of the parties, I find that part three of the test has been met because the consultations and communications reflected in Record 6 were about employment-related matters in which the OEB (and the OSC) have an interest. I agree with the submissions of the OSC regarding the nature of Executive 1's relationship with the OEB and his former employer, the OSC. Although he may have been employed and may be employed for a fixed term, his relationship was an employment relationship as that term is used in the *Act*. I also find that the respective obligations of the OSC and the OEB for contributions to the supplementary pension plan are matters in which the OSC and the OEB "have an interest". Accordingly, I find that part three of the test has been met.

Subject to my consideration of the exceptions to the exemption found in section 65(7), I find that Record 6 meets the three part test set out in section 65(6)3 and is excluded from the scope of the *Act*.

Section 65(7): exceptions to section 65(6)

If the record falls within any of the exceptions in section 65(7), the *Act* applies to them. Section 65(7) reads:

> 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.

Both the OEB and the OSC submit that Record 6 does not fall within any of the exceptions set out in section 65(7). The OSC submits:

> Section 65(7) can only come into play if the record in issue is an "agreement" between [Executive 1] and either the OEB or the OSC, or both. It is submitted that the Clarity document is not an agreement between [Executive 1] and the OEB and the OSC. The only signatories to the document are the OEB and the OSC and, as noted previously, the explicit purpose of the document is to reflect each institution's understandings of its obligations to [Executive 1].

Having reviewed the submissions and the record at issue, I find that none of the exceptions set out in 65(7) apply. Accordingly, I find that Record 6 is excluded from the *Act* pursuant to section 65(3)3 and I uphold the decision of the OEB to withhold this record.

As noted above, in view of my finding that Record 6 is not subject to the *Act*, it is not necessary for me to consider whether any of the other exemptions claimed in the alternative by the OEB are applicable to that record. I now turn to consider the exemptions claimed by the OEB with respect to the responsive portions of Records 1-5 and 7-13.

ECONOMIC AND OTHER INTERESTS

The OEB has claimed that Record 1, a copy of the Supplementary Pension Plan of Executive 1, is exempt under sections 18(1)(e) and (f) of the *Act*. Those sections read:

A head may refuse to disclose a record that contains,

> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

The purpose of section 18 is to protect certain economic interests of institutions and avoid creating an unfair advantage for those with whom the institution may do business by the premature disclosure of plans to change policy or commence projects. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute.
>
> …
>
> There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project.
>
> …
>
> [T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other government. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.

In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution. [Order PO-2064]

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

In order for section 18(1)(f) to apply, the institution must show that:

1. the record contains a plan or plans, and

2. the plan or plans relate to:

   (i) the management of personnel, or
   (ii) the administration of an institution, and

3. the plan or plans have not yet been put into operation or made public [Order PO-2071]

Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Order P-348].

The OEB's submissions with respect to Record 1 are as follows:

> It is difficult to set out what the plan deals [sic] without giving away the contents for the plan. However, the Board believes that it is a plan within the meaning of section 18 because it is a detailed method by which a thing is to be done (i.e. a detailed method by which [Executive 1]'s supplemental pension plan is to be done.) The plan has not yet been made public. Furthermore, the plan relates to the management of personnel or the administration of the Board because it relates to the management and administration of [Executive 1]'s pension plan by the Board.

The appellant did not file any submissions regarding the application of section 18 other than to state that the records requested under the *Act* are public documents that are not subject to the exemptions in the *Act* that the OEB relies upon.

I have carefully examined the record at issue and the representations of the parties and have determined that section 18(1)(e) is not applicable to Record 1 (the Supplementary Pension Plan) for the following reasons. Record 1 is not a "position(s), plan(s), procedure(s), criteria or instruction(s)" as those terms have been defined by previous orders. The fact that the word "plan" appears in the title of this record is not determinative of the issue. Although employment pension benefit schemes and other medical and related insurance benefit schemes that may be available to employees through their employment, or through other independent sources, are commonly referred to as plans, they are not necessarily "plans" as that term is used in section 18(1)(e). It is necessary to examine the nature of the information contained in the record itself.

Record 1 provides supplemental pension benefits to Executive 1 that are payable in addition to the benefits that he may be entitled to under the Ontario Public Service Pension Plan. It describes in detail the benefits that Executive 1 is entitled to under the plan. The nature of the information that appears in the plan is similar to the nature of the information that appears in the Ontario Public Service Pension Plan. It is a final agreement and it is in full force and effect.

In my opinion, benefit schemes of this nature that are in full force and effect, and that are not the subject of negotiations or proposed changes, do not meet the test for the application of section 18(1)(e). In reality, the benefit scheme set out in Record 1 is part of the overall compensation package for Executive 1. Disclosing details of the compensation package of this individual cannot be equated to disclosing positions, plans, procedures, criteria or instructions for labour relations negotiations, or to involve harm to the economic interests of the province. Accordingly, I find that section 18(1)(e) does not apply to this record.

Nor am I persuaded that section 18(1)(f) applies to this record. There are three parts to the test that must be met for the application of section 18(1)(f). Record 1 is a final agreement between the OEB and Executive 1 regarding the provision of pension benefits to Executive 1 and it does not set out a "plan of action" or a "thing to be done" or a "design or a scheme" as those terms are used in part one of the test for the application of section 18(1)(f). As noted above, details of a compensation package provided to a government executive cannot be said to be related to the management of personnel as contemplated by section 18(1)(f). Further, Record 1 clearly provides that it is effective from the date of commencement of the employment of Executive 1. Therefore, it has been put into operation and does not meet part three of the test. As all three parts of the test must be satisfied before section 18(1)(f) applies, I find that Record 1 does not fall within the scope of section 18(1)(f) of the *Act*.

PERSONAL INFORMATION/PERSONAL PRIVACY

I now turn to consider the application of the personal privacy provisions found in section 21 of the *Act* to Records 1, 2, 3, 4, 5, 8, 9, 10, 11, 12 and 13.

As noted, the OEB relies upon section 21(1), in the alternative to section 18, as the basis for withholding Record 1 in its entirety. As I have found that section 18 does not apply to Record 1,

I will consider the application of section 21(1) to this record. The OEB also relies upon section 21(1) of the *Act* as the basis for withholding the other records listed above.

For ease of analysis, I will again summarize the records to which the OEB has claimed the section 21(1) exemption:

Record 1 – the Supplementary Pension Plan for Executive 1;

Record 2 – a letter setting out the exact salary of Executive 1 and other terms of the Executive's remuneration;

Record 3 – the Order-in-Council approving the remuneration and compensation package for Executive 1;

Record 4 – Performance Measurement for Executive 1 for the 2003-2004 Transition Audit Report;

Record 5 – Pension Tax Equalization Payment letter for Executive 1;

Record 8 – March 2004 Job Offer for Executive 2;

Record 9 – 90 Day Objectives Year End Review Form for Executive 2;

Record 10 – Annual Performance Appraisal Form for Executive 2;

Record 11 – Letter dated August 8 to the Minister of Energy, the responsive portions of which deal with the remuneration of Board Members, and attached Minutes of the Management Committee;

Record 12 – Pension Tax Equalization Payment for Executives 3 and 4; and

Record 13 – a series of expense records for the four senior executives. The OEB has released portions of these records but relies upon section 21(1) as the basis for withholding access to information in the records including bank accounts, credit card numbers, addresses, phone numbers and the names of individuals not included in the requests (for example, individuals attending lunch or dinner meetings with the affected parties), and menu selections. The appellant has indicated that he does not want bank account numbers or credit card numbers, so I will remove these data items from consideration.

Personal Information

The section 21(1) personal privacy exemption claimed by the OEB applies only to information that qualifies as "personal information" under section 2(1) of the *Act*. The following parts of the definition of "personal information" in section 2(1) are relevant to this appeal:

> "personal information" means recorded information about an identifiable individual, including,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (h) the individual's name where 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11]. To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225]. To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

In Order PO-2225, referred to above, former Assistant Commissioner Tom Mitchinson, set out the following two step process applicable to a determination of whether information is "about" an individual in a business rather than a personal capacity, and therefore does not constitute personal information:

> ...the first question to ask in a case such as this is: *"in what context [does the information] of the individuals appear"*? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

…

> The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

The OEB has submitted that Records 1-5, 8-12 and parts of Record 13 contain the personal information of the four senior executives. The OEB also submits that Record 13 contains personal information of individuals who have not been notified as affected parties in this appeal. These are individuals who may be named in the expense accounts of the senior executives, for example, because they dined with the executives and had their meal paid for by OEB.

As previously noted, two of the executives filed representations in this appeal. Although they did not specifically address the application of the personal privacy provisions of the *Act* in their representations, they indicated an intention to rely upon the representations of the OEB.

Records 1-5 and 8-12

I have reviewed these records and note that they all contain the personal information of the four senior executives. In particular, the records contain the personal information relating to the employment history and compensation packages for the executives (paragraph (b)), identifying numbers assigned to the executives (paragraph (c)), home address and telephone numbers of the executives (paragraph (d)), and to an executive's name where it appears with other personal information relating to the executive or where the disclosure would reveal other personal information about the executive (paragraph (h)).

Record 13

Record 13 consists of over 500 pages of expense claim forms and the supporting documentation for those forms for the four senior executives. As previously noted, a significant portion of these records has already been disclosed to the appellant. The undisclosed portions of the pages include credit card numbers, expiry dates and other banking information, home address and telephone numbers and cell phone numbers of the executives and details of personal expenditures for which no compensation from the OEB was claimed. The pages also include the names of other individuals who attended lunch or dinner meetings with the executives and menu selections of individuals attending the lunch or dinner meetings. Finally, some of the records include cell phone statements and hotel receipts that reveal phone numbers telephoned by the senior executives.

As previously noted, the appellant has stated that he does not seek access to the credit card and banking information of the executives and therefore it is not necessary for me to make a

determination with respect to this information. I find that the home address and home telephone numbers of the executives are all personal information as defined in section 2 of the *Act*.

However, the business addresses and phone numbers, or any business related contact information for the executives is not personal information. In numerous instances, this information has been severed from the expense account information provided to the appellant. This is information about the executives in a business and professional context and does not qualify as personal information as defined by section 2 of the *Act*. Consequently, this information does not qualify for the exemption provided by section 21(1) of the *Act*. This reasoning applies equally to the names of OEB staff who sent or received emails regarding the expense claims. Their names appear in a business and professional context and they should be released.

I also find that the information relating to any personal expenditures for which the executives have reimbursed the OEB is their personal information.

I find that the information regarding the menu selections of the senior executives and their guests that appears in the expense claim forms is personal information as defined in section 2 of the *Act* as it is about the individuals in a personal capacity and not in a professional capacity and is not related to their professional obligations and responsibilities. Applying the two part test set out by former Assistant Commissioner, Tom Mitchinson, I find that although the context in which the information appears is a business context, there is something about the information at issue that, if disclosed would reveal something of a personal nature about the individual. Accordingly, I find that the menu selection of the executives and their guests is personal information as that term is defined in the *Act*.

I now turn to consider the names and contact information of the individuals that were entertained over lunch and dinner meetings with the four executives. The OEB submits:

> Addresses, names and phone numbers are all personal information under the definition of personal information in FIPPA. Again, it should be noted that the other individuals whose name and/or phone numbers appeared in the records were not contacted for their consent to the release of the information because they were not the subject of the request and the Board had decided not to release the information.

The appellant did not make any representations on this issue.

Having reviewed the records, I note that a number of the individuals that were entertained by the four senior executives were other staff members of the OEB. Others were government officials employed outside the OEB and the balance related to other individuals. The number of expense claims that relate to business meetings that included lunch and dinner over the 17 month period covered by the request is approximately 200. In addition, in some cases, employees of the OEB were recipients of gifts that were subject to expense accounts submitted by an executive.

Applying the test set out by former Assistant Commissioner Mitchinson, I find that the names and contact information of the individuals entertained by the senior executives, or receiving gifts from affected parties, are not personal information as defined by the *Act*. As is the case with all government employees, employees of the OEB are only entitled to claim reimbursement from the OEB for expenses that they have incurred if they relate to business conducted on behalf of the OEB. It is routine practice for all government employees to claim for these expenditures by providing supporting documentation and details related to the expense. The system is designed to make the employees accountable for the expenditure of public funds. In these circumstances, I find that the details of those expenditures and the names of individuals that were entertained appear in an exclusively business, professional or official government context.

The second part of the test articulated by the former Assistant Commissioner is whether there is something about the information at issue that if disclosed would reveal information of a personal nature about the individual. If the executives were conducting business meetings over meals with other individuals, then the disclosure of the names of the individuals that participated in those meetings does not reveal information of a personal nature about those individuals. The only information that is revealed is that these individuals had a business or professional relationship with the executives. Similarly, if an employee of the OEB received a gift paid for by an executive, it is to be presumed that the gift was as a result of business or professional accomplishments and not given in a personal capacity. Accordingly, I find that the second part of the test has been satisfied and that the names and contact information of the individuals that were entertained by the executives are not the personal information of those individuals.

With respect to the information of the individuals that were entertained by the executives, the OEB submits:

> Knowing the names of people who may have met with the four Board individuals who are the subject of the request (including what day they met with them, etc) is not necessary for promoting public scrutiny and their personal information should be kept confidential.

With respect, I disagree with the position put forward by the OEB. Given that public funds covered the cost of these meetings, it is to be presumed that the meetings involved public business. Disclosing the names of individuals who met with affected parties is therefore not disclosing any information of a personal nature.

This reasoning applies equally to the business expense claims for cell phone calls and calls made from hotels. The cell phone records and hotel receipts reveal the phone numbers that were telephoned by executives. The claim is made that the telephone calls were made for the purpose of doing business, and therefore the telephone numbers appear in an exclusively business or professional context. Equally, in these circumstances, the disclosure of the telephone numbers would not reveal information of a personal nature about these individuals. The only information that would be revealed by the disclosure of the telephone number is that these individuals were involved in a business relationship with the affected party. This is not information of a personal

nature. Accordingly, I find that the telephone numbers contained in the cell phone records and hotel receipts are not personal information.

In summary, I find that Records 1-5, 8-12 and 13 all contain personal information of the four senior executives of the OEB. As the records at issue contain the personal information of individuals other than the appellant, I must turn to consider the application of section 21 of the *Act* to the records.

However, business or professional contact information and the identities of individuals other than the executives on the expense claims and records do not constitute personal information as defined by the *Act* and cannot be exempted from disclosure pursuant to section 21(1) of the *Act*. Since no other exemptions were claimed for this information, I will order it to be disclosed by the OEB.

Invasion of Privacy

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

The OEB submits that the section 21(1)(f) exception to the exemption applies to Records 1-5, 8-12, and 13.

As noted above, representations were filed by two of the four senior executives who are affected parties in this appeal. One of these executives submitted that names, phone numbers, menu selections, bank account numbers and credit card numbers should be severed from the responsive records. The other executive submitted that disclosure of salary and financial information would be an unjustified invasion of his personal privacy and that this information should not be disclosed. In all other respects, both of the executives rely upon the representations filed by the OEB.

Section 21(1)(f)

Section 21(1)(f) 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.

Section 21(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 21(2) provides some criteria for the institution to consider

in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. It can not be rebutted by either one or a combination of the factors set out in section 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. Section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy, and when it applies, the information is not exempt.

Section 21(4)

I will turn first to consider the application of section 21(4) to the personal information of the four senior executives and other individuals. Sections 21(4)(a) and (b) read:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;
>
> (b) discloses financial or other details of a contract for personal services between an individual and an institution; or

Before I can consider whether section 21(4)(a) or (b) applies, it is necessary to determine whether the executives were employees or independent contractors. I considered the relationship of Executive 1 with the OEB in my discussion of the application of section 65(6)3 of the *Act*. As previously noted, I found that Executive 1 was an employee of the OEB despite the fact that his employment was for a fixed term. I have reviewed the responsive records relating to the other executives and the representations of the parties and I find that their relationship with the OEB was also that of employee and employer within the meaning of section 21(4)(a). I turn to consider the application of section 21(4)(a) to the records referred to above.

Record 1

Record 1 is the Supplementary Pension Plan for Executive 1. The OEB submits that this record contains the financial information of Executive 1 and of third parties in relation to Executive 1, and that therefore section 21(3)(f) applies. As noted above, if any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21(1)(f). That presumption can only be rebutted by the application of section 21(4) or the public interest override found in section 23 of the *Act*. If I find that section 21(4) applies, it is not necessary for me to consider the OEB's arguments

regarding the application of section 21(3). In the circumstances of this appeal, I have decided to consider, initially, the question of the application of section 21(4) to Record 1.

I note that while the OEB has made representations regarding the application of section 21(3)(f) to the record, it has not made any representations that specifically address the application of section 21(4)(a) of the *Act*.

In Order M-23, former Commissioner, Tom Wright, offered the following comment regarding the meaning of the term "benefits" under the municipal equivalent of section 21(4)(a):

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

I agree with the comments of former Commissioner Wright and adopt them here. I find that Record 1 contains information relating to the pension benefits of the affected party and that section 21(4)(a) applies to that information. Accordingly, it is not necessary for me to consider the application of section 21(3)(f) to this record.

In conclusion, I find that the disclosure of Record 1 does not constitute an unjustified invasion of privacy under section 21(1)(f) of the *Act*, as it falls within section 21(4)(a), and it should be disclosed in full to the appellant.

Records 2, 3, 8 and 11

All of these records include information relating to "benefits" such as details regarding salary, pay for performance amounts, pension entitlements, standard employee benefits, business expense entitlements, car and parking allowances and severance entitlements. Applying the definition of former Commissioner Wright noted above, I find that the information contained in these records that relates to benefits falls within section 21(4)(a) of the *Act*.

Record 8 also contains information about the employment responsibilities of Executive 2 and I find that this information falls within section 21(4)(a) of the *Act*. This information includes information regarding position description, reporting relationship, conflict of interest and OEB Code of Conduct obligations, and the requirement to give notice of termination of employment.

Record 8 includes personal information such as the date of birth, social insurance number, banking information, employee number, personal address and phone details and emergency contact information that does not fall within section 21(4)(a) and I must consider the application of sections 21(2) and (3) to that information.

Records 5 and 12

These records contain information regarding pension tax equalization payments that the OEB has agreed to pay to the executives. I find that this information is a benefit as that term is used in section 21(4)(a) of the *Act*. Accordingly, these records should be disclosed in their entirety to the appellant as to do so would not constitute an unjustified invasion of privacy under section 21(1)(f).

Records 4, 9 and 10

These records all contain information that relates to the evaluation of the performance of the executives. This information does not fall within the provisions of section 21(4)(a) and therefore it is necessary for me to consider the application of sections 21(2) and (3) to these records.

Record 13

As noted above, this record consists of a series of expense claims and supporting documentation for the four senior executives. These records were released to the appellant with some information severed. I have also indicated that elements of information severed by the OEB does not constitute personal information, that is, the names and contact information of individuals who appear on the record.

The remaining information at issue is the menu selections of individuals, including the executives and their guests, that appear on the record as well as personal expenditures and home addresses and phone numbers. I find that this information does not fall within section 21(4)(a) of the *Act* and I must therefore consider the application of sections 21(2) and (3) to this information.

In summary, the disclosure of the information to which I have found that section 21(4)(a) applies does not constitute an unjustified invasion of privacy under section 21(1)(f) of the *Act* and therefore Records 1, 5 and 12, in full, and the benefit and employment responsibility information in Records 2, 3, 8 and 11 should be disclosed to the appellant. The personal information that is contained in Records 4, 9, 10 and 13 does not fall within section 21(4)(a) and I must therefore now turn to consider whether disclosure of this information would constitute an unjustified invasion of personal privacy having regard to the other provisions in the *Act*.

Section 21(3)

The OEB claims that sections 21(3)(d), (e), (f) and (g) apply to the records remaining at issue.

Those sections read:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;
>
> (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
>
> (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; or

The information that remains at issue in Record 8 is information such as the social insurance number, home address and phone number and other personal details of Executive 2 and other individuals that Executive 2 has designated as beneficiaries under employment benefit plans. Some of this information was gathered for the purpose of collecting a tax (21(3)(e)). Some of this information falls within section 21(3)(f) as it relates to Executive 2's finances and financial activities. As this information falls within section 21(3), its disclosure would constitute an unjustified invasion of privacy and I find that its disclosure would be an unjustified invasion of personal privacy. Sections 21(4) and 23 do not apply, and it is therefore exempt under section 21(1). I uphold the OEB's decision to withhold it.

Also remaining at issue is the information relating to the personal details of the beneficiary designated under the employment benefit plans of Executive 2. This is highly sensitive personal information of that individual that falls within section 21(3)(f) as it describes that individual's finances, assets and financial activities. Accordingly, I find that its disclosure would be an unjustified invasion of personal privacy. Sections 21(4) and 23 do not apply, and it is therefore exempt under section 21(1). I uphold the decision of the OEB to withhold that information.

In summary, Records 2, 3 and 8 should be disclosed to the appellant subject to the appropriate severances identified above.

Records 4, 9 and 10

The OEB states that Records 4, 9 and 10 fall within the presumption created by section 21(3)(g) in that they contain personal or personnel evaluations that are carried out according to measurable standards.

Having reviewed the records and the submissions of the parties, I find that Records 4, 9 and 10 all contain personnel evaluations that are carried out according to measurable standards and that, therefore, section 21(3)(g) applies. Accordingly, disclosure of this information is presumed to be an unjustified invasion of privacy and I find that its disclosure would be an unjustified invasion of personal privacy. Sections 21(4) and 23 do not apply, and it is therefore exempt under section 21(1). I uphold the decision of the OEB to withhold access to these records in their entirety.

Record 13

Neither the OEB nor the appellant have provided any representations regarding the application of section 21(3) to the information remaining at issue in Record 13. Having reviewed the record, I find that the presumptions found in section 21(3) do not apply to menu selections or to the personal expenditures and home addresses and phone numbers found in this record.

Section 21(2)

Given my findings that none of the section 21(3) presumptions are applicable to Record 13, I must now consider whether its disclosure would constitute an unjustified invasion of personal privacy having regard to the factors set out in section 21(2) of the *Act*.

Section 21(2) reads:

> 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 Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(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.

Record 13

Although the appellant did not make any submissions regarding the application of section 21(2) of the *Act* to Record 13, I find that the following passage from the appellant's representations speak to some of the issues raised by this section:

> I am stating that the records I have requested are public documents, and not privy to sections under the act that the OEB makes reference to. It is in the public interest to have those records released even if only to ensure that senior officials at the OEB are not abusing the public trust with respect to compensation. In any case the public has a right to know how its most senior civil servants are compensated.

Nor does the OEB refer specifically to the application of section 21(2). The OEB representations appear to speak generally to the issues raised in this section, parts of which I have already quoted:

> Addresses and phone numbers (and even menu selections) of individuals are also not necessary for subjecting the activities of the Board to public scrutiny and should not be released.

Menu Selections

In determining whether the disclosure of menu selections would constitute an unjustified invasion of personal privacy, I find that the factor set out in section 21(2)(a) applies and that the disclosure of the menu selections of the executives and the individuals entertained by the affected parties is desirable for the purpose of subjecting the activities of the OEB to public scrutiny. I find that this factor weighs heavily in favour of disclosure of the menu selection. In Order P-256, former Assistant Commissioner Tom Mitchinson, made the following statement regarding the need for public knowledge respecting expenditures by government employees in the course of their duties:

> In my view, the public has a right to expect that expenditures made by employees of government institutions during the course of performing their employment-related responsibilities are made in accordance with established policies and procedures. It has a further right to expect that these policies and procedures are carefully developed, in accordance with sound and responsible administrative principles; clearly communicated and understood by all employees, applied fairly and consistently, and that audit systems are in place to ensure that they are followed and adhered to by all employees. *In submitting expense claims for reimbursement, government employees should do so on the basis that they may be called upon to substantiate each and every expenditure, both internally to the management staff of the institution, and externally to the general public. As a general principle, I feel that this level of disclosure of expense account information is, as section 21(2)(a) states: "... desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny."* (emphasis added)

I adopt the comments of the former Assistant Commissioner for the purposes of this appeal. As I stated in Order PO-2435, the role of access to information legislation in promoting government accountability and transparency is more compelling when the information sought relates directly to government expenditure of taxpayer money. In this case, where the expenditures relate to the entertainment of individuals by government employees and the entertainment by government employees of other government employees, the level of accountability is heightened and the role of the legislation even more compelling.

In addition to the factors that are set out in section 21(2), there is a related unlisted factor that is applicable to this appeal. The factor is whether "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution" as enunciated in Orders 99, P-237, M-129, M-173 and M-278. The four affected parties are senior executives at the OEB. The disclosure of the expense claims including menu selections is desirable for ensuring public confidence in the integrity of the OEB.

The role of access to information legislation in ensuring openness and transparency is even more compelling when the taxpayer's funds are being used for expenditures in the nature of gifts, entertainment, food and beverage. In my view the level of accountability must be very high on the part of those that have been entertained and those that have done the entertaining. Simply disclosing the amount of the claim is not enough to ensure accountability and transparency in relation to an expenditure. In the context of expense accounts, accountability is more than releasing a bottom line figure. It also involves transparency in how, and on whom, that money was spent. In some cases, menu selection, particularly expenditures on alcoholic beverages, will provide necessary information to assess the appropriateness of the expenditure. I find that this factor weighs heavily in favour of disclosure.

It might be argued that menu selection information is highly sensitive as set out in section 21(2)(f) of the *Act*. Menu choices could possibly reveal sensitive information about an

individual including an individual's health and religious affiliations. However, in the context of expense accounts, I believe that this is highly unlikely. A menu choice may be made for health or religious reasons. However, simply because a particular item was chosen, does not in and of itself convey definitive information about the diner. For example, I can order a salad without being a vegetarian. I would therefore give this factor relatively little weight.

In conclusion, I find that the factor of public scrutiny and the unlisted factor weigh heavily in favour of disclosure of the menu items of the affected parties and the individuals that were entertained by the affected parties at the expense of the taxpayer. At best, there is a modest privacy interest attached to the menu selections of individuals who are dining at public expense. Accordingly, I find that menu selections found in Record 13 should be disclosed to the appellant as the disclosure does not constitute an unjustified invasion of privacy.

Personal Expenditures and Home Address and Phone Numbers

I have found that Record 13 contains information relating to personal expenditures of the affected parties for which reimbursement was made to the OEB and their home address and phone details. In my view, no factors favouring disclosure of this information have been identified, and in that situation, the exception to the section 21(1) exemption found in section 21(1)(f) does not apply. For this reason, I find that this information is exempt under section 21(1) and should not be disclosed.

To be clear, duplicate copies of the records that I have ordered disclosed will accompany this order. On the duplicate copy, I have highlighted the portions of the records that should not be disclosed to the appellant. I note that in many instances, I will be ordering that information should be withheld that was previously disclosed to the appellant. Despite this, I am ordering that the information be withheld because section 21(1) is a mandatory exemption that does not depend on the discretion of the institution. The information relates to the affected parties who may not have seen copies of the records that were disclosed to the appellant previously.

INFORMATION AVAILABLE TO THE PUBLIC

The OEB relies upon the discretionary exemption found in section 22(a) with respect to Record 7 which is a copy of the Public Service Pension Plan.

Section 22(a) reads:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

Record 7

As previously noted, the OEB states that Record 7 contains information that is available pursuant to a regularized system of access and that section 22(a) applies to the information contained in that record. The OEB submits that it is publicly available and can be obtained through the Ontario Pension Plan web site.

The appellant did not make any submissions regarding the application of section 22(a) to Record 7.

I have reviewed Record 7 and the submissions of the parties. I agree with the submissions of the OEB and find that Record 7 is a publicly available record as it is available to all members of the general public at no cost through the internet. In these circumstances, I find that section 22(a) applies to exempt the record from disclosure. However, I note that, given the volume of records provided to the appellant, this document could have been included in the package released to him with little or no effort, or expense, to the OEB.

Records 2, 3, 8 and 11

The OEB also relied upon section 22(a) of the *Act* with respect to the salary information that appears in Records 2, 3, 8 and 11. I have already determined that the financial details of the compensation packages of the affected parties contained in those records are not exempt from disclosure under section 21 of the *Act*.

I agree with the position of the OEB that the base salary information of the affected parties is published pursuant to the *Public Sector Salary Disclosure Act*. As a result, salary information is available pursuant to a regularized system of access and falls with section 22(a) of the *Act*. However, in the context of Records 2, 3, 8 and 11, salary information constitutes, at best, one line in a much larger document that I have ordered disclosed. It would be absurd to disclose a lengthy document outlining the affected parties' compensation package, except for the base salary, and expect the appellant to find that single piece of information from a public source. As such, although base salary information may qualify for exemption from disclosure pursuant to section 22(a) of the *Act*, it is my expectation that the OEB will include that information when it complies with my disclosure order in relation to Records 2, 3, 8 and 11.

PUBLIC INTEREST OVERRIDE

The appellant relies upon the public interest override found in section 23 in support of his claim for access to the responsive records.

Based on my findings, there is only a limited amount of information that I have found exempt from disclosure. This includes:

- Performance Measurements for Executive 1 (Record 4);
- Personal information of Executive 2 and her beneficiaries (Record 8)
- 90 Day Objectives Year End Review Form for Executive 2 (Record 9);
- Annual Performance Appraisal Form for Executive 2 (Record 10);
- Personal Expenditures and Home Addresses and Home Phone Numbers contained in expense records (Record 13).

Section 23 reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

I have previously quoted a portion of this passage from the appellant's representations but it is worth repeating here:

> It is in the public interest to have those records released even if only to ensure that senior officials at the OEB are not abusing the public trust with respect to compensation. In any case the public has the right to know how its most senior civil servants are compensated. The precedent on this matter is clear: public sector executives have been required to release documents pertaining to compensation, including salary, incentives, bonuses, and documents with signatures authorizing those payments. In Ontario's energy sector, the former President of Hydro One, Ms. E. Clitheroe was required to release the same information when her compensation and expenses was the subject of an FOI request. At the federal level, Mr. Pierre Pettigrew's compensation details were also required to be disclosed to the public.

The OEB submits:

> The section 23 public interest override (i.e., the disclosure of the record clearly outweighs the purpose of the exemption) seems to be used mainly in cases where there is a concern over public health or safety or there are serious allegations of improper conduct. None of these records deal with health or safety. There have also been no public allegations of improper conduct concerning the four individuals. A personal interest shown by one individual does not constitute evidence of a public interest in the disclosure of the records. The Board does not believe that there is a compelling public interest in disclosing the record that would out weigh the exemptions set out in section 21.

I am in complete agreement with the sentiments expressed by the appellant and disagree with the position taken by the OEB. In terms of the compensation packages given to senior government employees and senior employees of government agencies, the public interest demands that complete disclosure be made. It is disingenuous to take the position that the base salary of such executives is subject to public disclosure, but that other benefits and arrangements that supplement the base salary are private. In my view, the public interest in disclosing this type of information would, in most cases, be very compelling. These types of benefits and supplemental arrangements are of significant value to the employees that receive them and are a significant cost to the government. In determining whether the compensation paid to a particular individual is appropriate, the entire package is relevant and must be disclosed.

Similarly, the expense accounts of these employees, paid by the public purse, must be made available, except to the extent that credit card or banking information may be disclosed. Without full disclosure, the ability to hold employees accountable for their expenditures will be impeded.

To be clear, had I found that portions of the compensation packages or the expense accounts (minus personal expenditures and personal contact information) qualified for exemption from

disclosure pursuant to section 21(1) of the *Act*, I would have found a compelling public interest in their disclosure and ordered that disclosure pursuant to section 23 of the *Act*.

However, in assessing the applicability of section 23 to this appeal, I am mindful of the extensive disclosure that I will be ordering. Based on the limited information that I have found has been properly withheld by the OEB, I find that section 23 does not apply in this appeal. I have ordered the disclosure of information that sheds any light on the operations of the OEB, including the compensation packages of senior executives and their expense accounts. In my view, there is no compelling public interest in the disclosure of the personal information that I have ordered withheld, and the interest in disclosure does not outweigh the purpose of the applicable exemptions. Accordingly, I find that section 23 does not apply to the information that I have found should not be disclosed.

ORDER:

1. I find that the OEB has conducted a reasonable search for responsive records.
2. I uphold the decision of the OEB with respect to the fee charged for disclosure of the records.
3. I uphold the decision of the OEB to withhold access to Records 4, 6, 7, 9, and 10, in full.
4. I order the OEB to disclose Records 1, 5 and 12, in full by **January 31, 2007** but not before **January 26, 2007**.
5. I order the OEB to disclose all of Records 2, 3, 8, 11 and 13, except the portions that I have highlighted on the duplicate copies of the records enclosed with this order by **January 31, 2007** but not before **January 26, 2007**.
6. In order to verify compliance with this order, I reserve the right to require the OEB to provide me with a copy of the records disclosed to the appellant pursuant to Provisions 4, 5.

Original signed by: December 27, 2006
Brian Beamish
Assistant Commissioner