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

ORDER MO-2293

Appeal MA07-282

Cobourg Police Services Board

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NATURE OF THE APPEAL:

The Cobourg Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a news organization for a copy of a severance agreement (the Agreement) relating to a named individual (the affected party), a former employee of the Police.

The Police denied access to the responsive record pursuant to sections 7(1), 10(1), 11(c) and 12 of the *Act* (the exemptions for advice or recommendations, third party information, economic and other interests and solicitor-client privilege). The Police also claimed that the personal privacy exemption at section 14(1) applies, based on the presumptions at sections 14(3)(d) and 14(3)(f) in addition to the factors favouring non-disclosure at sections 14(2)(f), 14(2)(h) and 14(2)(i) of the *Act*.

The requester (now the appellant) appealed the Police's decision to deny access to the severance agreement to this office.

During the mediation stage of this appeal, the mediator contacted the affected party, who indicated that he was not prepared to consent to the release of the information relating to him. At the end of mediation, the Police confirmed that they are no longer relying on sections 7(1) and 10(1) of the *Act* and were only applying section 12 of the *Act* to paragraphs 3 and 15 of the Agreement. The appellant, in turn, raised the application of the public interest override in section 16 of the *Act*.

This appeal was not completely resolved during mediation, and it was transferred to the Adjudication stage of the appeal process.

I commenced my inquiry by initially sending a Notice of Inquiry to the Police and the affected party. The Police responded with representations in response to the Notice of Inquiry. The affected party did not submit representations. I next sent a copy of the Notice of Inquiry, along with the non-confidential portions of the Police's representations, to the appellant. The appellant provided representations in response.

RECORDS AND ISSUES SUMMARY:

The record at issue in this appeal is a four-page severance agreement which ended the affected party's employment with the Police. The Police claim the application of section 14(1) (personal privacy) and section 11(c) (economic and other interests) to the entire agreement, as well as section 12 (solicitor-client privilege) to paragraphs 3 and 15 only.

The Police also raised section 38(b), the exemption to the right of access an individual possesses to their own personal information. In the present case, this section is not applicable. Section 38(b) may act as an exemption where an individual has made a request for their own personal information, and the information would also reveal personal information of another individual. Given that the record does not contain the appellant's personal information, and that the only personal information at issue in this appeal is that of the affected party (as outlined below), the applicable exemption that is found at section 14.

The appellant claims that disclosure should be ordered pursuant to section 16 (public interest override.)

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether section 14(1) might apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. The definition of section 2(1) reads, in part, as follows:

> "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,
>
> …
>
> (h) the individual's name, if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The Police submit that the appearance of the affected party's name in conjunction with information related to employment and financial transactions amount to personal information within the meaning at section 2(1).

Analysis and findings

Previous orders of this office have consistently held that information about individuals named in employment contracts or settlement and/or severance agreements, including name, address, terms, date of termination and terms of settlement, concern these individuals in their personal capacity, and therefore qualifies as their personal information (Orders M-173, P-1348, MO-1184, MO-1332, MO-1405, MO-1622, MO-1749, MO-1970 and PO-2519).

I am satisfied that the same considerations apply in the circumstances of this appeal. The record contains the name of the affected party, along with information concerning the financial arrangements related to his departure from his position with the Police. As such, I find that all of the information contained in the record falls within the scope of the definition of personal information in section 2(1) of the *Act* as the personal information of the affected party.

The records do not contain the personal information of any other identifiable individual, including the appellant.

PERSONAL PRIVACY

Where a requester seeks the personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. Therefore, if the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14(1).

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

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

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

Sections 14(4)(a) to (c) refer to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. Therefore, if section 14(4) applies, it is not necessary to refer to the provisions in sections 14(2) or 14(3).

The Police submit the presumptions at sections 14(3)(d) and 14(3)(f) as well as the factors at section 14(2) apply to the record with the result that disclosure of the record would be an unjustified invasion of the affected party's privacy. The Police do not raise the applicability of any of the exceptions at section 14(4).

I will first turn to consider whether any of the information in the record falls within the exceptions in section 14(4). If any of the information falls under the section 14(4), the exemption at section 14(1) does not apply.

Section 14(4)(a): disclosure is not an unjustified invasion of privacy

As noted, section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In my view, section 14(4)(a) is relevant to this appeal: That section states:

> 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;

Having reviewed the record at issue, the severance agreement clearly does not contain the classification, salary range, or the employment responsibilities of the affected party. Accordingly, the exception at section 14(4)(a) cannot apply unless I determine that any information contained in that record qualifies as a "benefit" as contemplated by section 14(4)(a).

In Order PO-2519, Adjudicator Steven Faughnan reviewed the definition of benefits applied in previous orders of this office and stated:

> The Commissioner's office has interpreted "benefits" to include entitlements, in addition to base salary, that an employee receives as a result of being employed by the institution [Order M-23]. Order M-23 lists the following as examples of "benefits":
>
> - insurance-related benefits
> - sick leave, vacation
> - leaves of absence
> - termination allowance
> - death and pension benefits
> - right to reimbursement for moving expenses
>
> In subsequent orders, adjudicators have found that "benefits" can include:
>
> - incentives and assistance given as inducements to enter into a contract of employment [Order PO-1885]
> - all entitlements provided as part of employment or upon conclusion of employment [Order P-1212]
>
> These principles and reasoning have been applied in previous orders issued by this office including MO-1405, MO-1749, and MO-1796.

This office has also held that the exception in section 14(4)(a) does not apply to entitlements that have been negotiated as part of a retirement or termination package (see for example Orders M-173, M-204, M-797 and MO-1332) except where it can be shown that the information reflects benefits to which the individual was entitled as a result of being employed (Orders MO-1749 and PO-2050). As Adjudicator Catherine Corban stated in Orders MO-1970 and MO-2174:

> [T]he common thread in these orders appears to be that section 14(4)(a) applies to benefits negotiated as part of a retirement or termination agreement, so long as they are benefits the individual received while employed and are continuing post-employment.

The parties did not make representations regarding the applicability of section 14(4)(a) to the record at issue in this appeal.

Turning to the record, paragraphs 2, 5 and 6 relate to payments in lieu of accumulated but unpaid leaves of absence, time earned, and allowances, as well as pension contributions and a legal indemnification clause effective to the date of resignation. Applying the principles from previous orders, these provisions reflect benefits to which the affected party was entitled to under his original contract of employment (Orders PO-1885, PO-2050 and MO-1749). Accordingly, I find that these paragraphs disclose a "benefit" for the purpose of section 14(4)(a), and this section therefore applies to them. I am satisfied that the remaining paragraphs of the termination agreement, containing various releases, agreements and undertakings which have been negotiated as part of the severance agreement, do not qualify as "benefits" under section 14(4)(a) (Orders M-173, M-204, M-419, M-797, MO-1332 and MO-2174).

When section 14(4)(a) is found to apply, disclosure of that information is not considered to be an unjustified invasion of personal privacy. Therefore, I conclude that paragraphs 2, 5 and 6 of the record are not exempt under section 14(1) and I will order that they be disclosed to the appellant, subject to the following discussion of the applicability of section 14(3) of the *Act* to portions of those paragraphs.

I find that the exception in section 14(4)(a) does not apply to the remaining portions of the Agreement, which consist of the lump sum payments and various releases, agreements and undertakings. I also find that none of the other provisions at section 14(4) are applicable. Accordingly, I will now consider whether the disclosure of any of the remaining information, which does not fall under section 14(4), represents a presumed to represent an unjustified invasion of privacy under section 14(3).

Section 14(3): disclosure presumed to be an unjustified invasion of privacy

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

In its representations, the Police submit that disclosure of the portions of the record that remain at issue are presumed to be unjustified invasions of privacy under sections 14(3)(d) and 14(3)(f).

Sections 14(3)(d) and (f) provide:

> 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;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

The Police submit that:

> …the information in this record describes employment history and further describes the amount of monies owed with respect to specific benefits of [the affected party's] employment with the Cobourg Police Services Board.

In addition, the Police make confidential representations with regard to specific portions of paragraph 3 and submit that this portion meets the criteria established by section 14(3)(f).

The appellant provided no representations on the applicability of section 14(3) other than to raise Order MO-2174 as applicable precedent.

Order MO-2174 adopts the approach taken by Adjudicator Laurel Cropley in Order PO-2050, which examined the application of the presumptions at section 21(3)(d) and (f) of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent to section 14(1) of the *Act*) to information in the context of severance agreements. Adjudicator Cropley concluded:

> Generally, previous orders have found that although one-time or lump sum payments or entitlements do not fall under the presumption found at sections 21(3)(f) or (d) [Orders M-173, MO-1184 and MO-1469], information such as start and finish dates of a salary continuation agreement fall within the presumption in section 21(3)(d) and references to the specific salary to be paid to an individual over that period of time fall within the presumption in section 21(3)(f) (Order P-1348).
>
> …
>
> Previous orders have found, however, that the address of an affected party, releases, agreements about the potential availability of early retirement, payment of independent legal fees and continued use of equipment, for example, do not fall within any of the presumptions in section 21(3) [Orders MO-1184 and MO-1332]. In Order M-173, former Assistant Commissioner Irwin Glasberg found that much of the information in these types of agreements did not pertain to the

> "employment history" of the individuals for the purposes of section 14(3)(d) (of the municipal *Act*), but could more accurately be described as relating to arrangements put in place to end the employment connection.

I agree with these principles and adopt them for the purposes of this appeal. Applying them to the record at issue, I find that only a limited amount of information contained in the record falls within the presumption at section 14(3). In paragraphs 1, 2, 6 and 11, reference is made to the termination date of the affected party. Based on the reasoning set out in Order PO-2050 and adopted in MO-2174, I find that reference to the termination date of the affected party relates to his employment history and as such the presumption at section 14(3)(d) applies.

However, I am satisfied that the presumptions at sections 14(3)(d) and (f) do not apply to any other portions of the record. The severance agreement lists, in paragraph 3, an amount that can be characterized as a lump sum payment to be conferred immediately. In fact, the Police in their representations identify this amount as a "lump sum" and do not relate this lump sum to an identifiable portion of the affected party's salary. As a result, the exact salary of the individual cannot be deduced from the information in the agreement. As noted in the extract from Order PO-2050 cited above, lump sum payments have been consistently treated by the Commissioner as not falling within the presumption of section 14(3)(d) or 14(3)(f). I therefore find that paragraph 3 is not subject to these presumptions.

As also noted in Order PO-2050, releases executed in connection with the termination of employment have been found not to fall within the presumption at section 14(3)(d) (Orders M-173, MO-1184 and MO-1332) since the information in a release does not pertain to the "employment history" of the individual. Rather, this information can be more accurately described as relating to arrangements put in place to end the employment relationship.

In the current appeal, I find that the severance agreement contains several releases, agreements and undertakings that do not contain information about the affected party's "employment history" and, therefore, do not fall under the presumption at section 14(3)(d). I further find that these paragraphs do not contain any information that describes the affected party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness as is required to fall under the presumption at section 14(3)(f). These releases, agreements and undertakings all relate to arrangements put in place to end the employment connection on mutually agreed upon terms. Therefore, I find that none of these provisions fall within any of the presumptions found at section 14(3).

Accordingly, I find that only the references to the affected party's termination date, found in paragraphs 1, 2, 6, and 11, fall within the presumption in section 14(3)(d). Disclosure of this information is therefore a presumed unjustified invasion of personal privacy. The section 14(1)(f) exception to the exemption therefore does not apply, and the information is exempt under section 14(1).

Section 14(2): factors and considerations

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

The factors listed in section 14(2) provide some criteria for institutions to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

I have found above that paragraphs 2, 5 and 6 meet the exception listed in section 14(4)(a). I have also found that a limited amount of information in paragraphs 1, 2, 6, and 11 meets the presumption at section 14(3)(d) which would result in disclosure representing a presumed unjustified invasion of privacy. Therefore, I must now review the remaining portions of the severance agreement to determine whether any of the listed factors found in section 14(2), as well as all other considerations that are relevant in the circumstances of this appeal, apply to that information.

The Police submit the factors listed at section 14(2)(f), (h), and (i) apply to the severance agreement. They state:

> The Board and [the affected party] entered into this agreement with the knowledge that this information was highly sensitive and the understanding that it would be kept confidential as both parties had made agreement to. In paragraph #2 and #3 it relates directly to outstanding benefits paid to [the affected party] and a lump sum given as a term of [the affected party's] termination.

The appellant submits that the same principles were laid out in Order MO-2174 apply to the case at hand and particularly Adjudicator Corban's discussion of "balancing the considerations" that arise under an analysis of section 14(2). In that order, Adjudicator Corban considered the applicability of sections 14(2)(a) and (f).

Sections 14(2)(a), (f), (h) and (i) provide:

> 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;
>
> (f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

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

I will review the application of each of these considerations below.

Section 14(2)(a): public scrutiny

In Order MO-2174, Adjudicator Corban discussed the principles behind the public scrutiny consideration of section 14(2)(a):

> In Order PO-1984, former Assistant Commissioner Tom Mitchinson noted that, "the public scrutiny consideration relates directly to issues of public accountability in the operation of the government's planning and development approval process, which falls squarely within the purposes outlined in section 1(a) of the *Act*".
>
> Previous orders have also found that the contents of agreements entered into between institutions and senior employees represent the sort of records for which a high degree of public scrutiny is warranted as identified in section 14(2)(a) of the *Act* [Orders M-173, MO-1184]. This is because "all government institutions are obliged to ensure that tax dollars are being spent wisely" [Orders MO-1184, MO-1332 and MO-1405].
>
> In Order MO-1469, Adjudicator Donald Hale followed those orders in his consideration of the section 14(2)(a) factor in relation to the disclosure of information contained in a severance agreement:
>
> > It has been well established in a number of previous decisions that the contents of agreements entered into between institutions and senior employees represent the sort of records for which a high degree of public scrutiny is warranted [Order M-173, M-953]. Based on this, and the appellant's desire to scrutinize how the Municipality compensated a senior management employee upon his termination, I find that section 14(2)(a) is a relevant consideration in the circumstances of the present appeal. I further find that this is a significant factor favouring the disclosure of the information contained in the record.

I agree with the principles identified by Adjudicator Corban and the approach outlined in Order MO-2174 for the purposes of the present appeal.

The appellant has provided information supporting the position that the issue of compensation contained in the severance agreement for this particular senior employee of the Police has been the subject of public attention. Taking into consideration the appellant's representations and all of the circumstances of this appeal, I am satisfied that disclosure of the information in the severance agreement is desirable for the purpose of shedding light on the details of this particular agreement and would address the "public scrutiny" concerns identified by the appellant.

Accordingly, I find that the consideration under section 14(2)(a) is a relevant factor that weighs significantly in favour of the disclosure of the remaining information in the record.

Section 14(2)(f): highly sensitive

The Police submit that the information in paragraphs 2 and 3 are highly sensitive as they relate directly to outstanding benefits paid to the affected party and a lump sum given as a term of his termination.

I note that I have already determined that paragraph 2, with the exception of the affected party's termination date, meets the exception found at section 14(4)(a) of the *Act*. As such, disclosure of this paragraph does not constitute an unjustified invasion of the affected party's privacy.

With regard to paragraph 3, prior orders have established that, for information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual (See Orders M-1053, P-1681 and PO-1736). I agree that disclosure might cause the individual to whom the record relates some degree of personal distress. However, I also would have anticipated that, had the affected person considered the information to be highly sensitive, the affected person would have responded accordingly. I note that although invited to do so, the affected person chose not to make representations. Accordingly, although in my view, the factor at section 14(2)(f) is a relevant consideration, I will only accord it moderate weight in balancing the privacy interests of the affected party against the appellant's right of access.

Section 14(2)(h): information supplied in confidence

In order for section 14(2)(h) to be a relevant consideration, the information in question must have been "supplied" by the affected party. In this case, the information about the severance agreement was negotiated, rather than supplied by the affected party, and section 14(2)(h) accordingly has no application.

The submission of the Police notes the existence of the confidentiality clause in paragraph 9. While it would not be unreasonable for the affected party to have an expectation that the terms of his departure from employment would enjoy some level of confidentiality, I note that paragraph 9 states that the record will not be disclosed "except as required by law." In my view, this is a recognition by the Police and the affected party that there may be circumstances where a legal requirement for disclosure exists. Although not expressly stated, disclosure pursuant to the *Act*

may be such a legal requirement. For this reason I accord only limited weight to the affected party's expectation of confidentiality under section 14(2)(h).

Section 14(2)(i): unfair damage to reputation

The Police have made no specific representations explaining how the reputation of any person may be damaged through the disclosure of the severance agreement.

The damage to the reputation envisioned by section 14(2)(i) is not dependent on whether the damage is present or foreseeable, but whether the damage would be "unfair" to the individual involved (Order P-256). I have no submissions from either the institution or the affected party indicating how unfair damage to any person's reputation would arise.

I have no evidence before me of the nature of any "harm" that is anticipated to befall the affected party. It is entirely possible that once it is disclosed, the information in the severance agreement may be disseminated through the media. However, even if there were to be disclosure to the public at large, I cannot conclude that it would unfairly damage the reputation of any person. In my view, any "harm" to the affected person would be directly connected to his employment and subsequent termination from employment, not from disclosure of the terms of his departure. In these circumstances, I am not persuaded that any consequences of disclosure would be "unfair".

I do not preclude the possibility that once the information is disclosed, it may be the subject of public commentary. That, however, is not a reason under the *Act* to withhold information. The possibility of commentary does not by itself lead to a conclusion that the disclosure of information may unfairly damage the reputation of the affected party.

Accordingly, I find that the factor in section 14(2)(i) is not relevant.

Public confidence in the integrity of an institution

An relevant consideration found to apply in appeals involving requests for severance agreements and that weighs in favour of disclosure, recognizes that "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution" (Orders 99, P-237, M-129, M-173 and P-1348). As Adjudicator Donald Hale noted in Order MO-1469:

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

In the current appeal, the appellant raises in his representations the example that a previous officer was terminated by the Police at a reported expense to taxpayers of approximately $800,000. In his representations, the appellant questions whether the Police have acted with propriety on this occasion. In these circumstances, I find that the public confidence consideration applies and carries significant weight in respect of the record pertaining to the affected party's termination.

Balancing the considerations

On balance, I found that the factors favouring disclosure in section 14(2)(a) and the relevant circumstance in relation to public confidence in the integrity of an institution both carry significant weight, and the factors favouring non-disclosure in sections 14(2)(f) and (h) carry only limited or moderate weight. Balancing the factors to determine whether the disclosure of the severance agreement would result in an unjustified invasion of privacy, I find that the considerations favouring disclosure outweigh the factors weighing in favour of the non-disclosure of this information. Accordingly, I find that disclosure of the remaining information would not constitute an unjustified invasion of personal privacy. The exception to the exemption in section 14(1)(f) therefore applies, and this information is not exempt under section 14(1).

To summarize, the information to which section 14(3)(d) applies (the date employment was terminated, where that appears in the record) is exempt under section 14(1). The remainder of the record is not exempt under this provision, as a consequence of my analysis under sections 14(4) and 14(2), above.

ECONOMIC AND OTHER INTERESTS

The Police also submit that section 11(c) applies to the record. Section 11(c) states:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

It has been said that in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" (See Order P-373, *Ontario (Worker's Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), and *Ontario (Ministry of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.)).

With respect to section 11(c), the Police state that if the record is disclosed, it would be a breach of the confidentiality clause within the record and that this breach would expose the Police to financial harm through civil litigation. The Police further state that if the record was disclosed, it would affect future negotiations and settlements with other employees.

As noted earlier, having examined the confidentiality clause in the record, there is an exception where disclosure is required by law. In my view, it seems highly unlikely that the Police could be sued for their disclosure of the record pursuant to my order where there is recognition within the clause for precisely this type of situation. Further, if I accept the position put forward by the Police, disclosure of these types of agreements could be avoided simply through the inclusion of a confidentiality clause, a circumstance which is clearly not acceptable.

With respect to the assertion that negotiations and settlements would be affected, previous orders have rejected arguments that disclosure of the details of contracts between senior employees and institutions could reasonably be expected to harm the economic or competitive interests of those organizations, within the meaning of section 11(c) (Orders P-1545, P-380, and MO-1184). The Police in this appeal have not provided detailed and convincing evidence that would substantiate a reasonable expectation of harm. The assertion in this case is merely speculative.

The Police have previously voluntarily released the employment contract of the affected party to the appellant. That contract would have contained the salary and benefits in far greater detail than the amounts owing under the severance agreement. As for the lump sum, I do not accept the Police's position that disclosure of this record could reasonably be expected to impact on the ability of the Police to negotiate the terms of termination agreements with current and future employees. Should the Police negotiate a termination package in the future, that negotiation will be based on the particular circumstances of the case. The fact that an employee may be able to use this record as a guide during those negotiations does not, in my view, prejudice the economic interests of the institution. The Police will not be denied the opportunity to vigorously negotiate what, in their view, is a fair settlement in those particular circumstances. In my view, the potential harm envisioned by the Police is too remote to satisfy the requirements of a reasonable expectation of prejudice to the Police's economic interests or their competitive position.

Further, I note that there is an established body of employment caselaw dealing with termination and severance agreements. The parameters for such agreements are generally well known, with factors such as length of service being considered when determining the elements of a fair package. I do not accept that disclosure of the terms of the agreement with the affected party will prejudice the Police in future negotiations.

Therefore, I find section 11(c) is not applicable to the information in the severance agreement.

SOLICITOR-CLIENT PRIVILEGE

The Police raise the solicitor-client privilege exemption in section 12 in relation to information in paragraph 3 regarding legal fees. The Police provided confidential representations with respect

to the paragraph and add that this information was provided to the Police for the sole purpose of this agreement and should remain confidential. The Police also claim that section 12 applies to exempt paragraph 15. They state:

> Paragraph #15 which relates directly to a court application that was dismissed as a term of this agreement was prepared for use in contemplation of litigation. This information should be protected under a solicitor-client privilege and not disclosed.

Section 12 states:

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

Section 12 contains two branches as described below. The institution must establish that one or the other (or both) branches apply

Branch 1: common law privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. (Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)).

The Police do not specifically list which head of privilege they are asserting protects paragraph 3 (legal fees). Previous orders have dealt with legal fees as potentially falling within the scope of solicitor-client communication privilege. I will adopt this analytical approach. The Police assert that paragraph 15 (agreement to dismiss a court application) is protected by litigation privilege.

Paragraph 3 – Legal Fees

Solicitor-client communication privilege

Common law solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice (*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)). The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

As well, in *Lavallee, Rackel & Heinz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, the Supreme Court of Canada stated (at para. 36 of the judgment) that solicitor-client privilege "must remain as close to absolute as possible if it is to retain relevance". I will bear this in mind in assessing the application of section 12 in this appeal.

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

Legal fees have been determined to be presumptively privileged by the Supreme Court of Canada (*Maranda v. Richer,* [2003] 3 S.C.R. 193). This presumption of privilege for legal fees has also been found to apply in the access to information context. The Ontario Court of Appeal upheld Orders PO-1922 and PO-1952, where the information at issue was the amount of legal fees, and stated that this presumption of privilege can be rebutted where the information is "neutral":

> The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire Act. [*Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941 (C.A.)]

In Order PO-2483, Senior Adjudicator John Higgins summarized the above-noted approach as follows:

> Accordingly, in determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is

> neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

I agree with the Senior Adjudicator's approach and adopt it for the purposes of this appeal.

The Police provided no evidence to suggest that the appellant is an assiduous inquirer. The appellant made no representations on the issue of solicitor-client privilege.

Where an appellant has not provided representations, it is still open to the adjudicator to find that the presumption of privilege has been rebutted, based on the totality of the evidence (Orders PO-2483 and PO-2568).

The information relating to legal fees ordered disclosed in Orders PO-1922 and PO-1952, both of which were upheld by the Court of Appeal, is substantially similar to the information relating to legal fees at issue in this appeal. Order PO-1922 required the Ministry to disclose the total amount of legal fees paid by the Attorney General to two lawyers who had acted for two intervenors in a criminal proceeding. Order PO-1952 required the Ministry to disclose the amounts of payments made by the Attorney General to four lawyers who had acted for Paul Bernardo on the appeal from his murder convictions.

In my view, there is no reasonable possibility that the disclosure of the information relating to legal fees in paragraph 3 would reveal communications between the lawyer and his or her client, such as instructions or strategies that the client may have communicated to his lawyer. I conclude that the reference to legal fees in paragraph 3 is "neutral" information, and the presumption that this information is subject to solicitor-client communication privilege is, therefore rebutted in this circumstance.

Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege (Orders PO-2483, PO-2484).

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

(*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)).

Waiver has been found to apply where, for example

- the record is disclosed to another outside party (Order P-1342; upheld on judicial

review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.))

- the communication is made to an opposing party in litigation (Order P-1551)
- the document records a communication made in open court (Order P-1551)

In this case, I am satisfied that the information in paragraph 3 for which solicitor-client privilege has been claimed was disclosed by either the affected party or his counsel to the Police. The information was then included in the termination agreement. Under these circumstances, I conclude that, had the information been subject to solicitor-client privilege, that privilege has been waived by the affected party through its communication to the Police.

As well, I note that the issue of privilege has been raised by the Police, who are not part of the solicitor-client relationship. As noted, the affected party, who is the client, has not raised privilege to oppose the disclosure of the information in paragraph 3. I am satisfied that, in this case, the Police are not in a position to raise the issue of solicitor-client privilege where the affected party has had that opportunity and declined to do so.

As noted, the Police did not specify which aspect of section 12 they rely on for paragraph 3. I have just found that the record is not subject to solicitor-client communication privilege. I also find that the record was not prepared for the dominant purpose of litigation, nor was it prepared by or for counsel retained or employed by the institution. In that situation, paragraph 3 is not protected by litigation privilege, nor by the statutory privilege provided by Branch 2 of the exemption. Accordingly, I find that section 12 does not apply to paragraph 3.

Paragraph 15

Litigation privilege

As described above, branch 1 of the section 12 exemption encompasses two heads of privilege as derived from the common law: (i) solicitor-client communication privilege and (ii) litigation privilege. I will now address if the information in paragraph 15 is protected by litigation privilege as claimed by the Police.

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation (Order MO-1337-I; *Chrusz*).

The record at issue in this appeal is a severance agreement between the affected party and the Police. As a whole, it was not created for the dominant purpose of existing or reasonably contemplated litigation. Rather, it was created for the purpose of ending the employment relationship on mutually agreed upon terms.

The Police submit that the information in paragraph 15 "was prepared for use in contemplation of litigation." At the time of signing, a court application already existed and my understanding of the Police's submission is that paragraph 15 of the severance agreement, requiring the withdrawal of this application, was prepared to terminate that court proceeding.

In Order P-1348, Adjudicator Laurel Cropley found that where the records at issue involved employee "buy out" packages, the severance agreements were held not to be protected by litigation privilege because they were not prepared "especially" for the purpose of contemplated litigation. Indeed, in that instance, the adjudicator held that the terms of the agreement were endorsed by all parties and it was "unlikely that any further litigation would be contemplated with respect to these terms." The exemption under section 19 (the provincial equivalent to section 12 of the *Act*) did not apply.

Assistant Commissioner Mitchinson agreed with Adjudicator Cropley's conclusion that severance agreements were not protected by litigation privilege. In the context of a settlement agreement to resolve a wrongful dismissal case, in Order MO-1184, the former Assistant Commissioner determined that:

> Once agreement was reached and the document was executed by the parties, no litigation privilege for this record was possible. As all parties agree, the Settlement Agreement was intended to end the litigation, and I am not persuaded, based on the evidence provided to me by the City, that disclosure of this record would necessarily revive the litigation. However, more importantly, confidentiality is integral to litigation privilege, and I find that a record which has been executed by all parties to an existing litigation and shared among them cannot qualify for exemption under "litigation privilege".

I agree with the principles enumerated by the former Assistant Commissioner and Adjudicator Cropley.

In this appeal, the information in paragraph 15 requiring the abandonment of the court application is similar to a settlement agreement created to resolve on-going litigation. As such, the paragraph was created to end the litigation, not for the dominant purpose of carrying out litigation. I am not persuaded that disclosure of this paragraph would revive the court application.

I conclude that the information contained in paragraph 15 does not meet the requirements for an exemption under Branch 1 of the section 12 exemption.

Branch 2: statutory privilege

Branch 2 of the section 12 exemption gives an institution the discretion to refuse to disclose a record that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

The information in paragraph 15 is an agreement for the affected party to withdraw a court application. I am of the view that but for the court application, this paragraph would not have been included in the severance agreement. However, I agree with Senior Adjudicator John Higgins in Order PO-2484, where he said:

> While I agree with the Ministry that, but for the litigation, the records at issue would not have been created, this does not in my view lead to an automatic conclusion that they were prepared for use in giving legal advice or in contemplation of or for use in litigation. In my view, the conclusion on this point depends on the meaning of "for use in."

A severance agreement is a contract, executed by the parties, to conclude the employment relationship in an orderly fashion and to determine the rights of the parties. I am not persuaded that a provision in the severance agreement to terminate any litigation that pre-dated the agreement was "for use in" that litigation. As a result of paragraph 15, the litigation would be terminated and there would be no litigation to use that information in. In Order PO-2405 (reconsidered in PO-2583-R, and subject to an ongoing application for judicial review,) Senior Adjudicator Higgins made a similar finding to the effect that records produced for settlement discussions were *not* prepared for use in litigation within the meaning of branch 2.

I therefore conclude that the information contained in paragraphs 3 and 15 is not protected by the section 12 solicitor-client privilege and should be disclosed.

PUBLIC INTEREST OVERRIDE

The appellant claims that there is a compelling public interest in the disclosure of the record and that section 16 of the *Act* is therefore applicable. For this reason the appellant argues that the exemption set out in section 14 does not apply to exempt the information that I have determined should be severed from the record. I have found that section 14 only applies to exempt the affected party's termination date.

Section 16 states:

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

For section 16 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.

While not specifically addressing section 16, the appellant, in his original request letter to the Police, notes that taxpayers have a right to know how their money is spent. He references a letter

to the editor of the Cobourg Daily Star regarding the affected party's severance agreement and states:

> The public has a vested interest in [the affected party's] severance agreement because as per the perception by the letter writer, the amount is not being released because it is "unreasonably excessive."

The Police submitted representations objecting to the application of section 16 to the record. The Police submit:

> During the tenure of [the affected party], media had focused on [the affected party] and his activities. The constant media attention was harmful to the reputation of [the affected party] and to the reputation of the Cobourg Police Service as a whole. Since [the affected party's] departure there has been no more mention of [the affected party] in the media or in the community. It is felt that the Cobourg Police Service and the community have moved on from this issue and that there is no real compelling public interest in obtaining this information.

In determining whether section 16 is applicable to the record at issue in this appeal, it is most relevant that I have found only a minimal amount of personal information exempt pursuant to section 14(1), that being the affected party's termination date. I agree with the appellant that there is a significant public interest in the financial terms of the affected party's termination agreement. That public interest will be satisfied with the disclosure that I will be ordering. I have concluded that there is no compelling public interest in the disclosure of the affected party's termination date. Disclosure of that particular piece of information will not assist the appellant, or the public at large, in determining whether taxpayers' money has been well spent through the termination agreement. As a result, I find that section 16 is not applicable to those portions of the record that I have found exempt under section 14(1).

ORDER:

1. I order the Police to disclose the severance agreement to the appellant, except the portions that I have highlighted on the duplicate copy enclosed with this order by **May 22, 2007** but not before **May 15, 2007**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Municipality to provide me with a copy of records disclosed to the appellant.

Original Signed By: April 17, 2008
Brian Beamish
Assistant Commissioner