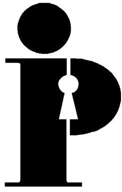

ORDER MO-2318

Appeal MA07-204

City of Guelph

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NATURE OF THE APPEAL:

The City of Guelph (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a journalist for the employment contract and documents related to the severance package awarded to the former Chief Administrative Officer of the City.

The City located an employment agreement, dated June 27, 2005 and a letter, dated May 4, 2007. The City denied access to the responsive records pursuant to the mandatory exemption found in section 14(1) of the *Act* (personal privacy). In support of the application of this exemption, the City claimed that disclosure of the agreement and letter would constitute an unjustified invasion of another individual's personal privacy taking into consideration the presumptions found at sections 14(3)(d) and 14(3)(f), and the factors found at sections 14(2)(f), 14(2)(h) and 14(2)(i) of the *Act*.

The requester (now the appellant) appealed the City's decision to this office and the appeal was assigned to a mediator. During mediation, the City issued a revised decision as it had located two additional records: a letter dated April 27, 2007 and email correspondence dated April 30, 2007. The City took the position that both records, listed as Records 2 and 3 in their revised index, were excluded from the provisions of the *Act* pursuant to section 52(3) which deals with labour relations and employment records. Alternatively, the City denied access to the letter (Record 2) under section 14(1), claiming that disclosure would constitute an unjustified invasion of privacy taking into account the presumptions found at sections 14(3)(d) and 14(3)(f), and the factors found at sections 14(2)(f), 14(2)(h) and 14(2)(i) of the *Act*. The City also denied access to the email correspondence (Record 3) under the discretionary exemption at section 12 (solicitor-client privilege). The City also indicated that it was claiming the section 14(1) privacy exemption for only selected paragraphs of the employment agreement (Record 1).

The mediator had discussions with the appellant as to whether she wanted access to the appendices attached to Record 1. The appellant advised that she no longer sought access to Appendix A. The appellant also raised the possible application of the public interest override in section 16 of the *Act* to the remaining withheld information.

This file was subsequently transferred to me for adjudication. Upon my review of the file, I was unclear as to whether the appellant sought access to Appendix B and Appendix C attached to Record 1. Accordingly, an Adjudication Review Officer from this office contacted the appellant who confirmed that she also sought access to these appendices.

I then asked the City to notify the individual to whom the records relate (the affected party) of their decision to grant the appellant partial access to Record 1. The affected party, in turn, wrote to this office and advised that if any of the agreement was to be disclosed, the following paragraphs of the agreement should be withheld from the appellant: 1.04, 2.05, 4.01, 4.03, 4.04, 4.05, 4.06, 6.01, 6.02, 7.02, 11.01, and 15.

The City subsequently confirmed that with the exception of information contained in paragraphs 1.04 and 11, their position mirrors that of the affected party.

I commenced my inquiry by sending a Notice of Inquiry to the City and the affected party. The City submitted brief representations which confirmed its position that sections 12 and 14(1) apply to information at issue but that it is bound by a "very broad confidentiality covenant" and is "…unable to make any meaningful representations without creating a potential dispute as to whether we have complied with this provision."

The City's representations, however, confirmed that it is no longer relying on section 14(1) of the *Act* to withhold access to Appendices B and C to Record 1. Also, the City confirmed that it was only applying section 12 of the *Act* to the information in Record 3.

The City's representations also state that the *Act* does not apply to records 2 and 3 pursuant to section 52(3) of the *Act*. I wrote to the City to seek further representations regarding its position. The City's supplemental representations clarify its position that records 2 and 3 are excluded pursuant to section 52(3)3 of the *Act*.

The affected party also submitted representations to this office. The affected party's representations state that disclosure of the records at issue would constitute an unjustified invasion of his personal privacy taking into consideration the presumptions at sections 14(3)(d), 14(3)(f) and 14(3)(g) of the *Act* and the factors favouring non-disclosure at sections 14(2)(e), 14(2)(f), 14(2)(h) and 14(2)(i) of the *Act*.

I then sent the Notice of Inquiry to the appellant and invited her representations. I also enclosed the representations of the City and the non-confidential representations of the affected party and invited her to comment on them. The appellant responded with representations, in which she raised the possible application of the public interest override in section 16 of the *Act* as well as the applicability of the *Public Sector Salary Disclosure Act* (*PSSDA*). I then provided the appellant's representations to the City and affected party and invited their reply representations. The City and the affected party provided reply representations with respect to the applicability of the *PSSDA*.

RECORDS AND ISSUES SUMMARY:

The following records are at issue in this appeal:

Record 1 - Employment Agreement, dated June 27, 2005

Record 2 - Letter, dated April 27, 2007 that discusses contents of a termination agreement

Record 3 - Email correspondence, dated April 30, 2007 that discusses contents of a termination agreement

Record 4 - Letter sent via email, dated May 4, 2007 containing the final terms of a termination agreement, including a letter relating to the affected party's service with the City, and a "Mutual Release", one copy of which is in draft form and another that is signed by the affected party and a representative of the City.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The City submits that records 2 and 3 are excluded from the operation of the *Act* by virtue of section 52(3)3 of the *Act*. Record 2 is a letter from a representative of the City to the affected party setting out the terms of a termination agreement. Record 3 is an email received by the same representative of the City from counsel representing the City. The email relays a second email to the representative of the City that contains a further discussion of the terms of the termination agreement.

Neither the affected party nor the appellant addressed the applicability of section 52(3) in their representations.

Section 52(3)3 states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> …
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

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

For section 52(3)3 to apply, the City 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, consultation, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

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

The City submits that Record 2 was prepared by the City and Record 3 contains information collected on behalf of the City with respect to an employment-related matter.

On my review of the records and the representations of the City, I agree that Record 2 was "prepared" by the City. I also agree that Record 3 was "collected" by the City, as the bulk of the record was created by legal counsel for the affected party and appears to form part of the negotiation of the termination agreement. Further, I am satisfied that both Record 2 and Record 3 were "used" by the City in the course of negotiating the severance agreement with the affected individual. As such, the first part of the section 52(3)3 test has been established as the information was clearly "prepared by", "collected" and/or "used" by the City. Accordingly, I am satisfied that part one of the test has been met.

Part 2: meetings, consultations, discussions or communications

Records 2 and 3 are correspondence that has passed between the City and the affected individual or their respective counsel and as such constitute "communications." The City submits that the information contained in the records was also the subject of numerous meetings, consultations and discussions and I am satisfied that the content of the correspondence implicitly reveals that such meetings, consultations and discussions among the City and its legal counsel did occur.

I am therefore satisfied that the City prepared, collected and used the information contained in Records 2 and 3 in relation to meetings, consultations, discussions, and/or communications. As a result, I find that part two of the test under section 52(3)3 has been satisfied.

Part 3: labour relations or employment related matters in which the City has an interest

I must now determine, first, whether the communications in the record are about "labour relations or employment-related matters", and, if so, whether these are matters in which the City "has an interest".

The City states that the meetings, consultations and discussions relating to Records 2 and 3 "concern an employment-related matter involving an individual who was employed by the City at that time."

From my review of Record 2 and 3, the information relates to the proposed contents of a severance agreement between the City and the affected party, a former employee of the City. These lead directly to the signing of Record 4 by the affected party and the City. As such, I accept that the information at issue relates to "employment-related matters" as it outlines the negotiations that took place to resolve the human resources issue arising from the relationship between an employer and employee, namely the terms of the termination of this relationship.

It has been established that the phrase "in which the institution has an interest" means more than a "mere curiosity or concern" [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355(C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

In this appeal, Record 2 and 3 contain information about a pending severance agreement between an individual employed by the City and the City itself. In my view, in light of this employment

relationship, the City has an interest that is far more than a mere curiosity or concern within the meaning of section 52(3)3. I therefore conclude that the City "has an interest" in the "employment-related matter" of the proposed severance agreement terms contained in Record 2 and 3.

Accordingly, I find that part three of the section 52(3)3 test has been met and that, subject to the following discussion of Section 52(4), Records 2 and 3 are excluded from the provisions of the *Act*.

Section 52(4)

Even if section 52(3)3 is applicable, if the records fall within any of the exceptions in section 52(4), the *Act* still applies to them.

The City states in their representations that none of the exceptions for agreements in section 52(4) apply because "neither Record 2 nor Record 3 is a record of final agreement: MO-1994."

Section 52(4) states:

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

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

> In my view, the fully executed Agreements and Release which form part of Record 1 and all of Record 13 represent "agreements between an institution and one or more employees". The records reflect the fact that the information contained in these documents was arrived at following negotiations between the individuals involved and the City. In addition, I have found above that the agreements and the negotiations which gave rise to them were "about

> employment-related matters between the institution and the employees". In my view, the Agreements which comprise part of Record 1 and all of Record 13 fall within the ambit of the exception in section 52(4)3.

As noted in the preceding discussion on the applicability of section 52(3)3, I have agreed with Adjudicator Hale's analysis. In this appeal, the City relies on the further analysis in Order MO-1994 which concluded that records that are not records of "final agreement" do not fall within the scope of the agreements covered by the exception in section 52(4). The City relies on the following quote from Order MO-1994:

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

In this instance, Records 2 and 3 are correspondence negotiating the terms of a severance agreement. I agree with the reasoning in Order MO-1994 that the information in these records are steps in the negotiation and do not fall within the scope of an "agreement" as contemplated by section 52(4)3. None of the other exceptions at section 52(4) apply to these records and the records are excluded from the *Act*.

Given my findings that Records 2 and 3 are excluded from the application of the *Act*, I do not need to consider the applicability of the exemptions claimed by the City.

I must now consider whether Records 1 and 4 contain personal information and if so, whether the section 14(1) exemption applies.

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 personal information in 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 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.)].

Representations

The City chose not to submit representations on the section 14(1) exemption because they felt that a confidentiality covenant contained in Record 4 prevented them from making full representations. The City did clarify that they are not claiming that the exemption in section 14(1) applies to the information contained in Appendix B, the benefit information brochure from 2005, or Appendix C, the City of Guelph Compensation Policy for Senior Management.

Although certain paragraphs were indicated to be of greater interest than others, the affected party does not consent to the release of any of the information in Records 1 and 4. The affected party submits that the information is of a "personal nature". The appellant did not submit any representations as to whether or not the records contained the personal information of the affected party.

Analysis and findings

Previous orders of this office have consistently held that information about individuals named in employment contracts or severance agreements, including name, address, terms, date of termination and terms of agreement, 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).

After reviewing Records 1 and 4, I find that they contain the personal information of the affected party. In particular, the records contain his name, information about his salary, dates of employment, the benefits he received, as well as financial arrangements related to his departure from the City.

There is information in Record 1 which, however, is not of a personal nature. The appendices B and C to Record 1 contain information which is non-personal. These appendices are generic brochures on City compensation and benefit information, which describe the standard benefits provided to all employees. The appendices are not unique to any particular individual and do not render any individual identifiable (Order MO-2172). From a review of the appendices, it is clear that any non-union or management employee of the City would receive these brochures or have access to them. This belief is strengthened by the fact that the City did not claim that section 14(1) applied to them.

Therefore, I find that Appendices B and C do not contain the personal information of the affected party or any other individual. Since only personal information can be exempt under section 14(1), it does not apply to Appendices B and C. No other exemptions have been relied on for that information. As such, I will order appendices B and C of Record 1 to be disclosed.

I find that the remaining information in Record 1, and the information in Record 4, fall 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 the exceptions in paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under the section 14(1) exemption. On reviewing section 14(1), paragraphs (d) and (f) appear to be potentially applicable to the circumstances of this case. I will begin my analysis with a consideration of section 14(1)(f).

Section 14(1)(f) – Unjustified invasion of personal privacy

Section 14(1)(f) of the *Act* states:

> 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 the disclosure of which 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 City did not submit any representations on the application of sections 14(2), (3) or (4). Neither does the appellant.

The affected party raises the presumptions at sections 14(3)(d), 14(3)(f) and 14(3)(g) as well as the factors at section 14(2) to support his position that disclosure of the records would be an unjustified invasion of his privacy. The affected party acknowledges that section 14(4)(a) may apply to portions of the records.

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) – Classification, salary range, benefits, employment responsibilities

In my view, section 14(4)(a) is applicable to portions of both Records 1 and 4. 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;

As noted, the affected party recognized in his representations that section 14(4)(a) may apply to information in the records, but takes the position that disclosure of information not falling into the categories enumerated in section 14(4)(a) must be an unjustified invasion of privacy.

Findings and Analysis

"Classification, salary range or employment responsibilities"

After examining Record 1, I find the information described in paragraphs 2.01 to 2.04 to be a description of "employment responsibilities" and their disclosure would not constitute an unjustified invasion of privacy under section 14(4)(a). The salary information contained in paragraph 4.01 is the affected party's actual salary and does not refer to a salary range. However, I find that the pay grade also referred to in paragraph 4.01 is a "classification." and as

such its disclosure does not constitute an unjustified invasion of personal privacy. Having reviewed Record 4, the severance agreement clearly does not contain the classification, salary range, or the employment responsibilities of the affected party and therefore section 14(4)(a) does not apply to it.

"Benefits"

The exception at section 14(4)(a) could apply to further information in Record 1 or 4 should I determine that any information in the records 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 Order MO-1970:

> [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 affected party did not make representations regarding the applicability of section 14(4)(a) to Record 1. In the confidential portion of his representations, the affected party indicated that he relies upon Order MO-1332 for the proposition that the provisions in Record 4 refer to a salary continuation period that was negotiated as part of having employment terminated rather than being benefits received as a result of being employed.

Turning to Record 1, I am satisfied that paragraphs 4.02 to 4.06, 6.01, 6.02, 7.02, and 15.01 relate to benefits as they deal with health and insurance benefits, automobile and moving allowances, professional memberships, vacation and overtime, a termination allowance and payment for legal advice. Applying the principles from previous orders, these paragraphs qualify as a "benefit" for the purpose of section 14(4)(a). In fact, I note that paragraphs 4.02 to 4.06 are entitled "Benefits". The other paragraphs encompass entitlements that fall under the ordinary understanding of benefits, such as vacation and overtime, payments for termination without cause and a payment for obtaining independent legal advice.

Having reviewed Record 4, I am satisfied that two portions contain provisions that may be characterized as benefits: the second half of paragraph 1 and all of paragraph 2. Applying the principles from previous orders, these provisions reflect a benefit to which the affected party was entitled to under his original contract of employment (Orders PO-1885, PO-2050 and MO-1749). With respect to the affected party's submission that these provisions provide for a salary continuation period negotiated upon termination, I disagree. In this appeal, the salary continuation period upon termination is set out in Record 1, the original employment contract, and is a benefit that flows from that original contract. 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 Records 1 and 4, containing various releases, agreements and undertakings which have been negotiated as part of these agreements, 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 the information in paragraphs 2.01 to 2.04, the classification in 4.01, paragraphs 4.02 to 4.06, 6.01, 6.02, 7.02 and 15.01 of Record 1 and portions of paragraph 1 and paragraph 2 in its entirety of Record 4 are not exempt under section 14(1). As no other exemptions are claimed, I will order this information disclosed.

I find that the exception in section 14(4)(a) does not apply to the remaining portions of the records, which consist of 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 unjustified invasion of privacy under section 14(3).

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

Section 14(3) of the *Act* 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 his representations, the affected party submits 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), 14(3)(f) and 14(3)(g) of the *Act*.

Sections 14(3)(d), (f) and (g) 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; and
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations.

Representations

The affected party merely states that the presumptions in section 14(3)(d), (f) and (g) apply to the information contained in the records as they are "such records consisting of employment history, personal finances and personal evaluations." The affected party does not make reference to any specific paragraphs of the records.

The appellant made no representations in this regard.

Analysis and Findings

Section 14(3)(g)

Included at pages 3 and 4 of Record 4 is a letter provided to the affected party. Applying the principles discussed in Orders MO-1184, MO-1994 and MO-1749, I find that this letter contains the type of information identified in the presumption under section 14(3)(g) as it consists of personal recommendations or evaluations, character references or personnel evaluations. Disclosure of this information is therefore presumed to constitute an unjustified invasion of privacy.

As for the remaining information in Records 1 and 4, I am satisfied from my review that neither record contains information that might be properly considered as falling within the presumption in section 14(3)(g).

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

In Order PO-2050, Adjudicator Laurel Cropley 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 sections 14(3)(d) and (f) of the *Act*) to information in the context of severance agreements, finding:

> Generally, previous orders have found that although one-time or lump sum payments or entitlements do not fall under the presumption found at sections 21(3)(f) or (d) [Orders M-173, MO-1184 and MO-1469], information such as start and finish dates of a salary continuation agreement fall within the presumption in section 21(3)(d) and references to the specific salary to be paid to an individual over that period of time fall within the presumption in section 21(3)(f) [Order P-1348].
>
> In addition, information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption [Orders M-173, P-1348, MO-1332, and PO-1885]. Contributions to a pension plan have been found to fall within the presumption in section 21(3)(f) [Orders M-173 and P-1348].
>
> Previous orders have found, however, that the address of an affected party, releases, agreements about the potential availability of early retirement, payment of independent legal fees and continued use of equipment, for example, do not fall within any of the presumptions in section 21(3) [Orders MO-1184 and MO-1332]. In Order M-173, former Assistant Commissioner Irwin Glasberg found that much

> of the information in these types of agreements did not pertain to the "employment history" of the individuals for the purposes of section 14(3)(d) (of the municipal *Act*), but could more accurately be described as relating to arrangements put in place to end the employment connection.

I agree with these principles and adopt them for the purpose of this appeal. Applying them to the records at issue, I find that only a limited amount of information contained in Records 1 and 4 falls within the presumption at section 14(3)(d) and (f).

Record 1

Paragraph 4.01 of Record 1 contains a reference to the affected party's annual salary. This office has held that disclosing an individual's exact salary would describe the individual's income and is thus normally presumed to constitute an unjustified invasion of personal privacy under section 14(3)(f) (Orders 61, M-5, P-183, PO-2050 and MO-1749). However, in cases where a public servant's salary is greater than $100,000, institutions are required to disclose these amounts under the *PSSDA*, with which the City acknowledges it has complied. As such, where the Legislature has spoken and expressly legislated the disclosure of personal information, that disclosure is not an unjustified invasion of privacy under section 14(1)(d). I will canvass the applicability of section 14(1)(d) in greater detail below.

Some limited information in Record 1 falls within the definition of "employment history" that previous orders of this office have classified under section 14(3)(d). The dates in paragraphs 1.01 and 1.02 setting out the term of employment are employment history and I will order this information severed from the record as its disclosure would be a presumed invasion of privacy under section 14(3)(d). Similarly, paragraph 4.01 makes reference to the start date for the affected party's employment with the City and I will order this information severed from the record.

Record 4

The first two paragraphs of Record 4 make reference to the termination date for the affected party. This information qualifies as "employment history" as described in section 14(3)(d) and is presumed to be an unjustified invasion of privacy if disclosed. I will order these references severed from the records.

Record 4 lists two lump sums in paragraphs 3 and 4. These lump sums are separate from the affected party's salary and there is no indication from the affected party, or on the face of the record itself, that these lump sums are in any way related to an identifiable portion of his salary. Lump sum payments have been consistently treated by this office as not falling within the presumption of section 14(3)(d) or 14(3)(f) (Orders M-173, MO-1184, MO-1469 and MO-2174). I agree with the approach taken in previous orders and therefore find that the lump sum payments set out in paragraphs 3 and 4 are 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.

I find that the remaining portions of the severance agreement, set out agreements and undertakings 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 required in order to fall under the presumption at section 14(3)(f). These agreements and undertakings therefore do not fall within any of the presumptions found at section 14(3).

Accordingly, I find that only the references to the party's term of employment and termination date, found in paragraphs 1.01, 1.02 and 4.01 of Record 1 and paragraphs 1 and 2 of Record 4 fall within the presumption in section 14(3)(d). Along with the information I found to fall within the presumption in section 14(3)(g), disclosure of this information is therefore presumed to be an unjustified invasion of the affected party's personal privacy. I have already found that section 14(4) does not apply to this information. The section 14(1)(f) exception to the exemption therefore does not apply to this information, and subject to the discussion of section 16, below, the information is exempt under section 14(1).

Section 14(1)(d) – Authorized under an Act of Ontario

Paragraph 4.01 of Record 1 sets out the affected party's annual salary. As noted above, disclosure of this information would normally be considered a presumed invasion of the affected party's personal privacy under section 14(3) (f) of the *Act*. However, the affected party's annual salary falls within the scope of the *Public Sector Salary Disclosure Act* (*PSSDA*) as it is greater than $100,000. Both the City and the affected party acknowledge that the salary has been disclosed in accordance with the *PSSDA* but maintain that this disclosure is for the number alone, not any other portion of the employment contract.

In Order PO-2641, I found that section 21(1)(d) (the provincial equivalent of section 14(1)(d)) authorizes the disclosure of salary information not otherwise permitted to be disclosed under section 14(1)(f). Section 14(1)(d) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

In order for section 14(1)(d) to apply, there must either be specific authorization in the statute for the disclosure of the type of personal information at issue, or there must be a general reference to the possibility of such disclosure in the statute together with a specific reference to the type of

personal information to be disclosed in regulation (Compliance Investigation Report 190-29P, Order M-292, MO-2030).

In Order PO-2641, I found that the *PSSDA* expressly authorized the institution to disclose the salary and benefit amounts and that this express authorization by statute falls within the exception created by section 21(1)(d):

> I observe that the *PSSDA* authorizes public availability of salary and benefit information by the employer, and in this case, the employer that is directed to make disclosure under the *PSSDA* is also the institution. This is analogous to the situation under the *Municipal Elections Act* (as addressed in *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773, [2002] O.J. No. 1776 (Div. Ct.)). Under section 3 of the *PSSDA*, I find that the University itself *is* both "obligated and authorized" to make the information public under the *PSSDA*. As well, I find that this situation does not resemble the facts in *Municipal Property Assessment Corp. v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 71 O.R. (3d) 303, [2004] O.J. No. 2118 (Div. Ct.), where public disclosure of the requested information by MPAC itself was not authorized under the *Assessment Act*. I therefore adopt the approach in *Gombu* and I conclude that the *Municipal Property Assessment Corp.* case is distinguishable.
>
> Accordingly, I find that section 3(1) of the *PSSDA* "expressly authorizes the disclosure" of the "salary" and "benefit" amounts of the President of the University. Section 3(1) of the *PSSDA* indicates that the obligation to disclose the "salary" and "benefit" information lies with the employer. It prescribes with specificity the manner in which the information should be disclosed, and states that disclosure should be made to members of the public. Salary is defined in section 2 of the *PSSDA,* in part, as follows:
>
> "salary" means the total of each amount received by an employee that is,
>
>> (a) an amount required by section 5 of the Income Tax Act (Canada) to be included in the employee's income from an office or employment,
>>
>> …
>
> In these circumstances, I find that the exception to the personal privacy exemption created by section 21(1)(d) applies to the President's "salary" in Article 3.1 of the REA. As I have already found that information that relates to the President's benefits should be disclosed pursuant to section 21(4) of the *Act*, it is not necessary for me to consider the application of section 21(1)(d) to that information. Accordingly, I find that the salary referenced in Article 3.1 of the REA should be disclosed to the appellant as it falls within the exception created by section 21(1)(d) of the *Act*.

I adopt the analysis in that appeal and find that the salary referenced in paragraph 4.01 of Record 1 is required to be disclosed in accordance with the *PSSDA*. As such, the section 14(1)(d) exception to the section 14(1) exemption applies to the salary amount, and I will order the annual salary be disclosed to the appellant.

Section 14(2): factors and considerations

I must now determine if the disclosure of the remaining personal information contained in Records 1 and 2 would constitute an unjustified invasion of the affected party's personal privacy. If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as they provide some criteria 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 Record 1 paragraphs 2.01 to 2.04, the classification in paragraph 4.01, all of paragraphs 4.02 to 4.06, 6.01 to 6.02, 7.02, 15.01, limited portions of paragraphs 1, and all of paragraph 2 of Record 4 meet the exception listed in section 14(4)(a). I have also determined that the affected party's annual salary should be disclosed. I have found that a limited amount of information in Records 1 and 2, that being references to the affected party's employment and termination date, meets the presumption at section 14(3)(d) which would result in disclosure of that information representing a presumed unjustified invasion of privacy. Similarly, I have found that the reference letter forming part of Record 4 meets the presumption at section 14(3)(g) and is similarly exempt from disclosure. Therefore, I must now review the remaining portions of Records 1 and 4 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 affected party submits the factors listed at section 14(2)(e), (f), (h), and (i) apply to the severance agreement, stating that:

> "[D]isclosure may unfairly expose me as an individual to pecuniary harm, is highly sensitive, and may unfairly damage my reputation… It remains my understanding and expectation that any information of the nature requested by the appellant would be kept in the strictest of confidence by the City..."

An additional consideration that this office has found relevant in dealing with these types of records is section 14(2)(a), which refers to subjecting government actions to public scrutiny.

Sections 14(2)(a), (e), (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 institution to public scrutiny;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

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 and will apply them for the purposes of the present appeal.

The appellant has provided information that she is acting in the public interest by "informing the citizenry about the activities of their government," especially as it relates to "portions of the contract… that come from taxpayer money." 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 these particular agreements and would address the "public scrutiny" concerns identified by the appellant. For example, as noted above, the severance agreement contains a paragraph setting out a one-time lump sum payment to the affected party. Given that this payment will come out of the public purse, and is therefore financed by taxpayer dollars, the public has an interest in ensuring that this payment is appropriate in the circumstances. Only through disclosure of this type of information can the actions of the City be subjected to meaningful scrutiny.

Further, both records set out terms of employment and termination that the public has a right to review in order to determine whether the affected party's original employment and subsequent termination were carried out in an appropriate manner.

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)(e): pecuniary or other harm

Turning to the factor at section 14(2)(e), this office has held that although the disclosure of personal information may be uncomfortable for those involved in an already acrimonious matter, this does not mean that harm would result within the meaning of this section, or that any resulting harm would be unfair [Order PO-2230]. However, it has also been held that the unfair harm contemplated by section 14(2)(e) is foreseeable where disclosure of personal information is likely to expose individuals to unwanted contact with the requester [Order M-1147], or where such disclosure could expose the individuals concerned to repercussions as a result of their involvement in an investigation by the institution [Order PO-1659]. Based on the information before me, while unwanted attention from the media may be uncomfortable for the affected party, it is unlikely that disclosure of the personal information at issue could lead to unfair exposure to pecuniary or other harm to the affected party. Accordingly, I find that the factor at section 14(2)(e) is not relevant in this appeal.

Section 14(2)(f): highly sensitive

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 (Order PO-2518).

With respect to Record 1, the affected party and the City only took issue with the disclosure of a limited number of paragraphs. Indeed, in Record 1, paragraphs 1.04, 2.05, 4.01, 4.03 to 4.06, 6.01-6.02, 7.02, 11.01, and 15.01 were indicated as a priority to be withheld while the remaining paragraphs were conceded as not being of great concern if disclosed to the appellant. I note that I have already determined that the classification in paragraph 4.01 and paragraphs 4.03 to 4.06, 6.01, 6.02, 7.02, and 15.01 meet the exception found at section 14(4)(a) of the *Act*. As such, disclosure of those paragraphs does not constitute an unjustified invasion of the affected party's privacy.

I agree that disclosure of the remaining paragraphs and Record 4 might cause the individual to whom the record relates some personal distress. Record 1, however, contains a "confidentiality" clause which indicates that salary range and policies governing benefits are a matter of public record, and that the City may release portions of Record 1 with notice to the affected party. This suggests the affected party had notice from the beginning that these records may not be entirely confidential. I further note that it is well known by the public that severance agreements are negotiated with senior officials should they depart prior to the end of their employment contracts. In my view, the terms negotiated by the affected party are relatively standard. In these circumstances, any "sensitivity" arises more from the fact that the affected party left his employment early (which is well-known to the public) than from the disclosure of the actual terms of his severance package.

Accordingly, in my view, while the factor at section 14(2)(f) is a relevant consideration, in these circumstances, it is only to be afforded little 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 contained in the employment contract in Record 1 and the severance agreement in Record 4 was negotiated, rather than supplied by the affected party, and section 14(2)(h) accordingly has no application.

The submission of the affected party indicates that it is his understanding and expectation that the agreements would be kept in the strictest of confidence by the City. I note that the "confidentiality" clause in Record 1 indicates that the clauses dealing with the termination allowance and severance agreement may be released publicly upon notice to the affected party and that information dealing with salary ranges and benefits are matters of public record. However, in apparent contradiction of that position, Record 4 contains a confidentiality clause in the "Mutual Release" at pages 5-7, which indicates that the circumstances of termination or the

terms of the release are to remain confidential. The confidentiality clause of Record 4 seems to be undermined by that clause in Record 1, which states that certain information in Record 4 could be made public. I also note that, while parties to an agreement may agree to keep the agreement confidential, they are not able to unilaterally agree to remove the agreement from the scope of the *Act*. A non-disclosure clause agreed to by an institution under the *Act* and an employee must be analyzed in that context.

Given the affected party's awareness of the terms in Record 1, even if the information had been "supplied" and section 14(2)(h) therefore could apply (which I have found not to be the case, above), I would find that the affected party has a lowered expectation of confidentiality over those terms specified as being public or that may be released to the public. In that circumstance, I would accord this factor only limited weight.

However, as noted above, this factor does not apply as the information was not "supplied".

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

The affected party has only made reference to the fact that his reputation may be damaged through disclosure of the records without any more specific representations explaining how this damage may occur.

Damage to an individual's reputation envisioned by section 14(2)(i) that "may" occur would establish the first requirement for the application of section 14(2)(ii), but any such damage must also meet a second requirement, namely, that it 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 nor whether any "unfair" damage would occur (Order P-256). It is likely that once it is disclosed, the information in the employment contract and severance agreement could be disseminated through the media. However, even if there were to be disclosure to the public at large, I cannot conclude, on the evidence provided to me, that it would unfairly damage the reputation of any person. In my view, with respect to Record 4, any "harm" to the affected person would be directly connected to his employment and subsequent termination from employment with the City, not from disclosure of the terms of his departure. In these circumstances, I am not persuaded that any consequences of disclosure would be "unfair". With respect to Record 1, I fail to see how disclosure of the terms of his employment with the City could damage the affected party's reputation, especially where the benefits and salary ranges are already matters of public record, as noted in Record 1.

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 favour withholding 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) does not apply.

Public confidence in the integrity of an institution

A 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 her representations the purpose of the *Act* to "shed light on the operations of government." The appellant makes numerous references to the value of the information for the purpose of holding the City accountable to the taxpayers. I agree with these submissions. Employment contracts and severance agreements may involve significant expenditures on the part of government institutions. Taxpayers have a right to review these expenditures in order to determine whether the institution has acted prudently with respect to their money. The integrity of a government institution is based on the principles of openness, transparency and accountability for the expenditure of taxpayer dollars. In these circumstances, I find that the public confidence consideration applies and carries significant weight in respect of the records.

Balancing the considerations

Many of the paragraphs remaining in issue in Record 1 (after the application of section 14(3) presumptions, above) are not contentious, and those that are, on my review, are relatively generic or innocuous, focusing on the contract renewal process, residency requirements and releases from liability. More contentious are the paragraphs in Record 4 concerning the lump sum amounts and the release terms.

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 section 14(2)(f) carries only limited weight. Balancing the factors to determine whether the disclosure of the remaining portions of the employment contract and severance agreement would result in an unjustified invasion of privacy, I find that the considerations favouring disclosure greatly outweigh the considerations weighing in favour of the non-disclosure of this information. Accordingly, I find that the disclosure of the remaining information in Records 1 and 4 would not constitute an unjustified invasion of the affected party's personal privacy. The exception to the exemption in

section 14(1)(f) therefore applies, and this information is not exempt under section 14(1). I will therefore order it to be disclosed.

PUBLIC INTEREST

The appellant claims that there is a compelling public interest in the disclosure of the records 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 limited information that I have determined should be severed from the records. I have found that section 14 only applies to the portions of the records that consist of employment history and the reference letter.

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 exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption (Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)).

In support of his position that section 16 is not applicable, the affected party submits that these "interests are essentially private in nature". The appellant relies on Orders M-773 and M-1074 for the suggestion that members of the media have no greater right to compel disclosure than any other member of the public and that the existence of media interest may not evidence "compelling" public interest.

The appellant submits that the purpose of her "request is to inform Guelph's residents of the operations of their government, and let them know how their money is being spent." "The public interest override …clearly applies to the portions [of the contract] that come from taxpayer money."

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

In this appeal, I agree with the appellant that a public interest exists in the disclosure of employment contracts and severance agreements, particularly as they concern the expenditure of public funds. I disagree with the affected party's position that these issues are essentially private in nature. However, it is most relevant that I have found only a very minimal amount of personal information exempt pursuant to section 14(1). I am satisfied that the terms of the employment contract and the severance agreement can be scrutinized without specific knowledge of the start

and end dates of employment or access to the letter given by the City to the affected party. The public interest is satisfied by the level of disclosure already required under this order. I find that there is no compelling public interest in the disclosure of the remaining undisclosed information, and therefore section 16 is not applicable to those portions that I have found exempt under section 14(1).

ORDER:

1. I uphold the decision of the City to withhold Records 2 and 3 in their entirety.

2. I uphold the decision of the City to deny access to the following sections of Record 1: the dates of the term of employment in paragraph 1.01, 1.02 and 4.01; and of Record 4: pages 3-4, and the dates of termination in paragraphs 1 and 2. For greater clarity, attached to the copy of my order to be sent to the City is a copy of the relevant records with the portions to be severed highlighted.

3. I order disclosure of the remaining portions of Record 1 and Record 4 in their entirety be made by sending the appellant a copy of the records, excluding the exempted portions, by no later than July 18, 2008, but not before July 14, 2008.

4. In order to verify compliance with the provisions above, I reserve the right to require the City to provide me with a copy of the material sent to the appellant.

Original Signed by: June 12, 2008
Brian Beamish
Assistant Commissioner