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

ORDER MO-2344

Appeal MA07-308

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 all email correspondence, records and memoranda related to, created by, and received from, the City's Director of Finance/Treasurer (the affected party) for the period July 1, 2007 to July 17, 2007, relating to that individual's retirement from and/or termination of employment by the City.

The City located seven responsive records and denied access to them on the basis that some of the records are subject to the discretionary exemption at section 12 of the *Act* (solicitor-client privilege). In addition, the City claimed that the records are exempt under section 14(1) of the *Act* (personal privacy) because disclosure of the records would constitute an unjustified invasion of the affected party's personal privacy, taking into consideration the presumptions found at sections 14(3)(d) and 14(3)(f), and the factors set out 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. During mediation, the City clarified that it relied on section 14(1) to withhold all of the records from the appellant and section 12 (solicitor-client privilege) to withhold two paragraphs on the notes used by the City's Chief Administrative Officer for briefing City Council. At the end of mediation, none of the issues in dispute were resolved. Also during mediation, the appellant raised the possible application of the public interest override in section 16 of the *Act*.

This file was subsequently transferred to me for adjudication. I decided to commence this inquiry by seeking the representations of the City and the affected party. The City was asked to provide representations regarding the application of the solicitor-client privilege and personal privacy exemptions under the *Act*. The affected party was invited to provide representations on the personal privacy exemption. Both parties were also asked to provide representations regarding the possible application of the public interest override found at section 16 of the *Act*. The City and affected party responded with representations.

I then sent the Notice of Inquiry, along with the representations of the City and the non-confidential representations of the affected party, to the appellant and invited her representations. 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 the affected party and invited their reply representations. The City 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	Briefing Note, undated, used by the City's Chief Administrative Officer (CAO) for briefing City Council

Record 2	Letter from the CAO to the affected party, that discusses the contents of the Minutes of Settlement and Release
Record 3	Minutes of Settlement and Release
Record 4	Letter from the affected party's counsel to the City, that discusses the contents of the Minutes of Settlement and other issues
Records 5, 6 and 7	Email correspondence involving City staff

The City claims that two portions of Record 1 are exempt from disclosure pursuant to section 12 of the *Act*. The City has also applied the personal privacy exemption at section 14(1) of the *Act* to all the records. Similarly, the affected party claims that all the records are exempt from disclosure pursuant to section 14(1).

DISCUSSION:

SOLICITOR/CLIENT PRIVILEGE

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or 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.

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) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

My analysis will be conducted under branch 1 solicitor-client communication privilege.

Solicitor-client communication privilege

Branch 1 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 professional legal advice. 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].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Analysis and Findings

I have reviewed the contents of the paragraphs at issue in Record 1 and I find that they describe communications between the City and a solicitor engaged by the City, in which the solicitor provides advice as to what should be done in the relevant legal context. Accordingly, I find that the two paragraphs contained in Record 1 are exempt from disclosure on the basis that branch 1 common law solicitor- client privilege under section 12 applies to them.

PERSONAL INFORMATION

I will now consider the application of the personal privacy exemption found at section 14(1) of the *Act* to the remainder of Record 1 and Records 2, 3, 4, 5, 6, and 7 in their entirety. In order to determine whether section 14(1) might apply to these records, it is necessary to decide whether each 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 detailed representations on the question of whether the records contain personal information, nor on the section 14(1) exemption. The City took the position that a confidentiality covenant contained in Record 3 prevented it from making full representations. The affected party notes in his representations that the records contain information relating to his employment history and his financial position and income. 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 the records, 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. Record 1 also contains a significant amount of information regarding the affected party's working relationship with the City. Therefore, I find that the information in the records 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.

I also find that portions of Record 1 contain the personal information of other individuals, who could be identified from the content of the record.

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)(d).

Paragraph 1a) of Record 3 sets out the affected party's annual salary. 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 *PSSDA* as it is greater than $100,000. The City acknowledges that the salary has been disclosed in accordance with the *PSSDA* but maintains that this disclosure is for the number alone, not any other portion of records relating to the affected party, including e-mail correspondence, and memoranda related to employee and, therefore, the *PSSDA* is not applicable to this appeal.

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 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 1a) of Record 3 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(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 representations on the application of sections 14(2), (3) or (4).

The affected party raises the presumptions at sections 14(3)(d) and 14(3)(f) as well as the factors at sections 14(2)(f), 14(2)(h) and 14(2)(i) to support his position that disclosure of the records would be an unjustified invasion of his privacy. The affected party did not make representations on the applicability of section 14(4).

I will first turn to consider whether any of the information in the records 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 Record 3. 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;

Analysis and Findings

"Classification, salary range or employment responsibilities"

Having reviewed the records, I find that they do not contain the classification, salary range, or the employment responsibilities of the affected party and therefore section 14(4)(a) does not apply to them.

"Benefits"

The exception at section 14(4)(a) could apply to information in the records 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.

Turning to Record 3, I am satisfied that portions of paragraph 1a), and paragraphs 3, 5, 6 and 7 in their entirety may be characterized as benefits. Paragraph 1a), except to the extent that it outlines the affected party's salary and Salary Continuation Period, discusses the City's responsibilities with regard to pension and health and welfare benefits. Similarly, paragraphs 3 and 5 deal with health coverage and pension eligibility respectively. Paragraph 6 deals with reimbursement for expenses incurred while employed, and paragraph 7 is a summation of the rights and responsibilities for both the City and the affected party with respect to benefits in general. Applying the principles from previous orders, these paragraphs disclose "benefits" for the purpose of section 14(4)(a).

I am satisfied that the remaining paragraphs of Record 3, 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. Under section 14(1)(f), therefore, disclosure of that information is not an unjustified invasion of personal privacy and the section 14(1) exemption does not apply. Therefore, I conclude that portions of Record 3, including the part of paragraph 1a) to which section 14(4)(a) applies, and paragraphs 3, 5, 6 and 7 in their entirety, are not exempt under section 14(1) and I will order them disclosed.

Turning to the remaining records, I am satisfied that those records do not contain information relating to benefits for the purpose of section 14(4)(a) and, therefore, section 14(4)(a) does not apply to them.

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 raised the presumptions found at sections 14(3)(d), and (f) of the *Act*. These sections 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

Representations

The affected party merely states that the presumptions in section 14(3)(d) and (f) apply to the information contained in the records as they relate to "my employment history or describing my financial position and income." The affected party does not make reference to any specific paragraphs of the records.

The appellant and the City made no representations in this regard.

Analysis and Findings

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:

> …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 the records falls within the presumptions at sections 14(3)(d) and (f).

Record 1

The first bulleted paragraph in this record contains a reference to the date of the affected party's last day worked. 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.

Record 2

The first paragraph of this record contains a reference to the date of the affected party's last day worked. 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.

Record 3

Some limited information in Record 3 falls within the definition of "employment history" that previous orders of this office have identified under section 14(3)(d). The dates in the preamble and in paragraphs 1a), 2 and 3, setting out the last day worked constitute employment history.

Paragraph 1a) also contains reference to a "Salary Continuation Period" and provides a date for the termination of this period. During the Salary Continuation Period, the City agrees to continue paying the affected party's salary and benefits, provided the affected party does not obtain employment. While the Salary Continuation Period might be construed as "employment history", I disagree. In essence, the Salary Continuation Period represents a notice period provided to the affected party for not continuing to work for the City. The agreement makes it clear that his employment ceased on the date noted above, not at the end of the Salary Continuation Period. As a result, given that the affected party's employment with the City was over, the Salary Continuation Period can hardly be said to represent his employment history. I will therefore not consider the Salary Continuation Period to be "employment history". I find that section 14(3)(d) does not apply to this information.

Records 5, 6 and 7

These records each contain a reference to the affected party's years of service. 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 these records.

I find that the remaining portions of the records 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).

Accordingly, I find that only the references to the affected party's last day worked and the years of service found in the first bulleted paragraph in Record 1, the first paragraph of Record 2, the preamble and paragraphs 1a), 2 and 3 of Record 3, and the applicable portions of Records 5, 6 and 7 fall within the presumption in section 14(3)(d) and are therefore presumed to be an unjustified invasion of the affected party's personal privacy. 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(2): factors and considerations

I must now determine if the disclosure of the remaining personal information contained in the records 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 3, paragraphs 1a), 3, 5, 6 and 7, relate to benefits as they deal with health, insurance and pension benefits and expenses to which the affected party was entitled as a result of being employed and, therefore, meet the exception listed in section 14(4)(a). I have also determined that the affected party's annual salary should be disclosed. In addition, I have found that a limited amount of information in the records, that being references to the affected party's employment termination date and years of service, meets the presumption at section 14(3)(d), which would result in disclosure of that information representing a presumed unjustified invasion of privacy. Therefore, I must now review the remaining portions of the records 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)(f), (h), and (i) apply to the records and indicates that he agreed with his former employer that the terms and conditions of his retirement from the City are to remain confidential.

In her representations, the affected party notes that, "the purpose of…my request is to inform Guelph's residents of the operations of their government, and let them know how their money is being spent."

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), (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 institution to public scrutiny;
>
> …
>
> (f) the personal information is highly sensitive;
>
> …

> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

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):

> 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 the affected party's "compensation package is precisely analogous to his salary" and, similarly, "must be released for the purposes of accountability," given that the money received by the affected party is "money that comes largely from taxpayers." Taking into consideration the appellant's representations and all of the circumstances of this appeal, I am satisfied that disclosure of the remaining information in Record 3 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. For example, as

noted above, Record 3 contains a paragraph setting out a "Salary Continuation Period" during which his salary will be paid even though the affected party's working relationship with the City has ended. Given that these funds will come out of the public purse, and are 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.

In addition, the information contained in Record 3 sets out the terms of the affected party's departure from the City that the public has a right to review in order to determine whether the affected party's departure was carried out in an appropriate manner.

I also find that the consideration under section 14(2)(a) does not relate to the remaining records at issue, as they are not the sort of records for which a high degree of scrutiny is warranted. Specifically, the records do not contain any information that relates to how the City compensated the affected party upon his departure from the City.

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 Record 3.

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).

I am of the view that disclosure of Record 1 would likely cause the affected party significant personal distress. It contains sensitive background information relevant to his departure from the City. The record also contains personal information of other individuals who may be identified from the content of the record.

Record 4 is a letter from the affected party's counsel to the City providing comments on the Minutes of Settlement and Release and requesting changes. The letter contains comments of a personal nature about the affected party and details relating to his employment with the City. To the extent that the letter is part of the process of negotiation between the City and the affected party, I am satisfied that it contains information that can be considered highly sensitive.

With respect to Records 2, 5, 6 and 7, subject to the exclusion of the affected party's years of service pursuant to section 14(3)(d), I find that disclosure of these records would not likely cause significant personal distress to the affected party. These records contain nothing of a confidential nature, nor do they discuss details of the employment relationship between the City and the affected party. In fact, the bulk of Records 5, 6 and 7 is comprised of a statement that the City planned on releasing publicly regarding the status of the affected party's employment, and that appears to have been shared in advance with the affected party.

With respect to Record 3, I agree that its disclosure might cause the affected party some personal distress, given that the record contains information relating to his departure from City staff. However, I 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 rather 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, with the exception of Record 1, in which section 14(2)(f) is to be given significant weight in balancing the privacy interests of the affected party.

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 Record 1 was not supplied by the affected party and in Records 2, 3, 5, 6 and 7 was the result of negotiations with, rather than supplied by, the affected party. Section 14(2)(h), accordingly, has no application.

I note that the City and the affected party placed great emphasis on the fact that Record 3 contains a confidentiality clause. However, as I outlined in Order MO-2318, while parties to an agreement may agree, as between themselves, 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 covered by the *Act* and an employee must be analyzed in that context.

As noted, Record 4 was prepared by counsel for the affected party to provide comments to the City on the terms of the Minutes of Settlement and Release. As such, I am satisfied that, as part of the negotiation process, these comments were "supplied" by counsel and that counsel would have expected that those negotiations would have been conducted in a confidential manner. In these circumstances, I find that the factor in section 14(2)(h) applies to Record 4 and I accord it significant weight.

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 this section, 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 might 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 records could be disseminated through the media. However, even if they were to be disclosure to the public at large, I cannot conclude (with one exception), on the evidence provided to me, that it would unfairly damage the reputation of any person. In my view, with respect to Record 3, any "harm" to the affected person would be directly connected to his departure 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 Records 2, 5, 6 and 7, I fail to see how disclosure of the contents of a cover letter and emails setting out the affected party's departure from the City would unfairly damage his reputation.

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.

The one exception to the above analysis is Record 1. I find that much of the information contained in the record is of a sensitive nature, and the accuracy and reliability of the information has not been tested (Order MO-2189). Therefore, I find that the affected party's reputation may be unfairly damaged by the disclosure of this information.

Accordingly, I find that the factor in section 14(2)(i) applies only to Record 1 and I accord it significant weight.

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. Separation 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 Record 3.

Balancing the considerations

With the exception of Records 1 and 4, I find 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 records 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 2, 3, 5, 6 and 7 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 Records 2, 3, 5, 6 and 7 to be disclosed, subject to my findings with respect to the presumptions under section 14(3)(d).

However, with respect to Record 1, I find the opposite to be true. Record 1 contains information that is sensitive, the accuracy of which has not been verified. The disclosure of this information would likely cause the affected party significant personal distress and may unfairly damage his reputation. In addition, the nature of the record is not of the type that has been found to be subject to public scrutiny, nor would it inform public confidence in an institution. Therefore, on balance, I uphold the City's decision to withhold disclosure of Record 1 in its entirety.

With regard to Record 4, I find that the factors supporting non-disclosure at sections 14(2)(f) and (h) are relevant and I have found there to be no factors weighing in favour of disclosure. I therefore also uphold the City's decision not to disclose Record 4.

PUBLIC INTEREST IN DISCLOSURE

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 information contained in Record 1 in its entirety and the limited information that I have determined should be severed from the remaining records, which consists of the affected party's employment history.

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.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act*, which are equivalent to sections 8 and 12 of the *Act*, are to be "read in" as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*. Accordingly, I will also consider whether section 16 applies to the parts of Record 1 that I found exempt under section 12.

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.)).

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." In addition, the appellant submits that the reasons for the affected party's departure from the City must be explained to the public, as he had access to the "city coffers."

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. Section 12 exists to protect solicitor-client privilege, a quasi-constitutional value that is jealously guarded by the courts. 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 separation and termination 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 sections 12 and 14(1). I am satisfied that the terms of Record 3 can be scrutinized without specific knowledge of the end dates of employment. Similarly, I am satisfied that the severance of the reference to the affected party's last day worked in Record 2 and years of service in Records 5, 6 and 7 will not interfere with the public's interest in the reasons for the affected party's departure from the City. 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 in these records, and therefore section 16 is not applicable to those portions that I have found exempt under section 14(1).

With respect to Records 1 and 4, I find that section 16 is not applicable. The information contained in Record 1 does not shed any light on the expenditure of public funds, nor does it relate to the affected party's accessibility to "city coffers." While there may be a public interest in the background information relating to the affected party's departure from the City, I find that this public interest does not outweigh his privacy interests in these circumstances.

Similarly, disclosure of Record 4 might shed light on the negotiation process between the City and the affected party. However, the assessment of how public funds have been spent can be accomplished by the disclosure of the Minutes of Settlement and Release (Record 3) that resulted from the negotiation process. The disclosure of Record 4 would not bring any greater transparency to the actual expenditure of City funds.

ORDER:

1. I uphold the decision of the City to withhold Records 1 and 4 in their entirety.

2. I uphold the decision of the City to deny access to the following sections of Record 2: the last sentence of the first paragraph, Record 3: the last day worked in the preamble and in paragraph 2, and to the following sections of Records 5, 6 and 7: the reference to the number of years of service. 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 Records 2, 3, 5, 6 and 7 made by sending the appellant a copy of the records, excluding the exempted portions, by no later than **October 15, 2008**, but not before **October 7, 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: August 9, 2008
Brian Beamish
Assistant Commissioner