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

INTERIM ORDER MO-2536-I

Appeal MA09-155

Municipality of Meaford

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NATURE OF THE APPEAL:

The Municipality of Meaford (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> I am requesting municipal records that show the amount of money paid to [a former senior administrator with the Municipality (the former administrator)] upon the severing of his employment with the Municipality. The legal term for the 'payout' is likely not severance. I am requesting the document that shows the negotiated amount that was agreed to by both parties to avoid court action.

The Municipality located a two-page record that is responsive to the request. This record is a signed copy of the Minutes of Settlement reached between the former administrator and the Municipality. The Municipality issued an initial decision letter to the requester that denied access to this record based on the exemption in section 14(1) of the *Act* (invasion of privacy).

Shortly thereafter, the Municipality issued an amended decision letter in which it again denied access to the record on the basis of section 14(1) of the *Act*, but also stated that the record qualified for exemption under section 6(1)(b) (closed meeting) of the *Act*.

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

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator initially assigned to this file sent a Notice of Inquiry identifying the facts and issues in this appeal to the Municipality and an individual who may have an interest in this record (the affected party). The Municipality provided representations in response. The affected party also sent correspondence to this office which raised certain procedural issues, which were addressed by the adjudicator. The Notice of Inquiry, along with a complete copy of the Municipality's representations, was then sent to the appellant, who also provided representations. Subsequently, the affected party also provided representations to this office.

This file was transferred to me to complete the adjudication process.

PRELIMINARY ISSUE – SCOPE OF THE REQUEST

As a preliminary matter, I note that the appellant's representations state:

> Initially, when I requested the information, I wasn't quite sure how to frame the request.
>
> As the Municipality mentioned, the Minutes of Settlement (2 page document) have information of a personal nature ... which I definitely do not want to access. I would be very satisfied with just the final, cumulative amount paid.

This statement confirms the appellant's interest, identified in her request, in the amount of money paid to the former administrator, as opposed to other information which might be contained in the record.

The record at issue in this appeal has been identified as the Minutes of Settlement entered into between the Municipality and the former administrator. This document includes certain clauses which clearly set out the amount of money paid to the former administrator, or relate to other "benefits" or costs which I consider to also be included in the scope of the request; however, this document also includes other clauses and information that do not relate to the amount paid. In particular, on my review of the record, clauses 2, 3, 4, 5 and 6 of the Minutes of Settlement contain information relating (either directly or indirectly) to the amount paid. The other clauses in the Minutes of Settlement relate to other items which do not relate to the amount, and the appellant has confirmed that she is not interested in pursuing access to this information. Accordingly, in this appeal, I will only be addressing issues concerning access to clauses 2 through 6 of the Minutes of Settlement, and will not be reviewing issues relating to access to the other clauses in that document.

RECORD:

The record in this appeal is a document entitled "Minutes of Settlement," which is a signed agreement entered into between the former administrator and the Municipality. The portions of this record that are at issue are clauses 2, 3, 4, 5 and 6.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The affected party submits that the record is excluded from the operation of the *Act* by virtue of section 52(3), and that section 52(4) of the *Act* does not apply to the record.

Sections 52(3) and (4) state:

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

> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.
>
> (4) 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.

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

The affected party takes the position that the record at issue does not fit within any of the exceptions in section 52(4), in particular, section 52(4)3. The affected party's representations, which I find to be somewhat confusing, seem to take the position that certain formalities regarding the manner in which a municipality can enter what he calls "lawful, formal agreements" were not met. He also suggests that certain requirements under the *Municipal Act* were not observed, and that, although portions of the record may in fact constitute an agreement between the parties, these portions merely summarize existing statutory obligations.

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. He stated:

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

> view, the Agreements which comprise part of Record 1 and all of Record 13 fall within the ambit of the exception in section 52(4)3.

I agree with Adjudicator Hale's analysis, and apply it to the record at issue in this appeal. On my review of the record, it appears on its face to be a signed agreement between the former administrator and the Municipality. This agreement appears to have been arrived at following negotiations between the parties, and is executed by both of the parties. In my view, the agreement which comprises the record falls within the ambit of the exception in section 52(4)3. Accordingly, the record is not excluded from the scope of the *Act* under section 52(3).

I will now consider whether the record qualifies for exemption under sections 14(1) and/or 6(1)(b) of the *Act*.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, the term "personal information" is defined as recorded information about an identifiable individual, including information relating to the employment history of the individual or information relating to financial transactions in which the individual has been involved (paragraph (b) of the definition) and the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual (paragraph (h) of the definition).

The Municipality states that the record contains the personal information of the affected party, as defined in section 2 of the *Act*. The appellant does not directly address this issue.

Previous orders of this office have considered the contents of various types of agreements, such as employment contracts or settlement and/or severance agreements (Orders M-173, MO-1184, MO-1332, MO-1405 and P-1348). These orders have consistently held that information about the individuals named in the agreements, which include, *inter alia*, their name, date of termination and terms of settlement, concern these individuals in their personal capacity and thus qualifies as personal information. I am satisfied that the same considerations apply in the circumstances of this appeal, and that the record contains the personal information of the affected party.

INVASION OF PRIVACY

Section 14(1) - Introduction

Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception which may apply in the present appeal is that set out in section 14(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

> if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(1)(f) is an exception to the section 14(1) prohibition against the disclosure of personal information. In order to establish that section 14(1)(f) applies, it must be shown that disclosure of the personal information at issue in this appeal would **not** constitute an unjustified invasion of personal privacy (see, for example, Order MO-1212).

In applying section 14(1)(f), sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

With respect to section 14(3) the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to in favour of disclosure.

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [See Orders PO-2017, 2033-I and PO-2056-I]

If none of the presumptions in section 14(3) applies, the Municipality must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

I will first 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

Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. Section 14(4)(a) may apply in the circumstances. It reads:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

> discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution;

The Municipality has simply taken the position that this section does not apply to the record. The appellant and the affected party do not directly address this issue.

In my view, the clauses at issue in the Minutes of Settlement do not contain information which could qualify as the classification, salary range or employment responsibilities of the former administrator; however, portions of the records may qualify as "benefits" under that section.

This 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

Subsequent orders have also 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]

Furthermore, 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.

On my review of clauses 2 through 6, I am satisfied that clause 6 is a provision that relates to what may be characterized "benefits". Applying the principles from previous orders, this clause reflects a benefit to which the affected party was entitled to under his original contract of employment, and is a benefit that flows from that original contract. Accordingly, I find that this clause discloses a "benefit" for the purpose of section 14(4)(a), and the exception in this section therefore applies to it.

I am satisfied that the remaining clauses relate to matters that have been negotiated as part of the agreement, do not qualify as "benefits" under section 14(4)(a) (Orders M-173, M-204, M-419, M-797, MO-1332 and MO-2174).

When section 14(4)(a) is found to apply, disclosure of that information is not considered to be an unjustified invasion of personal privacy. Therefore, I conclude that the information in clause 6 is not exempt under section 14(1).

Having found that the exception in section 14(4)(a) does not apply to the remaining clauses at issue, 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. As identified above, 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).

The Municipality takes the position that disclosure of portions of the record are presumed to be unjustified invasions of privacy under sections 14(3)(d) and (f) of the *Act*. These sections read:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness; and

Neither the appellant nor the affected party make reference to any of the presumptions.

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

The Municipality states that the presumption in section 14(3)(d) applies because the Minutes of Settlement reveal the last day the former administrator worked and his termination date. The Municipality also states that section 14(3)(f) applies, as the Minutes of Settlement "would specify the retirement/termination allowance. This in turn would reveal individuals finances, income, financial history and activities."

In Order PO-2050, Adjudicator Laurel Cropley examined the application of the presumption 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 clauses at issue, I find that only a limited amount of information contained in clauses 2, 3, 4 and 5 fall within the presumptions at section 14(3)(d) and (f).

Clause 2

The first sentence of Clause 2 of the record refers to the amount of the affected party's retirement allowance. This is a one-time or lump sum payment or entitlement, and I find that it does not fall under the presumptions found at sections 14(3)(f) or (d). The second sentence in this clause simply provides for a potential method of arranging payment, and I also find that it does not fall under the presumptions found at sections 14(3)(f) or (d).

Clauses 3 and 4

These clauses contain information, which, as indicated in the excerpt from Order PO-2050 above, do not pertain to the "employment history" of the individuals for the purposes of section 14(3)(d), but can more accurately be described as "relating to arrangements put in place to end

the employment connection." Accordingly, I find that they do not fit within the presumptions under section 14(3).

Clause 5

This clause relates to contributions to a pension plan. Information relating to this type of information has been found to fall within the presumption in section 14(3)(f) [Orders M-173 and P-1348], and I find that the presumption in that section applies to clause 5.

In summary, I find that only clause 5 of the record falls within the presumptions in section 14(3). As a result, the disclosure of clause 5 is presumed to be an unjustified invasion of the affected party's personal privacy, and it qualifies for exemption under section 14(1).

Section 14(2) - factors and considerations

I found above that certain information contained in the record falls within the presumptions under section 14(3), and that other information fits within the exception under 14(4). I must now review the remaining information (clauses 2, 3 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 the case, apply to the information.

Section 14(2) reads as follows:

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

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

The Municipality has taken the position that the factors favouring non-disclosure in sections 14(2)(e), (f), (h) and (i) apply. The appellant argues that the factors weighing in favour of disclosure in section 14(2)(a), (c), (d) apply, and that factors relied on by the Municipality do not apply. The affected party does not provide representations on any of the factors. I will now review the factors relied on by the parties to determine whether they apply to the remaining portions of the record.

Section 14(2)(a): subjecting the activities of the institution to public scrutiny;

The Municipality takes the position that this factor does not apply.

The appellant states that this factor applies and has significant weight. She states that she is a retired taxpayer on a fixed income, and is trying to assess her long term ability to continue to live in the Municipality. She identifies her concerns about the municipality's financial situation, and that she is "trying to gain an understanding of the nature and source of our overall debt."

In another portion of her representations, the appellant states:

> As a result of information in the local paper in 2007, the community became aware that there was a financial settlement. According to the letters to the editor in our local paper in 2007-2008, and due to the secrecy surrounding the settlement, some in our community, rightly or wrongly, made the assumption that the payout was substantial.

The appellant also refers to the building of "trust, transparency and accountability with our local government", and states:

> I understand that the actual negotiations should be private; however, I can't understand why the amount of the payout should be hidden in other costs within our itemized debt. This leads to further distrust of our local government, because again, rightly or wrongly, assumptions are made that other contentious expenditures may be hidden behind extraneous confidentiality agreements. …

Findings

Previous orders have reviewed the application of the factors in section 14(2) to agreements similar to the one at issue in this appeal. In Order MO-1469, Adjudicator Hale stated:

> It has been well-established in a number of previous decisions that the contents of agreements entered into between institutions and senior employees represent the

> sort of records for which a high degree of public scrutiny is warranted (Order M-173, M-953). Based on this, and the appellant's desire to scrutinize how the Municipality compensated a senior management employee upon his termination, I find that section 14(2)(a) is a relevant consideration in the circumstances of the present appeal. I further find that this is a significant factor favouring the disclosure of the information contained in the record.
>
> Previous orders issued by the Commissioner's office have identified another circumstance which should be considered in balancing access and privacy interests under section 14(2). This consideration is that "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution". (Orders 99, P-237, M-129, M-173, P-1348 and M-953).
>
> The severance agreement which forms the record at issue involved a significant expenditure of public funds on behalf of a senior employee. Further, the climate of spending restraints in which these agreements were negotiated placed an obligation on the Municipality's officials to ensure that tax dollars were spent wisely. On this basis, I conclude that the public confidence consideration also applies in the present circumstances.

I adopt the approach outlined in Order MO-1469 for the purposes of the present appeal.

I find that the consideration under section 14(2)(a) favouring the disclosure of the information in clauses 2, 3 and 4 is a relevant and significant factor. The appellant has indicated that the issue of the amount of the settlement has been the subject of public attention. In my view, the disclosure of information contained in clauses 3, 4 and the first sentence in clause 2 is desirable for the purpose of shedding some light on the details of this agreement. Specifically, these clauses contain information that relates to the amount of money paid to the former administrator, or relates to other expenses and costs which I found to be included in the scope of the request. In my view, disclosure of this information is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

In addition, I find that the "public confidence" consideration, referred to by Adjudicator Hale, above, also applies to the information contained in clauses 3, 4 and the first sentence in clause 2, and carries significant weight in respect of information pertaining to the affected person's termination of employment.

However, the second sentence in clause 2 simply relates to a payment option, and I am not satisfied that the factor in 14(2)(a) applies, nor that the disclosure of this sentence is desirable for ensuring public confidence in the integrity of the institution.

Sections (c) and (d): promote informed choice in the purchase of goods and services, and fair determination of rights

The appellant takes the position that these factors apply, as disclosure would allow her to make an informed choice regarding her ability to pay for municipal services. I do not accept the appellant's position, and find that these two factors do not apply to the information at issue.

Section (e): unfair exposure to pecuniary or other harm

The Municipality takes the position that this factor applies, because the Minutes of Settlement contain a confidentiality clause, and disclosure would therefore be "unfair." I find that this is not a factor in this appeal, as I am not satisfied that the affected party would be unfairly exposed to pecuniary or other harms.

Section (f): highly sensitive

Previous orders have established that, for this factor to apply, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518 and MO-2344].

The Municipality takes the position that this factor applies because disclosure of the information could cause significant distress to the affected party. The appellant takes the position that this is not a factor because of the time that has passed since the Minutes of Settlement were executed, and the assumptions (rightly or wrongly) that have already been made in the community about the amount.

In my view, based on the representations of the parties, I am satisfied that information of this nature can be considered to be "highly sensitive." However, given the time that has passed since the agreement was executed and the fact that no representations on this were received from the affected party, I consider this factor to be of little weight.

Section (g): supplied in confidence

The Municipality takes the position that, because the Minutes of Settlement contain a confidentiality clause, the information was "supplied in confidence." I agree, and find that this factor applies in the circumstances of this appeal, and give it some weight.

Section (h): unfair damage to reputation

The Municipality takes the position that this factor applies; however, most of the Municipality's representations focus more on the possibility of this factor applying to the Municipality and its staff than of it applying to the affected party. The factor in section (h) relates to the reputation of "any person referred to in the record" and, in this regard, it is the affected person's reputation that this section could apply to.

The Municipality also suggests that disclosure may adversely affect the affected party; however, it does not indicate how any such impact would be "unfair" in the circumstances. Based on my review of the record and the representations, I am not satisfied that disclosure of the clauses of the agreement at issue could result in unfair damage to the reputation of any person referred to in the record.

Finding

Weighing the factors favouring non-disclosure in sections 14(2)(f) and (g) against the factors favouring disclosure (both the one found in section 14(2)(a) and the unlisted "public confidence" factor), I find that the factors favouring disclosure which apply to the information contained in clauses 3, 4 and the first sentence of clause 2 outweigh the factors favouring non-disclosure for this information. These clauses contain information about the amount paid by the Municipality and, based on my review of the record and previous orders of this office, I find that the factors favouring disclosure which apply in this appeal carry significant weight with respect to this information. These clauses, entered into between the Municipality and one of its senior employees, represent "the sort of records for which a high degree of public scrutiny is warranted", and I accordingly find that the factors favouring disclosure apply to these clauses. As a result, these clauses do not qualify for exemption under section 14(1).

I also find, however, that the factors favouring disclosure carry little weight for the second sentence of clause 2. As identified earlier, the second sentence in this clause simply provides for a potential method of arranging payment, and information of this nature is not the sort of information for which a high degree of public scrutiny is warranted. In my view, the factors favouring non-disclosure outweigh the factors favouring disclosure of this information. Because I have found that this information constitutes the "personal information" of the affected party, I find that this sentence qualifies for exemption under section 14(1).

By way of summary, I have found that clause 5 falls within the presumption in section 14(3)(f) and should not be disclosed. I have also found that clause 6 fits within section 14(4)(a) and ought to be disclosed, and that clauses 3 and 4 and the first sentence of clause 2 should be disclosed based on a balancing of the factors in section 14(2).

Accordingly, I uphold the decision of the Municipality that clause 6 and the second sentence of clause 2 qualify for exemption under section 14(1).

I will now review the application of the exemption in section 6(1)(b) to the portions of the record which do not qualify for exemption under section 14(1) (namely, clauses 3, 4, 6 and the first sentence of clause 2).

CLOSED MEETING

The Municipality has also taken the position that the record is exempt under section 6(1)(b). That section states:

A head may refuse to disclose a record,

> that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting [Orders M-64, M-102, MO-1248]

I will review each part of this three-part test to determine whether the record qualifies for exemption under this section.

Part 1 - a council, board, commission or other body, or a committee of one of them, held a meeting

In support of its position that the record qualifies for exemption under section 6(1)(b) of the *Act*, the Municipality states that it held a closed Council meeting on August 13, 2007. Attached to the Municipality's representations is a copy of the resolution of the Municipality to go in camera, which indicates that Council went into closed session on that date. The appellant does not dispute that the meeting was held. In the circumstances, I am satisfied that the meeting did take place, and that Part 1 of the three part test under section 6(1)(b) has been met.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

In support of its position that this part of the three-part test is established, the Municipality states:

> Section 239(2) of the *Municipal Act* authorizes a municipal council to go in camera to discuss matters relating to an identifiable person including municipal employees or local board members. Please find a copy of the resolution attached to this document.

As indicated above, attached to the Municipality's representations is a copy of the resolution of the Municipality to go in camera, which states that Council went into closed session on August 13, 2007. This resolution also indicates that it went into closed session to discuss items relating to, among other things, "personal matters about an individual, including Municipal or local Board employees," as authorized by section 239(2)(b).

Upon my review of the record and the Municipality's representations, I am satisfied that the Municipality was authorized by section 239(2)(b) of the *Municipal Act* to hold a meeting in the absence of the public, and to consider the matters discussed in that in-camera meeting. In the circumstances, I find that the Municipality was authorized by statute to hold the meeting in the absence of the public, thereby satisfying Part 2 of the test under section 6(1)(b) of the *Act*.

Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting

Under Part 3 of the test set out above, previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

The Municipality's representations on this part of the test are sparse, simply stating that disclosure would reveal "possible verbal discussions that took place between members of Council in a closed setting."

The question of what information would "reveal the substance of deliberations" of a closed meeting has been discussed in a number of previous orders. In Order MO-2499-I Senior Adjudicator John Higgins recently reviewed a number of previous decisions of this office, as well as those of other access-to-information commissioners, in which the question of what information would "reveal the substance of deliberations" of a closed meeting was discussed. One of the decisions he considered was Order MO-2337, and the relevant portion of Senior Adjudicator Higgins' order reads:

> In Order MO-2337, Assistant Commissioner Brian Beamish dealt with a request for information about the theft of a fire truck that led to disciplinary action that was reflected in Minutes of Settlement. In that case, the Assistant Commissioner found that the evidence was not sufficient to establish that disclosure would reveal the substance of deliberations that took place at the closed meeting. The records only included a general reference to the disciplinary matter, and all decisions regarding the matter had been made before the closed meeting was held.
>
> In reaching this finding, Assistant Commissioner Beamish referred to Order M-1169, in which former Assistant Commissioner Mitchinson considered the application of section 6(1)(b) to handwritten notes and minutes of an in camera meeting where fully executed Minutes of Settlement relating to a complaint against the Chief of Police under the *Ontario Human Rights Code* were reviewed. The former Assistant Commissioner stated:
>
> > In my view, these two records deal with the subject of the human rights complaint and the outcome of the mediation exercise, but

> not the substance of any deliberations about this matter. The terms of settlement were simply reported to the Board at the January 20 meeting. *The Board did not, and it would appear did not have authority to, discuss these terms with a view to approving or making a decision about them*. Therefore, I find that the third requirement has not been established for these two records, and that they do not qualify for exemption under section 6(1)(b). [emphasis added]

I find the above discussion to be relevant to the circumstances of this appeal. In this appeal, the Municipality has stated that Council of the Municipality "approved the Minutes of Settlement." This seems to fit squarely within the highlighted discussion set out above, particularly where former Assistant Commissioner Mitchinson makes a distinction between material that is simply reported to an in camera meeting of a municipal body, and one where a municipal body has the authority to discuss these terms of an agreement "with a view to approving or making a decision about them."

Adjudicator Donald Hale also addressed this issue in Order MO-1676, where he considered the application of section 6(1)(b) to certain minutes of settlement. He stated:

> In Orders M-184 and M-196, former Assistant Commissioner Irwin Glasberg reviewed the operation of section 6(1)(b) in situations where a board of education and a municipal council reviewed and approved proposed severance agreements with former senior employees at meetings held in the absence of the public. In each case, section 6(1)(b) was found to apply as the former Assistant Commissioner held that the disclosure of the record would "reveal the substance of deliberations" of the decision-making body.
>
> In the present appeal, the Police Services Board was charged with making a decision on whether to approve the Minutes of Settlement negotiated between counsel for the former Chief and the Police. I accept the evidence of the Police that, following a discussion, the Board accepted the financial terms of settlement reflected in the first four paragraphs of the Minutes and "signed off" on them. I agree with the characterization by the Police of the remainder of the Minutes as "boiler plate" and find that the substance of the deliberations of the Board focussed on those financial aspects of the settlement which are reflected in paragraphs 1 to 4. Insofar as the remainder of the Minutes is concerned, however, I am not satisfied that its disclosure would serve to "reveal the substance of the Board's deliberations", as is required by section 6(1)(b).

I adopt the approach to this issue taken in these previous orders, and apply it to this appeal. In the circumstances, based on my review of the representations and the record, I find that the disclosure of the Minutes of Settlement would reveal the substance of the deliberations at the *in camera* meeting as they reveal the terms of the settlement that was the very substance of the discussions that took place. Furthermore, although some portions of the Minutes of Settlement may contain clauses which could be considered "boiler plate", I find that the clauses remaining at

issue do not contain this type of information. Therefore, the third requirement for the application of section 6(1)(b) has been met for the remaining information.

I have reviewed the exceptions to the exemption set out in section 6(2) and find that none is established in the circumstances of this appeal.

As all three requirements for the application of section 6(1)(b) have been met and the exception does not apply, I find that the record is exempt pursuant to section 6(1)(b). However, I must go on to review the municipality's exercise of discretion to apply this exemption to the record.

EXERCISE OF DISCRETION

The section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

The Municipality's representations on the exercise of its discretion to apply section 6(1)(b) are sparse. The Municipality states that it properly exercised its discretion by taking into account the following factors:

- that the privacy of the individual should be protected, and
- that the Minutes of Settlement contain a confidentiality clause

The Municipality also states that, in exercising its discretion it "examined all possible scenarios involving the release of this document" and also that it "sought legal advice."

Findings

I have carefully considered the Municipality's exercise of discretion to apply the exemption in section 6(1)(b) to the record at issue.

If the Municipality is found to have erred in the exercise of discretion based on any of the three reasons set out above, I may send the matter back to the Municipality for a re-exercise of discretion. I will now review the three reasons.

Did the Municipality exercise its discretion for an improper purpose?

Based on the representations provided by Municipality, I am satisfied that the Municipality did not exercise its discretion in bad faith or for an improper purpose.

Did the Municipality take into account irrelevant considerations?

On my review of the circumstances of this appeal, I find that the Municipality took into account an irrelevant consideration in deciding to exercise its discretion not to disclose the record at issue to the appellant.

As set out above, the Municipality stated that one of the factors it considered in exercising its discretion not to disclose the record is that that "the privacy of the individual should be protected." However, based on my findings above, the personal privacy provisions in section 14(1) do not apply to portions of the records, and disclosure would not constitute an unjustified invasion of privacy. Accordingly, I find that the factor that that "the privacy of the individual should be protected" does not apply to all of the information in the record, and that it is an irrelevant factor for certain portions of the record.

Therefore, in deciding to deny access to the record, I find that the Municipality took into account an irrelevant factor in exercising its discretion not to disclose certain portions of the record.

Did the Municipality fail to take into account a relevant factor?

On my review of the Municipality's representations, I also find that the Municipality failed to take into account a number of relevant factors. These factors include the transparency purpose of the *Act*, the public interest in information relating to the amount paid under a settlement agreement, and the fact that, in the absence of a section 6(1)(b) exemption claim, a significant amount of information about the termination of employment with public bodies is often ordered disclosed (as identified in my discussion of the personal privacy exemption, above). The Municipality does not refer to any of these factors, nor is there any evidence that they were considered by it. Although the Municipality states that it "examined all possible scenarios involving the release of this document," it does not indicate that it considered these factors.

In Order MO-2499-I, referred to above, Senior Adjudicator John Higgins confirmed the importance of these factors in deciding whether to release records relating to matters involving the termination of employment. In ordering the institution in that appeal to re-exercise its discretion, Senior Adjudicator Higgins stated:

> In my view, the Board's exercise of discretion, as explained above, did not adequately consider the transparency purpose of the *Act* or the fact that information about the terms on which the holder of a public office ceased to hold such an office is, inherently, a matter of some public interest. That interest is not circumscribed by the extent of recent media discussions of the issue. The Board also failed to take account of the fact that, in the absence of a claim under section 6(1)(b), a significant amount of information about the termination of public offices or employment with public bodies is often ordered disclosed. (See, for example, Orders MO-2293, MO-2174 and MO-1469.)

I also note that, in Order M-196, former Assistant Commissioner Irwin Glasberg dealt with a retirement settlement agreement, and concluded that it was exempt under section 6(1)(b). He added a postscript to the order, in which he stated:

> Where early retirement agreements have been considered in meetings which are closed to the public, municipalities may, under certain circumstances, be permitted to rely on section 6(1)(b) of the *Act* to withhold access to information contained in these records. *It would be unfortunate, however, if institutions began to use this provision to routinely shield the financial terms of such agreements from legitimate public scrutiny.*
>
> I would also point out that section 6(1)(b) is a discretionary exemption which means that the head of an institution can choose to release information about a retirement agreement notwithstanding that it was discussed in camera. …

Accordingly, in deciding to deny access to the record, I find that the Municipality failed to take into account a number of relevant factors in exercising its discretion not to disclose certain portions of the record.

Conclusion

The Municipality erred in exercising its discretion under section 6(1)(b), as it took into account an irrelevant consideration, and also failed to consider relevant considerations. I will therefore order it to re-exercise its discretion to apply section 6(1)(b) to the record at issue.

ORDER:

1. I uphold the decision of the Municipality that the mandatory exemption in section 14(1) of the *Act* applies to clause 5 and the second sentence in clause 2 of the record.

2. I do not uphold the decision of the Municipality that section 14(1) of the *Act* applies to clauses 3, 4 and 6 and the first sentence in clause 2.

3. I uphold the decision of the Municipality that section 6(1)(b) of the *Act* applies to the record, subject to the re-exercise of discretion referred to below.

4. I order the Municipality to re-exercise its discretion under section 6(1)(b) of the *Act*, using the discussion above as a guide.

5. I order the Municipality to provide me with representations on its exercise of discretion no later than **July 27, 2010**.

6. I will defer my final decision with respect to disclosure of the record pending my review of the municipality's exercise of discretion as required by Provision 4.

7. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues that may be outstanding.

Original Signed by: June 29, 2010
Frank DeVries
Adjudicator