



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

INTERIM ORDER MO-2645-I

Appeal MA09-161

West Nipissing Police Services Board



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NATURE OF THE APPEAL:

The West Nipissing Police Services Board (the Police) received a request from a member of the media under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for:

[a]ny contract that may contain financial or other details entered into between the West Nipissing Police Service Board and [the Chief of Police] and was made with consideration to past personal services provided by [this individual] dated June or July 2008.

The Police located the responsive record and issued a decision denying access to it, citing section 52(3) and section 12 of the *Act*.

The requester, now the appellant, appealed this decision.

During mediation the Police issued a revised decision letter in which they reiterated their position that the record falls outside the parameters of the *Act* under section 52(3)3. The letter also stated that in the alternative, they believe that the discretionary exemptions in sections 6(1)(b) (closed meeting), 11 (economic and other interests), 12 (solicitor-client privilege), and the mandatory exemption in section 14(1) (personal privacy) would apply to the record. The appellant raised the issue of the applicability of the public interest override at section 16 of the *Act*.

As mediation did not resolve this appeal, the file was transferred to adjudication where an adjudicator conducts an inquiry. After receiving representations from all the parties to the appeal, I issued Interim Order MO-2609-I. That order contains the following order provisions:

1. I order the Police to re-exercise their discretion in accordance with the analysis set out above and to advise the appellant, the Chief and this office of the result of this re-exercise of discretion, in writing. If the Police continue to withhold all or part of the record, I also order them to provide the appellant with an explanation of the basis for exercising their discretion to do so and to provide a copy of that explanation to the Chief and to me. The Police are required to send the results of their re-exercise, and their explanation to the appellant, with the copy to this office and to the Chief, no later than April 18, 2011. If the appellant and/or the Chief wish to respond to the Police's re-exercise of discretion, and/or their explanation for exercising their discretion to withhold information, they must do so within 21 days of the date of the Police's correspondence by providing me with written representations.
2. I remain seized of this matter pending the resolution of the issue outlined in provision 1.

In accordance with provision 1 of Interim Order MO-2609-I, the Police re-exercised their discretion and decided to continue to withhold the record in its entirety from the appellant. The

Police provided the appellant with an explanation of the basis for exercising their discretion to withhold the record and provided a copy of that explanation to the Chief and to me. Neither the Chief nor the appellant responded to the Police's explanation as to the re-exercise of their discretion. I will now determine whether the Police re-exercised their discretion in a proper manner.

RECORD:

The record at issue is an agreement dated July 11, 2008 and includes Attachment 1 to the agreement, but not Schedule B. This schedule was disclosed to the appellant during the adjudication stage of this appeal.

DISCUSSION:

RE-EXERCISE OF DISCRETION

Initial Representations

In their initial representations, the Police submitted that in exercising their discretion, they considered that the record contains personal information of a sensitive and confidential nature engaging mandatory sections of the *Act*. This is underlined by the fact that they notified the Chief under section 21 in order to provide him with an opportunity to comment. They also state that:

The appellant has no personal information contained in the record as the request is general in nature. The record is still active as the maturity date has not yet been realized. The possibility of a severed document being released is forfeited by the types [of] exemptions applied and the strong confidentiality clause which remains in effect.

The Police decide on a case-by-case system to determine the extent, if any, information can be released from a record. In this case, after a careful review, taking into regard the nature of the record the Police determined that denying access to the record was the only position to take.

A press release was released however; due to the confidentiality of the record the release did not contain sensitive information.

Although the appellant did not provide direct representations concerning the Police's exercise of discretion, its initial representations focused on what it considered should have been relevant in the Police's exercise of discretion. In particular, the appellant maintained that the Police did not take into account the transparency provisions of the *Act* as set out in section 1, which state that the purposes of the *Act* include a right of access to information under the control of institutions in accordance with the principles that,

- (i) information should be available to the public,

- (ii) necessary exemptions from the right of access should be limited and specific,

In its representations, the appellant stated that:

The resulting retirement contract issued by the Police Services Board was agreed upon before the conclusion of the investigation [into the conduct of the Chief]. The [appellant] believes it is in the best interest of the public of West Nipissing to know how members of the Police Services Board, an agency of the municipal government which includes their Mayor as chair, reacted in the wake of the investigation, especially in terms of financial compensation to [the Chief].

Furthermore, no details have been released by the [Police] as to the nature of the original complaint against [the Chief] or any relevant details about the investigation itself...

Releasing the record will serve the purpose of providing the public with information that is critical to their understanding of events that transpired during the investigation and how their local government's police board responded. It will also shed light onto how their tax dollars are being used to pay salaries (the total sum of which is already public knowledge), and any continued financial compensation in addition to regular retirement income within the conditions agreed upon in contracts of this nature...

Despite the confidentiality clause preventing the record from being released, the [appellant] believes that under the circumstances of a legal investigation, the taxpayers of West Nipissing should be informed of how [the Chief] was compensated. It not only sheds light on the operations of government, one of the main purposes of the *Act*, but it also outweighs the [Police's] arguments in sections 11, 12 and 14 because of the need for accountability in the expenditure of public funds.

Given the [Police's] responsibility to be transparent to taxpayers and the public, it is questionable they should be authorized to agree to such a confidentiality clause in the first place. If boards on governments are indeed authorized to sign confidentiality agreements to protect otherwise public information, this would allow them to circumvent the *Act* at will by simply creating such an agreement...

The [appellant] believes that it's in the best interest of the public of West Nipissing to be made aware of the financial details given the circumstances of [the Chief's] "severance." The salaries of public servants are made available because of the nature of their work and the taxpayer funds that compensate them. The same principles should apply when public servants are relieved of duty, especially in suspicious circumstances.

The [appellant] would like to respectfully submit again that the need for accountability in the expenditure of public funds should be considered, especially in this circumstance.

Analysis/Findings in Interim Order MO-2609-I

I found in Interim Order MO-2609-I that the information at issue was subject to statutory litigation privilege under section 12 as the record was prepared by or for counsel employed or retained by the Police for the settlement of contemplated litigation. The Chief and the Police were parties to this contemplated litigation.

In Interim Order MO-2609-I, I found that the Police had not exercised their discretion in a proper manner, by failing to take into account the following relevant factors:

- a) that information should be available to the public;
- b) the statutorily mandated practice of the Police with respect to similar information in the record;
- c) that disclosure of similar information is required by law;
- d) the public interest in the record;
- e) whether disclosure will increase public confidence in the operation of the Police;
- f) that some of the information in the record may be otherwise available;
- g) that some of the information in the record would have been disclosed but for the application of the discretionary section 12 exemption;
- h) the passage of time since the agreement was executed; and,
- i) that any necessary exemptions from the right of access should be limited and specific.

I also found in Interim Order MO-2609-I, that the Police had not considered severing specific parts of the record with a view to disclosing as much information as possible.

Representations of Police in Response to Interim Order MO-2609-I

In response to Interim Order MO-2609-I, the Police state that they considered the factors listed above and outlined other factors they took into consideration in reaching their decision, as described below:

Factors listed in Interim Order MO-2609-I

(a) and (i) - Consideration that information should be available to the public and that any necessary exemptions should be limited and specific.

The Police submit that these are factors of general application and they may be superseded by more specific considerations that support a denial of access.

(b), (c) and (f) - The statutory mandate practice with respect to similar information/Disclosure of similar information is required by law/Some information may otherwise be available.

The Police submit that the income and benefits of public sector employees that meet certain criteria are required to be disclosed under the *Public Sector Salary Disclosure Act (PSSDA)* and that this statutory requirement would, as a general proposition, indicate public policy support for releasing any financial information which fell within these categories. However, the Police submit that to the extent that a record captures salary or benefits amounts that are subject to *PSSDA* they will, in fact, be disclosed separately from the *MFIPPA* process albeit in aggregate amounts for income and benefits. It does not include provisions requiring disclosures of non-aggregate amounts for particular circumstances, for example, the income derived from a single term employment contract in cases where an individual has had multiple term employment contracts within the year or the costing of an employee retirement agreement.

(e) - Whether disclosure will increase public confidence in the institution.

The Police submit that they are not directly aware of any circumstances that would indicate public confidence would either be enhanced or diminished by the release of the disputed record currently.

(g) - Disclosure would occur but for the application of MFIPPA section 12.

The Police submit that even if the record was subject to multiple discretionary exemptions they would still be required to exercise their discretion and that it is the character and compelling nature of the factors, rather than simply their numbers, which should be given greater weight in determining whether to grant access.

(d) and (h) - Public Interest in the Record/Passage of Time

The Police state that they are not directly aware of any current public debate or inquiry into the terms of the record and consider that the passage of time may reduce the public relevance to the record.

Other Factors

Efficacy of the Mediation Process of Potential Legal Disputes

According to the Police, this factor has benefits to parties in terms of avoiding protracted legal battles, the uncertainties associated with assessing liability and reduces the costs associated with trials and tribunal proceedings. Such discussions are normally conducted as between the parties in confidence. The Police state that disclosure of the terms of any settlement discussions produces the benefit of allowing public scrutiny of its result, it also subjects the body to both justified and unjustified public criticism of the result. Granting access may provide incentive to

parties to litigate in order to avoid accountability for the result of the litigation. The Police note that this consideration is of general character only, and has therefore not assigned it paramount weight.

Costs to Organization

The Police submit that this is a very significant factor in this case and that granting access to the record has the real potential of imposing a variety of costs upon the institution. The Police provided me with additional confidential information on this factor.

Analysis/Findings

Based upon my review of the Police's confidential and non-confidential representations, and taking into account the provisions of Interim Order MO-2609-I and the contents of the record, I find that the Police have still not exercised their discretion in a proper manner taking into account all of the relevant considerations and not taking into account irrelevant considerations.

In support of my decision, I will review each factor set out in Interim Order MO-2609-I, along with the additional factors considered by the Police, as follows:

Factors listed in Interim Order MO-2609-I

(a) and (i)

- (a) *information should be available to the public; and*
- (i) *any necessary exemptions should be limited and specific.*

The Police did not provide specific representations on these factors.

Concerning factor (a), the Police should have specifically considered the requirement set out in section 1 that one of the purposes of the *Act* is to provide a right of access to information under the control of institutions in accordance with the principle that information should be available to the public.

Concerning factor (i), the Police have not considered whether they could have restricted the application of the discretionary exemption regarding litigation privilege in section 12 to certain portions or clauses of the record.

(b), (c) and (f)

- (b) *The statutorily mandated practice of the Police with respect to similar information in the record;*
- (c) *That disclosure of similar information is required by law; and*
- (f) *Some information may otherwise be available.*

The Police state that if the record contains salary or benefits amounts that are subject to *PSSDA* they will, in fact, be disclosed separately from the *MFIPPA* process in an aggregate amount. The Police did not consider whether any specific portions of the record contains this type of

information and whether to disclose these portions. Nor did the Police consider whether any other information in the record may be available other than pursuant to the *PSSDA*.

(e) - Whether disclosure will increase public confidence in the institution.

The Police submit that they are not aware of any benefit that disclosure would increase public confidence in the operation of their institution. However, the appellant, in its initial representations, expressed significant concerns about the operation of the Police. The appellant stated that:

In February 2008, the [Police] received a “complaint” relating to the conduct of former police Chief, according to their most recent press release after the results of the investigation into his actions during that time was released.

After 2 months of rumours, the [appellant] finally received an official comment in April 2008 confirming that a third party investigation (later revealed as the Ontario Civil Commission on Police Services) was taking place in regards to the complaint. The subject of the complaint was not released to protect the investigation, and still has not been released despite its conclusion.

[The Chief] also took a “voluntary leave” from his duties that April. At no time did the [Police] release a statement informing the public that there was no longer an acting chief or that an interim chief had been named.

In June, the matter was only discussed in closed meetings of the [Police], despite the interest taken by some members of West Nipissing Police Services.

A year later in April 2009 no new information had been released, and two police Chiefs assumed the role and then stepped down before current Chief [name] accepted the position.

In July 2009, still with no details into the investigation, [the Chief’s] “retirement” was officially announced in a two sentence press release.

On September 4, 2009 the investigation concluded and the media was alerted a month later. No charges were laid against [the Chief], and no new information into the complaint or the details of the investigation was released.

The public was and still is in the dark about a situation involving their police service...

[The Chief’s] sudden retirement came in the midst of an investigation into his actions as police Chief, raising suspicions that he may be criminally charged.

The resulting retirement contract issued by the Police Services Board was agreed upon before the conclusion of the investigation. The [appellant] believes it is in

the best interest of the public of West Nipissing to know how members of the Police Services Board, an agency of the municipal government which includes their Mayor as chair, reacted in the wake of the investigation, especially in terms of financial compensation to [the Chief].

Furthermore, no details have been released by the Board as to the nature of the original complaint against [the Chief] or any relevant details about the investigation itself. It's been nearly two years since the public was first informed about [his] retirement and the subsequent investigation - an issue that also required persistent inquiry from the media. By addressing the results of the investigation in a paragraph, without allowing the public to form their own opinions about the actions of their government, or those running its emergency services, is unacceptable.

Releasing the record will serve the purpose of providing the public with information that is critical to their understanding of events that transpired during the investigation and how their local government's police board responded. It will also shed light onto how their tax dollars are being used to pay salaries (the total sum of which is already public knowledge), and any continued financial compensation in addition to regular retirement income within the conditions agreed upon in contracts of this nature.

The [appellant] has been inundated with requests from the public wanting to know if [the Chief] was "paid off," to keep the issue silent. Given the amount of speculation from residents who have a lot of unanswered questions, it may even be beneficial for [the Police] to set the record straight. Releasing the details of this contract would put a lot of issues to rest and dispel rumours.

In the re-exercise of their discretion, the Police have not addressed these concerns expressed by the appellant about the public's confidence in the operation of the Police. The request in this appeal is from a member of the media. The record was entered into in the wake of an investigation into the Chief's professional conduct. The terms of the record were agreed upon before the conclusion of this investigation. There appears to be questions raised by the appellant in this appeal about the propriety of the Police's operation as it relates to the terms of the Chief's cessation of employment.

(g) - Disclosure would occur but for the application of section 12 of MFIPPA.

The Police gave the section 12 exemption greater weight than the application of the other exemptions in determining whether to grant access. The Police did not consider the findings in Interim Order MO-2609-I that, but for section 12, I would have ordered disclosure of clauses 5, 6, 7 and 14 of the record as these clauses were subject to the exception to section 14(1) in section 14(4)(a). In addition, I would have ordered disclosure of clauses 8, 9, 11, 13, 15 to 17 as being subject to the factors in favour of disclosure in section 14(2).

But for the section 12 exemption, I would have only withheld clauses 1, 2, 3, 4, 10, 12 and Attachment 1 of the record under the mandatory exemption in section 14(1).

The Police have also not considered that the section 12 litigation privilege exemption is discretionary and that, but for the application of section 12, many clauses in the record would have been ordered disclosed.

I also found in Interim Order MO-2609-I, that the Police had not considered severing specific parts of the record with a view to disclosing as much information as possible. The Police have still not considered this factor.

(d) and (h)

(d) Public Interest in the Record; and

(h) Passage of time since the agreement was executed

Concerning factor (d), as set out above, the appellant provided detailed representations concerning the public interest in the record. Although the Police may not be directly aware of any current public debate or inquiry into the terms of the record, they have not addressed the public interest considerations outlined above by the appellant, which is a media outlet. Nor have the Police made any effort to ascertain independently whether there are now any public interest concerns in the information contained in the record.

Concerning factor (h), the Police claim that the passage of time may have reduced the public relevance of the record. However, the Police have not considered the application of this factor to the specifics of this appeal, as outlined in Interim Order MO-2609-I. In Interim Order MO-2609-I, I stated that:

In addition, other information in the agreement may be available as a result of the passage of time since the request was made, such as payments made to the Chief that have been reported on the Ministry of Finance website or the fulfillment of certain terms. Purely factual information may have also been otherwise available if the request sought related documents, such as cheques, cheque requisitions or accounting entries. Documents of this nature, which would reveal factual financial information, would normally not be subject to the section 12 exemption (see for example Order MO-2346-I).

Other Factors

Efficacy of the Mediation Process of Potential Legal Disputes

In the re-exercise of their discretion, the Police considered that granting access might provide an incentive to parties to litigate in order to avoid accountability for the result of the litigation.

Costs to Organization

The Police gave this factor significant weight and claim that granting access to the record has the real potential of imposing a variety of costs upon the institution.

These two additional factors have been considered in other orders in relation to the application of the section 11 exemption. In this appeal, in Interim Order MO-2609-I, I found that sections 11(c) and (d): prejudice to economic interests and injury to financial interests, did not apply. I stated that the Police's evidence amounted to speculation of possible harm, which was not sufficient to establish that these exemptions apply.

With respect to both of these additional factors, I rely on the findings in Order PO-2598, which I referred to in Interim Order MO-2609-I, that disclosure of the record could not reasonably be expected to prejudice the economic or financial interests of the Police. In Order PO-2598, Adjudicator Catherine Corban stated:

Previous orders have rejected arguments that disclosure of the details of contracts between senior employees and institutions, including settlement agreements, could reasonably be expected to harm the economic or competitive interests of those organizations, within the meaning of section 18(1)(c) and/or (d) [see Orders P-1545, P-380, MO-1184 and PO-1885]. In Order MO-1184, former Assistant Commissioner Tom Mitchinson found that sections 11(c) and (d) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal equivalents of sections 18(1)(c) and (d)) did not apply to exempt a settlement agreement between the City of Hamilton and a former employee. He stated:

In the present case, I am not persuaded that disclosure of the record could reasonably be expected to result in either of the types of harm outlined in section 11(c), or the harm envisioned by section 11(d). A confidentiality clause is common to agreements of this nature which settle civil lawsuits, and indicates the sensitivity of arrangements regarding the termination or separation of employment relationships between and institution such as the City and its employees. However, in my view, the presence of a confidentiality clause in and of itself is not sufficient to bring the record within the scope of sections 11(c) or (d); this or any other term of settlement agreement, such as the one at issue in this appeal, cannot take precedence over the statutory right of access provided in the *Act*. Any increased costs to the City which would result from disclosure are speculative at best, and the evidence provided by the City is insufficient to establish a reasonable expectation of **prejudice** to the City's economic interest or **injury** to its financial interest. [emphasis in original]

Similarly, I am not persuaded that disclosure could reasonably be expected to prejudice the City's competitive position. It is widely recognized that government institutions are held to a high standard of accountability for the use of public funds, and that records in the custody or control of these organizations are governed by legislation which is based on a public right of access. I do not accept the City's position that disclosure of a record through this

statutory scheme could reasonably be expected to impact on the level of trust that current and future employees would have in the City's ability to negotiated future agreements. Agreements of this nature are negotiated on the basis of individual circumstances, and in an atmosphere where all parties have an interest in settlement. In my view, the potential harm envisioned by the City is simply too remote to satisfy the requirements of a reasonable expectation of prejudice to the City's competitive position.

Finally, it is also important to state that the circumstances of this appeal bear little or no relationship to the purpose of sections 11(c) and (d) exemption claims described earlier in this order.

I agree with the reasoning taken by Assistant Commissioner Mitchinson and adopt it for the purposes of this appeal.

Having reviewed the record at issue, the representations submitted by the Ministry and having considered previous decisions that have examined the application of section 18(1)(c) and (d) to settlement agreements, I do not accept that disclosure of the Minutes of Settlement, Release and Resignation could reasonably be expected to result in the harms contemplated in section 18(c) and (d). As noted above, the purpose of section 18(1)(c) is to protect the ability of institutions to compete for business and earn money in the marketplace. In my view, the negotiation of a settlement agreement respecting one OPP officer bears no relationship to the purpose of this exemption. I also do not accept that disclosure of employee settlement agreements have an impact on the broader economic interests of the Ontario government or cause "injury to the ability of the Government of Ontario to manage the economy of Ontario", as contemplated by section 18(1)(d)...

Additionally, following the reasoning in Order MO-1184, I do not accept that simply by inserting a standard confidentiality clause in its settlement agreements, the Ministry, or any other institution governed by the *Act*, can evade the legislative scheme which vests the public with a statutory right of access to records in its custody or control. I also do not accept that, as alleged by the Ministry, disclosure of this record under the *Act* would impact its ability to negotiate such agreements in the future, act as a disincentive to early settlement, encourage parties to not make concessions they would otherwise be willing to entertain or cause parties to be unwilling to execute written documents. As will be discussed in greater detail in my analysis of section 18(1)(e), agreements of this nature are negotiated based on the unique circumstances of the particular parties to them. In my view, parties to these types of agreements have an interest in reaching a negotiated agreement. Accordingly, I do not accept that the mere presence of a confidentiality agreement brings the record within the scope of the exemptions at section 18(1)(c) and/or (d) (emphasis added).

The Police have also not taken into consideration the relevant factor set out in section 64(1) concerning the availability of information under the *Act* that may not otherwise be available to a party to litigation. This section reads:

This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

Furthermore, a party cannot contract out of its obligations under the *Act*. In Order PO-2520, Senior Adjudicator John Higgins stated that:

Section 10(1) [of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), section 4(1) of the *Act*] creates an express and unambiguous right of access to records “in the custody or under the control” of an institution such as the College, subject to exceptions that do not include the provision of a contract. In my view, therefore, the *Act* applies in the circumstances of this appeal regardless of the contents of any agreement to the contrary, and the right of access in section 10(1) must be decided within the four corners of the statute. The Commissioner’s authority is unaffected.

Accordingly, I find that the Police’s consideration of the factors that disclosure of the record would result in an incentive to parties to litigate is improper. I also find, following the reasoning in Order PO-2598, that the Police’s claim that significant economic costs would flow from disclosure is improper.

Conclusion

Based upon my review of the Police’s confidential and non-confidential representations concerning the re-exercise of their discretion, I find that the Police did not re-exercise their discretion in a proper manner. The Police did not properly consider the factors listed in Interim Order MO-2609-I and improperly considered other factors.

This type of request involves issues that attract public scrutiny and, therefore, relates to the transparency purposes of the *Act*. I also find that the transparency provisions of the *Act* have not been properly considered by the Police in the re-exercise of their discretion.

Therefore, as the Police have taken into consideration irrelevant factors and have not taken into account, in a proper manner, relevant factors, I will order them to re-exercise their discretion again.

ORDER:

1. I order the Police to re-exercise their discretion again in accordance with the analysis set out above and in Order MO-2609-I and to advise the appellant, the Chief and this office of the result of this re-exercise of discretion, in writing. If the Police continue to withhold all or part of the record, I also order them to provide the appellant with an explanation of the basis for exercising their discretion to do so and to provide a copy of

that explanation to the Chief and to me. The Police are required to send the results of their re-exercise, and their explanation to the appellant, with the copy to this office and to the Chief, by no later than **September 12, 2011**. If the appellant and/or the Chief wish to respond to the Police's re-exercise of discretion, and/or their explanation for exercising their discretion to withhold information, they must do so within **21 days** of the date of the Police's correspondence by providing me with written representations.

2. I remain seized of this matter pending the resolution of the issue outlined in provision 1.

Original signed by: _____

Diane Smith
Adjudicator

August 22, 2011