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

INTERIM ORDER MO-2609-I

Appeal MA09-161

West Nipissing Police Services Board

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

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* (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 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. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Police and the Chief, initially. The Police then disclosed Schedule B to the record to the appellant. I received representations from the Police and the Chief. I sent the appellant a severed copy of the Police's representations, along with a Notice of Inquiry. Portions of the Police's representations and all of the Chief's representations were withheld due to confidentiality concerns. I received representations from the appellant and provided a copy to the Police and the Chief and sought reply representations. Only the Police responded, stating only that they relied upon their original representations.

Subsequently, on October 20, 2010, the Ontario Court of Appeal released its decision in *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, (2010 ONCA 681), which concerned the application of section 12 of the *Act* to settlement agreements. I then sought representations from both the Police and the appellant as to the applicability of this decision to the record at issue in this appeal. Neither party provided representations in response.

RECORD:

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

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

I will first determine whether section 52(3)3 excludes the record from the operation to the *Act*. Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 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.

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 term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" (Order P-1223). Meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings (Order MO-2024-I).

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157).

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship (Order PO-2157).

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507).

Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (Orders P-1560 and PO-2106).

The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees (*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)).

The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions (*Ministry of Correctional Services*, cited above).

Section 52(3)3: matters in which the institution has an interest

Introduction

For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The appellant submits that the Police have met the test for exclusion of the record under section 52(3)3 but that the exception in section 52(4)3 applies.

Section 52(4): exceptions to section 52(3)

If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4)3 states:

> This Act applies to the following records:

> 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.

Neither the Police nor the Chief provided representations on section 52(4).

Analysis/Findings

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 a municipality. Adjudicator Hale found that:

> In my view, the fully executed Agreements and Release which form part of Record 1 and all of Record 13 represent "agreements between an institution and one or more employees". The records reflect the fact that the information contained in these documents was arrived at following negotiations between the individuals involved and the City. In addition, I have found above that the agreements and the negotiations which gave rise to them were "about employment-related matters between the institution and the employees". In my view, the Agreements which comprise part of Record 1 and all of Record 13 fall within the ambit of the exception in section 52(4)3.

Support for this view in the decision in Order M-797 where Assistant Commissioner Tom Mitchinson found as follows:

> Sections 52(3) and (4) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 52(3) falls within one of the exceptions enumerated in section 52(4), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in Part 1 of the *Act* apply.

I agree with the preceding analysis and adopt the reasoning expressed in Orders MO-1622 and M-797 for the purpose of this appeal. Having reviewed the record at issue, I find that it is an agreement resulting from negotiations about employment related matters between the Police and their employee, the Chief. Accordingly, the record falls within the ambit of the section 52(4) exception to the section 52(3) exclusion. Because section 52(4) of the *Act* applies, the record may be the subject of an access request under the *Act*.

CLOSED MEETING

Section 6(1)(b) reads:

> 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 and MO-1248)

Under part 3 of the test

- "substance" generally means more than just the subject of the meeting (Orders M-703, MO-1344 and MO-2337)

- "deliberations" refer to discussions conducted with a view towards making a decision (Orders M-184, MO-2337, MO-2368 and MO-2389)

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings (Order MO-1344).

Part One

Only the Police provided representations on section 6(1)(b). Concerning part one of the three part test, the Police stated in their representations that there are no minutes or formal resolutions of a meeting. Nevertheless, they submit that:

> The record reflects that the [Police] had the record signed and discussed it *in camera* at a meeting held July 11, 2008 and resolved that the agreement be approved. Accordingly, the [Police submit] that the first part of the test has been met.

Analysis/Findings

Although the record is signed by a person on behalf of the Police, based upon my review of the record, I cannot locate any information therein that demonstrates that the Police held a meeting as submitted by the Police. The record merely reflects that on July 11, 2008, the Agreement (the record) was signed by the Chief and another person on behalf of the Police. I find that the Police have not established that a meeting was held on July 11, 2008. Therefore, part one of the test has not been met and the record is not exempt by reason of section 6(1)(b).

ECONOMIC AND OTHER INTERESTS

I will now determine whether the discretionary exemptions at sections 11(c), (d) or (e) apply to the record.

Section 11 states in part:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act* (Order MO-2363).

The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests (see Orders MO-2363 and PO-2758).

The Police submit that section 11(c) applies as disclosure:

> … could prejudice the economic interests of the [Police] if a third party obtained details as to the settlement arrangements between the [Police] and the [Chief]. This is emphasized by the fact that the maturity date has not yet been reached.

The Police submit that section 11(d) applies as disclosure:

> … could impair the financial interests of the [Police] if a third party obtained the results of the record, which reflect the eventual outcome of settlement negotiations. The effective date has not yet been realized.

The Police submit that section 11(e) applies as disclosure:

> …would reveal the position the [Police] took with respect to negotiations that will result when the record has reached the maturity date.

The Police rely on the findings of Adjudicator Catherine Corban in Order PO-2598, wherein she stated that with regard to section 18(1)(e) of the provincial *Act*, the equivalent of section 11(e) of the *Act*:

> In the circumstances of this appeal, it is clear that the negotiations which led to the Minutes of Settlement, Release and Resignation have concluded and that the record is in fact a final agreement. As such, I am satisfied that it cannot be characterized as a predetermined course of action or way of proceeding. In addition, in my view, disclosure of the final agreement cannot be said to disclose the Ministry's bargaining strategy or the instructions given to those individuals who carried out the negotiations. As with most negotiated agreements, the Minutes of Settlement in this case represent an agreement, the culmination of the negotiation between the OPP and the particular officer to whom the agreement relates. Therefore, the Minutes of Settlement, Release and Resignation reflect the give and take of the negotiation process that existed between those two particular parties. I am satisfied that the Minutes of Settlement do not contain positions, plans, procedures, criteria or instructions. Therefore, I find that the first two parts of the test under section 18(1)(e) have not been met.
>
> .....I do not accept that disclosure of these particular Minutes of Settlement would reveal positions, plans or procedures intended to be applied by the Ministry in the negotiation of those future agreements.

The Police submit that in this case:

> …the record at issue clearly reflects that the matter has not concluded as the effective date has not yet been realized and the matter could be re-visited should certain clauses be transgressed. This would differ from Adjudicator Corban's position and the [Police submit] would in fact engage the applied exemption.

The Police agree with the Ministry position taken in Order PO-2598 where the Ministry argued the following:

> The Ministry contends in respect of both clauses (c), (d) and (e) that revealing the settlement negotiations resulting in the Minutes could have negative implications for other settlement negotiations to which the Crown is a party. Once the Minutes are disclosed, there is no limit as to who may access them, and for what purpose.

> The disclosure of the Minutes could promote litigation, as disclosure could encourage other parties involved in proceedings against the Crown to adopt similar positions based on those taken in the Minutes, regardless of whether the facts or legal positions are similar to those reflected in the Minutes. Disclosure might therefore act as a disincentive to early settlement, and to parties making concessions they would otherwise be willing to entertain. Finally, parties might be unwilling to execute written documents such as the Minutes if they knew that they would be disclosed, notwithstanding the confidentiality clauses that purport to protect the Minutes from disclosure. It was imbedded in the record at issue that clearly was put in place to protect the record from disclosure.

Concerning sections 11(c), (d) and (e), the appellant relies on the findings of Adjudicator Catherine Corban in Order PO-2598.

Sections 11(c) and (d): prejudice to economic interests and injury to financial interests

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions (Orders P-1190 and MO-2233).

This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position (Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758).

For sections 11 (c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient (*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)).

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11 (Orders MO-1947 and MO-2363).

In Order PO-2598, which is relied upon by both parties, the requester sought the agreement made between the Ontario Provincial Police (OPP) and an OPP officer who had resigned. The responsive records in that appeal consisted of the Minutes of Settlement reached between the OPP and the officer, the attached Release and Resignation. Adjudicator Corban stated:

Although there is clearly a difference in wording between "prejudice the economic interest" and "be injurious to the financial interests" in section 18(1)(c) and (d) [the provincial equivalent of sections 11(c) and (d) of the *Act*], in my view, in the circumstances of this appeal, any such difference is irrelevant to the consideration of these two exemptions. Accordingly, I will address their potential application together.

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).

Moreover, sections 18(1)(c) and (d) are harms based exemptions that require the Ministry to provide "detailed and convincing" evidence to demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. As noted above, evidence amounting to speculation of possible harm is not sufficient to establish that these exemptions apply. In the circumstances of this appeal, the Ministry has simply argued generally that the exemptions apply but, in my view, has not provided me with sufficiently detailed and convincing evidence to establish that disclosure of the Minutes of Settlement, Release and Resignation could reasonable be expected to prejudice the economic interests of the Ministry (section 18(1)(c)) or be injurious to its financial interests (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).
>
> Finally, most of the previous orders that have found that section 18(1)(c) and/or (d) do not apply involve settlement agreements between institutions and senior employees. In the current appeal, the OPP officer to whom the settlement agreement in this appeal relates is not a "senior" officer. This fact does not alter my determination that section 18(1)(c) and (d) do not apply. In fact, in my view, if the disclosure of a settlement agreement involving a senior employee and an institution is not generally found to reasonably be expected to prejudice the economic interests or be injurious to the financial interests of an institution, then a settlement agreement involving a less senior employee, with less financial significance to the institution, also does not.
>
> Accordingly, I find that section 18(1)(c) and (d) do not apply to exempt the record from disclosure.

I adopt this reasoning of Adjudicator Corban in this appeal. The record at issue in this appeal is essentially the same type of record that was at issue in Order PO-2598. In Order PO-2598, the record consisted of the Minutes of Settlement between the OPP and the officer named in the request, a Release and a Resignation. In this appeal, the record is an agreement with two schedules. Schedule B, which has been disclosed, is a copy of press release of the Chief and the Police announcing the Chief's retirement and the acceptance of this offer of retirement by the Police. According to the Police, the record:

> …speaks to the cessation of the [Chief's] employment with the [Police]. The record clearly outlines a full and final settlement and legal release between the parties…. The record reflects the conclusion of negotiations of a severance package with an employee…
>
> [T]he Agreement is a communication to the [Police] that was made in pursuance of settlement by solicitors representing both the [Chief] and the [Police]… The record was prepared by solicitors who represented the [Police] and [the Chief].

I find that the Police have not provided detailed and convincing evidence as to how their economic interests could be prejudiced by disclosure of the record. In making this finding I have considered the contents of the record, the Police's confidential and non-confidential representations, including their representations about the "maturity date" and the timing of the disclosure of the record under this order. Furthermore, I find that based on the terms of this record, disclosure would not dissuade other Police employees from entering into settlement agreements with the Police. The Police's evidence amounts to speculation of possible harm and is not sufficient to establish that the exemptions at issue apply.

I find that disclosure of the information in the record could not reasonably be expected to prejudice the Police's economic interests or competitive position or be injurious to the financial interests of the Police. Therefore, I find that the record is not exempt by reason of sections 11(c) or 11(d).

Section 11(e): positions, plans, procedures, criteria or instructions

In order for section 11(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of an institution (Order PO-2064).

Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation (Orders PO-2064 and PO-2536).

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding (Orders PO-2034 and PO-2598).

The term "plans" is used in sections 18(1)(e), (f) and (g). Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" (Orders P-348 and PO-2536).

The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow (Order PO-2034).

In Order PO-2598, Adjudicator Corban stated with respect to section 18(1)(e) of the provincial *Act*, the equivalent to section 11(e) of the *Act* that:

> In the circumstances of this appeal, it is clear that the negotiations which led to the Minutes of Settlement, Release and Resignation have concluded and that the record is in fact a final agreement. As such, I am satisfied that it cannot be characterized as a pre-determined course of action or way of proceeding. In addition, in my view, disclosure of the final agreement cannot be said to disclose the Ministry's bargaining strategy or the instructions given to those individuals who carried out the negotiations. As with most negotiated agreements, the Minutes of Settlement in this case represents an agreement, the culmination of the

negotiation between the OPP and the particular officer to whom the agreement relates. Therefore, the Minutes of Settlement, Release and Resignation reflect the give and take of the negotiation process that existed between those two particular parties. I am satisfied that the Minutes of Settlement do not contain positions, plans, procedures, criteria or instructions. Therefore, I find that the first two parts of the test under section 18(1)(e) have not been met.

Even if I were to accept that the record at issue contains a pre-determined course of action or way of proceeding, I do not find that parts 3 and 4 of the section 18(1)(e) test are met in the circumstances of this appeal. Although I acknowledge that the Ministry will most certainly enter into similar agreements with other OPP officers in the future, I do not accept that disclosure of these particular Minutes of Settlement would reveal positions, plans or procedures intended to be applied by the Ministry in the negotiation of those future agreements.

In Order 87, Former Commissioner Sidney B. Linden reviewed the application of section 18(1)(e) to completed negotiations and stated that:

> Turning to the exemption claim under subsection 18(1)(e), this subsection refers to :positions, plans, procedures, criteria or instructions *to be applied* to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario" (emphasis added). In my view, the exemption is not available to prevent the release of these types of records in situations where they *have been applied* to negotiations between the government and third parties (emphasis added). Furthermore, to interpret the phrase "or to be carried on by or on behalf of an institution of the Government of Ontario" to mean any possible future negotiations including those that have not been presently commenced or even contemplated, is in my view, too wide. My conclusion is therefore that in the circumstances of this appeal, negotiations between the institution and Toyota have been completed and any positions, plans, procedures, criteria or instructions applied to these negotiations are no longer exempt from disclosure under subsection 18(1)(e).

Following the reasoning applied by Commissioner Linden in Order 87, if the Settlement Agreement could be said to reveal a pre-determined course of action, in my view, it has already been applied to those negotiations as the Minutes of Settlement, Release and Resignation represent a final agreement and, as noted above, the negations have clearly concluded. I understand the Ministry, as does any employer, contemplates entering into future settlement agreements with OPP officers. However, the Ministry has not provided me with any evidence of particular settlement agreements that are either currently ongoing or contemplated that would specifically be affected by disclosure of the records at issue.

> I am also not satisfied that disclosure of the Minutes of Settlement, even if they were to reveal a pre-determined course of action, could have an adverse affect on other similar negotiations. Any future agreements, and any preceding negotiations, will not only involve different parties but also will entail different considerations and circumstances from those existing at the time of the negotiation of the record at issue in this appeal. Any future settlement negotiations will, therefore, result from separate and distinct negotiations and culminate in separate and distinct agreements. For that reason, in my view, the record at issue in this appeal does not contain any information relating to the conduct of either current or future negotiations and any speculation of harm to the Ministry's negotiating position as a result of its disclosure is purely speculative. Accordingly, I also find that the Ministry has also failed to satisfy parts 3 and 4 of the test under section 18(1)(e).
>
> In any event, I have concluded that the Ministry has failed to demonstrate that the Minutes of Settlement, Release and Resignation contain "positions, plans, procedures, criteria or instructions", and that therefore, parts 1 and 2 of the test under section 18(1)(e) have not been met. As all parts of the section 18(1)(e) test must be met for the exemption to apply, I find that section 18(1)(e) does not apply to exempt the record at issue from disclosure.

I adopt this reasoning of Adjudicator Corban in this appeal. The record is a negotiated agreement outlining the settlement reached between the Police and the Chief as to the terms of his resignation. The Police submit that part 3 of the test under section 11(e) has been met as disclosure of the record "would reveal the position the Police took with respect to negotiations that will result when the record has reached the maturity date". The Police did not provide any explanation as to what negotiations would result upon the record's maturity date, nor can I locate any specific reference to future negotiations in the record.

The Police have also not provided information as to where in the record there are positions, plans, procedures, criteria or instructions which are intended to be applied to negotiations (parts 1 and 2 of the test).

As noted by the Police, this is a final agreement. Moreover, the evidence before me, including the record itself, does not support the proposition that the record contains any positions, plans, procedures, criteria or instructions that could apply to current or future negotiations. I conclude that none of parts 1, 2, 3 or 4 of the test are met.

As all four parts of the test under section 11(e) have not been met, I find that the record is not exempt by reason of section 11(e).

In conclusion, I find that the record at issue does not qualify for exemption under any of the discretionary exemptions at sections 11(c), (d) or (e) of the *Act*.

PERSONAL INFORMATION

I will now determine whether the record contains "personal information" as defined in section 2(1) and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where 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).

Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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 and 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 and MO-2344).

The Police submit that the record contains the personal information of the Chief only, including information relating to his employment history, his financial transactions, as well as other personal information where the disclosure of the name would reveal other personal information in accordance with paragraphs (b) and (h) of the definition of personal information in section 2(1). The Police refer to Orders MO-1184, MO-1332, MO-1405, MO-1749 and P-1348, which they state have found that various types of agreements, such as employment contracts or severance agreements, contain personal information.

The appellant did not provide representations on this issue.

Analysis/Findings

Previous orders of this office have 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, MO-2318, MO-2344 and PO-2519).

After reviewing the record, I find that it contains the personal information of the Chief. In particular, the record contains his name, information about his salary, dates of employment, the benefits he received, as well as financial and other arrangements related to his departure from the Police. Therefore, I find that the information in the record falls within the definition of personal

information in section 2(1) of the *Act* as the personal information of the Chief. The record does not contain the personal information of any other individuals.

PERSONAL PRIVACY

I will now determine whether the mandatory exemption at section 14(1) applies to the information at issue.

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. In this case the exception in section 14(1)(f) may apply. This section 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.

The section 14(1)(f) exception requires a consideration of additional parts of section 14. The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

Section 14(4)

If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14.

In the circumstances, section 14(4)(a) may apply. This section 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;

Neither the Police nor the appellant provided representations on the applicability of section 14(4)(a) to the record.

Analysis/Findings re: section 14(4)

As stated above, section 14(4)(a) applies to the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution.

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. The following have been found to qualify as "benefits":

- insurance-related benefits,
- sick leave, vacation,
- leaves of absence,
- termination allowance,
- death and pension benefits,
- right to reimbursement for moving expenses, and
- incentives and assistance given as inducements to enter into a contract of employment (Orders M-23 and PO-1885).

The term "benefits" does not include entitlements that have been *negotiated* as part of a retirement or termination package unless the information reflects benefits to which the individual was entitled as a result of being employed (Orders MO-1749, PO-2050, PO-2519 and PO-2641).

In this appeal, the record is a severance agreement. It does not contain the employment responsibilities, classification or salary range of the Chief. The only information that section 14(4)(a) may apply to in this appeal is the information in the record concerning the benefits that the Chief received as a result of being employed by the Police.

Based upon my review of the record, I find that only the information identified by the Police as clauses 5, 6, 7 and 14 contains information that falls within section 14(4)(a). This information is about any benefits that the Chief will receive from the Police because of his employment. This includes information about the Chief's entitlement to his salary continuation, sick leave and vacation pay, as well as his entitlement to life insurance, pension, health and dental benefits and any other entitlements he may be entitled to received as a result of the conclusion of his employment with the Police (see Orders MO-2318 and MO-2344).

I find that the exception in section 14(4)(a) does not apply to the remaining portions of the record, which consists of various releases, agreements and undertakings. I also find that none of the other provisions at section 14(4) are applicable.

Accordingly, I find that by reason of section 14(4)(a), clauses 5, 6, 7 and 14 of the record are not exempt under the personal privacy exemption in section 14(1). I will consider below whether clauses 5, 6, 7 and 14 of the record are exempt by reason of the solicitor-client exemption in section 12.

Section 14(3)

I will now consider whether the information other than clauses 5, 6, 7 and 14 of the record is exempt by reason of the presumptions in section 14(3). If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at

section 16 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767)].

The Police rely on the presumptions in paragraphs (d) and (f). These sections read:

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

The Police did not provide representations concerning section 14(3)(f). The Police provided both confidential and non-confidential representations on section 14(3)(d). In their non-confidential representations, they submit that:

> In Order PO-2050, Adjudicator Laurel Cropley examined the application of the presumptions of section 21(3)(d) and (f) to similar information... She stated:
>
> > Record 3 is entitled "Agreement and Release" between the Commission and the [Chief]. It contains specifics relating to [his] termination from employment with the Commission, such as termination date, termination payments, general terms and some standard contract terms.
> >
> > 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) [of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*)] (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 (Order 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).
>
> The [Police] would refer to clauses 1, 3, 4, 5, 6, 10, 11, 14, 15, 16 and 17 and submit these matters clearly fall within the ambit of section 14(3)(d).

The appellant did not provide representations on section 14(3).

Analysis/Findings re: sections 14(3)(d) and 14(3)(f)

Based upon my review of the record, I find that clauses 1, 2, 4, 10, 12 and Attachment 1 of the record reveals the Chief's end date of employment, the last day worked and any restrictive covenants. This type of information falls within the section 14(3)(d) presumption, as it relates to the Chief's employment history (Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344).

To qualify under section 14(3)(f), information about an asset must be specific and must reveal, for example, its dollar value or size (Order PO-2011). I find that none of the information remaining at issue in the record is subject to section 14(3)(f). This information does not describe the Chief's specific finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. As noted above, information that may be contained in the agreement about salary continuation is a benefit, and disclosure of that type of information would not be an unjustified invasion of privacy because of section 14(4)(a)

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy (Order P-239).

I will, therefore, now consider the information that I have not found to be subject to the exception in section 14(4)(a) or subject to the presumption in section 14(3)(d) under section 14(2). This remaining information consists of clauses 3, 8, 9, 11, 13, 15 to 17.

Section 14(2)

The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) (Order P-99).

The Police rely on the factors in sections 14(2)(e), (f), (h) and (i), which read:

> 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,

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

The Police submit that:

> *(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;*
>
> …the record contains information that would reasonably expect to expose the [Chief] to harm through the disclosure of the record. In Order P-1167, the former adjudicator found that subsection 14(2)(e) was relevant to prevent the disclosure of the settlement of a human rights complaint. The [Police] submit, and is limited by the strong confidentiality condition, that clauses 1, 3, 4, 5, 6, 10, 11, 14, 15, 16 and 17 would clearly meet the test.
>
> *(f) the personal information is highly sensitive;*
>
> …the record contains information which would cause significant stress to the [Chief]. Again the Board would refer the IPC to the noted clauses (1, 2, 3, 4, 8, 13 and 17) within the record.
>
> *(h) the personal information has been supplied by the individual to whom the information relates in confidence;*
>
> …the Agreement contains confidentiality clauses (clauses 5 and 6) and that exempts them from disclosure.
>
> The [Police] and the [Chief] entered into the Agreement with the expectation that it would always remain private and confidential. The confidentiality clause protects the privacy of the [Chief] and his family, and the [Police] submit it should be respected, particularly as once they are disclosed, and they may be used for any purpose.
>
> *(i) the disclosure may unfairly damage the reputation for any personal referred to in the record.*
>
> The [Police] refer to the earlier noted clauses.

> The [Police] submit the record contains extremely sensitive personal information the release of which would constitute an unjustified invasion of the [Chief's] personal information.

The appellant's representations focus on the public interest in disclosure of the record. Therefore, it appears to rely on the factor favouring disclosure in section 14(2)(a), which reads:

> 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,
>
> > the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

The appellant submits 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 [the Police] to set the record straight. Releasing the details of this contract would put a lot of issues to rest and dispel rumours.

As stated above, the Police did not provide representations in reply.

Analysis/Findings re: section 14(2) to clauses 3, 8, 9, 11, 13, 15 to 17 of the record

14(2)(a): public scrutiny

This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny (Order P-1134).

The public has a right to expect that expenditures of employees of government institutions during the course of performing their employment-related responsibilities are made in accordance with established policies and procedures, carefully developed in accordance with sound and responsible administrative principles (Orders P-256 and PO-2536).

In order for this section to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application (Order PO-2905).

Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 14(2)(a) (Order P-256).

Upon my review of the information at issue in clauses 3, 8, 9, 11, 13, 15 to 17, I agree with the appellant that the factor in section 14(2)(a) favouring disclosure applies. Disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny. The circumstances surrounding the conclusion of the Chief's employment with the Police is of significant interest to the public, including information as to whether this was carried out in accordance with established policies and procedures, carefully developed in accordance with sound and responsible administrative principles (Orders P-256 and PO-2536). The Chief held a position of significance in the municipality and the circumstances surrounding the end of his employment with the Police, according to the appellant, involved allegations of impropriety on the Chief's part. The cessation of the Chief's employment with the Police was dealt with in a closed meeting with little information being provided to the public.

14(2)(e): pecuniary or other harm

The Police submit that this section applies to clauses 3, 11 and 15 to 17. This section favours the privacy rights of the Chief. The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved (Order P-256).

Although the Police have claimed that disclosure of the information at issue in clauses 3 and 15 to 17 would reasonably expect to expose the Chief to harm, they have not provided any specific details as to why this would be the case. I have also considered the Chief's confidential representations. Based upon the representations of the Chief, I find that disclosure of clause 3 would expose the Chief to pecuniary or other harm. I find that disclosure of the information in clauses 11, 15 to 17 of the record, which are primarily general and specific release clauses, would not expose him to pecuniary or other harm. Therefore, I find that this factor does not apply to clauses 11, 15 to 17, but does apply to clause 3.

14(2)(f): highly sensitive

The Police submit that clauses 3, 8 and 17 contain information that, if disclosed, would cause significant stress to the Chief. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed (Orders PO-2518, PO-2617, MO-2262 and MO-2344). Based upon my review of the Police's and Chief's confidential representations, I do not agree that disclosure of clauses 8 and 17 could reasonably be expected to cause significant personal distress to the Chief. These clauses contain either general or specific releases. I do, however, agree that disclosure of clause 3 would cause significant distress to the Chief.

14(2)(h): supplied in confidence

The Police state in their representations that clauses 5 and 6 are the confidentiality clauses in the record. Based upon my review of the record, I find that the confidentiality clause is actually contained in clause 13.

Section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation (Order PO-1670). I find that section 14(2)(h) applies in this case as both the Chief and the Police had an expectation that the information would be treated confidentially. In addition, that expectation is reasonable in the circumstances.

Accordingly, I agree with the Police that section 14(2)(h) applies and weighs in favour of the privacy protection of the Chief's personal information at issue in clauses 3, 8, 9, 11, 13, 15 to 17.

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

The Police submit that the record contains extremely sensitive personal information the release of which would constitute an unjustified invasion of the Chief's personal privacy.

The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved (Order P-256).

I find that other than clause 3, disclosure of the remaining information at issue in clauses 8, 9, 11, 13, 15 to 17 of the record would not unfairly damage the reputation of the Chief. Based upon my review of the Chief's representations, I find that disclosure of clause 3 would unfairly damage the reputation of the Chief. This 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 Chief's reputation may be unfairly damaged by the disclosure of this information (see also Order MO-2344).

Conclusion regarding section 14(2) re: clauses 3, 8, 9, 11, 13, 15 to 17

I have found that the factor in section 14(2)(a) weighs in favour of disclosure of clauses 3, 8, 9, 11, 13, 15 to 17. However, I found that the factor which weighs against disclosure in section 14(2)(h) applies to these same clauses. I also found that the factors that weigh against disclosure in sections 14(2)(e), (f) and (i) apply to clause 3.

On balance, the factors in section 14(2)(2)(e),(f),(h) and (i) weigh against disclosure of the information in clause 3. This clause contains information that is sensitive, disclosure of which would expose the Chief unfairly to pecuniary or other harm, would likely cause him significant personal distress and may unfairly damage his reputation. Therefore, on balance, I uphold the Police's decision to withhold disclosure of clause 3 of the record.

However, on balance, the factor in section 14(2)(a) in relation to the public's confidence in the integrity of the Police, favours disclosure of the information in clauses 8, 9, 11, 13, 15 to 17, and

carries significant weight. The factors favouring non-disclosure of this information in sections 14(2)(e),(f), (h) and (i) carry only limited weight. Accordingly, I find that the disclosure of the information in clauses 8, 9, 11, 13, 15 to 17 would not constitute an unjustified invasion of the Chief's personal privacy. The exception to the exemption in section 14(1)(f) therefore applies, and the information in clauses 8, 9, 11, 13, 15 to 17 is not exempt under section 14(1). I will consider below whether this information is exempt under section 12

Conclusion regarding section 14(1)

I found above that clauses 5, 6, 7 and 14 are not exempt from disclosure by reason of section 14(4)(a). I also found above that clauses 1, 2, 4, 10, 12 and Attachment 1 to the record are subject to the presumption in section 14(3)(d). I found that the factors in section 14(2) weigh against disclosure of the information in the record in clause 3; however, the factors weigh in favour of disclosure of clauses 8, 9, 11, 13, 15 to 17.

Section 14(1) is a mandatory exemption; therefore, clauses 1, 2, 3, 4, 10, 12 and Attachment 1 are exempt under this section. Clauses 5, 6, 7 and 14 are not exempt under section 14(1) as being subject to the exception in section 14(4)(a). In addition, clauses 8, 9, 11, 13, 15 to 17 are also not exempt under section 14(1) as being subject to the factors in favour of disclosure in section 14(2). I must now go on to consider the application of the discretionary exemption in section 12.

SOLICITOR-CLIENT PRIVILEGE

I have found that clauses 5 to 9, 11 and 13 to 17, are not exempt under the mandatory personal privacy exemption in section 14(1). I must now consider whether the discretionary exemption in section 12 applies to this information. Nevertheless, I will consider the application of section 12 to the entire record, including the clauses that I have found subject to the mandatory exemption in section 14(1). Section 12 states:

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

The Police submit that:

> …the common law solicitor-client communication privilege applies to exempt the Agreement from disclosure. Specifically, [they submit] that the record is privileged because it was made in pursuance of settlement.
>
> Prior IPC orders have found that settlement related documents can form the basis of a section 19 [of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*, the equivalent to section 12 of the *Act*] claim. In Order 49, former Commissioner Sidney Linden stated:

> ... it is possible for letters or communications passing between opposing lawyers to obtain the status of a privilege[d] communication if they are made "without prejudice" and in pursuance of settlement...
>
> The [Police submit] that the Agreement is a communication to the Police that was made in pursuance of settlement by solicitors representing both the [Chief] and the Police… Therefore, the Police submit that Order 49 should be applied to this matter. The IPC has followed Order 49 with subsequent orders, including M-477 and P-1278.
>
> Solicitor-client privilege protects the direct communications - both oral and documentary prepared by solicitors in providing legal advice. This communication, in the form of an agreement, is intended and continues to be held in confidence.
>
> Solicitor privilege in this case has not been waived as evidenced by the existence of a strong confidentiality clause in the record.

The Police also rely on *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (C.A.). In that case, the Court determined that records prepared for use in the mediation or settlement of litigation are exempt under section 12.

In confidential submissions, the Police submit that the agreement is a settlement of contemplated litigation, and they explain the nature of the contemplated litigation.

Analysis/Findings

Section 12 contains two branches. Branch 1 arises from the common law and branch 2 is a statutory privilege. The Police must establish that one or the other (or both) branches apply. The second branch of section 12 provides that a record is exempt from disclosure if it was "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation".

I do not agree with the submission by the Police that common law solicitor-client communication privilege under branch 1 applies to the agreement, which is not a communication between solicitor-client and which was shared with a party opposed in interest.

However, for the reasons that follow, I find that the agreement is exempt under branch 2, which 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 Ontario Court of Appeal decision cited above in *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (the *Magnotta* case), found that records prepared for use in the mediation or settlement of litigation are exempt under the statutory litigation privilege aspect found in branch 2 of section 12. Based on the wording of section 12, this would extend to

"contemplated" litigation. Similar to the record at issue here, the record in *Magnotta* was a settlement agreement that contained a confidentiality clause.

More particularly, the Court of Appeal found that the word "litigation" in the second branch encompasses mediation and settlement discussions. The Court stated:

> Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records – both those prepared by Crown counsel and those prepared by Magnotta – fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions. To limit the second branch to records prepared by, or at the behest or on behalf of, Crown counsel is contrary to the plain meaning of the language of the second branch. Furthermore, it is antithetical to the public policy interest in settlement of litigation because it would lead to situations in which the government entity's records would be exempt from production while the private party's mediation material would be producible…
>
> The Disputed Records are documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Furthermore, the Disputed Records were explicitly cloaked in confidentiality. Before undertaking the mediation, the parties signed a mediation agreement that contained a confidentiality provision and the settlement documents were replete with extensive confidentiality provisions. Clearly, the Disputed Records fall within any reasonable "zone of privacy".

In my view, in order to conclude that there was "contemplated" litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation (see Order PO-2323).

The question of whether records were prepared for use in mediation or settlement of litigation or contemplated litigation, and/or whether litigation is reasonably in contemplation, is a question of fact that must be decided in the specific circumstances of each case.

In the specific circumstances of this appeal, based on the confidential representations of the Police, I am satisfied that litigation was reasonably in contemplation, and that there was more than a vague or general apprehension of litigation. I am also satisfied that the record at issue is an agreement that was made in settlement of this reasonably contemplated litigation. The record contains a full and a final settlement and legal release between the parties, and was prepared by counsel for the Police and the Chief. The record was prepared by, or delivered to, counsel employed or retained by the Police to settle the issue of the cessation of the Chief's employment with the Police.

Accordingly, like the records in *Magnotta*, I find that that the record was prepared by or for counsel for the institution in contemplation of or for use in litigation, and is therefore subject to branch 2 statutory litigation privilege. On this basis, I find the record is subject to the section 12 solicitor-client exemption. As this exemption is discretionary, I will now consider whether the Police properly exercised their discretion under section 12 of the *Act*.

Furthermore, I am unable to consider the application of the public interest override claimed by the appellant at section 16 of the *Act* as regards section 12. Section 16 cannot apply in this appeal (see *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815). Section 16 does not include the application of the public interest override to records subject to section 12. Section 16 reads:

> 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.

EXERCISE OF DISCRETION

The section 12 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 Chiefs
- 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 Chief
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

The Police submit 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 representations do focus on what it considers should have been relevant in the Police's exercise of discretion. In particular, the appellant maintains 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,

As referred to above, the appellant states 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

I have found, above, that the information at issue in this appeal is subject to statutory litigation privilege under section 12 as a record that 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.

The appellant has maintained that there is a significant public interest in disclosure of the information in the record. According to the appellant, the Chief's conduct while in office was formally complained about and was the subject of an investigation. Because of this complaint into his conduct, the Chief took a "voluntary leave" from his duties. After a period of approximately two months, a settlement agreement (the record) was entered into between the Chief and the Police following closed meetings of the West Nipissing Police Services Board.

The appellant states that this agreement between the Chief and the Police was entered into prior to the conclusion of the investigation into the Chief's conduct. The appellant has provided details in its representations of the significant public interest in the terms of the Chief's severance, including financial terms. The Police did not reply to the representations of the appellant, despite being invited by me to do so.

Generally, when a public official's employment terminates, there is a significant public interest in obtaining information about the terms of that termination, including, in particular, information to assist in determining whether taxpayers' money has been well spent through the termination agreement (see for example Order MO-2174, MO-2293 and MO-2318).

The only public information made available by the Police was a statement released by them approximately one year after the agreement was entered into with the Chief. This statement comprised Schedule "B" to the record and stated that:

> Chief [name] has expressed his desire to retire from his position as Chief of the West Nipissing Police Service and the Board [the West Nipissing Police Services Board] has accepted it.
>
> Throughout its dealings in this matter, the Board has acted with diligence and in the best interests of all stakeholders.

In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, (the *CLA* case) the Supreme Court of Canada in a unanimous decision stated as follows concerning the exercise of discretion under section 19 of the provincial *Act*, which is similar to the exemption at issue in this appeal in section 12 of the *Act*:

> …the "head" making a decision under ss. 14 and 19 of the [provincial *Act*] has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.
>
> The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) provides that where an exemption is claimed, "the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions" [emphasis added].

The Court in the *CLA* case did not deem it necessary for this office to review the exercise of discretion in the case of records subject to solicitor-client privilege under section 19 of the provincial *Act*. The Court stated:

> We view the records falling under the s. 19 [of the provincial *Act*] solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:
>
> > . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.] (See also Goodis, at paras. 15-17, and Blood Tribe, at paras. 9-11.)

This differs from the case here, as the record is not subject to solicitor-client privilege under section 12 of the *Act* but, instead, is subject to the statutory exemption at branch 2 of that section.

In this appeal, I find that the Police have failed to take into account in the exercise of their discretion whether there is a public interest in the disclosure of the record or whether disclosure of the record would increase public confidence in the operation of the Police. In addition, I find that the Police have failed to take into account the past practice of the institution as mandated by statute with respect to similar information. The Police have also failed to take into account that some of the information in the record may be available in one or more other records that would

not be exempt under the *Act*. Nor, apparently, have the Police considered severing specific parts of the record with a view to disclosing as much information as possible.

For example, the amount the Chief would have received salary and benefits over a specific time period is something that would have been publicly available by means of Ontario's *Public Sector Salary Disclosure Act* (the *PSSDA*). The *PSSDA* requires organizations that receive public funding from the Ontario government to disclose annually the names, positions, salaries and total taxable benefits of employees paid $100,000 or more in a calendar year. The *PSSDA* covers a range of public bodies, including provincial government ministries, hospitals, universities and colleges, municipalities (including police services) and other public sector employers who receive a significant level of funding from the Ontario government.

Section 3 of the *PSSDA* states, in part:

> (1) Not later than March 31 of each year beginning with the year 1996, every employer shall make available for inspection by the public without charge a written record of the amount of salary and benefits paid in the previous year by the employer to or in respect of an employee to whom the employer paid at least $100,000 as salary.
>
> (2) The record shall indicate the year to which the information on it relates, shall list employees alphabetically by surname, and shall show for each employee,
>
> (a) the employee's name as shown on the employer's payroll records;
>
> (b) the office or position last held by the employee with the employer in the year;
>
> (c) the amount of salary paid by the employer to the employee in the year;
>
> (d) the amount of benefits reported to Revenue Canada, Taxation, under the *Income Tax Act* (Canada) by the employer for the employee in the year.
>
> ….
>
> (4) An employer required by this section to make a record or statement available to the public by March 31 in a given year shall allow the public to inspect it without charge at a suitable location on the employer's premises at any time during the employer's normal working hours throughout the period beginning on March 31 and ending on December 31 of the same year.

Previous orders of this office have found salary information that may be available as a result of the application of the *PSSDA* is not exempt under section 21(1)(d) of the *Freedom of Information and Protection of Privacy Act* (the equivalent to section 14(1)(d) of the municipal *Act*) (see for example Orders PO-2641 and MO-2470).

In this appeal, pursuant to the *PSSDA*, the Chief's salary is available on the Ministry of Finance's website for the years 2008 and 2009. The Police were required by law to disclose this information. In not making available information about the Chief's salary and benefits entitlement that may arise from the record at issue, the Police have failed to take into account the statutorily mandated requirement of making similar information publicly available.

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).

In conclusion, I find that the Police have not exercised their discretion in a proper manner, by failing to take into account the following relevant factors:

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

Accordingly, I will order the Police to re-exercise their discretion.

ORDER:

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.

Original Signed By: March 29, 2011
Diane Smith
Adjudicator