

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

INTERIM ORDER MO-2768-I

Appeal MA11-287

Corporation of the City of Orillia

July 24, 2012

Summary: A media requester sought access to the details of the payment of the city's former manager's salary after termination. The city denied access citing sections 6(1)(b), 11(c), 12 and 14(1) of the *Act*. This order upholds the application of section 6(1)(b) and orders the city to re-exercise its discretion.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 6(1)(b), 11(c), 12, 14(1), 14(3)(d), 14(f), 14(2)(a).

Orders and Investigation Reports Considered: Orders MO-1796, MO-2344, MO-2536-I, MO-2705, PO-2050.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815

OVERVIEW:

[1] The City of Orillia (the city) received a request from a media requester under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

a copy of documentation that details how much money former city manager [named individual (the affected person)] was given as part of his severance package. ...Please also provide details relating to any benefits

and considerations that may have been included as a part of [the named individual's] package.

[2] The city issued a decision denying access to the records, citing sections 6(1)(b) (closed meeting), 11(c) (economic and other interests), 12 (solicitor-client privilege) and 14(1) (personal privacy).

[3] The requester, now the appellant, appealed this decision.

[4] As mediation did not resolve the issues in this appeal, the file was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*. During adjudication, the appellant clarified its request to narrow the scope of its request to the information that contains the length of time the affected person will continue to collect a salary, as there was no dollar payout amount agreed to between the affected person and the city.

[5] In this order, I uphold the application of section 6(1)(b) and order the city to re-exercise its discretion.

RECORD:

[6] At issue is the information in the final agreement between the city and the affected person that describes the length of time the affected person will continue to collect a salary. The city has claimed the application of sections 6(1)(b), 11(c), 12, and 14(1) to this information.

[7] From my review of the records, it appears that this information (the length of time the affected person will continue to collect a salary), is contained in paragraph 1 of Record 24, the final agreement.

ISSUES:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory exemption at section 14(1) apply to the information at issue?

C. Does the discretionary exemption at section 6(1)(b) apply to the term of payment of the affected person's salary after termination?

D. Does the discretionary exemption at section 11(c) apply to the term of payment of the affected person's salary after termination?

E. Does the discretionary exemption at section 12 apply to the term of payment of the affected person's salary after termination?

F. Did the institution exercise its discretion under section 6(1)(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[8] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" 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 if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[9] 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].

[10] Sections 2(2), (2.1) and (2.2) 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.

(2.1) 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.

(2.2) 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.

[11] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

[12] 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].

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

[14] In the non-confidential portions of its representations, the city submits that the record at issue contains the personal information of the affected person relating to his financial affairs. The city states that the length of time the affected person will continue to collect a salary will reveal his income/financial situation, and negotiations regarding termination. The city relies on Order MO-2344 where it was found that records containing the name, information about salary, dates of employment, benefits

received, as well as financial arrangements related to termination, fall within the scope of the definition of personal information.

[15] The affected person did not directly address this issue.

[16] The appellant states that it is not interested in the affected person's personal financial situation.

Analysis/Findings

[17] In Order MO-1796, Adjudicator Rosemary Muzzi considered whether information about salary continuation in employment or termination agreements constitutes personal information. She stated that:

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

Previous orders of this office have considered the contents of various types of agreements, such as employment contracts or settlement and/or severance agreements (Orders M-173, MO-1184, MO-1332, MO-1405 and P-1348). These orders have consistently held that information about the individuals named in the agreements, including name, address, terms, date of termination and terms of settlement, concern these individuals in their personal capacity and thus qualifies as personal information. I am satisfied that the same considerations apply in the circumstances of this appeal, and that all of the records in items 1 to 7 of this appeal contain the personal information of the affected parties.

[18] I adopt this and find that the information in issue in the record is personal information as it reveals information relating to financial transactions in which the affected person has been involved in accordance with paragraph (b) of the definition of personal information in section 2(1) of the *Act*. This information is information about this individual in a personal capacity, as it reveals something of a personal nature about the affected person concerning the termination of his employment with the city.¹

¹ Order MO-2705.

B. Does the mandatory exemption at section 14(1) apply to the information at issue?

[19] 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.

[20] If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. In the circumstances, only section 14(1)(f) appears relevant. It states:

[21] Section 14(1)(f) states:

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.

[22] 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).

[23] The city submits that the record describes a negotiated settlement agreement and the ensuing financial arrangements relating to the termination of employment of the affected person and that it was understood that the terms and conditions of the affected person's termination would remain confidential.²

[24] The city states that disclosure would constitute an unjustified invasion of privacy under section 14(1)(f). It relies on the following paragraphs of section 14 of the *Act*:

(2) 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;

² The city submits that the findings in Order MO-2344 are relevant and that similar circumstances exist in the current appeal.

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

(3) 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;

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

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

[25] Concerning each of these sections, the city states that:

Section 14(2)(e) - the affected person will be exposed unfairly to pecuniary or other harm as his financial information and details concerning the negotiations leading to the termination agreement will be exposed and possibly published in the newspaper of a small city.

Section 14(2)(f) - the personal information is highly sensitive. The affected person and the city agreed to keep the terms of the settlement confidential and to not do so we believe would cause significant personal distress to the affected person as the information contains details relating to his employment termination (Order MO-2344).

Section 14(2)(h) - both the city and the affected person had an expectation that the personal information supplied by the individual to whom the information relates would be kept confidential.

Section 14(3)(d) - relates to employment or educational history. The personal information relates to employment history detailing end dates of employment.

Section 14(3)(f) - describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or creditworthiness. The information describes the [affected person's]

finances as a result of a negotiation process concerning the affected person's employment termination package.

Section 14(4)(a) - Did the entitlement arise as a result of being employed or was it negotiated as part of a retirement or termination package? The entitlement was a result of negotiations for a termination package between the City of Orillia and the affected person. It was understood that the terms and conditions of his termination from the city would remain confidential (Order MO-2344).

[26] The affected person submits that he negotiated a settlement with the city that was to remain confidential. He states that disclosure would cause him significant personal distress and harm.

[27] The appellant states that divulging the affected person's income will not be harmful to the affected person, as his previous salary has been divulged in the annual list under the *Public Sector Salary Disclosure Act*. The appellant submits that the affected person's income is also a matter of public interest, as his income is paid for by the city and, therefore, by the taxpayers of the city.

[28] Concerning section 14(2)(e), where the city notes the potential harm to the affected person of having details of the termination agreement published "in the newspaper of a small city", the appellant believes the size of the city is irrelevant to this matter. It states that for example, if this matter concerned a city manager in a larger city, it is to be believed the media would pursue the information pertaining to an affected person's termination and the impact it would have on that city's residents.

[29] Regarding section 14(3)(d), where the city notes "the personal information relates to employment history detailing end dates of employment", the appellant sees no reason to believe the release of this information would be harmful to the city or the affected person.

Analysis/Findings

Section 14(4)(a)

[30] If section 14(4)(a) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14.

[31] Concerning section 14(4)(a), 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].

[32] 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].

[33] As the salary continuation past termination would have been negotiated as part of a termination package, the information at issue is not a benefit and section 14(4)(a) does not apply.

Section 14(3)(d) and (f)

[34] If sections 14(3)(d) and (f) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14(1).

[35] In Order PO-2050, Adjudicator Laurel Cropley examined the application of the presumptions at section 21(3)(d) and (f) of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent to sections 14(3)(d) and (f) of the *Act*) to information in the context of severance agreements. Adjudicator Cropley stated that:

...information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption [Orders M-173, P-1348, MO-1332, and PO-1885]. Contributions to a pension plan have been found to fall within the presumption in section 21(3)(f) [Orders M-173 and P-1348].

Previous orders have found, however, that the address of an affected party, releases, agreements about the potential availability of early retirement, payment of independent legal fees and continued use of equipment, for example, do not fall within any of the presumptions in section 21(3) [Orders MO-1184 and MO-1332]. In Order M-173, former Assistant Commissioner Irwin Glasberg found that much of the

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

[36] I agree with the reasoning of Adjudicator Cropley in Order PO-2050 and find that information in Record 24 that reveals the end date of the affected person's employment comes within the section 14(3)(d) presumption.

[37] In Order MO-2344, Assistant Commissioner Brian Beamish considered the application of section 14(3)(d) to Minutes of Settlement and Release of a City of Guelph employee whose employment had terminated. Concerning this record, he stated that:

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

[38] The information at issue in this appeal is also the information about the salary continuation period for a city employee whose employment has terminated. In Order MO-2705, relying on Order MO-2344, I found that a reference to payment of salary after the termination date represents a notice period provided to an affected party named in the termination letter for not continuing to work for the city. I stated that given that an affected party who is subject to the termination letter with the city was over, the payment of his salary after termination is not "employment history" and found that section 14(3)(d) did not apply to this information.

[39] Accordingly relying on Orders MO-2344 and MO-2705, I find that the reference in the record to the term of payment of the affected person's salary after termination is not subject to the presumption in section 14(3)(d). This information is also not subject to the presumption in section 14(3)(f), as it does not describe the affected person's actual salary.³

³ Order MO-2705.

[40] I find, however, that the related information concerning the end date of the affected person's employment, comes within the section 14(3)(d) presumption.

[41] As none of the presumptions in section 14(3) apply to the reference in the record to the term of payment of the affected person's salary after termination, I will consider the application of the factors listed in section 14(2), as they provide some criteria to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 14(2)

[42] As stated above, the city and the affected person rely on the factors in sections 14(2)(e), (f) and (h), which weigh against disclosure of the term of payment of the affected person's salary after termination.

[43] Concerning the factor in section 14(2)(e), given the fact that the payment of the affected person's salary post termination has been made public by reason of the *PSSDA*, I find that the damage or harm envisioned by the affected person and the city in their representations is neither present nor foreseeable.

[44] As the affected person's salary post termination has been made public, I do not find that the information at issue is highly sensitive, such that the factor in section 14(2)(f) would apply. 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].

[45] I also find that the factor in section 14(2)(h) does not apply as both the city and the affected person would have been aware that the payment of the affected person's salary after termination would have been made public by reason of the *PSSDA*, which also applied to the payment of his salary prior to termination. Section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation [Order PO-1670].

[46] Therefore, I find that the factors in this appeal that weigh against disclosure in section 14(2)(e), (f) and (h) do not apply.

[47] The appellant relies on the factor in section 14(2)(a), which weighs in favour of disclosure of the term of payment of the affected person's salary after termination. This section 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;

[48] Based on my review of the parties' representations, I find that the factor in section 14(2)(a) that weighs in favour of disclosure prevails in this appeal. 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].

[49] The affected person's salary has been disclosed by the Ministry of Finance since his termination as a result of the *Public Sector Salary Disclosure Act* (the *PSSDA*). The information at issue reveals only the term of this payment post termination, which information would be revealed as a result of the *PSSDA*. Neither the city nor the affected person have established evidence of any particular harm to the affected person that disclosure of his post termination salary has caused in the past.

[50] Section 14(2)(a) 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].

[51] 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].

[52] As the factor in section 14(2)(a) which weighs in favour of disclosure of the term of payment of the salary of the affected person prevails, I find that disclosure of this information is not an unjustified invasion of the affected person's privacy under section 14(1).

Conclusion

[53] Accordingly, I find that the mandatory personal privacy exemption in section 14(1) does not apply to the term of payment of the affected person's salary after termination. As the city has also claimed the application of the discretionary exemptions in sections 6(1)(b), 11(c) and 12 to this information, I will now consider whether the term of payment of the affected person's salary after termination is exempt by reason of these sections.

C. Does the discretionary exemption at section 6(1)(b) apply to the term of payment of the affected person's salary after termination?

[54] 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.

[55] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

[56] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]; and
- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344].

[57] The city states that it held closed session meetings of Council Committee on February 28, 2011, April 18, 2011 and May 9, 2011, in the absence of the public to discuss a personal matter concerning its city manager as authorized by section 239(2)(b) of the *Municipal Act*, which reads:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

personal matter about an identifiable individual, including municipal or local board employees;

[58] The city provided a copy of the resolutions closing the meetings to the public and the meeting minutes, along with other evidence that the conditions for holding closed meetings were met.

[59] The city submits that disclosure of the information at issue would reveal the actual substance of the deliberations at the meetings, and not merely the subject of the deliberations, regarding the length of time the affected person would continue to collect a salary.

[60] Neither the affected person nor the appellant addressed this issue directly in their representations.

Analysis/Findings

[61] 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].

[62] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera* (Order M-102).

[63] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, the purpose of the meeting must be to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting [*St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.)].

[64] Having regard to the representations of the city, I am satisfied that the closed meetings identified by the city discussed the term of payment of the affected person's salary after termination. I am also satisfied that the meetings were authorized by section 239(2)(b) of the *Municipal Act* to be held in the absence of the public. Accordingly, I find that parts 1 and 2 of the three-part test have been met.

[65] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations (Orders MO-1344, MO-2389 and MO-2499-I).

[66] Based on my review of the city's representations and the information at issue, I am satisfied that the disclosure of the term of payment of the affected person's salary after termination would reveal the substance of the deliberations of the in-camera meetings described above, as this information was discussed at these in-camera meetings.

[67] Accordingly, I find that the third requirement for the application of section 6(1)(b) has been met. All three parts of the test under section 6(1)(b) have, therefore, been met. As none of the exceptions to section 6(1)(b) in section 6(2) apply, I find that the information at issue, the term of payment of the affected person's salary after termination is, subject to my review of the city's exercise of discretion, exempt by reason of section 6(1)(b). For the sake of completeness, I will also consider whether this information is also subject to the discretionary exemptions in sections 11(c) and 12.

D. Does the discretionary exemption at section 11(c) apply to the term of payment of the affected person's salary after termination?

[68] Section 11(c) states:

A head may refuse to disclose a record that contains,

information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[69] 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.

[70] For section 11(c) 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.)].

[71] 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].

[72] 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].

[73] 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].

[74] The city submits that Record 24 contains a confidentiality clause giving the city and the affected person an expectation of privacy of the negotiation process and outcome. It submits that disclosure could impact the city's reputation, ultimately sending the message to the outside world, and to city staff that the city's written word of keeping confidential or sensitive records private cannot be guaranteed. The city states that this could affect the city's competitive position in two ways:

- i) Future developers may have concerns of relocating to our city if they feel their information cannot be kept confidential during the initial process.
- ii) The city may have difficulty attracting high level competent staff if their perception is the city's confidentiality process is flawed. The city's competitiveness in the job market could be affected by not attracting the best potential candidates for jobs because of the release of these documents.

[75] The affected person did not provide representations on this issue.

[76] The appellant submits that the impact disclosure of the information at issue might have on "future developers" who might want to relocate to the city is irrelevant to this particular request. The appellant states that it is not seeking to make public any information regarding private business and that the affected person's salary was, is and will possibly continue to be paid by residents of the city.

Analysis/Findings

[77] 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].

[78] 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].

[79] I disagree with the city's submission that future developers may have concerns in relocating to the city if they feel their information cannot be kept confidential during the initial process. At issue in this appeal is the term of payment of salary of a former city employee. This information is not connected in any way to the potential development of city property by outside developers. The *Act* contains a provision in section 10(1) which details the circumstances in which an institution can refuse to disclose a record of a third party supplied in confidence.⁴ Section 10(1) does not apply in this appeal.

[80] With respect to the city's other submission that it may have difficulty attracting high level competent staff if their perception is the city's confidentiality process is flawed. The city, as well as other institutions⁵ in this province, is subject to the terms of *MFIPPA*. The city is in the same position vis-à-vis the *Act* in attracting staff as any other institution in this province. One of the purposes of the *Act* is to provide a right of access to information under the control of institutions.⁶ The confidentiality process of

⁴ Section 10(1) reads:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

⁵ Section 2(1), definition of "institution".

⁶ Section 1 of the *Act*.

an institution is not flawed merely because an institution is subject to the access provisions set out in the *Act*.

[81] I find that the city has not provided “detailed and convincing” evidence to establish a “reasonable expectation of harm” in disclosure of the term of payment of the affected person’s salary. Therefore, I find that disclosure of the term of payment of salary of the affected person could not reasonably be expected to prejudice the economic interests or the competitive position of the city and section 11(c) does not apply.

E. Does the discretionary exemption at section 12 apply to the term of payment of the affected person’s salary after termination?

[82] Section 12 states as follows:

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.

[83] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[84] The city submits that section 12 applies as the record is subject to solicitor-client communication privilege. Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

[85] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[86] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

[87] The city states that the record is subject to common law solicitor-client privilege as the record contains detailed information about the negotiated final settlement. The city further states all communications were made in confidence as evidenced by the confidentiality clause in the agreement.

[88] The affected person did not provide representations on this issue.

[89] The appellant states that it is not asking for communications between the affected person and his legal counsel.

Analysis/Findings

[90] As stated above, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client. The information at issue is the term of payment of the affected person's salary and is contained in the Record 24, which is a letter from the affected person's lawyer to the city. The city and the affected person's lawyer are not in a solicitor-client relationship. Therefore, section 12 does not apply to the information at issue in this appeal.

F. Did the institution exercise its discretion under section 6(1)(b)? If so, should this office uphold the exercise of discretion?

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

[92] 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.

[93] 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)].

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

- the purposes of the *Act*, including the principles that
 - information should be available to the public

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

[95] The city submits that because of the sensitive and confidential nature of the subject matter and because the affected person did not consent to the release of his information, it was decided not to release any of the record.

[96] Neither the affected person nor the appellant addressed this issue directly in their representations.

Analysis/Findings

[97] Based on my review of the city's representations, I find that it did not exercise its discretion in a proper manner. In applying section 6(1)(b), the city failed to take into account relevant factors. I find that the city did not adequately consider the transparency purpose of the *Act* or the fact that information about the payment of the affected person's salary after termination would be revealed by reason of the provisions of the *PSSDA*.

[98] In Order MO-2536-I, Adjudicator Frank DeVries ordered an institution to re-exercise its discretion regarding a record that contained information about the amount of money paid to a former senior administrator upon the severing of his employment with the municipality. In that order, he stated that:

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

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

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

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

Where early retirement agreements have been considered in meetings which are closed to the public, municipalities may,

under certain circumstances, be permitted to rely on section 6(1)(b) of the Act to withhold access to information contained in these records. It would be unfortunate, however, if institutions began to use this provision to routinely shield the financial terms of such agreements from legitimate public scrutiny.

I would also point out that section 6(1)(b) is a discretionary exemption which means that the head of an institution can choose to release information about a retirement agreement notwithstanding that it was discussed in camera. ...

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

[99] I adopt this reasoning of Adjudicator DeVries in Order MO-2536-I and the orders cited by him, and find that the city has failed to take into account relevant factors in the exercise of its discretion in deciding not to disclose the term of payment of the former city manager's salary. In particular, the city has failed to take into account the transparency purpose of the *Act*, the public interest in information relating to the amount paid under a settlement agreement, and the fact that, in the absence of a section 6(1)(b) exemption claim, a significant amount of information about the termination of employment with public bodies is often ordered disclosed.

[100] As stated by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*:⁷

However, by stipulating that "[a] head may refuse to disclose" a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head.

A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.

[101] I will therefore, order the city to re-exercise its discretion concerning the information that I have found subject to section 6(1)(b), the term of payment of the affected person's salary after termination.

⁷ 2010 SCC 23, [2010] 1 S.C.R. 815, at paragraphs 45 and 46.

ORDER:

1. I uphold the decision of the city that the mandatory exemption in section 14(1) of the *Act* applies to the end date of the affected person's employment.
2. I uphold the decision of the city that the discretionary exemption in section 6(1)(b) of the *Act* applies to the term of payment of the former city manager's salary, subject to the re-exercise of discretion referred to below.
3. I order the city to re-exercise its discretion in accordance with the analysis set out above concerning the information in Record 24 that sets out the term of payment of the affected person's salary. For ease of reference, I have provided the city with a copy of Record 24 with this information highlighted. I order the city to advise the appellant, the affected person and this office of the result of this re-exercise of discretion, in writing. If the city continues to withhold this information, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to the affected person and to me. The city is required to send the results of its re-exercise, and its explanation to the appellant, with the copy to this office and to the affected person, by no later than **August 15, 2012**. If the appellant and/or the affected person wish to respond to the city's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, they must do so within 21 days of the date of the city's correspondence by providing me with written representations.
4. I remain seized of this matter pending the resolution of the issue outlined in provision 3.

Original Signed By: _____

July 24, 2012

Diane Smith
Adjudicator