

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-2812-F

Appeal MA11-287

Corporation of the City of Orillia

November 13, 2012

Summary: A media requester sought access to the details of the post-termination salary payment of the city's former manager. Interim Order MO-2768-I determined that this information was subject to section 6(1)(b) (closed meeting) and ordered the city to re-exercise its discretion. This order upholds the city's re-exercise of discretion.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 6(1)(b).

Orders and Investigation Reports Considered: Orders MO-2768-I, P-58.

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 member of the media 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 [his] 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. During adjudication, the appellant narrowed the scope of its request to the information that contains the length of time the affected person will continue to collect a salary.

[5] In Interim Order MO-2768-I, I upheld the application of section 6(1)(b) and ordered the city to re-exercise its discretion with respect to the information in Record 24. This record contains information about the length of time the affected person will continue to collect a salary. In particular, I ordered the city to:

...re-exercise its discretion in accordance with the analysis set out [in the order] concerning the information in Record 24 that sets out the term of payment of the affected person's salary. ... 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.

[6] The city re-exercised its discretion and decided to continue withholding the information at issue in Record 24. In accordance with Interim Order MO-2768-I, the city provided a copy of its representations in support of its decision to continue to withhold the information at issue in Record 24 to the appellant and the affected person. Neither the appellant nor the affected person provided me with representations, despite being provided with an opportunity to do so.

[7] In this order, I uphold the city's re-exercise of discretion to not disclose the information at issue in this appeal.

RECORD:

[8] At issue is the information in Record 24, the final agreement between the city and the affected person, which describes the length of time that the affected person will continue to collect a salary.

DISCUSSION:

[9] In Interim Order MO-2768-I, I ordered the city to re-exercise its discretion with respect to the information at issue in Record 24. This order included the following analysis as to the considerations the city should take into account in the re-exercise of its discretion:

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*...

...[T]he city has failed to take into account ... 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.

[10] In its explanation for re-exercising its discretion to continue to withhold the information at issue in Record 24, the city states that:

We have further examined the transparency purpose of the *Municipal Freedom of Information and Protection of Privacy Act* and the public interest in information relating to the amount paid under a settlement agreement in relation to the requested information. The City of Orillia believes information should be available to the public and as such encourages routine disclosure of information to the public as often as possible, outside *MFIPPA*. The city considers each *MFIPPA* request when discretionary exemptions are involved, individually, to determine whether information can be released in the interests of transparency. The city published, as required by the *PSSDA*, early in 2012, a list of salaries including the affected party's salary and feel this publication provides information to the public in the interests of transparency.

Section 6(1)(b) of the *Act* applies to the record(s) as they were discussed in a Closed Session meeting as required by Chapters 12 and 22 of the city

of Orillia Municipal Code, and as set out under the *Municipal Act* section 239(1)(2). Chapters 12 and 22, require the city, when dealing with personal matters about an identifiable individual, including municipal or local board employees, to do so in closed session. We feel we cannot release the information and maintain the integrity of the city's by-laws.

The city entered into a legal, binding agreement to maintain confidentiality. Legally, it is our responsibility to ensure that this information remain confidential.

The affected party does not agree to the release of the information and his privacy rights should be protected.

The city understands that in the absence of exemption s. 6(1)(b), a significant of information about public bodies is often ordered disclosed, however, believes for the above noted reasons, this information *should not be released* [emphasis in original].

After careful consideration of all of the factors noted in the Interim Order, we feel we must uphold our decision to deny access to the information setting out the term of payment of the affected person's salary, for the reasons noted.

Analysis/Findings

[11] 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.

[12] 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.

[13] 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)].

[14] 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.

[15] As stated above, the appellant did not provide representations in response to the city's explanation for re-exercising its discretion. I have carefully reviewed the city's explanation in support of its decision to continue to withhold the information at issue in Record 24. I find that the city re-exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations. These relevant considerations include those set out immediately above and those set out in Interim Order MO-2768-I.

[16] As stated by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*:¹

The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed [emphasis added by the court].

[17] I determined in Interim Order MO-2768-I that the section 6(1)(b) exemption was properly claimed. I have now determined that the city has properly exercised its discretion. I am unable to substitute my discretion for that of the city. Accordingly, I will uphold the city's decision that the information at issue in this appeal is exempt by reason of section 6(1)(b) of the *Act*.

ORDER:

1. I uphold the city's decision and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ November 13, 2012

¹ 2010 SCC 23, [2010] 1 S.C.R. 815, at paragraphs 68 and 69.