

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3684-I

Appeal MA17-298

Corporation of the City of North Bay

November 5, 2018

**Summary:** The appellant made a request to the city under the *Act* for all records relating to a specific position. The city located one responsive record, an employment agreement, and denied the appellant access to it, in full. The city claimed the record is excluded from the scope of the *Act* under section 52(3)2 (employment or labour relations). In the alternative, the city also claimed the application of a number of exemptions, including sections 6(1)(b) (closed meeting) and 14(1) (personal privacy), to withhold the record. The appellant appealed the city's decision and claimed additional responsive records should exist. In this order, the adjudicator finds the record is not excluded under section 52(3)2 due to the application of the exception to the exclusion in section 52(4)3 (agreement between an institution and employee). In addition, the adjudicator finds the record is not subject to the section 6(1)(b) exemption. The adjudicator finds the record is not subject to the 14(1) exemption, with the exception of certain salary information. However, the adjudicator finds the public interest override in section 16 applies to this salary information and orders the city to disclose the record to the appellant, in full. Finally, the adjudicator finds the city did not conduct a reasonable search for responsive records and orders it to conduct a further search.

**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*), 2(2.1), 6(1)(b), 14(1), 14(3)(f), 14(4)(a), 16, 17, 52(3)2 and 52(4)3.

**Orders and Investigation Reports Considered:** Orders MO-2470, MO-2563, MO-2964-I, MO-3130, MO-3181, MO-3191-F and PO-2641.

## **OVERVIEW:**

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the City of North Bay (the city) for all records relating to "the job, job description, powers, duties of position of 'Corporate Advisor' and/or 'Corporate Adviser' including initial job advertisement/posting/offering."

[2] After locating one responsive record, an employment agreement, the city notified the other party to the agreement (the affected party) under section 21 of the *Act*. The affected party advised the city that disclosure of the record would constitute an unjustified invasion of their personal privacy.

[3] The city then issued an access decision to the appellant, denying him access to the record in full. The city claimed the record is excluded from the scope of the *Act* pursuant to section 52(3)2 (employment or labour relations). In the alternative, the city stated the record is exempt from disclosure under the discretionary exemption in section 6(1)(b) (closed meeting) and the mandatory exemption in section 14(1) (personal privacy) of the *Act*. Finally, the city advised the appellant no records exist relating to the "initial job advertisement/posting/offering" portion of the request.

[4] The appellant appealed the city's decision.

[5] During mediation, the appellant confirmed his interest in pursuing access to the employment agreement. In addition, the appellant stated additional responsive records should exist, such as a job description, the job advertisement/posting/offering and memos or emails between staff leading to the creation of the agreement. As a result, reasonable search was added as an issue in this appeal. The appellant also raised the possible application of the public interest override in section 16 of the *Act* to the record.

[6] The city confirmed its position that no portion of the record may be disclosed. In a supplemental decision letter, the city advised the appellant it also claims the exemptions in sections 10 (third party information) and 12 (solicitor-client privilege) to withhold the record in full. The city advised no additional responsive records exist.

[7] The mediator contacted the other party to the agreement (the affected party). The affected party advised they do not consent to the disclosure of the record to the appellant.

[8] The appeal was not resolved at mediation. Consequently, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry into the issues under appeal. I began the inquiry by inviting the city and the affected party to submit representations in response to a Notice of Inquiry. The city and affected party submitted representations. In its representations, the city claimed the application of the exclusion in section 52(3)2 and the exemptions in sections 6(1)(b) and 14(1), only, and abandoned its other exemption claims. Accordingly, I will only consider the city's application of the exclusion in section 52(3)2

and the exemptions in section 6(1)(b) and 14(1) in this order. The affected party did not consent to the disclosure of any information relating to them.

[9] I then invited the appellant to make representations in response to the Notice of Inquiry and the city's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. I did not share the affected party's representations with the appellant due to confidentiality concerns. The appellant submitted representations. I then sought and received reply representations from the city.

[10] In the discussion that follows, I find the record is not excluded from the scope of the *Act* given the application of the exception to the section 52(3)2 exclusion in section 52(4). In addition, I find the record is not exempt from disclosure under section 6(1)(b). I find the record is not also exempt under section 14(1), with the exception of certain salary information. However, I find the public interest override in section 16 applies to the salary information and order the city to disclose the entire record to the appellant. Finally, I find the city did not conduct a reasonable search for responsive records and order it to conduct another search.

## **RECORD:**

[11] The record at issue is a Confidential Employment Agreement.

## **PRELIMINARY ISSUE**

[12] I note the appellant states he pursues access to "the Corporate Advisor's employment contract, the in-camera Meeting Minutes of Dec. 8, 2015 including the attendance and voting records of such, and a formal letter of apology by the [Mayor of the city] to the citizens of North Bay for misleading the public" in his representations. I confirm the only record at issue before me is the Confidential Employment Agreement. As such, I can only consider the city's access decision regarding this record. The other records identified in the appellant's representations are not before me in this appeal. I cannot consider whether the city is required to disclose these records to the appellant. However, the possible existence of further responsive records is addressed under Issue F, below.

## **ISSUES:**

- A. Does section 52(3)2 apply to exclude the record from the scope of the *Act*?
- B. Does the discretionary exemption at section 6(1)(b) apply to the record?
- C. Does the record contain *personal information* as defined in section 2(1) and, if so, to whom does it relate?

- D. Does the mandatory exemption at section 14(1) apply to the information at issue?
- E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 14(1) exemption?
- F. Did the city conduct a reasonable search for records?

## **DISCUSSION:**

### **Issue A: Does section 52(3)2 apply to exclude the record from the scope of the *Act*?**

[13] The city claims the application of section 52(3)2 to exclude the record from the scope of the *Act*. Section 52(3)2 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:

- 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution, bargaining agent or party to a proceeding or an anticipated proceeding.

Section 52(4) states, in part,

This Act applies to the following, records:

- 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

If section 52(3)2 applies to the record and none of the exceptions in section 52(4) applies, the record is excluded from the scope of the *Act*.

[14] The city claims the application of section 52(3)2 to exclude the Confidential Employment Agreement between itself and an individual employee from the scope of the *Act*.

[15] Based on my review of the record, I find it fits squarely within the exception to the exclusion in section 52(4)3. The record is an agreement between the city and an employee resulting from negotiations about employment-related matters between the city and the employee. Given the application of the exception in section 52(4)3, I do not need to consider whether section 52(3)2 applies.

[16] Therefore, I find the record is not excluded from the scope of the *Act*. I will

consider whether the record is exempt from disclosure below.

**Issue B: Does the discretionary exemption at section 6(1)(b) apply to the record?**

[17] The city claims the application of the discretionary exemption in section 6(1)(b) to the record. Section 6(1)(b) reads as follows:

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.

[18] For this exemption to apply, the city must establish the following:

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.<sup>1</sup>

Previous orders of this office have found that *deliberations* refer to discussions conducted with a view towards making a decision.<sup>2</sup> In addition, *substance* generally means more than just the subject of the meeting.<sup>3</sup>

[19] 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.<sup>4</sup>

[20] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish a meeting was held by it and the meeting was properly held *in camera*.<sup>5</sup>

[21] With respect to the third requirement, the wording of the provision and previous decisions of the IPC make it clear that 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) specifically requires that disclosure of the record would reveal the *actual substance* of deliberations at the in-camera meeting, not merely the subject

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<sup>1</sup> Orders M-64, M-102 and MO-1248.

<sup>2</sup> Order M-184.

<sup>3</sup> Orders M-703 and MO-1344.

<sup>4</sup> Order MO-1344.

<sup>5</sup> Order M-102.

of the deliberations.<sup>6</sup>

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

[22] The city submits the Council of the City of North Bay held a Special Closed Meeting of City Council on December 8, 2015. The city states notice of this meeting was published in the North Bay Nugget on December 5, 2015 and the notice was given in accordance with its Procedural By-Law 2011-186. The city provided copies of the Notice of Meeting and the relevant by-law with its representations.

[23] Based on the city's representations, I find city council held an in-camera meeting and part 1 of the three-part test under section 6(1)(b) is satisfied.

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

[24] The city states the *Municipal Act, 2001* authorizes City Council to hold meetings not open to the public. The city specifically refers to section 239(2) of the *Municipal Act, 2001*, which allows meetings or part of a meeting to be closed to the public if certain subject matters are being considered. The city submits City Council made a motion to adjourn into closed session on December 8, 2015 to discuss a personal matter about an identifiable individual who is a municipal employee under section 239(2)(b) of the *Municipal Act, 2001*.

[25] I am satisfied section 239(2)(b) of the *Municipal Act, 2001* authorized the city to hold the meeting in camera because the subject matter of the relevant part of the meeting discussed a personal matter relating to an identifiable individual who was a municipal employee. Therefore, I find part 2 of the three-part test for the application of section 6(1)(b) is satisfied.

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

[26] The city submits a confidential memorandum was provided to City Council during the closed meeting on December 8, 2015. The city claims the terms of the confidential memorandum formed the basis for the agreement at issue. The city submits the Special Closed Meeting was held in relation to the matter of the agreement between the city and the affected party. The city submits the contents of the record would reveal the substance of the deliberations of a closed meeting of Council.

[27] For further context, the city states City Council provided direction to its staff to prepare an agreement between the city and the affected party on the basis of the confidential deliberations held and the confidential memorandum presented in the

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<sup>6</sup> Orders MO-1344, MO-2389 and MO-2499-I.

closed session. The city submits disclosure of the confidential memorandum<sup>7</sup> and the record, which is based on the memorandum, would reveal the substance of the deliberations of the closed session meeting.

[28] The appellant's representations do not address the application of section 6(1)(b) to the record directly. The appellant's submissions relate to his interest in the justification for the city's entering into this agreement with the affected party.

[29] In Interim Order MO-2964-I, the adjudicator considered the application of section 6(1)(b) to employment contracts that were deliberated upon in a closed meeting, but later executed by the parties. The adjudicator found these employment contracts were not exempt from disclosure under section 6(1)(b). Specifically, the adjudicator stated,

... background documents or the minutes of the in-camera meetings would, in my view, be precisely the kind of records which would reveal the "substance of the deliberations" of the in-camera meetings. However, these minutes and documents are not the records at issue in this appeal. The records at issue are the six executed agreements entered into between the city and the six individuals. In my view, disclosure of these records would not reveal the substance of the deliberations. Rather, **disclosure of the final executed contracts would reveal the *subject* or the "product" of the deliberations.** [Emphasis added]<sup>8</sup>

The adjudicator also considered the institution's arguments that (1) previous decisions of the IPC have found that disclosure of final agreements, discussed or approved at in-camera meetings, would reveal the substance of the deliberations of those meetings; and (2) that proper statutory interpretation supports a finding that section 6(1)(b) applies to final, executed employment agreements. The adjudicator rejected both of these arguments in Interim Order MO-2964-I and found section 6(1)(b) did not apply to the final executed employment contracts before him.

[30] The adjudicator specifically addressed the institution's arguments that previous IPC decisions have found that disclosure of final agreements, discussed or approved at in-camera meetings, would reveal the substance of the deliberations of those meetings. The adjudicator considered previous IPC decisions, including Order MO-1676, and noted that these orders involved in-camera discussions about the minutes of settlement or terms of termination agreements negotiated between, or entered into by, municipal bodies and former employees. The adjudicator observed that none of these decisions addressed employment agreements entered into with individuals who then commence or continue employment with the municipal body in accordance with those employment agreements. Furthermore, the adjudicator noted,

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<sup>7</sup> I confirm this record is not before me in this appeal. Therefore, I cannot consider the application of section 6(1)(b) to it.

<sup>8</sup> Interim Order MO-2964-I at para 43.

... additional factors may be in play when municipalities enter termination agreements or minutes of settlement to settle litigation. There may be instances where simply disclosing the fact that a settlement agreement was entered into may reveal solicitor-client privileged information or other confidential information. These same concerns are not raised with respect to employment agreements ultimately executed by parties, which then result in the employment of the individuals.

On this basis, I find that these previous orders are distinguishable on their facts, analysis and conclusion.<sup>9</sup>

Therefore, the adjudicator found that section 6(1)(b) did not apply to a final employment agreement between the municipality and an employee. The adjudicator stated, "Although disclosure may reveal the result of the in-camera deliberations, it would not reveal the substance of those deliberations for the purpose of section 6(1)(b)."<sup>10</sup>

[31] The adjudicator followed this analysis in his subsequent Order MO-3130, deciding that a proper statutory interpretation supported a finding that section 6(1)(b) does not apply to a final, executed employment agreement.

[32] Both Interim Order MO-2964-I and Order MO-3130 were later followed in Order MO-3181, in which the adjudicator found section 6(1)(b) did not apply to exempt two employment contracts between the Deep River Police Services Board and two individuals, which were executed by the parties after one in-camera meeting but prior to a second in-camera meeting. The adjudicator found disclosure of the final adopted employment agreements would not reveal the substance of the deliberations of the in-camera meetings at which the agreements were discussed. Accordingly, the adjudicator found the records did not meet the third part of the test for section 6(1)(b) and did not qualify for exemption under that section.

[33] I adopt the analyses in these decisions for the purposes of this appeal. Following Interim Order MO-2964-I and Orders MO-3130 and MO-3181, I find the Confidential Employment Agreement at issue is not exempt under section 6(1)(b) of the *Act*. While the agreement may be based on a confidential memorandum that was discussed during an in-camera meeting, the agreement itself reveals the results of the in-camera deliberations and not the actual substance of the deliberations. Therefore, I find the record does not qualify for exemption under section 6(1)(b).

**Issue C: Does the record contain *personal information* as defined in section 2(1) and, if so, to whom does it relate?**

[34] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record at issue contains *personal information* and, if so, to whom it

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<sup>9</sup> *Ibid.* at paras 48-49.

<sup>10</sup> *Ibid.* at para 50.



relates. The term *personal information* 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 viewed 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.<sup>11</sup>

[35] Section 2(2.1) also relates to the definition of personal information. Section 2(2.1) states,

(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.

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<sup>11</sup> Order 11.

[36] 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.<sup>12</sup> 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.<sup>13</sup>

[37] The city submits the agreement contains the personal information of an identifiable individual.

[38] The appellant does not address whether the record contains the personal information of an individual in his representations.

[39] Previous orders of this office have found that information about individuals in employment contracts generally constitutes their *personal information* within the meaning of section 2(1). Specifically, the IPC has found that information such as the individual's address, the terms of the agreement and the date of termination relate to these individuals in their personal capacity and therefore qualifies as their personal information.<sup>14</sup>

[40] However, the IPC has also found that certain information contained in employment contracts does not constitute an individual's personal information because it either relates to management rights, such as the rights of the city as the employer of the individual, or are generic clauses about a non-personal matter, such as the laws that govern the interpretation of the contract.<sup>15</sup>

[41] Upon review of the record, I find some of the information constitutes the personal information of the affected party, as it contains information about their specific benefits and salary information. Specifically, I find the information contained in Article 1, Article 2 (with the exception of the affected party's position in Section 2.1) and Article 4 consists of the affected party's *personal information*. In addition, I find the effective date of the agreement in the fifth paragraph of the preamble and Section 2.1 relate to the affected party in a personal manner and therefore constitutes their *personal information* within the meaning of section 2(1) of the *Act*.

[42] However, I find the remainder of the information in the record does not qualify as the affected party's personal information within the meaning of that term in section 2(1) of the *Act*. First, I find the portions of the fifth paragraph of the preamble and Section 2.1 of the record identifying the affected party's employment position do not constitute *personal information*, because of section 2(2.1) of the *Act*. Accordingly, this information does not constitute their personal information and cannot be exempt from disclosure under section 14(1) of the *Act*. I will order the city to disclose this

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<sup>12</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>13</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>14</sup> Orders M-173, P-1348, MO-1184, MO-1332, MO-1405, MO-1622, MO-1749, MO-1970, MO-2318 and PO-2519.

<sup>15</sup> Orders PO-1885, MO-2470 and MO-3044.

information to the appellant.

[43] In addition, I find the date the agreement was signed and the signatures of the witnesses and parties to the agreement do not constitute *personal information*. In addition, I find the preamble, with the exception of the effective date of the agreement in the fifth paragraph, does not contain *personal information*. The majority of the preamble outlines the circumstances of the creation of the agreement and does not reveal something of a personal nature about the affected party. In addition, I find Articles 3 and 5 through 11 of the agreement do not contain *personal information*; these portions of the agreement consist of standard terms unrelated to personal matters, such as a non-competition clause, the affected party's right to independent legal advice and a confidentiality clause. Based on my review, I find this information does not relate to the affected party in a personal manner.

[44] I will now consider whether the remaining portions of the record, specifically the effective date of the agreement in the preamble and Section 2.1 and Articles 1, 2 (with the exception of Section 2.1) and 4 are exempt under section 14(1) of the *Act*.

**Issue D: Does the mandatory exemption at section 14(1) apply to the information at issue?**

[45] 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.

[46] The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception, which allows for disclosure if it would not be an unjustified invasion of personal privacy, is more complex and requires a consideration of additional parts of section 14. Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

***Section 14(4)(a)***

[47] If any of the paragraphs in section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14(1). Section 14(4) reads, in part:

... 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 an employee of an institution;

None of the parties provided submissions on whether portions of the record contain information that falls within section 14(4)(a). I will now consider whether the information that remains at issue contains this type of information.

### *Benefits*

[48] The IPC has interpreted *benefits* in section 14(4)(a) 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.<sup>16</sup>

[49] In Order MO-2470, the adjudicator reviewed the terms of two employment agreements between the Essex Police Services Board and its Chief and Deputy Chief. He found the following terms constituted *benefits* for the purpose of section 14(4)(a):

... the information under the following headings in the Chief's employment contract qualifies as "benefits" for the purposes of section 14(4)(a): court time, other assignments, clothing and equipment, professional development, legal indemnification, vacations, holidays, sick leave, life insurance, workplace safety and insurance, health and welfare, bereavement leave, survivor's pension, separation, incidental expense allowance, membership and participation in professional associations.

Similarly, I am satisfied that the information under the following headings in the Deputy Chief's employment contract qualifies as "benefits" for the purposes of section 14(4)(a): court time, other assignments, uniforms, equipment, clothing and cleaning allowances, professional development, legal indemnification, vacation, holidays, sick leave, life insurance, workplace safety and insurance, health and welfare, bereavement leave, survivor's pension, separation, membership fees, physical fitness, home office expense, and Appendix B (memorandum of understanding with respect to the Deputy Chief's pension).

I agree with this approach and will apply it to the term *benefits* and the information remaining at issue.

[50] Based on my review of the record, I find Article 1, with the exception of the

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<sup>16</sup> Orders M-23 and PO-1885.

salary information in Section 1.1, and Sections 2.3, 2.4, 2.7 and 4.3 of the record constitute *benefits* for the purpose of section 14(4)(a) of the *Act*. These clauses generally relate to the vacation and other benefits related to the affected party's employment with the city. Therefore, the disclosure of this information would not constitute an unjustified invasion of personal privacy and it does not qualify for exemption under section 14(1).

### *Employment Responsibilities*

[51] Some of the duties and responsibilities of the affected party are set out in Sections 4.1, 4.2 and 4.4 of the record. Based on my review of these sections, I find they constitute *employment responsibilities* for the purpose of section 14(4)(a).

[52] In addition, I find the effective date of the agreement (contained in the fifth paragraph of the preamble and Section 2.1) as well as Section 2.6 are captured within the meaning of *employment responsibilities* in section 14(4)(a). In Order MO-2470, the adjudicator found that information relating to the position, hours of work and duration of the agreement constituted *employment responsibilities* for the purposes of section 14(4)(a). Adopting this interpretation and analysis, I find the information relating to the duration of the contract found in the effective date and Section 2.6 of the agreement constitute *employment responsibilities*.

[53] Finally, I find the information contained in Section 2.2 of the agreement, with the exception of the salary information, relates to the affected party's *employment responsibilities* within the meaning of section 14(4)(a).

[54] As the information described above falls within the meaning of *employment responsibilities*, its disclosure would not constitute an unjustified invasion of personal privacy. Therefore, I find that this information does not qualify for exemption under section 14(1).

[55] Based on my review of the record, I find the salary information contained in Sections 1.1 and 2.2 of the record does not fall under any of the categories of information identified in section 14(4)(a). Specifically, I find this information does not disclose the *salary range* of the affected party. I also find that none of the other situations in section 14(4) apply to the salary information at issue.

### ***Section 14(1)(d)***

[56] In my view, the only exception in paragraphs (a) to (e) of section 14(1) that might apply to the salary information in the record is paragraph (d). Section 14(1)(d) of the *Act* states,

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

under an Act of Ontario or Canada that expressly authorizes the disclosure.

[57] In his representations, the appellant noted that the salary of the affected party is publicly disclosed pursuant to Ontario's *Public Sector Salary Disclosure Act* (the *PSSDA*). The city acknowledges the affected party's salary is published in the "Sunshine List".

[58] Previous orders of this office have established that the *PPSDA* expressly authorizes the disclosure of salary and benefit amounts and this authorization meets the requirements of section 14(1)(d).<sup>17</sup> In Order PO-2641, the adjudicator found that section 3(1) of the *PSSDA* "expressly authorized" the disclosure of the salary of the President of McMaster University, as contemplated in the exception in 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*).

[59] Sections 1.1 and 2.2 of the record contain information relating to the affected party's salary. However, these portions of the record do not contain information to which the *PSSDA* would apply. Based on my review of this information, I find it does not fit within the exception in section 14(1)(d) of the *Act*. None of the other exceptions in paragraphs (a) to (e) of section 14(1) apply to this information.

### ***Section 14(1)(f)***

[60] Since I found that none of the exceptions in sections 14(1)(a) through (e) apply to the salary information remaining at issue, I need to decide whether the exception at section 14(1)(f) applies. Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. I found above that section 14(4), which sets out situations that would not be an unjustified invasion of personal privacy, does not apply to the salary information in the record. Therefore, I now turn to sections 14(2) and (3), which help in determining whether disclosure would or would not be an unjustified invasion of privacy.

[61] Based on my review, I find the presumption in section 14(3)(f) applies to the salary information that remains at issue. None of the parties claimed the application of this presumption. Regardless, I find the salary information at issue fits within the presumption in section 14(3)(f) because it "describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or creditworthiness." Therefore, I find the salary information falls within the presumption in section 14(3)(f).

[62] The Divisional Court has ruled that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue is caught by section 14(4) or if the

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<sup>17</sup> Orders PO-2641 and MO-2344.

"compelling public interest" override at section 16 applies.<sup>18</sup> I found that the salary information at issue is not caught by section 14(4), above. Therefore, I find the salary information is exempt under section 14(1) of the *Act*. I will consider whether there is a compelling public interest in the disclosure of the salary information that outweighs the purpose of the section 14(1) exemption, below.

[63] In conclusion, I find the majority of the record is not exempt under section 14(1) and will order the city to disclose it to the appellant. I find, however, that the section 14(1) exemption applies to the salary information in Sections 1.1 and 2.2 of the record.

**Issue E: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 14(1) exemption?**

[64] Section 16 of the *Act* states,

An exemption from disclosure of a record under sections 7, 9, 9.1, 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.

[65] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[66] The *Act* is silent as to who bears the burden of proof with respect to section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which would seldom, if ever, be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.<sup>19</sup>

[67] In its representations, the city acknowledges there is a public interest in the disclosure of information relating to the use of public money where the information relates to the expenditures of such money. However, the city states this public interest "co-exists" with the *Act's* other purpose, to protect privacy. The city states the salary of the Corporate Advisor position was published pursuant to the *PSSDA*. The city submits the record qualifies for exemption under section 14(1) and there is no compelling public interest in its disclosure.

[68] The appellant claims that there is a compelling public interest in the disclosure of the record because it relates to a highly paid official employed by the city. The appellant submits it is very troubling there was no advertising or job description for this position with the city. The appellant notes the city acknowledges there is a public interest in the disclosure of information relating to the use of public money. The

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<sup>18</sup> *John Doe v. Ontario (Information and Privacy Commissioner)*, (1993), 13 O.R. (3d) 767.

<sup>19</sup> Order P-244.

appellant submits the public interest outweighs the purposes of the personal privacy exemption.

[69] The appellant submits there is a compelling public interest in the record to shed light on the operations of government. The appellant submits the public does not know the job description of the Corporate Advisor position, the length of time the affected party will be employed by the city, who they report to or their daily duties in this role. The appellant also submits the public does not know why the city hired the affected party for this position nor the criteria used to approve the hiring. The appellant submits the city should have considered other candidates for this position.

[70] Finally, the appellant notes that the North Bay Regional Health Centre (the NBRHC) publicly posts their executive contracts on their website to promote accountability and transparency. The appellant submits the NBRHC recognized "a greater public good in disclosing executive contracts given the mounting scrutiny from the public." The appellant suggests the city should have a similar practice of posting executive contracts on its website.

[71] I invited the city to respond to the appellant's representations. In reply, the city submits the disclosure of the affected party's salary pursuant to the *PSSDA* satisfies the public interest in the expenditure of public money. The city submits, "the injury to the relationship between Council and its employees that would be caused by the release of the record would far exceed any benefit to be obtained by the disclosure of the record."

[72] The affected party submits there is no public benefit to the disclosure of the information contained in the record.

### ***Compelling public interest***

[73] In considering whether there is a *public interest* in disclosure of the records, the first question to ask is whether there is a relationship between the records and the *Act's* central purpose of shedding light on the operations of government.<sup>20</sup> Previous orders state that, in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>21</sup>

[74] A public interest does not exist where the interests being advanced are essentially private in nature.<sup>22</sup> Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.<sup>23</sup> A public interest is not automatically established where the requester is a member of the media.<sup>24</sup> The

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<sup>20</sup> Orders P-984 and PO-2607.

<sup>21</sup> Orders P-984 and PO-2556.

<sup>22</sup> Orders P-12, P-347 and P-1439.

<sup>23</sup> Order MO-1564.

<sup>24</sup> Orders M-773 and M-1074.



word *compelling* has been defined in previous orders as “rousing strong interest or attention.”<sup>25</sup>

[75] Any public interest in *non-disclosure* that may exist must also be considered.<sup>26</sup> A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of *compelling*.<sup>27</sup>

[76] In Order MO-2563, the adjudicator determined that, based on the nature of the salary information at issue and the fact that the named individual employees of the York Police Services Board were subject to the *PSSDA*, the exact salary information in the employment contracts for each of a number of years ought to be disclosed.<sup>28</sup> The adjudicator found there was a compelling public interest in the disclosure of the information, specifically stating,

In my view, the allocation of taxpayers’ money for the payment of senior level public sector salaries “rouses strong interest and attention,” which means that the public interest in disclosure is “compelling.” In addition, I have considered whether there is any public interest in the non-disclosure of the withheld portions of the record at issue and have concluded that none exists.

The Divisional Court upheld Order MO-2563.<sup>29</sup>

[77] I adopt these findings for the purpose of this analysis and similarly find that the allocation of taxpayers’ money for the payment of the affected party’s salary “rouses strong interest and attention,” particularly since the agreement at issue relates to a newly created and highly paid senior level position. As a result, I find the public interest in the disclosure of the salary information at issue is *compelling*.

[78] In addition, based on my review of his representations, it does not appear the appellant is motivated by a private interest. I note that in Order MO-2563, the adjudicator acknowledged the requester in that appeal may have had a private interest in pursuing access to the records. Regardless, the adjudicator found that this type of salary information was “of broader interest to all taxpayers as a means of shedding light on the affairs of government and, in particular, ensuring accountability for the allocation of public funds.” I agree with this analysis and adopt it.

[79] Reviewing the salary information that remains at issue, I find the public has a right to know to the fullest extent possible how public money was allocated to the

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<sup>25</sup> Order P-984.

<sup>26</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

<sup>27</sup> Orders PO-2072-F, PO-2098-R and PO-3197.

<sup>28</sup> I note the adjudicator found that the *PSSDA* did not apply to the salary information before him because it consisted of base salary amounts and the information disclosed under the *PSSDA* consisted of base salary plus pay for performance.

<sup>29</sup> *York (Police Services Board) v. (Ontario) Information and Privacy Commissioner*, 2012 ONSC 6175 (CanLII).

salary of this senior public servant. Accordingly, I find there is a compelling interest in disclosure of this information. I have considered whether there is any public interest in the non-disclosure of the salary information and find none exists.

[80] Accordingly, I find the first requirement under section 16 is satisfied. I will now examine whether this interest clearly outweighs the purpose of the section 14(1) exemption.

***Purpose of the Exemption***

[81] In my view, the compelling public interest in disclosure of the salary information in Sections 1.1 and 2.2 of the agreement outweighs the purpose of the section 14(1) exemption in this case. I find support for this finding in Order MO-2563, in which the adjudicator stated,

The public has a right to know to the fullest extent possible how taxpayer dollars have been allocated to public servants' salaries, and this has particular force with respect to public servants at senior levels who earn significant amounts of money paid out of the public purse. Certainly, the *PSSDA* is one important tool for ensuring such openness and transparency. However, in my view, to limit disclosure to only those amounts that are disclosed under the *PSSDA* seems incongruent with the government's commitment to openness and transparency and, in turn, accountability for the allocation of public resources. In my view, when an individual enters the public service he/she accepts that his/her salary may be exposed to public scrutiny. In this case, the amounts at issue exceed the *PSSDA* \$100,000 threshold and the impact on the affected parties' privacy is limited to the amounts provided for pay for performance in 2009, which can be extrapolated from a comparison of the base salary amounts in the records with the salaries published under the *PSSDA* for that year. In my view, the need for complete transparency in this case outweighs the limited privacy interests of the affected parties.

As stated above, the Divisional Court upheld this decision. Furthermore, the analysis in Order MO-2563 was adopted in Final Order MO-3191-F, where the adjudicator found there was a compelling public interest in the salary information contained in nine employment contracts of high-level employees with the City of Greater Sudbury that outweighed the purpose of the section 14(1) exemption.

[82] I adopt the analysis in Order MO-2563 for the purposes of this appeal. I agree that when an individual enters the public service he/she accepts that his/her salary may be exposed to public scrutiny. In addition, the affected party's salary is publicly available because it exceeds the *PSSDA* \$100,000 threshold. As such, I find the impact of disclosure on the privacy of the affected party in relation to the salary information in the record is limited. Finally, I find that the need for transparency with regard to a high level public sector employee's salary and the allocation of public funds outweighs the limited privacy rights of the affected party in this case.

[83] Therefore, I find that the public interest override in section 16 of the *Act* applies to the salary information contained in the record. I will order the city to disclose the record to the appellant, in full.

**Issue F: Did the city conduct a reasonable search for records?**

[84] The appellant claims additional responsive records exist beyond the record identified by the city. Accordingly, I must determine whether the city conducted a reasonable search for records as required by section 17 of the *Act*.<sup>30</sup> If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the city's decision. If I am not satisfied, I may order further searches.

[85] The *Act* does not require the city to prove with absolute certainty further records do not exist. However, the city must provide sufficient evidence to show they made a reasonable effort to identify and locate responsive records.<sup>31</sup> To be responsive, a record must be *reasonably related* to the request.<sup>32</sup>

[86] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records reasonably related to the request.<sup>33</sup> A further search will be ordered if the institution does not provide sufficient evidence to demonstrate it made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>34</sup>

[87] Although a requester will rarely be in a position to indicate precisely which records the institution did not identify, the requester must still provide a reasonable basis for concluding such records exist.<sup>35</sup>

[88] In its original representations, the city claimed the only record identified in its search is the Confidential Employment Agreement. The city asserted, "No other records were found to be responsive to the Appellant's request." The city did not provide any other representations on the search it conducted in response to the appellant's request.

[89] The appellant takes the position that additional responsive records ought to exist. During mediation, the appellant claimed that documents such as a job description, job advertisement/posting/offering, memos or emails between staff leading to the creation of the agreement ought to exist. In his representations, the appellant submits there should be additional emails or notes from the Chief Administrative Officer or city staff regarding such a highly paid position within the city.

[90] In response to the appellant's submissions, the city affirmed it conducted a thorough search for records in relation to "Corporate Advisor" and/or "Corporate

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<sup>30</sup> Orders P-85, P-221 and PO-1954-I.

<sup>31</sup> Orders P-624 and PO-2559.

<sup>32</sup> Order PO-2554.

<sup>33</sup> Orders M-909, PO-2469 and PO-2592.

<sup>34</sup> Order MO-2185.

<sup>35</sup> Order MO-2246.

Adviser." The city states that, upon receipt of the appellant's request, it made the following inquiries:

1. The Human Resources Department was requested to complete a search for their records for all documentation in relation to the position of "Corporate Advisor" and or "Corporate Adviser".
2. Information Services was requested to conduct a search of [the affected party's] electronic files for any documentation in relation to the position of "Corporate Advisor" and or "Corporate Adviser".

[91] The appellant's original request was for all records relating to "the job, job description, powers, duties of position of 'Corporate Advisor' and/or 'Corporate Advisor' including initial job advertisement/posting/offering." While, as stated above, the *Act* does not require the city to provide with absolute certainty further records do not exist, the city must provide *sufficient evidence* to show it made a reasonable effort to identify and locate responsive records.<sup>36</sup>

[92] Based on my review of the city's representations, I find the city has not provided sufficient evidence to demonstrate that experienced employees knowledgeable in the subject matter of the request expended a reasonable effort to locate records reasonably related to the request. The city's representations on its search for records are entirely lacking in detail. I note the Notice of Inquiry sent to the city asked the city to "provide a written summary of all steps taken in response to the request."<sup>37</sup> Specifically, the Notice of Inquiry asked the city to "provide details carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches?"<sup>38</sup> Based on my review, I find the city did not provide sufficient details of the searches it conducted. For example, it did not identify the individuals who conducted the searches, the files and/or locations searched by the Human Resources Department or the individuals who were contacted in the course of the search.

[93] In addition, I find the city appeared to narrow the scope of the appellant's request without justification in its search for records. According to the city's representations, it searched two locations: the Human Resources Department and the affected party's electronic files. Furthermore, the city searched for documentation relating to the position of "Corporate Advisor" and/or "Corporate Adviser." Based on my review of the information before me, it does not appear the appellant narrowed his request from "all records" the city may have relating to "the job, job description, powers, duties of position of 'Corporate Advisor' and/or 'Corporate Advisor' including initial job advertisement/posting/offering." It is unclear why the city restricted its search to only the Human Resources Department and the affected party's own electronic files, when it is possible that additional records may exist within other departments at the

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<sup>36</sup> Orders P-624 and PO-2559.

<sup>37</sup> Page 29 of the Notice of Inquiry dated October 26, 2017 sent to the city.

<sup>38</sup> *Ibid.*

city. It is also unclear whether the city conducted a search for records relating to the job description, powers, duties or the advertisement/posting/offering for the "Corporate Advisor"/"Corporate Adviser" role. The city's representations do not offer any clarification regarding its search.

[94] Furthermore, the appellant states it is "hard to believe that there are no additional emails or notes from the CAO or staff" regarding the newly created position of "Corporate Advisor" or "Corporate Adviser" with the city. I agree it is reasonable to conclude when examining this record that there was likely earlier correspondence or discussion<sup>39</sup> regarding this position and/or the affected party's transition to this role before the agreement was signed. While it may be possible that further additional records do not exist, the city failed to address this issue with sufficient detail in its representations or reply representations.

[95] Accordingly, I find the city did not conduct a reasonable search for records responsive to the appellant's request. As a result, I will order the city to conduct a further search for responsive records and to provide a reasonable amount of detail to this office regarding the results of said search.

## **ORDER:**

1. I order the city to disclose the Confidential Employment Agreement to the appellant by **December 11, 2018** but not before **December 6, 2018**.
2. I order the city to conduct a further search in response to the appellant's request relating to this appeal. I order the city to provide me with an affidavit sworn by the individual(s) who conduct(s) the search(es) by **December 6, 2018** describing its search efforts. At a minimum, the affidavit(s) should include the following information:
  - a. The names and positions of the individuals who conducted the searches;
  - b. Information about the types of files searched, the nature and location of the search(es) and the steps taken in conducting the search(es); and
  - c. The results of the search(es).
3. The information should be provided by way of representations with the affidavit that may be shared with the appellant, unless there is an overriding confidentiality concern.
4. If the city locates additional responsive records as a result of its further search, I order it to issue an access decision to the appellant in accordance with the

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<sup>39</sup> For example, it is clear the confidential memorandum the city referred to in its arguments on the application of section 6(1)(b) is reasonably related to the appellant's request.

requirements of this *Act*, treating the date of this order as the date of the request.

5. I reserve the right to require the city to provide me with a copy of the information it discloses to the appellant in accordance with Order Provisions 1 and 3.
6. I remain seized of this appeal to deal with any outstanding issues arising from Item 2 of this order.

Original Signed by: \_\_\_\_\_

Justine Wai  
Adjudicator

November 5, 2018 \_\_\_\_\_