

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3851

Appeal MA18-325

City of St. Catharines

October 22, 2019

Summary: The City of St. Catharines received a request for access to the retirement or employment termination packages for two named individuals, including information about any incentives that the individuals received. The city located six records responsive to the request and denied access to the records in full, citing the exclusion at section 52(3)3 (employment or labour relations), and the exemptions at sections 6(1)(b) (closed meeting), 11(c) (economic or other interests), 12 (solicitor-client privilege), and 14(1) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that three of the records are excluded from the *Act* by section 52(3)3, while the other three records are exempt from disclosure based on sections 12 and 14(1). The adjudicator upholds the city's decision.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c.M56, sections 2(1) (definition of "personal information"), 12, 14(1), 14(1)(f), 14(2)(a), 14(3)(d), 14(3)(f), 14(4)(a), and 52(3)3.

Orders Considered: Orders MO-1469, MO-2344, and PO-2050.

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

OVERVIEW:

[1] The City of St. Catharines (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the "retirement or termination of employment package" for two named individuals, including the amount

paid, any “computer equipment and cell phones given including any information contained without deleting,” and any other incentives paid, such as vacation pay.

[2] The city initially located five records responsive to the request and issued a decision withholding them in full. The city denied access pursuant to the exclusion at section 52(3)3 (employment or labour relations), and the exemptions at sections 6(1)(b) (closed meeting), 11(c) (economic or other interests), 12 (solicitor-client privilege), and 14(1) (personal privacy) of the *Act*. In response to the query about any computers or cell phones given to the departing employees, the city advised that one of the individuals purchased a cell phone and that, prior to that individual receiving the phone, all information was deleted from it.

[3] The requester appealed the city’s decision to this office, thereby becoming the appellant in this appeal.

[4] During the mediation stage of the appeal process, the city advised that it was also denying access to a sixth responsive record based on the personal privacy exemption in section 14(1). The appellant asked for the file to proceed to adjudication.

[5] A mediated resolution was not achieved and the file was transferred to the adjudication stage of the appeal process. As part of my inquiry, I invited and received representations from the city, the two named individuals (the affected parties), and the appellant. The representations were shared between the parties in accordance with *Practice Direction Number 7* of the IPC’s *Code of Procedure*.

[6] For the reasons that follow, I uphold the city’s decision on the basis that some of the records are excluded from the *Act* by section 52(3)3, and the remaining records are exempt under sections 12 and 14(1).

RECORDS:

There are six records at issue, totalling nine pages. They were described in the city’s index of records¹ as follows:

Record	Description	Exclusions / exemptions applied
A	Amendment to employment contract (affected party #1)	ss. 6(1)(b), 11(c), and 14(1)

¹ Records A-E appear as described in the index that accompanied the city’s initial decision letter; record F was added during mediation and appears as described to the mediator.

B	Letter from Human Resources (affected party #1)	ss. 6(1)(b), 11(c), 14(1), and 52(3)3
C	Notice of termination (affected party #1)	ss. 6(1)(b), 11(c), 14(1), and 52(3)3
D	Memo from Human Resources to Payroll (affected party #1)	ss. 6(1)(b), 11(c), 14(1), and 52(3)3
E	Minutes of settlement and release (affected party #2)	ss. 11(c), 12, and 14(1)
F	Receipt for phone (affected party #1)	s.14(1)

ISSUES:

- A. Does section 52(3) exclude records B, C, and D from the *Act*?
- B. Does the discretionary solicitor-client privilege exemption at section 12 apply to record E?
- C. Do records A and F contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the mandatory personal privacy exemption at section 14(1) apply to the personal information in records A and F?
- E. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

ISSUE A: Does section 52(3) exclude records B, C, and D from the *Act*?

[7] The city withheld records B, C, and D on the basis that they are excluded from the scope of the *Act* by the labour or employment relations exclusion at section 52(3)3. This section 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:

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

[8] Section 52(4) sets out a number of exceptions to the exclusions in section 52(3). If the records fall within any of the exceptions in 52(4), the *Act* will apply. Section 52(4) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
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.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

[9] If section 52(3)3 applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[10] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.²

[11] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.³

[12] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human

² Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

³ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.⁴

[13] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.⁵

[14] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.⁶

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

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Representations

[16] The city maintains that records B, C, and D are excluded from the scope of the *Act* under section 52(3)3. The city's representations address each of the records, in turn.

[17] The city maintains that record B is correspondence from the city to one of the affected parties, which summarizes the payments that were to be made to the affected party upon their departure from the city, including salary, vacation pay, and benefits. The city explains that the record was prepared as a result of discussions with the affected party and consultations amongst city staff regarding the payment and benefits that the affected party would receive. Accordingly, the city maintains that the record was prepared, maintained, and used in relation to an employment-related matter in which the city, as an employer, has an interest.

[18] With respect to record C, the city maintains that it is a standard form that is used to document the payout of vacation pay and sick leave, among other things, when

⁴ Order PO-2157.

⁵ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

⁶ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

an employee leaves the employment of the city. The city explains that the term “termination” is used generically to include all employee departures, regardless of the reason. The record instructs payroll staff to make the necessary payments and changes to the payroll system, and is signed off on by staff with the authority to provide those instructions.

[19] The city submits that record D is a memorandum to the payroll staff, which was supplied in order to supplement the information provided in record C.

[20] The city maintains that both records C and D were created, used, and maintained to implement decisions arising from discussions, meetings, or consultations between city staff to determine what payout and payroll system changes would be required upon termination of employment, which the city maintains is an employment-related matter.

[21] The city says that it considered the application of the exceptions in section 52(4) and determined that none apply.

[22] The appellant’s submissions did not directly address the section 52(3)3 exclusion; however, he maintains that he has obtained similar information from other institutions, including the City of Hamilton and the Hamilton Police Services Board regarding the former Chief of Police, the former Fire Chief, and the Hamilton Street Railway General Manager.

[23] Although the affected parties’ submissions did not address the exclusion, both parties objected to the disclosure of the records at issue to the appellant.

Analysis and findings

[24] Based on my review of the records, and with the context provided by the city, I find that records B, C, and D are excluded under section 52(3)3 of the *Act* and do not fit within any of the exceptions to the exclusion set out in section 52(4).

[25] I am satisfied that all three of the records were prepared and used by the city in relation to meetings, discussions, and consultations amongst city staff and between city staff and affected party #1, who was a former city employee. I am also satisfied that each of the records relates to employment-related matters, including the compensation provided to the affected party upon their departure from the city’s staff. I conclude that these are matters in which the city has an interest that is more than a mere curiosity or concern, and that it is an interest involving the city’s workforce.⁷ On this basis, I find that all three parts of the section 52(3)3 test have been met.

[26] In addition, I am satisfied that none of the three records fall within the

⁷ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

exceptions to the exclusion at section 52(4) of the *Act*. Specifically, the records are not agreements between the city and the affected party, nor are they expense accounts submitted by the affected party for the purpose of seeking reimbursement. They are also not an agreement between the city and a trade union, or an agreement that ended a proceeding related to labour relations or employment-related matters.

[27] As all three parts of the section 52(3)3 test have been met and none of the exceptions apply, I conclude that the records B, C, and D are excluded from the scope of the *Act*. This means that the appellant has no right of access to these records under the *Act*, and it is unnecessary for me to consider whether the exemptions in sections 6(1)(b), 11(c), and 14(1) apply to them.

Issue B: Does the discretionary solicitor-client privilege exemption at section 12 apply to record E?

[28] The city relies on the solicitor-client privilege exemption at section 12 of the *Act* to deny access to record E, which consists of minutes of settlement and a release. This section states:

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

[29] Section 12 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law. Branch 2 (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege. The institution must establish that one or the other (or both) branches apply. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[30] I will consider Branch 2 first. Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation.

[31] Litigation privilege under branch 2 protects records created for the dominant purpose of litigation, actual or contemplated.⁸ The statutory litigation privilege in section 12 also protects records prepared for use in the mediation or settlement of litigation.⁹

⁸ Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

⁹ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

[32] While the common law litigation privilege generally comes to an end with the termination of litigation,¹⁰ termination of litigation does not end the statutory litigation privilege in section 12.¹¹

Representations

[33] The city submits that record E was created through a negotiation process intended to avoid litigation, in which both the city and one of the affected parties were represented by legal counsel. The city explains that the record was prepared by legal counsel and reflects the negotiated settlement that was reached between the parties. On this basis, the city maintains that it falls under branch 2 of section 12.

[34] Both the city and the affected party who has an interest in record E note that the record contains a confidentiality clause. The city maintains that this supports its position that any privilege attaching to the record has not been waived.

Analysis and findings

[35] In *Liquor Control Board of Ontario v. Magnotta Winery Corporation (Magnotta)*,¹² the records that were found to be exempt by reason of section 19 of *FIPPA* (the provincial equivalent of section 12 in the *Act*) were documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, as part of the litigation process. The records, including copies of all agreements pertaining to the settlement, were found to be “explicitly cloaked” in confidentiality.

[36] In this appeal, record E consists of minutes of settlement and a release, settling any claims that affected party #2 may have had against the city. Based on my review of the record and the city’s submissions, I find that the record is subject to the statutory litigation privilege. The record was prepared by or for counsel employed by the city for use in the settlement of contemplated litigation, and therefore falls within the ambit of Branch 2 of section 12.¹³ Moreover, I find that the privilege over record E has not been lost or waived.

[37] Accordingly, subject to my findings on the city’s exercise of discretion, I find that record E is exempt from disclosure based on section 12 of the *Act*.

¹⁰ *Blank v. Canada (Minister of Justice)*, cited above.

¹¹ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

¹² *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

¹³ *Magnotta*, cited above.

Issue C: Do records A and F contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[38] Records A (an amendment to an employment contract) and F (a receipt for a phone) are the only records that I have not yet considered. The city claims that these records are exempt under the mandatory personal privacy exemption at section 14(1) of the *Act*. In order to determine whether the personal privacy exemption applies, it is necessary to decide whether these records contain “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows, in part:

“personal information” means recorded information about an identifiable individual, including,

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,

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.

[39] 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.¹⁴

[40] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(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.

[41] 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

¹⁴ Order 11.

individual.¹⁵

[42] 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.¹⁶

Representations

[43] The city submits that records A and F contain one of the affected parties' personal information, including information relating to their employment history and financial transactions under paragraph (b) of the definition. The city maintains that while this information relates to the affected party's employment, it is associated with the affected party in their personal capacity and, therefore, is not caught by section 2(2.1).

[44] The city also submits that the definition of personal information set out in the *Act* is not exhaustive. With this in mind, the city maintains that highly sensitive information relating to the termination of the affected party's employment with the city constitutes that individual's personal information. The city submits that such information is found in record A.

[45] The affected party whose information is at issue in records A and F did not address whether the records contain their personal information, as defined in the *Act*.

[46] The appellant also did not comment on whether the records contain personal information.

Analysis and findings

[47] Based on my review of records A and F, I am satisfied that they contain affected party #1's personal information as defined in the *Act*.

[48] Previous orders of this office have considered the contents of various types of agreements, such as employment contracts or settlement and/or severance agreements.¹⁷ These orders have consistently held that information about the individuals named in the agreements, including their name, date of termination and terms of settlement, concern these individuals in their personal capacity and thus qualifies as personal information.

[49] I am satisfied that the same considerations apply in the circumstances of this

¹⁵ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO -2225.

¹⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁷ Orders M-173, MO-1184, MO-1332, MO-1405, P-1348, and MO-2815-I.

appeal. Record A contains information including the affected party's name, the date that their employment with the city ended, and details of their compensation upon terminating the employment relationship. Accordingly, I find that record A contains the personal information of the affected party as contemplated by paragraphs (b) and (h) of the definition.

[50] I also find that record F contains information relating to a financial transaction in which the affected party was involved, as contemplated by paragraph (b) of the definition of "personal information" in section 2(1) of the *Act*.

[51] Although the records are about the affected party in a professional capacity, I am satisfied that they reveal something of a personal nature about the affected party relating to the termination of their employment with the city. Accordingly, I find that the business identity exception to the "personal information" definition that is found in section 2(2.1) does not apply to these records, and that they contain personal information about the affected party according to the definition in section 2(1).

[52] I will now consider whether the affected party's personal information is exempt under the personal privacy exemption in section 14(1) of the *Act*.

Issue D: Does the mandatory personal privacy exemption at section 14(1) apply to the personal information in records A and F?

[53] 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.

Section 14(1) exceptions to the exemption

[54] If the information fits within any of paragraphs (a) to (e) of section 14(1), it is not exempt from disclosure.

[55] The city and one of the affected parties submit that none of the exceptions in paragraphs (a) to (e) of section 14(1) apply. With respect to section 14(1)(d), in particular, which provides for disclosure of information when authorized by another Act, the city maintains that to the extent that the *Public Sector Salary Disclosure Act* authorizes the disclosure of salary and benefit information relating to the affected parties, that disclosure has been made and is publicly available.

[56] Based on the evidence before me, I am satisfied that the exception in section 14(1)(d) does not apply. I am also satisfied that the exceptions in paragraphs (a) through (c), and (e) are not applicable in the circumstances of this appeal.

[57] However, the exception in section 14(1)(f) may apply. This section reads:

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

if the disclosure does not constitute an unjustified invasion of personal privacy.

[58] The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would be an unjustified invasion of privacy under section 14(1)(f). If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14.

Section 14(4) exceptions

[59] I have considered whether the exception to section 14(1) in section 14(4)(a) applies to record A. This exception applies to the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution, and reads:

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

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

[60] 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. For example, sick leave, vacation, termination allowance, and insurance-related benefits have been found to qualify as "benefits."¹⁸ However, 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.¹⁹ The city maintains that section 14(4)(a) of the *Act* does not apply to record A for that reason.

[61] Based on my review of the record, and having considered the city's submissions, I find that the exception in section 14(4)(a) does not apply to record A. I am satisfied that the information contained in the record reflects negotiated terms of the affected party's termination package, and not benefits to which the individual was entitled as a result of being employed.

[62] I will now consider whether disclosure of records A or F would constitute a presumed unjustified invasion of privacy under section 14(3).

¹⁸ Orders M-23 and PO-1885

¹⁹ Orders M-173, M-204, M-419, M-797, MO-1332, and MO-2174.

Section 14(3) presumptions

[63] If any of paragraphs (a) to (h) of section 14(3) apply to the personal information in records A and F, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy can only be overcome if section 14(4) or the “public interest override” at section 16 applies.²⁰ I have already considered section 14(4). The public interest override in section 16 has not been raised in this appeal.

[64] The city relies on the presumptions in sections 14(3)(d) and 14(3)(f). These sections read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(d) relates to employment or educational history;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

[65] The city submits that these presumptions apply to records A and F, because the records are all related to the affected party's employment history with the city, including the end date of employment, the number of vacation and sick days, salary, and benefit and pension entitlements.

[66] The appellant and affected party's submissions did not address the presumptions in section 14(3).

14(3)(d): employment or educational history

[67] In Order PO-2050, Adjudicator Laurel Cropley examined the application of the presumption at section 21(3)(d) and (f) of the *FIPPA* (the provincial equivalent to sections 14(3)(d) and (f) of the *Act*) to information in the context of severance agreements, finding:

Generally, previous orders have found that although one-time or lump sum payments or entitlements do not fall under the presumption found at sections 21(3)(f) or (d) [Orders M-173, MO-1184 and MO-1469], information such as start and finish dates of a salary continuation agreement fall within the presumption in section 21(3)(d) and references

²⁰ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

to the specific salary to be paid to an individual over that period of time fall within the presumption in section 21(3)(f) [Order P-1348].

[...]

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.

[68] In addition, the following information has been found to fall within the section 14(3)(d) presumption:²¹

- 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.

[69] I agree with Adjudicator Cropley's reasoning in Order PO-2050 and, based on my review of the records, find that the presumption in section 14(3)(d) applies to information in record A. In particular, I find that the presumption applies to the first, second, and fourth bullet points, which identify the end date of employment and other information relevant to the affected party's employment history.

²¹ Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050; see also Orders PO-2598, MO-2174 and MO-2344.

[70] As disclosure of these portions of record A is presumed to constitute an unjustified invasion of the affected party's personal privacy under section 14(3)(d), the exemption at section 14(1) applies.

14(3)(f): finances

[71] For the presumption in section 14(3)(f) to apply, information about an asset must be specific and must reveal, for example, its dollar value or size.²² However, lump sum payments that are separate from an individual's salary,²³ and contributions to a pension plan,²⁴ have consistently been found not to fall within section 14(3)(f).

[72] Record F is a receipt documenting the affected party's purchases from the city. I find that this information "describes" the affected party's "financial activities" within the meaning of section 14(3)(f). Accordingly, I find that the presumption at section 14(3)(f) applies to record F as a whole, such that its disclosure would be an unjustified invasion of personal privacy.

[73] As disclosure of record F is presumed to constitute an unjustified invasion of the affected party's personal privacy under section 14(3)(f), I uphold the city's decision to withhold the record based on the personal privacy exemption at section 14(1).

Section 14(2) factors

[74] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).²⁵ As a result, the factors favouring disclosure in sections 14(2)(a) to (d) cannot rebut the presumption that the disclosure of certain information in record A and all of record F would be an unjustified invasion of the affected party's personal privacy.

[75] However, there are portions of record A for which the section 14(3) presumptions do not apply. Section 14(2) lists various factors that may be relevant in determining whether disclosure of those portions of the record would constitute an unjustified invasion of personal privacy.²⁶ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory

²² Order PO-2011.

²³ Orders M-173, MO-1184, MO-1469, MO-2174 and MO-2318.

²⁴ Orders M-173, P-1348 and PO-2050.

²⁵ *John Doe*, cited above.

²⁶ Order P-239.

section 14(1) exemption applies.²⁷

[76] The city raised the application of the following factors, all of which weigh against disclosing the remaining information in record A:

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,

(f) the personal information is highly sensitive;

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

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[77] The city explains that all of the records relate to the affected parties' departure from their employment with the city. Accordingly, the city maintains that they are highly sensitive and would reasonably be expected, by the affected parties, to be treated as confidential. The city maintains that disclosing the records could reasonably be expected to cause the affected parties personal distress and to unfairly damage their reputations.

[78] The affected party whose personal information is contained in record A did not provide submissions addressing the factors and considerations under section 14(2).

Factors favouring disclosure

[79] As mentioned above, one or more of the factors favouring disclosure must be present for me to find that disclosure of the remaining personal information in record A does not constitute an unjustified invasion of the affected party's personal privacy. While none of the parties raised any factors favouring disclosure of this information, in my view, the factor at section 14(2)(a), which contemplates disclosure in order to subject the activities of the government to public scrutiny, may be relevant.²⁸

[80] Previous orders have reviewed the application of the factor in section 14(2)(a) to agreements between institutions and their employees. In Order MO-1469, for example, Adjudicator Donald Hale stated:

²⁷ Orders PO-2267 and PO-2733.

²⁸ Order P-1134.

It has been well-established in a number of previous decisions that the contents of agreements entered into between institutions and senior employees represent the sort of records for which a high degree of public scrutiny is warranted (Orders M-173, M-953). Based on this, and the appellant's desire to scrutinize how the Municipality compensated a senior management employee upon his termination, I find that section 14(2)(a) is a relevant consideration in the circumstances of the present appeal. I further find that this is a significant factor favouring the disclosure of the information contained in the record.

[81] I agree with the approach outlined in Order MO-1469; however, I am satisfied that the remaining information at issue in record A does not relate to the amount of money paid to the city's former employee or to other expenses and costs. Therefore, I find that disclosure of this information is not desirable for the purpose of subjecting the activities of the city to public scrutiny as contemplated by section 14(2)(a). As a result, I find that this factor does not weigh in favour of the information being disclosed to the appellant.

[82] I am also not satisfied that any other listed or unlisted factors in favour of disclosure, such as inherent fairness,²⁹ or ensuring public confidence in the city,³⁰ apply to the remaining personal information at issue in record A.

[83] As none of the listed or unlisted factors favouring disclosure apply, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.³¹ Accordingly, it is not necessary for me to consider the factors weighing against disclosure at sections 14(2)(f), (h), and (i), that were relied on by the city.

Conclusion

[84] I found that disclosure of the first, second, and fourth bullet point in record A and the entirety of record F would result in an unjustified invasion of personal privacy based on the presumptions at section 14(3)(d) and 14(3)(f). I also found that none of the listed or unlisted factors in section 14(2) weighing in favour of disclosure apply to the remaining personal information at issue in record A. Accordingly, I find that the section 14(1)(f) exception is not established with respect to that information,³² and I uphold the city's decision to withhold the entirety of records A and F under section 14(1) of the *Act*.

[85] Given my findings above, it is not necessary for me to consider whether the

²⁹ See Order P-1014, for example.

³⁰ Orders M-129, P-237, P-1014 and PO-2657.

³¹ Orders PO-2267 and PO-2733.

³² Orders PO-2267 and PO-2733.

discretionary exemptions at sections 6 or 11 apply to any of records A, B, C, D, or E.

Issue E: Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[86] The section 12 exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[87] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it did so in bad faith or for an improper purpose, it took into account irrelevant considerations, or it failed to take into account relevant considerations.

[88] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations. This office may not, however, substitute its own discretion for that of the institution.

[89] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- 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.

[90] The city submits that it properly exercised its discretion to rely on the exemption at section 12 to withhold record E. The city maintains that it decided not to release the record, even though it could choose to do so, as doing so would infringe the personal privacy and reasonable expectations of confidentiality of the affected party concerning highly sensitive matters. The city also submits that disclosing the record would prejudice its ability to conduct similar negotiations with departing employees in confidence in the future. The city refers to Orders MO-2921 and MO-3650 in support of its submissions.

[91] Having considered the city's submissions, I am satisfied that the city properly exercised its discretion in deciding to withhold record E, even though it could have decided to disclose the record to the appellant. In particular, I am satisfied that the city considered the sensitive nature of the records, which were generated as a result of negotiations between the city and an outgoing employee, and the interests that the solicitor-client privilege exemption seeks to protect. The Supreme Court has recognized the particular importance of solicitor-client privilege, stating that it must be as close to absolute as possible to ensure public confidence and retain relevance.³³

[92] There is no evidence before me to suggest that the city took into account irrelevant factors or that it decided to withhold the information in bad faith. Accordingly, I uphold the city's exercise of discretion to rely on section 12 to withhold the information that I have found qualifies for the exemption.

ORDER:

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

Original Signed By: _____

Jaime Cardy
Adjudicator

October 22, 2019

³³ See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.