

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3937

Appeal MA18-00899

The Corporation of the City of Oshawa

July 10, 2020

Summary: The appellant requested access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from the City of Oshawa (the city) to employment agreements of the fire chief, two deputy fire chiefs and a city commissioner. The city withheld the records in full, claiming that the agreements were excluded from the *Act* due to the labour and employment relations exclusion in section 52(3) or that the mandatory personal privacy exemption in section 14(1) applied. The appellant appealed the city's decision and sought access to the agreements in full, asserting that there is a compelling public interest in disclosure meaning that the public interest override in section 16 should apply. In this order, the adjudicator finds that the agreements are not excluded from the *Act*, that section 14(1) applies to some of the information and that there is not a sufficiently compelling public interest that outweighs the purpose of the personal privacy exemption in this case to override the exemption. As a result, the adjudicator orders the city to disclose the agreements except for the affected parties' signatures, specific salary information and their home addresses.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 52(3)3, 4(2), 14(1) and 16.

Orders and Investigation Reports Considered: Orders M-797, MO-1391, MO-3684-I, PO-1885 and MO-1970.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Oshawa (the city) for the employment contracts and/or agreements of employment and benefits for the Fire Chief, two Deputy Chiefs and the Commissioner of Community Services.

[2] After locating the four employment agreements, the city denied the appellant access to them. The city claimed that the agreements were excluded from the *Act* under section 52(3) (employment or labour relations). Alternatively, the city claimed that the agreements were exempt in their entirety under section 14(1) (personal privacy) of the *Act*. The appellant appealed the city's decision.

[3] During mediation, the mediator notified four individuals whose interests may be affected by the disclosure of the agreements (the affected parties). The affected parties did not consent to the disclosure of information relating to them. The city also confirmed its position that the agreements are either excluded under section 52(3) or exempt under section 14(1).

[4] The appellant confirmed his interest in pursuing access to the agreements and raised the possible application of the public interest override in section 16 of the *Act*. Accordingly, the possible application of section 16 was added as an issue in this appeal.

[5] Mediation did not resolve the issues under appeal and the appeal transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[6] The appellant, the city and the four affected parties submitted representations in the inquiry. Representations were shared in accordance with the IPC's *Code of Procedure* and Practice Direction 7.

[7] In this order, I find that section 52(3) does not apply and that the agreements are covered by the *Act*. I also find that section 14(1) applies to certain information in the agreements: the affected parties' home addresses, signatures and specific salary information. However, section 14(1) does not apply to the start dates, salary ranges, information about vacation and benefits, or job description information contained in the agreements. I conclude that the public interest override does not apply, and I order the city to disclose the agreements except for the affected parties' home addresses, signatures and specific salary information.

RECORDS:

[8] The records at issue are four employment agreements.

ISSUES:

- A. Does section 52(3) exclude the agreements from the *Act*?
- B. Do the agreements contain "personal information" as defined in section 2(1) and if so, to whom does it relate?
- C. Does the mandatory exemption at section 14(1) apply to the personal information in the agreements?
- D. Is there a compelling public interest in disclosure of the personal information in the agreements that clearly outweighs the purpose of the section 14(1) exemption?

DISCUSSION:

Issue A: Does section 52(3) exclude the agreements from the *Act*?

[9] The city and the affected parties claim that the agreements are excluded from the *Act* because of section 52(3)3.

[10] Section 52(3)3 states:

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

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

[11] Most of the city's representations set out its position that section 52(3)3 applies to the agreements. The affected parties' representations support the city's position. I have not summarized the city's representations on this issue because I have determined that the exclusion does not apply because of the clear exception to the exclusion in section 52(4) of the *Act*.

[12] The exclusion relied on by the city and the affected parties is subject to section 52(4), which lists certain types of records that are expressly deemed to be subject to the *Act*. The exceptions in section 52(4) are prescriptive, specific and mandatory.¹ IPC adjudicators have consistently found that employment agreements fit into the section 52(4)3 exception and are therefore subject to the *Act*.² The city acknowledges these prior orders but maintains its position that the exclusion applies despite not providing any evidence or argument about the application of the section 52(4) exception.

[13] 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.

[14] Based on my review of the records, I find that they all fit squarely within the exception to the exclusion in section 52(4)3; they are employment agreements. In reaching this conclusion, I have considered the city's and the affected parties' representations that the exclusion applies; however, they have not established that the exception to the exclusion applies.

¹ Order M-797.

² Orders MO-3684-I, MO-1622, MO-1994, and MO-2318.

[15] Having found that the agreements fit into the exception in section 52(4)3, I find that section 52(3) does not apply, and the records are not excluded from the *Act*. I will now consider the alternative claims made by the city and the affected parties.

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

[16] To determine whether the section 14(1) personal privacy exemption applies as claimed by the city, it is necessary to determine whether the records contain “personal information.”

[17] Personal information is defined in section 2(1) of the *Act*. The definition lists several types of recorded information that constitute personal information if it is about an identifiable individual. Relevant parts of the definition are:

“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,

...

(d) the address, telephone number, symbol or other particular assigned to the individual,

...

(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;

[18] The list is not exhaustive and IPC adjudicators have held that other types of information may also qualify as personal information.³

[19] The *Act* states that the name, title, contact information or designation of an individual in a business, professional or official capacity is not personal information under section 2(2.1). This applies even if the individual carries out their business responsibilities from their dwelling and their contact information relates to the dwelling (section 2(2.2)). Nevertheless, if this type of information reveals something of a personal nature about the individual, it may still qualify as personal information.⁴

³ Order 11.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

Representations

[20] The city submits that the agreements contain the following types of personal information of the affected parties: home addresses;⁵ and, the affected parties' starting employment dates.⁶ The city acknowledges that information about a person in their professional or business capacity is not personal information, but it maintains that the information at issue in this appeal would nevertheless reveal "something of a personal nature about an identifiable individual."⁷ As will be discussed below, the city refers to the fact that the agreements contain information about benefits and salary, although it makes no specific representations that this information constitutes personal information.

[21] The affected parties assert that disclosure of the agreements would constitute an unjustified invasion of their personal privacy because disclosure would reveal their employment record. In making this argument, I infer that the affected parties assert that the entire agreements constitute their personal information, although they have not so specified.

[22] In consideration of the affected parties' position in this appeal, it is necessary to explain the concept of severance set out in the *Act*. If certain records contain information that must or may not be disclosed, section 4(2) of the *Act* requires institutions to sever (or redact) those portions of the records and disclose the rest if it is reasonably possible to do so. In fact, the city's alternative position is that if it is not successful in withholding the entirety of the records under sections 52(3) or 14(1), only the affected parties' home addresses and start dates should be severed and withheld.

[23] The possibility of severance means that I must examine the different *types of information* contained in the agreements and apply the exemptions in the *Act* separately to the different types of information and not the agreements as a whole, as the affected parties may be requesting or expecting.

[24] The appellant states that he does not seek access to personal information but rather information about the affected parties' professional roles.

Discussion and Analysis

[25] As argued by the city, IPC adjudicators have held that certain information found in employment or other similar types of agreements may qualify as personal information.⁸

[26] The consistent approach of adjudicators is to review the information contained within the agreements to determine whether any of the information relates to an identifiable individual personally rather than in their official or professional capacity.⁹ Prior adjudicators have also determined that some information commonly found within

⁵ Citing Orders M-498 and P-332.

⁶ Citing Order P-1128.

⁷ Citing Orders P-1409, PO-2255 and R-980015.

⁸ Orders M-173, P-1348, MO-1184, MO-1332, MO-1405, MO-1622, MO-1749, MO-1970, MO-2318, PO-1885, PO-2050 and MO-3684-I.

⁹ For instance, see Order PO-1885.

employment agreements, such as boilerplate or terms for the benefit of the employer do not qualify as personal information unless it contains some detail particular to the employee at issue.¹⁰

[27] The city and the affected parties claim that the agreements in their entirety qualify as personal information. In consideration of section 4(2) and the approach taken by prior adjudicators, I will now determine whether any *parts* of the agreements qualify as personal information.

Start dates

[28] This appeal deals with the employment agreements of four senior officials at the city: the Fire Chief, two Deputy Fire Chiefs and the Commissioner of Community Services. In my view, the fact that the affected parties held these roles and began their service in these roles on the dates that they did is information about them in their professional or official capacity and not personal information.

[29] The city argues that start dates have been found to qualify as personal information in prior orders of this office. The city is correct; however, many of the prior orders containing this result are in the context of severance or retirement agreements, where an individual's total overall service to an institution is relevant to determining certain entitlements.¹¹

[30] The agreements in this case are employment agreements that include the dates on which senior, high profile officials at the city commenced their roles. The start dates of such senior officials is often newsworthy and a matter of public record. Having considered the orders referred to by the city and the circumstances of this case, I have concluded that the date on which these senior public officials commenced a particular role does not reveal anything personal about these individuals, rather it is information about them in their professional or official capacity.¹² I would have reached a different conclusion if the information at issue was historical information about when the affected parties commenced their initial employment with the city, unrelated to the roles at issue in the agreements.

Home addresses

[31] I agree with the city that the home addresses of the affected parties qualify as personal information. Addresses are a specifically enumerated type of personal information in the *Act* and there is no evidence before me that the affected parties conducted their business from the homes so as to engage the exception in section 2(2.2) of the *Act*.

¹⁰ See for instance, Orders MO-3684-I and MO-2318.

¹¹ Orders M-173, P-1348, MO-1184, MO-1332, MO-1405, MO-1970, MO-2318 and PO-1885.

¹² See Order PO-1885, which explains, "Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information."

Other personal information

[32] Based on my review of the agreements, I have identified additional types of information that qualifies as personal information. All four of the agreements contain:

- specific salary information;
- salary range information;
- general descriptions about vacations, leave and benefits programs available to the officials; and,
- the signatures of the affected parties on the agreements.¹³

[33] Two of the agreements also contain descriptions of the job duties of the office holder.

[34] The balance of the information in the agreements consists of boilerplate contract terms and signatures of the employer's representative, which do not qualify as personal information.

[35] In summary, I find that the following types of information in the agreements qualifies as personal information under section 2(1): home addresses, specific salary information, salary ranges, description of vacation, leaves and benefits available to the affected parties (referred to below as "benefits and vacations"), the affected parties' signatures, and descriptions of job duties (referred to below as "job duties").

[36] The section 14(1) (personal privacy) exemption only applies to personal information. As a result, none of the remaining information in the agreements is exempt from disclosure and because there are no other exemptions claimed for this information and no other mandatory exemptions apply, I will order the city to disclose it.

[37] I will now consider whether the mandatory exemption at section 14(1) applies to the personal information.

Issue C: Does the mandatory exemption at section 14(1) apply to the personal information in the agreements?

[38] Section 14(1) of the *Act* requires institutions to withhold personal information unless an exception applies. The only exception relevant to this appeal is section 14(1)(f) which says that personal information must be disclosed if its disclosure would not constitute an unjustified invasion of personal privacy.

[39] Sections 14(2) and (3) help in determining whether disclosure would constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[40] Once established, a presumed unjustified invasion of personal privacy under

¹³ Order MO-1391.

section 14(3) can only be overcome if section 14(4) or the “public interest override” at section 16 applies.¹⁴

[41] Where no section 14(3) presumption applies, the factors in section 14(2) assist in determining whether disclosure would constitute an unjustified invasion of personal privacy. Some of the section 14(2) factors, if present, weigh against disclosure while others weigh in favour of disclosure.

Representations

[42] The city made representations that disclosure of the start dates would be a presumed unjustified invasion of personal privacy. I need not consider this argument because as explained above, I have found that the start dates do not qualify as personal information in this case.

[43] The city also submitted that disclosure of the home addresses would constitute an unjustified invasion of personal privacy. The city’s main submission is that none of the factors in section 14(2) apply, but taken in context, I infer that it is the city’s view that none of the factors that weigh in favour of disclosure apply.

[44] The city disputes that section 14(4) applies to the agreements. As noted, section 14(4) deems that disclosure of certain information is not an unjustified invasion of personal privacy. The city states if section 14(4) applies, it is only in relation to “the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution.” Further, the city “acknowledges that the portions of the records at issue do contain the classification, salary range and benefits and/or the employment responsibilities of an individual who is or was an officer of employee of the institution.”

[45] The affected parties state that the agreements contain personal information which is subject to the mandatory personal privacy exemption.

[46] The appellant states that he is not interested in personal information – only information that relates to the professional roles of the affected parties.

Analysis and Discussion

[47] The issue I must determine is whether section 14(1)(f) applies to the personal information in the agreements. That is, whether disclosure of the personal information constitutes an unjustified invasion of personal privacy. If so, the city is required to withhold that information under section 14(1) of the *Act*. As described above, disclosure of certain types of information described in section 14(3) is presumed to be an unjustified invasion of personal privacy, while disclosure of some types of information set out in section 14(4) is not. If neither section 14(3) or (4) apply, I must review the circumstances in section 14(2) of the *Act* to determine the issue.

¹⁴ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

Home addresses

[48] The city's position is that disclosure of the home addresses would be an unjustified invasion of personal privacy and, specifically, that section 14(4) does not apply to this information. In this appeal, the appellant says that his only claim for information is about the affected parties in their professional capacities. In other words, he makes no claim – and therefore advances no case – in favour of disclosure of the home addresses.

[49] I agree with the city that disclosure of the home addresses would be an unjustified invasion of personal privacy. I reach this conclusion in consideration of the circumstances in section 14(2). That is, I am not able to identify how disclosure of the home addresses is desirable for subjecting the activities of the city to public scrutiny (section 14(2)(a)) and I conclude that the information was supplied by the affected parties in confidence (section 14(2)(h)). I accordingly find that disclosure of the home addresses would be an unjustified invasion of the affected parties' personal privacy and should be withheld under section 14(1).¹⁵ I will consider below whether the home addresses should be disclosed pursuant to the public interest override in section 16 of the *Act*.

Job duties

[50] Two of the agreements include a job profile, which describes the job duties of two of the affected parties. The city reasonably concedes that section 14(4)(a) applies to this information.

[51] In consideration of the plain language of section 14(4)(a) ("employment responsibilities") and my review of the agreements, I find that disclosure of the job duties information would not constitute an unjustified invasion of personal privacy and should be disclosed.

Benefits and vacation entitlements

[52] The benefits and vacation entitlement information is general and refers to policies or programs in place for employees at the city. Section 14(4)(a) of the *Act* states that disclosure of benefits of individuals employed by institutions does not constitute an unjustified invasion of personal privacy, meaning that the section 14(1)(f) exception applies and the information is not exempt under section 14(1). The city reasonably concedes this point in its representations.

[53] Based on my review of the plain language of section 14(4)(a), noting that this office has given "benefits" a broad meaning, and my review of the agreements, I find that the vacation and benefits information fits into section 14(4)(a) and accordingly that disclosure of this information would not be an unjustified invasion of personal privacy and should be disclosed.

¹⁵ A similar approach was taken by the adjudicator in Order PO-2733.

Specific salary information and salary ranges

[54] Section 14(3)(f) is relevant to the salary ranges and the specific salary information. It states (emphasis added):

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

...

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

[55] As is clear, section 14(3)(f) stipulates that disclosure of a person's income is a presumed unjustified invasion of personal privacy. Disclosure of the affected parties' specific salary and their salary range is therefore a presumed unjustified invasion of personal privacy and this information must be withheld under section 14(1) unless the presumption is overcome by section 14(4) or the public interest override in section 16.

[56] I will consider section 14(4) in this section and, if necessary, consider section 16 in the final part of this order.

[57] In my view, section 14(4)(a) is applicable to the salary ranges. It states (emphases added):

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

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

[58] Based on the plain language of section 14(4)(a), and as conceded by the city, disclosure of salary range information is deemed not to be an unjustified invasion of personal privacy. As a result, the section 14(1)(f) exception applies to this information and it should be disclosed.

[59] As is also clear from the plain wording of the section, salary ranges are distinct from a person's specific salary. Accordingly, disclosure of the specific salary information remains a presumed unjustified invasion of personal privacy because of section 14(3)(f) meaning it should not be disclosed unless the section 16 public interest override applies, which I will consider in the next section of this order.

The affected parties' signatures

[60] None of the section 14(3) presumptions apply to the affected parties' signatures so I must turn to the considerations in section 14(2) and other relevant considerations¹⁶ to

¹⁶ As noted above, the list in section 14(2) is not exhaustive.

determine whether disclosure of the signatures would constitute an unjustified invasion of personal privacy. Neither party has made specific representations about the affected parties' signatures.

[61] Circumstances 14(2)(a) and (f) are relevant to this issue. I am unable to conclude that the affected parties' signatures are highly sensitive information, which would weigh against disclosure. These are senior public officials who are likely to have signed documents in their official capacity making it difficult to establish that their signatures are sensitive information, although I have no evidence before me to make such a conclusion. However, I am also unable to conclude that disclosure of the signatures is desirable for the purpose of subjecting the activities of the city to public scrutiny, which would weigh in favour of disclosure.

[62] Having weighed these considerations and given the mandatory nature of section 14(1) of the *Act*, I conclude that disclosure of the signatures would constitute an unjustified invasion of personal privacy meaning they should not be disclosed unless the section 16 public interest override applies, which I will consider in the next section of this order.

Summary

[63] I find that the affected parties' home addresses, specific salary information and their signatures are exempt under the mandatory section 14(1) exemption. I will order the city to disclose the remaining information either because it does not qualify as personal information or because it is personal information to which section 14(1) does not apply.

[64] This does not end the matter because the appellant argues that section 16 of the *Act* applies – that even if the *Act* would otherwise require that the information be withheld, there is a compelling public interest in the disclosure of the information at issue and that public interest outweighs the purpose of the exemption. I will consider this argument next in relation to the affected parties' home addresses, specific salary information and their signatures.

Issue D: Is there a compelling public interest in disclosure of the personal information in the agreements that clearly outweighs the purpose of the section 14(1) exemption?

[65] Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[66] 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.

[67] The *Act* is silent as to who bears the burden of proof in respect of 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.¹⁷

Representations

[68] Although the city made no specific claims regarding the salary information under section 14(1), it has done so under section 16. Regarding the salary information contained in the agreements, the city says that the public interest override should not apply because another public process or forum exists to address the public interest. Specifically, the city refers to the *Public Sector Salary Disclosure Act, 1996*¹⁸ and asserts that information about the salary paid to the affected parties is already proactively disclosed.

[69] Regarding the home addresses, the city refers to two prior IPC orders in which the adjudicators found that public interest considerations were not sufficient to override the privacy considerations in section 14(1).¹⁹

[70] The appellant submits that the public has a right to know the job duties and pay/remuneration structures of these officials. He says that his request is limited only to the final terms between the officials and the city, not the negotiations leading to the final agreement.

Discussion and Analysis

[71] It is important to note that the city has withheld the agreements in their entirety. I note this because my analysis above has already concluded that the city ought to disclose most of the agreements, other than: home addresses, specific salary information and signatures of the affected parties.

[72] Several prior orders of this office have concluded that there is a compelling public interest in disclosure of salary information of senior public officials,²⁰ although adjudicators are required to weigh the circumstances in each case and there are prior orders in which adjudicators have concluded that there is not a sufficiently compelling public interest to disclose specific salary information.²¹ As illustrated by the adjudicators in Orders MO-1970 and PO-1885, it is necessary to consider what has been disclosed, what will be disclosed because of the outcome of the appeal in relation to claimed exemptions (i.e. section 14(1) in this case) and make an assessment as to whether there is a compelling public interest in the disclosure of the specific information remaining at issue.²²

¹⁷ Order P-244.

¹⁸ S.O. 1996, c. 1, Sched. A.

¹⁹ Orders P-332 and M-498.

²⁰ Orders MO-3684-I, MO-2563 (upheld in *York (Police Services Board) v. (Ontario) Information and Privacy Commissioner*, 2012 ONSC 6175 (CanLII),

²¹ Orders MO-1970 and PO-1885.

²² See for example Order MO-3883.

[73] In my view, there is no public interest to be served by disclosure of the home addresses or the signatures of the officials in this case. The appellant does not make this case and I see no basis for such a case to be made in consideration of the broader principles of the *Act*.

[74] While there are situations where the disclosure of specific salary information of senior public officials under certain circumstances could give rise to a compelling public interest that outweighs the purpose of the personal privacy exemption, it is my view that this is not such a case.

[75] In forming this view, I have considered the fact that the specific salaries of the affected parties are, in fact, disclosed pursuant to the *Public Sector Salary Disclosure Act*. Further, as I understand it, the appellant seeks information about the pay structure and duties, which will be apparent from the information that I will order to be disclosed in this order.

[76] Like the adjudicator in Order PO-1885, it is my view the level of disclosure which will be made to the appellant in compliance with this order addresses any public interest issues raised by the appellant.

ORDER:

1. I order disclosure of the agreements, with the exception of the home addresses, specific salary information and the signatures of the affected parties.
2. I order disclosure to be made by sending the appellant a copy of the agreements, excluding the exempted portions, by **August 14, 2020**, but not before **August 7, 2020**.
3. In order to verify compliance with provision number 1 of this order, I reserve the right to require the city to provide me with a copy of the agreements, which it provided to the appellant.
4. The timeline noted in provision number 1 may be extended if the city is unable to comply in light of the current COVID-19 situation and the parties are unable to reach an agreement on the issue. I remain seized of the appeal to address any such extension requests.

Original signed by: _____

Valerie Jepson
Adjudicator

July 10, 2020 _____