Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4261

Appeal MA19-00417

Kingston Police Services Board

September 29, 2022

Summary: The appellant submitted a request to the Kingston Police Services Board under the *Municipal Freedom of Information and Protection of Privacy Act* seeking access to records regarding buyout packages that, according to the appellant, were given to three named individuals and offered to six other named individuals. The police relied on the discretionary exemption in section 14(5) of the *Act* to refuse to confirm or deny the existence of records responsive to the request. In this order, the adjudicator upholds the police's refusal to confirm or deny the existence of responsive records because she accepts that disclosure of any responsive records, if they exist, and disclosure of whether responsive records do or do not exist would be an unjustified invasion of personal privacy. She also finds that there is no compelling public interest in disclosure of whether responsive records do or do not exist that clearly outweighs the purpose of the section 14(5) exemption.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, sections 2(1) (definition of "personal information"), 2(2.1) and 14(5).

Orders and Investigation Reports Considered: Orders M-23, MO-1749, MO-2344, PO-1809, PO-1810 and PO-1885.

Cases Considered: *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

OVERVIEW:

[1] This order considers the discretionary exemption at section 14(5) that permits an institution to refuse to confirm or deny the existence of a record, where disclosure of the record and of whether it exists would be an unjustified invasion of personal privacy, and its application to a request for records of buyout packages for nine named individuals.

[2] The appellant submitted a request to the Kingston Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about buyout packages that the appellant says were given to three named individuals and offered to six other named individuals. In his request, the appellant stated that he sought access to information on the amount and term of each buyout, each individual's annual salary at the time of the buyout, and the amount of money "over and above sick time payout." The appellant also requested copies of the buyout contracts.

[3] In response, the police issued a decision to the appellant in which they refused to confirm or deny the existence of records responsive to the request, relying on the personal privacy refuse to confirm or deny provision found in section 14(5) of the *Act*. The requester was not satisfied with the police's decision and appealed it to the Information and Privacy Commissioner of Ontario (the IPC).

[4] The IPC attempted to mediate the appeal but a mediated resolution was not possible. As a result, the appeal was moved to the adjudication stage of the appeal process. I conducted an inquiry, inviting and receiving representations from the parties on the issues set out below. The police provided representations and submitted that most of them were confidential and should not be shared with the appellant. I reviewed the police's representations and issued a sharing decision in accordance with *Practice Direction Number 7* of the IPC *Code of Procedure.* I then shared the police's non-confidential representations with the appellant. In this order, I refer only to the non-confidential representations of the police; however, I have reviewed and considered the parties' complete representations.

[5] In the discussion that follows, I uphold the police's decision and dismiss the appeal.

ISSUES:

A. Would responsive records, if they exist, contain "personal information" as defined in section 2(1) of the *Act*?

B. Have the police properly applied section 14(5) of the *Act* in the circumstances of this appeal?

C. Is there a compelling public interest in disclosure of responsive records, if they exist, or of whether responsive records do or do not exist, that clearly outweighs the purpose of the section 14(5) exemption?

DISCUSSION:

A. Would responsive records, if they exist, contain "personal information" as defined in section 2(1) of the *Act*?

[6] The police have refused to confirm or deny the existence of responsive records on the basis that section 14(5) of the *Act* applies because disclosure of the records and disclosure of whether the records do or do not exist would be an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information.

[7] Therefore, I must first determine whether records, if they exist, would contain the personal information of individuals other than the appellant. The term "personal information" is defined, in part, in sections 2(1) and 2(2.1) of the *Act*. The parts of that definition that are relevant in this appeal are the following:

> 2(1) In this Act,
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> "personal information" means recorded information about an identifiable individual, including,
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> > (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[.]
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> 2(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.

The parties' representations

[8] The police argue that the records, if they exist, would contain the following information about the named individuals: names, signatures, effective dates of retirement, specific salary information, specific benefits, information related to

negotiations at retirement, terms of confidentiality agreements and/or memorandums of agreement and/or terms of settlement, and/or specific miscellaneous information regarding employment histories and income. The police refer to all of the above information as "specific employee information." They argue that this specific employee information qualifies as personal information under paragraphs (b) and (h) of the definition of that term in section 2(1) of the *Act* because it relates to the employment history of an identifiable individual and because the individuals' names would appear in any requested records along with other personal information about the individuals.

[9] The appellant acknowledges that the responsive records, if they exist, contain personal information of the named individuals. He argues, however, that I should draw a distinction between personal information and professional information. He submits that the records he requested could be severed to remove personally identifying information and could then be disclosed to him as anonymized responsive records that relate to a group of individuals without identifying a specific individual. The appellant agrees that the specific employee information listed by the police in their representations should be severed.

Analysis and findings

[10] As acknowledged by the appellant and submitted by the police, responsive records, if they exist, would contain personal information about the nine individuals the appellant names in his access request. There is no dispute that responsive records, if they exist, would contain, at a minimum, employment history information within the meaning of paragraph (b) of the definition of "personal information," and the individuals' names along with other personal information about them engaging paragraph (h) of the definition. Specifically, responsive records, if they exist, would reveal that the nine individuals, named by the appellant in his access request, were offered buyout packages, or accepted buyout packages. I find that, if responsive records exist, they would contain "personal information" as defined in paragraphs (b) and (h) of the definition of that term in section 2(1) of the *Act*.

[11] Regarding the appellant's arguments that, responsive records (if they exist) would also contain professional information that does not qualify as personal information in accordance with section 2(2.1), and any personal information could be severed, they do not affect my finding that any existing responsive records would inevitably contain personal information.

B. Have the police properly applied section 14(5) of the *Act* in the circumstances of this appeal?

[12] The police rely on section 14(5) of the *Act* to confirm or deny the existence of records responsive to the appellant's request. Section 14(5) states:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[13] Section 14(5) gives an institution a significant discretionary power that should be used only in rare cases.[1] By relying on section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This is very different from the usual case, where even if the institution denies access to a record, the requester is at least told whether or not there is a record.

[14] For section 14(5) to apply, it must be the case that:

1. disclosure of the record (if it exists) would be an unjustified invasion of personal privacy, and

2. disclosure of the fact that the record exists (or does not exist) would in itself give some information to the requester, and disclosure of that information would be an unjustified invasion of personal privacy.

[15] The Ontario Court of Appeal has upheld this approach and two-part test.[2] Below, I consider whether the two requirements have been satisfied.

Part one: Would disclosure of the records (if they exist) be an unjustified invasion of personal privacy?

[16] As I found above, if responsive records exist, they would inevitably contain information that would qualify as the personal information of the nine individuals named in the appellant's request.

[17] Under part one of the section 14(5) two-part test, the police must demonstrate that disclosure of the records, if they exist, would be an "unjustified invasion of personal privacy."

[18] Sections 14(1) to (4) are relevant in deciding if disclosure of the information would be an "unjustified invasion of personal privacy" under section 14(5). If any of the section 14(1)(a) to (e) exceptions exist, disclosure would not be an unjustified invasion of personal privacy.

[19] Sections 14(3)(a) to (h) outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy.[3] If one of these

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[1] Order P-339.
[2] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.
[3] If a section 14(3) presumption is found to apply, it cannot be rebutted by the factors in section 14(2) for the purposes of deciding whether the section 14(1) exemption has been established.

presumptions applies, the personal information cannot be disclosed unless:

- there is a reason under section 14(4) that disclosure of the information would not be an "unjustified invasion of personal privacy," or
- there is a "compelling public interest" under section 16 that means the information should nonetheless be disclosed (the "public interest override").[4]

[20] If the personal information being requested does not fit within any presumptions under section 14(3), one must next consider the factors set out in section 14(2) to determine whether or not disclosure would be an unjustified invasion of personal privacy. However, if one of the situations in section 14(4) is present, then disclosure would not be an unjustified invasion of personal privacy and the institution may not rely on section 14(5).

[21] The police claim that the presumption in section 14(3)(d) applies, resulting in an unjustified invasion of personal privacy.[5] The appellant submits that disclosure would not result in an unjustified invasion of personal privacy, citing the factors in sections 14(2)(a) and (d), as well as the exception in section 14(4)(a). These sections state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
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> . . .
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
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> . . .
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
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> (d) relates to employment or educational history;

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

[5] The police also claim that the presumption in section 14(3)(f) (information relating to finances) applies, and that if no presumption applies, they claim the factor in section 14(2)(f) (highly sensitive) applies and weighs in favour of privacy protection. I do not address these claims because I find that the presumption in section 14(3)(d) applies.

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

The parties' representations

[22] The police argue that disclosure of responsive records, if they exist, would be an unjustified invasion of personal privacy because it would reveal personal information about the named individuals that relates to their employment history; namely, that the nine individuals named in the request participated in certain events and confidential discussions prior to their retirement, and the circumstances under which their departure was negotiated.

[23] The police state that though responsive records, if they exist, would be related to the information described in section 14(4)(a), they would include specific employee information and their disclosure would reveal information that goes beyond classifications, salary ranges and benefits or employment responsibilities; information that goes beyond what was stated in the original employment agreements and, consequently, goes beyond the ambit of section 14(4)(a). The police rely on Orders MO-1749 and MO-2344 to argue that the exception in "section 14(4)(a) does not apply to entitlements that have been negotiated as part of a retirement or termination package […] except where it can be shown that the information reflects benefits to which the individual was entitled as a result of being employed." The police acknowledge the expansive interpretation of the term "benefits" in Order MO-1749 – including "life, health, hospital, dental and disability insurance as well as sick leave, vacation, leaves of absence, termination allowance, death and pension benefits"[6] – and the finding that such benefits are not exempt from disclosure, as a result of the application of section 14(4)(a). However, they submit that that the finding from Order MO-1749 does not apply in this appeal because the police do not ordinarily, and are not obligated to, enter into retirement-related agreements (with incentives) with their employees. Rather, if the police enter into any buyout agreements, they negotiate buyouts under circumstances unique to a specific individual, and, therefore, disclosure of any such records would reveal the circumstances under which an individual is retiring prematurely. The police submit that these factors are inextricably linked to an individual's employment history and, thus, fall within the presumption in section 14(3)(d).

[24] In response to the police's representations, the appellant relies on the exception at section 14(4)(a) of the *Act.* He argues that the exception applies to the responsive records, which he says, presumably, would contain information relating to the classification, salary range and benefits of the named individuals. He further argues that

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[6] Order MO-1749 at page 5.

he seeks information relating to a group of individuals, not specific individuals, who were all senior executive members of the police who held highly public profiles and were well compensated from government funds, and whose buyouts came from public funds.

[25] In his representations, the appellant explains the reasons for his access request. I do not include those reasons in this order because they are not relevant to my determination of the issues in this appeal. The only relevant part of those reasons is the appellant's acknowledgement that he knows the names of the individuals he identified in his access request through his holding a position with a specific organization.

[26] The appellant also relies on the factors in sections 14(2)(a) and (d) to support a finding that disclosure of the records, if they exist, would not constitute an unjustified invasion of personal privacy. He submits that disclosure of the requested records, excluding the specific employee information that he concedes should be severed, is desirable for the purpose of subjecting the police's activities to public scrutiny, engaging section 14(2)(a). He also asserts that disclosure is relevant to a fair determination of rights affecting himself, since he has a professional interest in disclosure of the responsive records.

[27] In his representations, the appellant also refers to the public interest override at section 16. He asserts that it would be of significant public interest that the named individuals were given buyout packages from public funds, and that this would meet the threshold of a compelling public interest as contemplated by section 16. He provides no further submissions on section 16 and how it might override the application of section 14(5).

Analysis and findings

[28] I agree with the police that the presumption in section 14(3)(d) applies to the records, if they exist. This presumption covers several types of information connected to employment or education history, including:

- dates on which former employees are eligible for early retirement,
- start and end dates of employment,
- number of years of service,
- the last day worked,
- the dates upon which the notice period commenced and terminated,
- the date of earliest retirement,
- entitlement to sick leave and annual leave,

- 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.[7]

[29] Responsive records, if they exist, would relate to the employment history of the nine named individuals. Disclosure of any responsive records, if they exist, would reveal the start and/or end date of employment, the number of years of service, the last day worked and the fact that the nine individuals named in the appellant's request received or were offered buyout packages and the dates of those offers or acceptances. I am satisfied that all of this information is employment history that fits within the meaning of section 14(3)(d). As a result, I find that disclosure of responsive records, if they exist, is presumed to be an unjustified invasion of personal privacy under section 14(3)(d) of the *Act.*

[30] I am satisfied that the exception in section 14(4)(a) is not engaged in this appeal because responsive records, if they exist, would not likely not contain only the "classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee" of the police. 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; for example: 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.[8] Records of buyout packages, if they exist, would include entitlements that have been negotiated as part of a retirement or termination package. The IPC has found that these types of negotiated entitlements do not qualify as "benefits" under section 14(4)(a), unless the information reflects benefits to which the individual was entitled as part of their employment.[9] I agree with and adopt the same approach in this appeal and I find that section 14(4)(a) does not apply to all of the information in the records, if they exist. No other situation under section 14(4) has been relied on and I find that none applies.

[31] Above, I have found that the presumption in section 14(3)(d) applies, and that the section 14(4)(a) circumstances would not apply to the records in their entirety, if they exist. The records, if they exist, would not contain the appellant's own personal information. As a result, having found that the presumption applies, I do not need to consider whether the section 14(2) factors apply.[10] I find that disclosure of the records, if they exist, would be an unjustified invasion of the personal privacy of the individuals named in the appellant's request. I find, therefore, that the police have established part

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[7] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050; see also Orders PO-2598, MO-2174 and MO-2344.
[8] Orders M-23 and PO-1885.
[9] Orders MO-1749, PO-2050, PO-2519 and PO-2641.
[10] *John Doe*, cited at footnote 4, above.

one of the two-part test for the application of section 14(5).

Part two: Would disclosure of the fact that the records exist (or do not exist) be an unjustified invasion of personal privacy?

[32] Under part two of the section 14(5) two-part test, the police must show that disclosure of just the fact that a record does or does not exist would in itself disclose some personal information to the appellant, and this would be an unjustified invasion of personal privacy.

[33] The police argue that disclosure of the fact that responsive records do or do not exist is presumed to be an unjustified invasion of personal privacy under section 14(3)(d) of the *Act.* The police explain that this disclosure would reveal personal information about the nine named individuals that relates to their employment history; namely, it would confirm or whether these nine individuals accepted or were offered buyout packages. The police add that section 14(4)(a) does not apply because disclosure of the fact that buyout packages were, or were not, offered to these individuals is not one of the types of information specified in that section.

[34] The appellant's position is that disclosure of the fact that responsive records exist would not be an unjustified invasion of personal privacy if the names and other identifying information were severed from the records. The appellant argues that the factors in sections 14(2)(a) and (d) apply because the police's offer and negotiation of buyout packages should be scrutinized by the public and disclosure of the fact that responsive records exist will assist him with certain professional duties and will be in the public interest.

Analysis and findings

[35] I agree with the police that the presumption in section 14(3)(d) applies because disclosure of the fact that responsive records do or do not exist would reveal personal information relating to the nine named individuals' employment history. Specifically, this disclosure would reveal whether the nine individuals named in the appellant's request received or were offered buyout packages, negotiated buyout packages and chose to retire prematurely. I am satisfied that choosing to retire prematurely falls within the meaning of employment history and within the ambit of section 14(3)(b). I find that disclosure of the fact that responsive records do or do not exist, which in turn would disclose whether the named individuals chose to retire prematurely and negotiated, accepted or were offered buyout packages, would be an unjustified invasion of personal privacy.

[36] As a result, I find that the police have established part two of the two-part test for the application of section 14(5). Having found that the police have established both parts of the two-part test under section 14(5), I find that the police have established that section 14(5) of the *Act* applies.

[37] Section 14(5) is a discretionary exemption. As noted above, the IPC has found that the discretionary power to refuse to confirm or deny the existence of a record should only be exercised in rare cases. I must, therefore, review the police's exercise of discretion in deciding to rely on this section to refuse to confirm or deny the existence of responsive records.

[38] On appeal, the IPC may review the police's decision in order to determine whether the police exercised their discretion and, if so, whether they erred in doing so. I may find that the police erred in exercising their discretion and send the matter back to the police for a re-exercise of discretion based on proper considerations if I determine that the police exercised their discretion in bad faith or for an improper purpose, considered irrelevant considerations, or failed to consider relevant considerations.

[39] On the police's exercise of discretion, the appellant's position appears to be that the police did not consider the severance of personal information from any responsive records in order to remove personally identifying information, and the intent of the legislature to shed light on the operations of institutions, particularly as those operations relate to the items enumerated in section 14(4). He states that he seeks information relating to a group of individuals – senior executive members of the police – not specific individuals, and the police should have considered that fact and the fact that buyout packages come from public funds.

[40] In the circumstances of this appeal, based on the representations of the police and the nature of the information that any responsive records that might exist would contain, I am satisfied that the police considered relevant considerations and did not act in bad faith or for an improper purpose. I am not persuaded by the appellant's framing of his request as one for information about a group of individuals and not specific individuals, and his assertion that the police should have considered this in their exercise of discretion. The appellant's request is for personal information about nine named individuals and, as I have found above, the disclosure of that personal information, including the confirmation or denial of whether that personal information exists, would be an unjustified invasion of personal privacy. The police appropriately considered the nature of the information at issue and the purpose and importance of the personal privacy exemption.

[41] Accordingly, I conclude that the police exercised their discretion appropriately in relying on section 14(5) to refuse to confirm or deny the existence of records responsive to the appellant's request, and I uphold their decision.

C. Is there a compelling public interest in disclosure of responsive records, if they exist, or of whether responsive records do or do not exist, that clearly outweighs the purpose of the section 14(5) exemption?

[42] The appellant asserts that there is a public interest in disclosure of the responsive records, if they exist, and in disclosure of whether responsive records do or do not exist, that is sufficient to engage the public interest override in section 16 of the *Act*. Section

16, the "public interest override," applies in circumstances where an exemption would otherwise be made out. It 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.

[43] For section 16 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[44] The appellant's representations on the public interest override are brief. He asserts that the public interest override is engaged because any police buyout packages would have been paid with public funds. He also argues that if the information he seeks were made publicly available, it would generate significant public interest sufficient to meet the threshold of the compelling public interest override. The appellant also refers to his organization's interest in any responsive records and submits the police should have considered it and should not have relied on section 14(5) in the circumstances because disclosure of responsive records would subject the police's activities to public scrutiny and would be in the public interest.

[45] Previous IPC orders have stated that, in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening citizens 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.[11] The IPC has also found that a "public interest" does not exist where the interests being advanced are essentially private in nature.[12] However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.[13]

[46] I am not satisfied that there is a compelling public interest in disclosure of the fact that responsive records do or do not exist that outweighs the purpose of the section 14(5) exemption. While previous IPC orders have found there to be a compelling public interest, in some cases, in the disclosure of salary and other information relating to high ranking public officials, I am not convinced that similar considerations apply in this refuse to confirm or deny appeal. The appellant had various options in terms of how to frame his access request, options that would not put the police in the position of invading the personal privacy of the individuals in question by the very fact of confirming or denying the existence of records. In the circumstances of this appeal, even if there were a compelling public interest in knowing whether the police offered buyout packages to the

[11] Orders P-984 and PO-2556.
[12] Orders P-12, P-347 and P-1439.
[13] Order MO-1564.

nine individuals named in the appellant's request, I find that it would not outweigh the purpose of the section 14(5) exemption.

ORDER:

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

Original Signed By: September 29, 2022

Stella Ball
Adjudicator