

ALBERTA
**OFFICE OF THE INFORMATION AND
PRIVACY COMMISSIONER**

ORDER 2001-020

August 22, 2001

CITY OF CALGARY

Review Numbers 2091/2094/2103

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant filed an access request with the City of Calgary for all information related to discretionary buyouts for City managers since January 1, 1999. The City issued notice of its decision to sever some personal information and disclose the records. Three third parties asked the Commissioner to review the City's decision to disclose their personal information. The Commissioner upheld the City's decision and ordered the City to release the records, as the City had severed them, to the Applicant.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c.F-18.5, ss. 1(1)(n) and (r), 16, 29, 30, 67(3)(a), 68.

Authorities Cited: AB: Orders 97-002, 98-014, 98-018, 2000-029.

I. BACKGROUND

[para. 1.] On June 14, 2000, the City of Calgary (the "City") received an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") from the Applicant for "all information related to the discretionary buyout for managers in the City of Calgary since 1999-01-01."

[para. 2.] The City refused access to the records.

[para. 3.] The Applicant asked me to review the City's decision. This request for review was given the internal file #1998.

[para. 4.] The City decided to consider disclosing the records and issued section 29 notices to the affected third parties. The City then decided to give the Applicant access to the records and issued section 30 Notices to the affected third parties.

[para. 5.] Three third parties refused to consent to the disclosure of their personal information in the records. Each of the three third parties to this inquiry asked me to review the City's decision to give access to the records. As a result, request for review numbers 2091, 2094 and 2130 were opened. The Applicant agreed not to pursue his request for review.

[para. 6.] On February 26, 2001, the City released the bulk of the responsive records to the Applicant, severing only the name of each third party, that individual's employee number, the employee's signature, the date employment was to end, and the date of the employee's retirement. Job titles or positions, and the basic terms of the agreement, including precise sums of monies paid to the outgoing employees, were released. The records pertaining to the three affected parties were provisionally severed in the same way, but were withheld from the Applicant pending this inquiry.

[para. 7.] Notice of a written inquiry was issued on March 9, 2001, consolidating the three third party requests for review into one inquiry. The issues for inquiry were identified as:

Does section 16(2) apply to the records or information in the records? or

Does section 16(1) apply to the records or information in the records?

II. RECORDS AT ISSUE

[para. 8.] The records are three memoranda of agreement (the "severance agreements") that set out the terms of severance between the City and each of the three third parties. The format of each of these records is the same.

III. ISSUE

[para. 9.] There is a single issue in this inquiry:

Does section 16 apply to the records?

IV. DISCUSSION OF THE ISSUE

Does section 16 apply to the records?

[para. 10.] Section 16 is a mandatory section of the Act that directs the head of a public body to refuse to disclose the personal information of a third party to an applicant if that disclosure would be an unreasonable invasion of a third party's personal privacy. Section 16(1) reads:

16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

1. Do the records contain personal information of a third party?

[para. 11.] "Personal information" is defined in a non-exhaustive fashion in section 1(1)(n) of the Act. The relevant provisions read:

1(1) In this Act ...

(n) 'personal information' means recorded information about an identifiable individual, including

(i) the individual's name...

...

(vii) information about the individual's ... financial, employment ... history...

[para. 12.] The records are boilerplate severance agreements. On a line-by-line analysis, I find that each memo contains some standard boilerplate, such as a recitation of the consideration for the agreement, a confidentiality clause, a clause about the agreement being the entire agreement, and a clause in which the third party releases the City from liability. This boilerplate is not personal information within the meaning of section 16. I do not need to consider that information. It can be released under the Act.

[para. 13.] There is also personal information in the records. The personal information falls into these categories: the name of one of the third parties, that individual's job title or position, his employee number, that individual's signature, the date the individual's employment was to end, the date of the individual's retirement, and the severance paid to that individual.

2. Would disclosure of the third parties' personal information be an unreasonable invasion of the third parties' personal privacy?

(a.) Disclosure not an unreasonable invasion of the third parties' personal privacy under section 16(2)(e) or (h)

[para. 14.] Section 16(2) sets out the circumstances in which disclosure of third party personal information is not an unreasonable invasion of personal privacy. The relevant provisions read:

16(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an...employee...of a public body...

...

(h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body...

[para. 15.] The City argues in effect that section 16(2)(e) applies to the basic terms of the severance agreements, including precise sums paid out, and each third party's job title or position. As such, that information can be disclosed to the Applicant. Alternately, the City could release the third party personal information to the Applicant under section 16(2)(h).

[para. 16.] The third parties denied that section 16(2) applied to the records, for various reasons. One third party argued that the severance package was not a discretionary benefit because the money could not be received until after he ceased to be a City employee. Another third party argued that because his position was eliminated, he was constructively dismissed and his severance package was not a discretionary benefit.

Is a severance package a "discretionary benefit" under section 16(2)(e)?

[para. 17.] "Discretionary benefits" is not a defined term in the Act. I have not previously considered the meaning of this phrase in section 16(2)(e).

[para. 18.] In Order 98-014, I said that a "benefit" means, among other things, a favorable or helpful factor or circumstance, or an advantage. The Dictionary of Canadian Law (2nd Edition) defines benefit as: "3. Compensation or an indemnity paid in money, financial assistance or services." Both definitions suggest that a "benefit" can run the gamut from the purely discretionary (that, is, gratuitous) to being required by law.

[para. 19.] In Orders 98-014 and 98-018, I considered the general meaning of the word "discretionary." I found that, in the simplest terms, "discretionary" means that a decision-maker has a choice as to whether, or how, to exercise a power.

[para. 20.] I turn now to the use of the phrase "discretionary benefit" in the context of section 16(2)(e) of the Act. One of the purposes of section 16(2)(e) is to allow the release of information about the employment benefits and responsibilities of public employees, allowing a degree of transparency in relation to the compensation and benefits provided to public employees. The general reference to "benefits" rather than to specific identified benefits in section 16(2)(e) indicates that the legislative intention was to capture a range of discretionary benefits that flow from the employment relationship. I think that the Legislature contemplated that precise sums and details of this particular benefit could be disclosed under 16(2)(e) for the following reasons.

[para. 21.] A severance package is an employment-related "benefit" for the purposes of section 16(2)(e) of the Act. Severance is a beneficial payment or an advantage that flows from the employment relationship to the employee, whether or not it is actually paid before the relationship formally ends, and whether or not it is required by law.

[para. 22.] A severance package is also a "discretionary" benefit because the City exercised its discretion to negotiate mutually acceptable compensation with each third

party. This creates the necessary element of a degree of discretion. Therefore, I am satisfied that the severance package of each of the third parties, formalized in the records, is a discretionary benefit for the purposes of section 16(2)(e).

Are unique job titles “employment responsibilities” under section 16(2)(e)?

[para. 23.] The third parties argued that disclosure of their job title or position would indirectly reveal their identity. This would be an unreasonable invasion of their personal privacy under the Act. The City disagreed.

[para. 24.] I find that job titles or positions, in general, come within the reference to “employment responsibilities” in section 16(2)(e). Indirect disclosure of third party identity through release of a unique job title is contemplated under the 16(2)(e) reference to “employment responsibilities.” Disclosure of a unique job title in a severance agreement is not an unreasonable invasion of third party personal privacy under section 16(2)(e). Many senior positions in government are unique. The accountability dimension of 16(2)(e) would be seriously undercut if higher-paid employees in unique positions escaped the scrutiny accorded to lower-paid employees who are not in unique positions.

Conclusion under section 16(2)(e)

[para. 25.] Section 16(2)(e) says that disclosure of each third party’s discretionary benefits and employment responsibilities is not an unreasonable invasion of that third party’s personal privacy. Therefore, having reviewed the records, I uphold the City’s decision to disclose the basic terms of the severance agreements, including severance amounts, and the job titles or positions under section 16(2)(e). I do not need to consider the alternate claim under section 16(2)(h) for this same information.

(b.) Presumptions as to an unreasonable invasion of a third party’s personal privacy under section 16(4) of the Act

[para. 26.] I must now consider if section 16(4) applies to the personal information the City severed from the records. The City applied section 16(4)(d) and (g) and severed each third party’s name, employee number, the date the employee’s employment with the City was to end, the date the employee was to retire, and the employee’s signature.

[para. 27.] The relevant provisions of section 16(4) of the Act read:

16(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if...

....

(d) the personal information relates to employment... history,

...

(g) the personal information consists of the third party’s name when

- (i) it appears with other personal information about the third party, or
- (ii) the disclosure of the name itself would reveal personal information about the third party...

[para. 28.] In Order 2000-029, I interpreted the reference to “employment history” in section 16(4)(d) as a broad, general phrase that covers information pertaining to an individual’s work record.

[para. 29.] Using that interpretation, I find that section 16(4)(d) applies to each third party’s employee number, the date his employment with the City was to end, and the date the employee was to retire. Alternately, section 16(4)(g)(i) would apply to that information. Section 16(4)(g)(i) and (ii) apply to each third party’s name and signature.

(c.) Relevant circumstances under section 16(5)

[para. 30.] The relevant provisions of section 16(5) read:

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party’s personal privacy, the head of a public body must consider all the relevant circumstances, including whether

- (a) the disclosure is desirable for the purpose of subjecting the activities of ... a public body to public scrutiny,
...
- (e) the third party will be exposed unfairly to financial or other harm,
- (f) the personal information has been supplied in confidence,
...
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant...

[para. 31.] The City provided sworn evidence of the relevant circumstances it considered when it assessed the records under the Act. The third parties raised other considerations under this provision.

Section 16(5)(a)

[para. 32.] The Applicant argues, in effect, that the records should be completely disclosed to create transparency in the City’s dealings with its employees, and provide information that will allow departing City employees to negotiate a fairer deal for themselves. One of the third parties attacks this argument for transparency as overblown. The City argues that if section 16(5)(a) applies, it weighs in favour of disclosure: the taxpayer’s right to see how tax dollars are spent justifies disclosure.

[para. 33.] In Order 97-002, I set out three criteria to determine if section 16(5)(a) is a relevant circumstance weighing in favour of disclosure: 1) more than one person has decided that public scrutiny of the public body is necessary; 2) the applicant’s concerns are about the actions of more than one person within the public body; 3) the public body has not previously disclosed a substantial amount of information about the matter.

[para. 34.] After reviewing the evidence, I find that there is no evidence that more than one person has decided that public scrutiny of the public body is necessary. Further, I

note that the City has already disclosed a substantial amount of information about managerial buyouts in the specified period. Therefore, I find that section 16(5)(a) is not a relevant circumstance. It does not weigh in favour of disclosure of the third parties' personal information.

Section 16(5)(e) and (h)

[para. 35.] The City argued that disclosure of the records as it proposed to sever them would not lead to significant harm of the reputation or financial interests of any of the third parties. The City said it received no specific evidence of possible harm or unfairness from the third parties.

[para. 36.] The third parties argued in effect that 16(5)(e) and (h) weigh against disclosure. The arguments included that the disclosure is unfair because it is selective (only a limited class is targeted) and one third party and his family could be at risk if it was known that he received a large amount of money. As well, if the severance packages were disclosed, one or more of the third parties could appear to be a poor negotiator if the severance deal for that party was viewed as too modest. If, however, the severance package was too large, a third party could appear to be receiving a "special benefit" from the City. It was argued that either would have an adverse impact on the third party's future employability and reputation.

[para. 37.] The test under section 16(5)(e) is whether disclosure would result in an unfair harm to a third party. Section 16(5)(h) also emphasizes an unfair damage to reputation. Both provisions focus on whether any harm, whether foreseeable or not, would be unfair. I reject the third party arguments. I do not see how disclosing information pertaining to a negotiated severance agreement with the City would cause any harm or damage to a third party's reputation that could be called unfair. I conclude that neither provision is a relevant circumstance. Neither one weighs against disclosure of the third parties' personal information.

Section 16(5)(f)

[para. 38.] The City admits that each of the third parties believed that the agreement was to remain confidential. The third parties emphasize that they each entered into the severance agreement expecting that the matter would remain confidential. One of them points out that the City insisted on a written confidentiality clause. The third parties say they had no notice that details of the agreement could be revealed in the future.

[para. 39.] Each of the three severance agreements contains a confidentiality clause. Each of the third parties refused to consent to the disclosure of his personal information when approached by the City.

[para. 40.] Given this evidence, I find that section 16(5)(f) is a relevant circumstance. It is not a decisive circumstance, but it does weigh against disclosure of the third parties' personal information.

Other relevant circumstances

[para. 41.] The Applicant argued that it would not violate section 16 to release all of the personal information in the records. In particular, the Applicant stressed that any information in the records would be less meaningful if personal information is severed. Further, the personal information is already in the public domain or is common knowledge.

[para. 42.] I have considered these arguments. The information that will be disclosed will be sufficiently meaningful to the Applicant, even with some severing. The fact that some personal information may be in the public domain does not in itself justify disclosure of that information under the Act. Therefore, I do not consider this as a relevant circumstance.

(d.) The burden of proof under section 67(3) of the Act

[para. 43.] Section 67(3) sets out the burden of proof in this inquiry:

67(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

- (a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy

[para. 44.] Since section 16(2) applies to the job titles or positions, and the basic terms of the severance agreement, including precise sums, I find that it has been established that disclosure of that personal information would not be an unreasonable invasion of the third parties' personal privacy under section 67(3).

[para. 45.] I have examined the Applicant's arguments and find that he has failed to prove that disclosure of any of the third parties' personal information to which section 16(4)(d) or (g) applies would not be an unreasonable invasion of the three third parties' personal information. Therefore, the Applicant has failed to discharge the burden of proof in relation to that information under section 67(3): i.e. each third party's name, signature, employee number, the date the employee's employment with the City was to end, and the date the employee was to retire. Disclosure of that personal information would be an unreasonable invasion of the third parties' personal privacy.

V. ORDER

[para. 46.] I make the following Order under section 68 of the Act:

1. I find that section 16(2)(e) of the Act applies to the job titles or positions, and the basic terms of the severance agreement, including precise sums, in the records. Disclosure of that information would not be an unreasonable invasion of the third parties' personal

privacy. I uphold the City's decision to disclose that information to the Applicant. I order the City to release that information to the Applicant.

2. I find that section 16(4) (d),(g)(i) and (ii) apply to each third party's name, signature, employee number, the date the employee's employment with the City was to end, and the date the employee was to retire. Disclosure of that personal information would be an unreasonable invasion of the third parties' personal privacy. I uphold the City's decision not to disclose this personal information in the records to the Applicant. I order the City not to disclose that information to the Applicant. I further order the City to notify me in writing, within 50 days of receiving this Order, that it has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner