

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2003-002

June 16, 2003

THE CITY OF CALGARY

Review Number 2336

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Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* for access to the severance agreements for all managerial employees of the City of Calgary from January 1, 1999 to July 31, 2001. The Applicant then subsequently made three amendments to his access request expanding the scope of the request to include all employment related benefits for commissioners and executive officers employed by the City of Calgary.

In response to the access request and amendments, the City of Calgary disclosed a severed copy of a number of agreements but withheld four supplementary pension agreements in their entirety under section 17 [previously section 16] of the Act.

The Applicant objected to the City of Calgary's decision to withhold the four agreements. In addition, the Applicant stated that the City of Calgary did not make every reasonable effort to search for the records as required by section 10 [previously section 9].

The Adjudicator found that section 17 [previously section 16] applied to the name of each Affected Party, the retirement date of each Affected Party and the signature of each Affected Party. However, the Adjudicator found that section 17 [previously section 16] did not apply to the remainder of the four agreements which included information regarding the supplementary pension benefits formula and other clauses regarding the administration of the pension benefits. The Adjudicator also held that the City of Calgary did not conduct an adequate search for records in response to the Applicant's second amendment and did not properly inform the Applicant of the results of the search.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n) [previously s. 1(1)(n)], 10(1) [previously s. 9(1)], 17 [previously s. 16], 27(2) [previously s. 26(2)], 72 [previously s. 68], 92(1)(e) [previously s. 86(1)(c.1)], 92(1)(g) [previously s. 86(1)(e)].

Authorities Cited: AB: Orders 96-022, 97-002, 98-007, 98-014, 98-018, 99-021, 99-028, 99-039, 2000-020, 2000-028, 2000-029, 2000-030, 2001-013, 2001-020, F2002-004.

Cases Cited: *University of Alberta v. Pylypiuk* (2002), A.J. No. 445 (Alta. Q.B.)

I. BACKGROUND

[para 1] On September 4, 2001, the Applicant made an access request to the City of Calgary (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for access to severance agreements for all managerial employees of the Public Body from January 1, 1999 to July 31, 2001.

[para 2] On October 4, 2001, the Public Body responded to the Applicant’s access request by disclosing a severed copy of a number of the agreements. However, the Public Body withheld four supplementary pension agreements in their entirety.

[para 3] On October 22, 2001, the Applicant sent a letter to the Public Body requesting a copy of his original access request and other information regarding the severed agreements already disclosed. The Applicant also amended his original access request (the “first amendment”). In that letter the Applicant stated that he would like access to information regarding the total value of all discretionary benefits, whether included in the severance agreements or in addition to severance agreements (e.g., bonuses and honoraria), for five positions: (a) Commissioner of Planning and Operations; (b) Chief Executive Officer; (c) Executive Officer Community Vitality and Protection; (d) Executive Officer Land Use and Mobility; and (e) Deputy Chief Executive Officer.

[para 4] On November 9, 2001, the Public Body responded to the Applicant’s October 22, 2001 letter and provided the Applicant with a copy of the Applicant’s original access request and other additional information corresponding to the severed agreements already disclosed. The Public Body did not, however, provide the Applicant with additional information regarding the discretionary benefits given to the five positions.

[para 5] On January 2, 2002, the Applicant requested a review of the Public Body’s decision. Mediation was authorized.

[para 6] On May 27, 2002, the Applicant sent another letter to the Public Body once again clarifying his request (the “second amendment”). In that letter, the Applicant stated that he would like access to information regarding “all other employment related benefits or compensation awarded to the group of employees known collectively as

commissioners and executive officers” including but not limited to: “bonuses; honorariums [sic], special payments to the Local Authorities Pension Plan or payments to any other pension plan”.

[para 7] On June 10, 2002, the Public Body wrote to the Applicant informing the Applicant that it had completed another search but that it had not found any additional records responsive to the access request.

[para 8] On or about July 31, 2002 the Applicant had further discussions with the Public Body during which the Applicant once again amended his access request (the “third amendment”). As a result, the Public Body conducted another search and identified another five pages of records. The Public Body released a severed copy of three pages of records to the Applicant, but withheld the two other pages of records under section 27(2) [previously section 26(2)]. These records are not at issue in this inquiry.

[para 9] Mediation was not successful in resolving certain issues between the parties. Those issues were set down for a written inquiry. The Public Body and Applicant each submitted an initial and a rebuttal brief. The Affected Parties each submitted an initial brief. The Affected Parties did not submit a rebuttal.

II. RECORDS AT ISSUE

[para 10] The records at issue consist of four agreements. Each agreement was signed by the Public Body and one of the Affected Parties. In the agreements the Public Body agrees to pay the Affected Party a supplementary pension calculated according to a specific formula.

III. ISSUES

[para 11] There are two issues in this inquiry:

- A) Does section 17 [previously section 16] of the Act apply to the records/information?
- B) Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely as required by section 10(1) [previously section 9(1)] of the Act?

[para 12] I note that the Revised Statutes of Alberta (R.S.A. 2000) came into force on January 1, 2002. Although this did not result in substantive changes to the Act, various sections of the Act have been renumbered. Consequently, all section numbers referred to in this Order reflect the new numbering as well as the previous numbering.

IV. DISCUSSION

A) Does section 17 [previously section 16] of the Act apply to the records/information?

[para 13] Section 17 [previously section 16] is a mandatory (“must”) section of the Act. If section 17 [previously section 16] applies, a public body must refuse to disclose the information. In order for this section to apply two criteria must be fulfilled:

- (a) the severed information must be “personal information” of a third party; and
- (b) the disclosure of the personal information must be an unreasonable invasion of a third party’s personal privacy.

1. Is the severed information “personal information” of a third party?

[para 14] Personal information is defined in section 1(n) [previously section 1(1)(n)]. This section reads:

1 In this Act,

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

- (i) the individual’s name, home or business address or home or business telephone number,*
- (ii) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,*
- (iii) the individual’s age, sex, marital status or family status,*
- (iv) an identifying number, symbol or other particular assigned to the individual,*
- (v) the individual’s fingerprints, blood type or inheritable characteristics,*
- (vi) information about the individual’s health and health care history, including information about a physical or mental disability,*

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 15] The Public Body states that the records at issue contain the personal information of the Affected Parties.

[para 16] The Affected Parties did not specifically address what portion of the records should be considered personal information, although all of the Affected Parties objected to the disclosure of the agreements.

[para 17] The records consist of four agreements entered into by the Public Body and the Affected Parties. Each agreement contains the name of the relevant Affected Party, the date of the Affected Party's retirement, the Affected Party's signature, the supplementary pension benefit formula and other clauses that relate to the administration of the pension benefit. Each agreement also contains the names, signatures and job titles of individuals who signed the contract either on behalf of the Public Body, as a witness, as a solicitor or as a commissioner for oaths.

[para 18] I have closely reviewed the records and all the arguments of the parties. I find that all of the information within the records falls within the definition of personal information under section 1(n) [previously section 1(1)(n)] of the Act. I find that the name of each Affected Party, the retirement date of each Affected Party, the signature of each Affected Party, as well as the supplementary pension benefits formula and other clauses which relate to the administration of the pension benefit, is the personal information of the Affected Parties. I also find that the names, signatures and job titles of individuals who signed the contract either on behalf of the Public Body, as a witness, as a solicitor or as a commissioner for oaths is personal information of those individuals.

2. Would the disclosure of the personal information be an unreasonable invasion of a third party's personal privacy, as provided by section 17(1) [previously section 16(1)] or section 17(4) [previously section 16(4)]?

[para 19] Section 17(1) [previously section 16(1)] states that the head of a public body must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. This section reads:

17(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.

Section 17(2)

[para 20] Section 17(2) [previously section 16(2)] lists a number of circumstances where a disclosure of personal information would not be considered an unreasonable invasion of a third party's personal privacy. The relevant portions of this section read:

17(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 officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,

...

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

Section 17(2)(e) [previously section 16(2)(e)] – Discretionary Benefits or Employment Responsibilities as an Officer, Employee or Member of a Public Body

[para 21] The Public Body states that the supplementary pension benefits are not discretionary benefits under section 17(2)(e) [previously section 16(2)(e)]. The Public Body states that although the pension benefits were approved by City Council, the Public Body's administration did not have any discretion to approve or withhold the pension.

[para 22] The Applicant states that the supplementary pension benefits are discretionary benefits under section 17(2)(e) [previously section 16(2)(e)]. The Applicant states that the Public Body's City Council exercised its discretion when it approved the benefits. The Applicant also states that an employee's job title or position should be considered information regarding an employment responsibility under section 17(2)(e) [previously section 16(2)(e)].

[para 23] In Orders 98-014 and 98-018, the Commissioner defined the word "discretionary" to mean a choice given to a decision-maker as to whether, or how, to exercise a power. The Commissioner said that in order for a benefit to be "discretionary" the decision-maker must have a choice as to whether, or how, to grant the benefit. The Commissioner defined the word "benefit" to mean, among other things, a favourable or helpful factor or circumstance, or an advantage. In Order 2001-020, the Commissioner stated that one of the purposes of section 17(2)(e) [previously section 16(2)(e)] is to allow the release of information about employment benefits and responsibilities of public employees, allowing a degree of transparency in relation to the compensation and benefits provided to public employees. The Commissioner stated that the general

reference to “benefits” rather than to specific identified benefits in section 17(2)(e) [previously section 16(2)(e)] indicates that the legislative intention was to capture a range of discretionary benefits that flow from the employment relationship.

[para 24] I find that the supplementary pension benefits formula and other clauses which relate to the administration of the pension benefits is information regarding a discretionary benefit under section 17(2)(e) [previously section 16(2)(e)]. I do not agree with the Public Body’s argument that the supplementary pension benefits are not a discretionary benefit because the Public Body’s City Council, and not the Public Body’s administration, exercised the discretion to grant the benefits. I find that the supplementary pension benefit outlined within each agreement is a “benefit” within the meaning of section 17(2)(e) [previously section 16(2)(e)]. I also find that the Public Body’s City Council had a choice as to whether, or how, to grant the benefit and that the Public Body’s City Council exercised its discretion, on behalf of the Public Body, to grant the supplementary pension benefits to the Affected Parties. As such, I find that the disclosure of this information would not be an unreasonable invasion of a third party’s personal privacy under section 17(2) [previously section 16(2)]. Furthermore, as there are no other mandatory exceptions that apply to any of this information and the Public Body has not claimed any discretionary exceptions in regard to this information, the Public Body must disclose this information to the Applicant.

[para 25] I also find that the job titles of individuals who signed the contract either on behalf of the Public Body, as solicitor or as commissioner for oaths is information regarding an employment responsibility under section 17(2)(e) [previously section 16(2)(e)] (see Order 2001-020). As such, I find that the disclosure of this information would also not be an unreasonable invasion of a third party’s personal privacy under section 17(2) [previously section 16(2)]. Furthermore, as there are no other mandatory exceptions that apply to any of this information and the Public Body has not claimed any discretionary exceptions in regard to this information, the Public Body must also disclose this information to the Applicant.

[para 26] However, I find that the remainder of the information within the records does not fall within section 17(2)(e) [previously section 16(2)(e)]. I find that the names of the Affected Parties, the retirement date of each Affected Party, the signature of each Affected Party, and the names and signatures of individuals who signed the contract either, on behalf of the Public Body, as a witness, as a solicitor or as a commissioner for oaths is not information about an employment responsibility nor is it information regarding a discretionary benefit.

Section 17(2)(h) [previously section 16(2)(h)] – Discretionary Benefits of a Financial Nature Granted to the Third Party by a Public Body

[para 27] The Public Body states that a pension benefit should not be considered a “discretionary benefit” under section 17(2)(h) [previously section 16(2)(h)].

[para 28] The Applicant states that a pension benefit should be considered a discretionary benefit under section 17(2)(h) [previously section 16(2)(h)].

[para 29] There are several provisions within section 17(2) [previously section 16(2)] that address discretionary benefits. Each of these provisions address a different context or situation. For example, section 17(2)(e) [previously section 16(2)(e)] specifically addresses the discretionary benefits of an officer, employee or member of a public body in an employment context while section 17(2)(g) [previously section 16(2)(g)] addresses licenses, permits and other discretionary benefits of a similar nature granted to a third party. Similarly, section 17(2)(h) [previously section 16(2)(h)] also addresses a different type of discretionary benefit of a financial nature not addressed within the other two provisions.

[para 30] The information at issue in this inquiry relates to the discretionary benefits granted by a public body in an employment context. I find that section 17(2)(h) [previously section 16(2)(h)] does not apply to this type of information.

Section 17(4) [previously section 16(4)]

[para 31] Section 17(4) [previously section 16(4)] lists a number of circumstances where a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. The relevant portions of this section read:

17(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 or educational 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 32] The only personal information which remains to be addressed under section 17(4) [previously section 16(4)] are the names of the Affected Parties, the retirement date of each Affected Party, the signature of each Affected Party and the

names and signatures of individuals who signed the contract either on behalf of the Public Body, as a witness, as a solicitor or as a commissioner for oaths.

[para 33] The Public Body states that the presumptions under section 17(4)(d) [previously section 16(4)(d)], 17(4)(g)(i) [previously section 16(4)(g)(i)] and 17(4)(g)(ii) [previously section 16(4)(g)(ii)] apply to the records.

[para 34] After examining the records and all of the arguments of the parties, I find that section 17(4)(g)(i) [previously section 16(4)(g)(i)] applies to this personal information. The personal information consists of a Third Party's name which appears with other personal information about the Third Party. I find that this personal information fulfills the criteria under section 17(4)(g)(i) [previously section 16(4)(g)(i)].

[para 35] As I have found that section 17(4)(g)(i) [previously section 16(4)(g)(i)] applies to this information, I will not examine the Public Body's alternate claims under section 17(4) [previously section 16(4)].

Section 17(5) [previously section 16(5)]

[para 36] In determining whether the disclosure of personal information would constitute an unreasonable invasion of a third party's personal privacy under sections 17(1) [previously section 16(1)] and 17(4) [previously section 16(4)], a public body must consider the relevant circumstances under section 17(5) [previously section 16(5)].

[para 37] The portions of section 17(5) [previously section 16(5)] at issue in this inquiry read as follows:

17(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 the Government of Alberta or a public body to public scrutiny,

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence, ...

[para 38] The only personal information which must be addressed under section 17(5) [previously section 16(5)] are the names of the Affected Parties, the retirement date of each Affected Party, the signature of each Affected Party and the names and signatures of individuals who signed the contract either on behalf of the Public Body, as a witness, as a solicitor or as a commissioner for oaths.

Section 17(5)(a) [previously section 16(5)(a)] – Public Scrutiny

[para 39] If section 17(5)(a) [previously section 16(5)(a)] applies, it is a relevant circumstance that weighs in favour of disclosure.

[para 40] The Public Body states that section 17(5)(a) [previously section 16(5)(a)] is not a relevant circumstance in this inquiry. The Public Body states that the disclosure of the information is not necessary to subject the Public Body to public scrutiny.

[para 41] The Applicant states that public scrutiny is a relevant circumstance in this inquiry. The Applicant states that taxpayers are entitled to access the information within the records.

[para 42] In Order 97-002, the Commissioner stated that in order to fulfill section 17(5)(a) [previously section 16(5)(a)], there must be evidence that the activities of the Government of Alberta or a public body have been called into question which necessitates the disclosure of personal information. The Commissioner also said that:

- (i) It is not sufficient for one person to decide that public scrutiny is necessary;
- (ii) The applicant's concerns must be about the actions of more than one person within the public body; and
- (iii) If the public body had previously disclosed a substantial amount of information, the release of further personal information would not likely be desirable. This is particularly so if the public body had already investigated the matter.

[para 43] In *University of Alberta v. Pylypiuk* (2002) A.J. No. 445 (Alta. Q.B.), Justice Gallant elaborated on the three-part test and stated that in order for this section to apply, there must be some public component present, such as public accountability, public interest and public fairness. This is particularly so where a person's rights are not affected by disclosure under section 17(5)(c) [previously section 16(5)(c)].

[para 44] After a review of the records and arguments of the parties, I find that the personal information at issue under section 17(5) [previously section 16(5)] does not fulfill the requirements of section 17(5)(a) [previously section 16(5)(a)].

[para 45] Although the Applicant states that the supplementary pension benefits should be subject to public scrutiny, the Applicant has not specifically identified any individuals, other than himself, that believe public scrutiny is necessary. In addition, although I agree that the Applicant's concerns are focused on the actions of more than one individual within the Public Body, the Public Body has previously disclosed a substantial amount of information including a severed copy of the majority of the other agreements requested by the Applicant.

[para 46] Lastly, I find that the personal information at issue under section 17(5)(a) [previously section 16(5)(a)] does not relate to the global issue of public scrutiny. This personal information consists of the Affected Parties' names, the retirement date of each Affected Party, the signature of each Affected Party and the names and signatures of individuals who signed the contract either on behalf of the Public Body, as a witness, as a solicitor or as a commissioner for oaths. I find that the disclosure of this information does not relate to the global issue of public scrutiny.

Section 17(5)(c) [previously section 16(5)(c)] – Fair determination of the Applicant's rights

[para 47] If section 17(5)(c) [previously section 16(5)(c)] applies, it is a relevant circumstance that weighs in favour of disclosure.

[para 48] The Public Body states that section 17(5)(c) [previously section 16(5)(c)] is not a relevant circumstance in this inquiry. The Public Body states that the Applicant does not need this information to determine his rights.

[para 49] The Applicant states that, as a taxpayer, he should be given access to this information. However, the Applicant did not specifically address section 17(5)(c) [previously section 16(5)(c)].

[para 50] In Order 99-028, the Commissioner stated that all four of the following criteria must be fulfilled under section 17(5)(c) [previously section 16(5)(c)]:

- (a) the right in question must be a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
- (b) the right must be related to a proceeding which is either existing or contemplated, not one which has already been completed;
- (c) the personal information which the appellant is seeking access to must have some bearing on or be significant to the determination of the right in question; and
- (d) the personal information must be required in order to prepare for the proceeding or to ensure an impartial hearing.

[para 51] I find that these four criteria are not fulfilled. There is insufficient evidence that the personal information at issue under section 17(5) [previously section 16(5)] is relevant to a legal right drawn from the concepts of common law or statute law, that it is related to an existing or contemplated proceeding, that the personal information will have a bearing on or is significant to the determination of the right, or that the information is required in order to prepare for the proceeding or to ensure an impartial hearing.

Section 17(5)(e) [previously section 16(5)(e)] – Unfair Exposure to Financial or other Harm

[para 52] If section 17(5)(e) [previously section 16(5)(e)] applies, it is a relevant circumstance that weighs in favour of withholding the personal information.

[para 53] The Public Body states that section 17(5)(e) [previously section 16(5)(e)] is a relevant circumstance in this inquiry. The Public Body did not, however, elaborate on this point.

[para 54] The Affected Parties did not specifically address section 17(5)(e) [previously section 16(5)(e)] although one Affected Party did imply that the Applicant could use the information in a manner that might harm the Affected Parties.

[para 55] In Order 2000-029, the Commissioner stated that the focus of section 17(5)(e) [previously section 16(5)(e)] is unfair exposure to harm. The kinds of harm that fall under this section could include, among others, concern for safety, damage to familial relationships and damage to reputation (Orders 98-007, 2000-028)

[para 56] I find that the personal information at issue under section 17(5) [previously section 16(5)] does not fall within section 17(5)(e) [previously section 16(5)(e)]. The test under section 17(5)(e) [previously section 16(5)(e)] is whether disclosure would result in unfair harm to a third party. I do not see how disclosing this personal information could unfairly cause harm to the Third Parties. I find that section 17(5)(e) [previously section 16(5)(e)] is not a relevant circumstance in this inquiry.

Section 17(5)(f) [previously section 16(5)(f)] – Personal Information Supplied in Confidence

[para 57] If section 17(5)(f) [previously section 16(5)(f)] applies, it is a relevant circumstance that weighs in favour of withholding the personal information.

[para 58] The Public Body states that section 17(5)(f) [previously section 16(5)(f)] applies to the personal information. The Public Body did not, however, elaborate on this point.

[para 59] One of the Affected Parties also referred to the information as “personal and confidential”, but did not elaborate on this point or its application to this inquiry.

[para 60] I find that the personal information at issue under section 17(5) [previously section 16(5)] does not fall within section 17(5)(f) [previously section 16(5)(f)]. I find that there is insufficient evidence that this personal information was supplied in confidence to the Public Body.

Other relevant circumstances

[para 61] The information at issue under section 17(5) [previously section 16(5)] includes information regarding the names and signatures of individuals who signed the contract either on behalf of the Public Body, as a witness, as a solicitor or as a commissioner for oaths.

[para 62] I find that the context in which these individuals signed these contracts is a relevant circumstance that weighs in favour of disclosing the names and signatures of these individuals. I find that the names and signatures were provided by individuals acting in their professional capacities and, as such, the disclosure of this information would not be an unreasonable invasion of privacy under section 17 [previously section 16] as (see Order 2001-013). Furthermore, as there are no other mandatory exceptions that apply to this information and the Public Body did not claim any discretionary exceptions, this information must be disclosed to the Applicant.

Conclusion under section 17 [previously section 16]

[para 63] I find that the disclosure of the names of the Affected Parties, the retirement date of each Affected Party, the signature of each Affected Party would be an unreasonable invasion of a third party's personal privacy under section 17 [previously section 16]. As such, the Public Body must withhold this information from the Applicant.

[para 64] However, I find that the remainder of the information within the records would not be an unreasonable invasion of a third party's personal privacy under section 17 [previously section 16]. I find that the disclosure the information regarding the supplementary pension benefit formula and other clauses which relate to the administration of the pension benefit would not be an unreasonable invasion of a third party's personal privacy as this information consists of information regarding a discretionary benefit under section 17(2)(e) [previously section 16(2)(e)]. In addition, I find that the disclosure of information regarding the job titles of individuals who signed the contract either on behalf of the public body, as a solicitor or as a commissioner for oaths, would not be an unreasonable invasion of a third party's personal privacy as this information consists of information regarding employment responsibilities under section 17(2)(e) [previously section 16(2)(e)]. Lastly, I find that the disclosure of the names and signatures of individuals who signed the contract either on behalf of the public body, as a witness, as a solicitor or as a commissioner for oaths would not be an unreasonable invasion of a third party's personal privacy as this information was provided by these individuals in their professional capacities. The Public Body cannot withhold any of this

information under section 17 [previously section 16]. Furthermore, as there are no other mandatory exceptions that apply to this information and the Public Body has not claimed any discretionary exceptions in regard to this information, the Public Body must disclose this information to the Applicant.

B) Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely as required by section 10(1) [previously section 9(1)] of the Act?

[para 65] Section 10(1) [previously section 9(1)] states:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 66] The Applicant states that the Public Body did not conduct an adequate search for records and that the Public Body should possess additional responsive records. In particular, the Applicant states that the Public Body should have additional records responsive to the Applicant's second amendment dated May 27, 2002. The Applicant also alleges that the Public Body may have breached section 92(1)(e) [previously section 86(1)(c.1)] and 92(1)(g) [previously section 86(1)(e)] by altering, falsifying, concealing or destroying records.

[para 67] The Public Body states that it made every reasonable effort to assist the Applicant and respond openly, accurately and completely including three searches for information. The Public Body also states that it did not breach section 92(1) [previously section 86(1)].

[para 68] In Order 96-022, the Commissioner said that a public body has the burden of proving that it has fulfilled its duty under section 10(1) [previously section 9(1)]. The Commissioner said that a public body must show that it has conducted an adequate search. The Public Body must show that: (a) it made every reasonable effort to search for the records requested; and (b) that it informed the applicant in a timely fashion about what has been done.

1) For What Time Period do I Review the Public Body's response?

[para 69] In Order 99-039, the Commissioner stated that he would review the actions taken by a public body prior to the date of an applicant's request for review but not after as this would result in a review of what went on in mediation. However, a subsequent Order from this Office, Order 2000-030, elaborated on this principle and held that the Commissioner will review a further request for information by the Applicant during mediation if the Public Body, by its actions, has accepted the request.

[para 70] As previously mentioned, the Applicant made its initial access request on September 4, 2001. The Applicant then made three amendments to the access request. The first amendment was made on October 22, 2001, the second amendment on May 27,

2002 and a third amendment on or about July 31, 2002. The issue before me is whether the Public Body, by its actions, accepted the second and third amendments which were made after the Applicant's request for review on January 2, 2002.

[para 71] After a review of all the correspondence between the parties and the submissions of the parties, I find that the Public Body, by its actions, accepted the Applicant's second and third amendments. In coming to this conclusion, I took into account the following factors:

- (a) The Public Body conducted further searches under the *Freedom of Information and Protection of Privacy Act* in response to the second and third amendments and responded to the Applicant by letter on June 10, 2002 and again on July 31, 2002.
- (b) The Public Body, in its June 10, 2002 letter and the July 31, 2002 letter, referred to the same access request number that had been assigned to the Applicant's initial access request.
- (c) In the Public Body's submission, the Public Body referred to the additional searches for records and the June 10, 2002 letter and July 31, 2002 letter as evidence that it fulfilled its duty under section 10.

[para 72] These factors show that the Public Body accepted the second and third amendments to the original access request and treated these amendments as part of the original request. As such, I find that I have the ability to review the Public Body's response to these amendments.

(2) Did the Public Body make every reasonable effort to search for the records requested and inform the Applicant in a timely fashion about the searches conducted?

[para 73] In Order 2000-020, the Commissioner stated that the applicable standard for a Public body performing a search is not perfection but what is reasonable in the circumstances. The Commissioner adopted the definition of "reasonable" in Black's Law Dictionary: "fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view."

[para 74] In Orders 99-021 and F2002-004, the Commissioner stated that if a public body cannot locate responsive records, the public body should inform the applicant about the steps taken to find records. The Commissioner cited some specific examples of the type of information that should be included in the letter. This information includes:

- a chronology of the Public Body's search
- a list of files the Public Body searched
- a summary of the electronic and manual search the Public Body conducted

- the names and numbers of files the Public Body became aware of, but could not locate
- the files the Public Body determined had properly been destroyed, and the disposal number for those files.

[para 75] In the Applicant's initial submission, the Applicant questions whether the Public Body properly searched for records or knew where to locate the responsive records in response to his request and, in particular, in response to the Applicant's second amendment dated May 27, 2002.

[para 76] After a review of the submissions and records, I find that the Public Body did not conduct an adequate search for records in response to the second amendment. Although the Public Body conducted a further search, I find that the Public Body inappropriately limited the scope of that search. In the Public Body's affidavit, the Public Body states that it conducted a search for "discretionary benefits" given to the Affected Parties, but that no further records were found. However, in the Applicant's second amendment the Applicant requested a broad range of records including "all other employment related benefits or compensation awarded to the group of employees known collectively as commissioners and executive officers" including but not limited to: "bonuses; honorariums [sic], special payments to the Local Authorities Pension Plan or payments to any other pension plan". The Applicant did not limit his May 27, 2002 amendment to information regarding "discretionary benefits". I find that the Public Body, by restricting its search to "discretionary benefits", inappropriately limited the scope of its search.

[para 77] I also find that the Public Body did not, in the June 10, 2002 letter, properly inform the Applicant about the steps taken to find the records. The Public Body informed the Applicant that it did not find any additional responsive records. However, the Public Body did not provide the Applicant with a chronology of the Public Body's search, a list of files searched, a summary of the electronic and manual search by the Public Body or any other information regarding possibly relevant files.

[para 78] I do not, however, find that there are reasonable and probable grounds to believe an offence has been committed under section 92(1)(e) [previously section 86(1)(c.1)] or 92(1)(g) [previously section 86(1)(e)]. After reviewing all of the available evidence regarding the Applicant's allegations of offences under section 92 [previously section 86], I am satisfied that there is insufficient evidence to proceed on any of these allegations.

V. ORDER

[para 79] I make the following Order under section 72 [previously section 68]:

A) Does section 17 [previously section 16] of the Act apply to the records/information?

[para 80] I find that the disclosure of the names of the Affected Parties, the retirement date of each Affected Party and the signature of each Affected Party would be an unreasonable invasion of a third party's personal privacy under section 17 [previously section 16]. I order the Public Body not to disclose this information to the Applicant.

[para 81] I find that the disclosure of the remainder of the information within the records would not be an unreasonable invasion of a third party's personal privacy under section 17 [previously section 16]. Section 17 [previously section 16] does not apply to this information. Furthermore, as there are no other mandatory exceptions that apply to this information and the Public Body has not claimed any discretionary exceptions in regard to this information, I order the Public Body to disclose this information to the Applicant.

[para 82] Along with this Order, I will provide the Public Body with a copy of the records which highlight the information that the Public Body must withhold under section 17 [previously section 16].

B) Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely as required by section 10(1) [previously section 9(1)] of the Act?

[para 83] I find that the Public Body did not fulfill its duty to assist under section 10(1) [previously section 9(1)]. I find that the Public Body did not conduct an adequate search for the records in response to the Applicant's second amendment. I also find that the Public Body did not properly inform the Applicant about the steps taken to find the records requested.

[para 84] I order the Public Body to conduct an additional search for records according to the perimeters outlined in the Applicant's second amendment. I also order the Public Body to provide the Applicant and this Office with a notice outlining whether responsive records were located, whether the responsive records will be disclosed and if not, the exceptions applied to the records. If responsive records do not exist, I order the Public Body to inform the Applicant and this Office of the steps taken to find the records including a chronology of the Public Body's search, a list of files searched, a summary of the electronic and manual search by the Public Body or any other information regarding possibly relevant files.

[para 85] I further order that the Public Body notify me in writing within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Dave Bell
Adjudicator