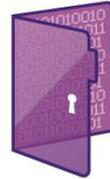


Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2013-1491-AP-787

Date: June 5, 2014

Case about access to pension amounts found in the University Presidents' employment contracts

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). The Applicant asked that the Commissioner carry out an investigation after receiving an unsatisfactory response to a request for access to information filed under Part 2 of the Act.
2. The Applicant made a request to St. Thomas University ("the University") on April 25, 2013 to receive the following:
 - information about the number of part-time employees paid less than \$60,000 per fiscal year and the value of salaries, and bonuses and severance pay paid to these employees in each fiscal year from 2004/2005 to 2011/2012,
 - the same above information for full-time employees,
 - amount of payments made to law firms or lawyers for each year from 2004/2005 to 2011/2012, and
 - a copy of the President's employment contract for the same time period.

("the Request")

3. The University issued a response on May 27, 2013 granting access to the information for part-time and full-time employees as well as payments made to lawyers and law firms for the period of time requested.
4. Where the University had reservations about providing access was in regards to the President's employment contracts. The University decided to refuse access to those relevant records in full, explaining that the records contained personal information that the University could not disclose as the Act deemed the disclosure to be an unreasonable invasion of privacy, referencing paragraphs 21(2)(e) (*employment, occupational or educational history*) and 21(2)(g) (*source of income or financial circumstances, activities or history*). The University also indicated to the Applicant of being aware of its obligations to make some information about its employees and officers available to the public (such as job classification, salary range, benefits, employment responsibilities, travel expenses) as required under paragraph 21(3)(f). In that regard, the University directed the Applicant to the University's website where information regarding salary range, allowances, and travel expenses of its employees has been made public.

("the Response")

5. In filing a Complaint, the Applicant referenced paragraphs 21(3)(f) (*employment-related information of an officer or employee of a public body*) and 21(3)(g) (*details of a contract to supply goods or services to a public body*) of the *Act* to challenge the University's refusal and the Applicant further stated that the University had not considered these provisions when having to consider the release of the President's employment contracts.

(“the Complaint”)

INVESTIGATION

Approach to complaint investigation in two phases

6. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter without having to issue a Report of Findings that contains recommendations.
7. In essence, this complaint investigation approach has two phases: an interactive component that will seek to resolve the matter by ensuring that the rules of the legislation are applied properly; and where unable to resolve the matter, we move to publish a Report of our findings that describe the proper application of those same rules.
8. As the Commissioner and her Office are tasked with the interpretation of the *Act*, we use the complaint resolution process to share our interpretation of the rules, to receive input, and assist both public bodies and those who seek the information in better understanding this legislation.
9. We seek neither a negotiated nor bargained outcome of the case.
10. Our goal is to apply the proper interpretation of the law by recommending what information ought to be provided to the applicant, the individual who sought access (referred to as the applicant). Where we are successful in doing so, our process allows the applicant to receive the information to which he or she was entitled under the *Act*.
11. The most important distinction in having this approach is that we spend time and effort during the first phase to impart upon the public body:
- our interpretation of rules of the *Act* that are applicable to the case;
 - our recommended course of action:
 - that provides the applicant the information to which entitled; and,
 - the proper content of a revised response:

- containing the information not initially provided to the applicant by the public body.
12. In this regard, our complaint resolution process is intended to produce the proper and lawful outcome of the case through a revised response that is in conformity with the *Act* and that the applicant states is satisfactory.
 13. Where we are unable to effect a resolution of the complaint in this fashion, we conclude our investigation with a Report of Findings, such as this one, that encapsulates the same recommended course of action that we first provided to the public body; this time, the recommended course of action is expressed as formal recommendations issued under section 73 of the *Act*.
 14. A full description of all the steps involved in the Commissioner's complaint resolution process can be found on our website at <http://info-priv-nb.ca/>.

Phase one to resolve the present complaint case

15. During our investigation, the University provided us with copies of all of the relevant records for review, including the employment contracts for all four individuals who had served as Presidents for the University between the academic years of 2004/2005 to 2011/2012.
16. We reviewed these documents and the applicable provisions of the *Act*; in addition, we researched the question of the release to the public of university presidents' contracts in other Canadian provinces.
17. We had good discussions with University officials. This work led the University to agree to try to resolve the complaint by providing to the Applicant information not earlier released, namely all four Presidents' contracts in full, exception for one type of redaction: the exact amounts paid to the Presidents such as the exact salary amounts in all four contracts and the exact pension amounts in two of the contracts.
18. The University was of the view that to disclose pension amounts was akin to disclosing exact salary amounts, adding that exact salary amounts were personal information protected by the *Act* under subsection 21(1) at it regards an individual's privacy. For that reason, the University would not disclose the exact pension amounts to the Applicant in this case.

19. We agreed that the exact salary amounts paid to each President were protected as personal information and the *Act* has no overriding provisions to remove that protection for the purposes of the public's rights to access this type of information, unless the individual to whom the information belongs consents to its disclosure.
20. In that regard, the University was properly protecting the exact salary amounts from disclosure under paragraph 21(2)(g) in this case. The question at issue was the exact pension amounts, a benefit afforded to the Presidents as public body officials.
21. The Applicant presented arguments regarding the University's refusal and challenged whether the exact pension amounts merited the same protection from disclosure as exact salary amounts. The Applicant's input in that regard was such that there was nothing in the employment contracts regarding the Presidents' pension that could be linked to other information to reveal their exact salary amounts, and because of this fact, the exact pension amount ought not to be protected as exact salary amount.
22. The Applicant also indicated that provisions relating to a university president's pension benefits have been the subject of public disclosure in other Canadian jurisdictions and New Brunswick universities ought not to be different.
23. We conducted more work and found that while the employment contracts showed that the respective Presidents are entitled to receive pension benefits of a certain dollar amount, no further details, either in the contracts themselves or from the University, explained the extent of these benefits. In other words, the University would not provide what those pension benefits truly represent.
24. In addition, we found no other records or information that could be used by the Applicant to somehow calculate the Presidents' exact salary amount by having access to their exact pension amounts.
25. Providing useful information regarding pension amounts is part of the University's statutory obligation to be transparent and accountable about pension benefits afforded to its Presidents. Our work on this issue continued with the University but did not result in the University releasing the exact pension amounts to the Applicant, despite our interpretation of the rules found in the *Act* and supporting caselaw.

26. Therefore, we carried on to phase two of our process and prepared the present Report of Findings that carries a recommendation under section 73 for the exact pension amounts found in the employment contracts of the Presidents of the University to be released to the Applicant.
27. We provide our interpretation of the applicable rules in explaining why this recommendation is in conformity with the *Act* and represents the information to which the Applicant, and by extension, the public is entitled to receive in our view.

LAW AND ANALYSIS

Transparency and public sector employment contracts

28. The University has already taken steps to better inform the public about how it compensates faculty and staff by updating its website to include salary range information, as well as salary range and car and housing allowance information, dating back to 2004.
29. Further and as a result of our discussions, the University also recognized that the employment contracts constitute information of the same nature and its disclosure is required by the *Act*. The University disclosed substantially all of the information in the contracts during the complaint investigation process, but for exact salary and pension amounts.
30. Given that the University provided access to most all of the information in the Presidents' employment contracts during the informal resolution process, we need not address the application of the law on the contracts themselves.¹
31. Thus, the only information that remains at issue is the disclosure of exact pension amounts contained in two of the Presidents' contracts.
32. In doing so, we address one of the foundational principles of the *Act*: to promote transparency and accountability in the conduct of the public business of public bodies.

¹ The Commissioner addressed the question of the disclosure of employment contracts generally in previous Reports of Findings **2013-1490-AP-786** and **2013-1493-AP-789**.

33. Public bodies must account to the public how they spend the public purse. A key component this transparency is how public bodies compensate their employees and officials.
34. We recognize that employment contracts in the private sector are viewed as confidential and even competitive in nature; however, such considerations do not apply to the public sector.
35. The Legislature has passed the *Act* that includes clear rules to disregard those held views so as to ensure that public bodies make employment contracts public. It is for that reason public bodies cannot refuse to disclose to the public the salaries (through a range) as well as benefits paid from the public purse for all of its employees and officials.
36. Employment contracts, we agree, contain in large part personal information about the individuals who were awarded the position, such as the University Presidents in this case.
37. The key question becomes whether the release of any or all of the personal information in the employment contracts would constitute an unreasonable invasion of the President's privacy, as delineated in section 21 of the *Act*.
38. We emphasize the fact that section 21 has three separate but related components and all three must be considered and applied when requested to release personal information:
- subsection 21(1) setting out the main premise that personal information should not be disclosed as its release can cause an unreasonable invasion of privacy;
 - subsection 21(2) setting out guidelines as to what types of personal information, if released, will intrude on privacy;
- and,
- subsection 21(3) setting out guidelines as to what types of personal information, if released, have been deemed in law not to intrude on privacy.
39. For example, any personal information can be disclosed without intruding on privacy where the person to whom the personal information related consents to releasing the information, or that of a person's business contact information, or permits or licenses issued to an individual.

40. Given our explanations as to the functioning of section 21 above, we find that the University was correct to first apply subsection 21(1) and also subsection 21(2) of the *Act* as guidelines in regards to the release of the Presidents' exact salary and benefits, i.e., their personal information.
41. Where we find that the University was incorrect is in its failure to continue with the application of the third component of section 21, namely subsection 21(3), being the deeming legal provision that clearly provides that certain kinds of the Presidents' personal information can be released without intruding on their privacy.
42. In other words, the University did not take into account subsection 21(3) of the *Act* in relation to the exact pension amounts as that provision overrides the protection of personal information for public employees and public officials, including that of its Presidents.
43. Now we turn our attention to the question of releasing information that relates to the pension amounts of the University's Presidents, i.e., whether they constitute information about "benefits" for the purposes of paragraph 21(3)(f) of the *Act*.

"Benefits"

44. As indicated in our previous Reports of Findings (**2013-1490-AP-786** and **2013-1493-AP-789**), while the term "benefits" is not defined in the *Act*, we have interpreted "benefits" to have a comprehensive meaning.
45. Our interpretation is based on the wording found of paragraph 21(3)(f)(i) as one of the categories of personal information that is deemed lawful to be released to the public. Paragraph 21(3)(f)(i) is an exception to the rule that otherwise calls for the protection of an individual's income, job classification and responsibilities, as well as benefits and travel expenses afforded to him or her:

21(3) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

(f) the information is about the third party's job classification,
salary range, benefits, employment responsibilities or travel expenses

(i) as an officer or employee of a public body...

(Emphasis added)

46. Our interpretation of paragraph 21(3)(f)(i) is also based on its specific purpose to release that kind of personal information where it belongs to public officials or employees, again in respect of the requirement for public bodies to be transparent in their spending of public funds.
47. Furthermore, our interpretation to the definition of *benefits* is in keeping with caselaw from other Canadian jurisdictions.
48. For example, the Ontario Information and Privacy Commissioner's Office published a number of decisions on this very question, such as in Order M-23, in which we note this finding:
- ...I believe that it is consistent with the intent of section 14(4)(a) and the purposes of the *Act* that "benefits" be given a fairly expansive interpretation. In my opinion, the word "benefits" as it is used in section 14(4)(a), means entitlements that an officer or employee receives as a result of being employed by the institution. Generally speaking, these entitlements will be in addition to a base salary. They will include insurance-related benefits such as, life, health, hospital, dental and disability coverage. They will also include sick leave, vacation, leaves of absence, termination allowance, death and pension benefits. As well, a right to reimbursement from the institution for moving expenses will come within the meaning of "benefits."
49. The Ontario Information and Privacy Commissioner's Office found that there no unjustified or unreasonable invasion of privacy by making publicly available the clauses found in employment contracts of this kind, and more importantly to the case at hand, for also releasing pension benefits.
50. Similarly, the Office of the Information and Privacy Commissioner in Alberta found that the employment contract of the appointment of a senior official at the International Intergovernmental and Aboriginal Relations of the government of Alberta be released in full, without redactions for negotiated pensions benefits (see 2007 CanLII 81653).
51. We agree with the approach to define the word "benefits" in a broad fashion, particularly given the fact that the New Brunswick statute has specifically included the exception in subsection 21(3) to not protect and call for the release of certain types of personal information.

52. For instance, paragraph 21(3)(h) serves to establish that financial details found in a benefit that has been agreed to above and beyond the usual terms and conditions of an employment contract, i.e., as a discretionary benefit, is related to employment and must also be released:

21(3) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if:

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

53. In our view and in keeping with the Alberta case referred to above, we find that the term "benefits" must include pensions, especially those that have been granted by exercise of the public body's discretion.
54. We note that the University did not disagree with this interpretation but remained of the view that the *exact* pension amounts was not be released.

Privacy rights vs. the public's right to know what benefits are granted

55. The University decided not to disclose the exact pension amounts on the basis that the amounts are too specific and would amount to an unreasonable invasion of the Presidents' privacy. The University's view is based on privacy concerns of the Presidents and that the University believes those concerns outweigh the public interest in having access to pension benefits granted to university presidents.
56. We found that the respective employment contracts of the former and current President included exact pension amounts. Exact pension amounts fall within paragraph 21(2)(g), as this information does reveal the source of income and financial circumstances of the former and current President; however, the analysis does not end there.
57. As explained above, subsections 21(2) and (3) respectively set out what kinds of information are deemed as well as those that are deemed not to be an unreasonable invasion of privacy if disclosed. For that reason, we must also consider subparagraph 21(3)(f)(i) where the law indicates that the disclosure of information about an individual's benefits as an officer or employee of a public body is deemed not to be an unreasonable invasion of his or her privacy.

58. In the present case, both Presidents in question were granted pension-related benefits of a specific dollar amount, over and above those benefits that are normally granted to other employees of the University. In other words, they were granted a benefit of a discretionary nature of which paragraph 21(3)(h) speaks to as information that cannot be refused to the public.
59. The fact that the two Presidents are entitled to receive pension benefits of an undisclosed amount and of a discretionary nature that is not further explained will not be sufficient for the University to meet its obligations under the *Act*; moreover, to refuse to release this information is contrary to paragraphs 21(3)(f) and 21(3)(h).
60. The disclosure of information that allows the public to understand the value and extent of the benefits granted is not only in keeping with the trend to provide full disclosure across the country, it is also in keeping with a public body's legal obligations under the *Act*.
61. In arriving at this finding, we researched the question of disclosure of similar additional pension benefits found in University presidents' contracts across the country, many of which are publicly available in full and posted on the respective universities' websites.
62. Nearly all of the employment contracts we reviewed provide details about the value of supplementary pension benefits, including calculation schemes, salary percentages to be contributed by the employee and the university respectively, as well as exact dollar amounts for retirement allowances to be granted upon completion of the contracted term of service. There are no fewer than 10 universities:
- Dalhousie University
 - University of Ottawa
 - University of Saskatchewan
 - University of Regina
 - Memorial University of Newfoundland
 - University of Calgary
 - University of Windsor
 - Trent University
 - and, the Université de Moncton, here in New Brunswick.
63. Having established that 'benefits' include pension information, we now address the questions of the disclosure of exact pension amounts.

64. The *Act* is clear in that public bodies cannot refuse to disclose information about benefits of their officers and employees; the *Act* is also definite in that public bodies cannot refuse to release information about a discretionary benefit of a financial nature that they have decided to grant to persons.
65. In the absence of any other details that explain what those pension benefits actually represent, particularly that would explain the value of the pension benefits granted by the University to its Presidents, such as a calculation scheme or similar explanation, we find that the exact pension amounts found in the two employment contracts cannot be protected from disclosure. There is no way for the Applicant, and the public for that matter, to see whether the Presidents are being awarded \$1000.00 or \$100,000.00 per year as a pension. There is no way to tell.
66. We reiterate that the *Act* obligates the University to be transparent and accountable in terms of how it compensates its employees and officials, including the requirement to disclose information about benefits, and benefits includes pensions granted as part of a regular standard or as a discretionary benefit.
67. It follows that the pension benefits paid and to be paid to these Presidents directly by the University must be disclosed.
68. While paragraphs 21(2) and 21(3) distinguish between salary ranges (deemed not to be an unreasonable invasion of privacy to disclose) and exact salary amounts (deemed to be an unreasonable invasion of privacy to disclose), there is no similar wording to suggest that exact benefit amounts are protected from disclosure, including pensions.
69. For all of these reasons, we find that the exact pension amounts under these circumstances merit disclosure and do not constitute an unreasonable invasion of the Presidents' privacy.
70. The Applicant, and by extension the public, is entitled to know the nature and value of the pension benefits granted to the Presidents by the University.

71. We note that the University has already provided the Applicant with full access to the two former Presidents' employment contracts that did not contain pension amounts and there is no need for us to recommend that those records be disclosed again to the Applicant.

RECOMMENDATION

72. Based on all of the above, we recommend pursuant to subsection 73(1) of the *Act* that St. Thomas University release once again to the Applicant the two President's employment contracts in question in full, with only one allowable redaction for the exact salary amount. There is to be no redaction for the exact pension amounts as that information is found not to be protected from disclosure under section 21.

Dated at Fredericton, New Brunswick, this _____ day of June, 2014.

Anne E. Bertrand, Q.C.
Commissioner