

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: 2013-1493-AP-789

Date: April 29, 2014

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").
2. This Report stems from a Complaint filed with this Office in which the Applicant requested 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.
3. The Applicant made a request to Mount Allison University ("the University") on April 25, 2013 to receive the following :
 - information about the number of part-time employees paid less than \$80,000 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")

4. The University responded on May 24, 2013, granting access to some of the information for part-time and full-time employees for the years 2007 to 2012, as well as the payments made to lawyers and law firms.
5. As for the President's employment contracts, the University refused access in full, being of the view that the Act prohibited it "from disclosing any recorded information about an identifiable individual, which expressly includes information about an individual's employment". In doing so, the University referenced subsection 43(1) found in Part 3 of the Act as well as the definition of "personal information" found in section 1. Further, the University was of the view that the Act does not authorize and even prohibits the release of the requested information as an unreasonable invasion of privacy, referencing subsections 21(1) and 21(2). Lastly, the University directed the Applicant to its website where information about salary ranges, allowances and travel expenses is publicly available.

("the Response")

6. In the 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 stating that the University had not considered these provisions that called for the disclosure of the requested information.

(“the Complaint”)

INVESTIGATION

7. The University provided us with copies of the relevant records for our review, which consisted of the employment agreements and corresponding reappointment contracts for both of the University Presidents that have held the position between 2004/2005 and 2011/2012. We reviewed these documents and the applicable provisions of the *Act* as well as the results of our research into the disclosure of university presidents' contracts in other Canadian jurisdictions.
8. As with any complaint under investigation by the Commissioner's Office, we sought to resolve the matter informally. The informal resolution process is not a mediated outcome; rather, it allows both public bodies and members of the public better understand this legislation and ensures that a person who seeks access to information (an applicant) receives the information to which he or she was entitled under the *Act*. (*Note*: A full description of the steps involved in the Commissioner's informal resolution process can be found on our website at <http://info-priv-nb.ca/>).
9. In this case, we were not able to convince the University that the refusal to release the requested information was not in conformity with the *Act*, namely that the President's employment contracts should be disclosed with only minor redactions to protect some sensitive personal information. We therefore proceeded to report on our findings and issue a recommendation for the information that should be released to the Applicant.

LAW AND ANALYSIS

Transparency and public sector employment contracts

10. One of the foundational principles of the *Act* is to promote transparency and accountability in the conduct of the public business of public bodies, as public bodies are accountable to the public in how they expend funds from the public purse. A key component of how a public body conducts its business is how the public body compensates its employees and officials. In that regard, the *Act* calls for transparency

and accountability through the disclosure of how salaries and benefits are paid from the public purse and obligating public bodies to make this information publicly available.

11. While employment contracts in the private sector are considered to be highly confidential and competitive in nature, these considerations do not apply in the public sector.
12. We do recognize that information about a person's employment squarely falls within the realm of "personal information" as defined in section 1 of the *Act* and that employment contracts routinely include personal information of the person being employed including exact salary, employment duties and responsibilities, and benefits such as pension eligibility, health and dental insurance, vacation and sick leave, and the like. The rules regarding the disclosure of personal information in the context of an access to information request, however, are found in Part 2 of the *Act* and specifically in section 21 based on the principle that the disclosure of the personal information may be an unreasonable invasion of the privacy of the individual to whom the information belongs.
13. Section 21 is indeed helpful in providing guidelines as to what kinds of information are deemed to be and deemed not to be an unreasonable invasion of privacy if it were to be disclosed, and these are found in subsections 21(2) and 21(3), respectively. In that regard, subsection 21(2) deems what information related to a person's employment and financial circumstances would be an unreasonable invasion of privacy:

21(2) A disclosure of personal information about a third party shall be deemed to be an unreasonable invasion of privacy if

(...)

(e) the personal information relates to the third party's employment, al or educational history,

(...)

(g) the personal information describes the third party's source of income or financial circumstances, activities or history...

14. More importantly to the matter at hand, however, is that the consideration for disclosing or not this type of information does not end with subsections 21(1) or 21(2). In fact, a public body must also consider subsection 21(3) that sets out the exceptions to the exceptions, thereby making it mandatory for certain kinds of personal information to be released, personal information that the *Act* deems not to be an unreasonable invasion of privacy to disclose. These include:

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...

(...)

(h) the disclosure reveals information about a discretionary benefit of a financial nature granted by a public body to the third party, including the granting of a licence or permit...

15. It is important to note that subsection 21(3) applies "despite subsection (2)," meaning that even where information falls within one of the provisions that deem it to be an unreasonable invasion of privacy to disclose as found in subsection 21(2), the same personal information will not be protected where the Act has deemed it not to be an unreasonable invasion of privacy under subsection 21(3).
16. It is for that reason that while most public sector employment contracts contain a large amount of personal information, very little of that information is of the kind that warrants protection from disclosure, as such employees are paid from the public purse and it is not considered an unreasonable invasion of their privacy to make that information available by virtue of paragraph 21(3)(f), and in some circumstances, 21(3)(h).
17. We note that exact salary amounts and home or personal contact information cannot be disclosed without the employee's consent; however, information that sets out a range of salary, job duties and responsibilities and the benefits associated with the position must be disclosed.
18. To this end, 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 dating back to 2004 as well as travel expense information for 2012/2013.
19. In our view, the President's employment contracts are information of the same nature and should also be made available to the public in the spirit of openness and transparency and as required by the Act.

Nature of the information in the Contracts

20. The purpose of the employment contracts with both of the University presidents was to establish the terms and conditions that would govern the employment relationship. While the contracts are not identical, they contained similar provisions, including:
- Term—commencement and expiration date, terms of renewal
 - Position and duties—plus full professorship in a particular faculty
 - Process for performance evaluations
 - Compensation/Remuneration
 - Exact salary, and process for salary review
 - Terms for discretionary performance bonuses
 - Benefits
 - Normal faculty member benefits, life insurance coverage
 - Car allowance amounts
 - Reimbursements for President and spouse for travel and entertainment expenses incurred with the position, relocation fees, compensation for maintaining residence in another city, etc.
 - Use of Cranewood residence
 - Vacation leave, sabbatical/administrative leave, research allowance amounts
 - Retirement contributions or pension eligibility and pension plan
 - General terms and conditions
 - Termination without notice or pay in lieu of for just cause
 - Clauses such as governing law, dispute resolution, whole agreement, etc.

Personal information

21. Contracts of this nature contain in large part personal information about the two University Presidents. As such, the key question becomes whether the release of any or all of the personal information would constitute an unreasonable invasion of their privacy, as delineated by section 21 of the *Act*.
22. The University was correct to consider subsection 21(2) of the *Act*, which serves as a guide as to when the disclosure of another individual's personal information could result in an unreasonable invasion of privacy; however, the University did not properly take into account subsection 21(3) which deems certain kinds of information not to be an unreasonable invasion of privacy.

23. Employment agreements clearly relate to a person's employment history and describe a person's source of income and financial circumstances, but under subsection 21(3), the *deeming provision*, that information must be disclosed as it is not considered a violation of privacy to do so. In that regard, personal information about a person's "job classification, salary range, benefits, employment responsibilities or travel expenses" as an employee of a public body (subparagraph 21(3)(f)(i)). We understand that the University considered all of these provisions in making the decision to refuse access to the employment agreements in full, but we believe that the University misinterpreted paragraph 21(3)(f) in nevertheless refusing access to the information.

Employment-related information of public body officials and employees

24. Paragraph 21(3)(f) provides:

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...

25. The wording of this provision is intentionally broad to include information about various aspects of a person's employment with a public body. Such information includes information about that person's job classification, salary range, benefits, employment responsibilities, and travel expenses.
26. The employment contracts relate to the President's duties and set out the general principles under which the President is to conduct his or her work, including that the President shall have the authority to manage and direct the business and affairs of the University. The contracts also stipulate that the President shall devote his full time and attention in doing so, with restrictions on outside activities that would place the President in a conflict of interest or adversely impact the ability to fulfill his or her duties, specific duties and responsibilities of the position of President, and that performance reviews will be conducted.
27. In other words, all of the clauses in the contracts are about the President's employment responsibilities as an employee of the University; this brings the information squarely in line with the deeming provision found in paragraph 21(3)(f) and should be disclosed.

“Benefits”

28. On the question of benefits granted to the President, we note that the word “benefits” is not defined in the *Act*, but there is another deeming provision applicable to benefits generally awarded to third parties, namely paragraph 21(3)(h), that speaks to the required disclosure of benefits of a financial nature granted to a third party by a public body:

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...

29. Again, this falls squarely within the intent of the legislation to make some third party personal information available to the public where the information discloses payments made from the public purse. Discretionary benefits of a financial nature are those that are negotiated between the parties and agreed to, as not every contract for services or employment such as in this case, may grant the same benefits in every instance.
30. Our research revealed that other jurisdictions have interpreted the term “benefits” in the context of similar provisions of access to information laws. The Ontario Information and Privacy Commissioner’s Office has published a number of decisions on this point, including Order M-23, in which the former Commissioner states:

...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.”

31. The former Commissioner found that the disclosure of clauses found in employment contracts of this kind would not be considered in law an unjustified invasion of personal privacy. We agree with the approach to define “benefits” in a broad fashion, particularly given the fact that paragraphs 21(3)(f) and 21(3)(h) both serve as overrides to the otherwise protected personal information.

32. This demonstrates the strength of the intent to promote transparency and accountability in how public bodies compensate employees and the benefits and entitlements that they are granted with their positions.
33. Applying the deeming provisions found in paragraphs 21(3)(f) and 21(3)(h) of the *Act* and broad definition that has been assigned to “benefits” to the employment contracts in this case, we find that a large number of clauses contain information that directly sets out the benefits that are granted to the person who holds the position of President:
- Normal faculty member benefits, life insurance coverage
 - Car allowance amounts
 - Reimbursements for President and spouse for travel and entertainment expenses incurred with the position, relocation fees, compensation for maintaining residence in another city, etc.
 - Use of Cranewood residence
 - Vacation leave, sabbatical/administrative leave, research allowance amounts
 - Retirement contributions or pension eligibility and pension plan
34. These clauses consist of information about the President’s benefits as an employee of the University, a public body, which falls within meaning of “benefits” set out in the *Act*; therefore, we find that this information should be disclosed.
35. Further, we note that the re-appointment letter dated April 23, 2010 indicates that the President’s pension structure was being reviewed and may result in changes that would be discussed and agreed upon on future advice. In order to ensure that a full disclosure of the relevant information relating to the current President’s pension entitlements occurs, we also find that this information should be disclosed.

Standard clauses

36. The employment contracts also include a number of general or standard clauses, including a confidentiality provision that the agreement may be terminated without notice or pay in lieu of for just cause, as well as general clauses about the contract itself, including governing law, dispute resolution, entire agreement, etc. These are standard contract clauses and do not contain personal information of the former or current President and thus cannot be protected under section 21. We find that this information should also be disclosed.

Publicly known or publicly available information

37. In addition, we noted that some of the information in the employment contracts is already publicly known or publicly available. For example, it is a known fact who the two individuals who held the position of President are, the dates and duration of their tenure, as well as the fact that one of them also holds a full professor position at the same time. Further, it is also known that the University compensates the President for certain expenses, including travel, as the University has made the President's travel expenses paid since 2004 available on its website; therefore, when information is already publicly known and available, it cannot be considered an unreasonable invasion of privacy to disclose. We find that this information was not properly refused and must be released.

Personal information that was properly refused

38. As for the exact salary paid to each of the Presidents, that is protected personal information and can only be disclosed with their consent; thus, the exact salary was properly protected from disclosure under paragraph 21(2)(g) in this case.
39. Similarly, there is some information in the Appendix to the 2006 contract that sets out the President's pension benefits and retirement allowance. We note that the exact amounts of the retirement allowance listed in the table, when combined with the description of the retirement allowance calculation, would also reveal the President's exact salary. As this would reveal personal information that is protected under paragraph 21(2)(g), we find that the retirement allowance calculation was properly refused so as to protect the President's exact salary.
40. We find that the remainder of the President's contracts should have been provided to the Applicant.

Precedents in other Canadian jurisdictions

41. In researching the question of the disclosure of employment contracts, we looked to other Canadian jurisdictions to see whether this kind of information was being made available elsewhere. A case directly on point ordered the disclosure in full of the President of McMaster University's renewal employment agreement (Order PO-2641, 2008 Can LII 4966 (ON IPC)), as it found that none of the information in the agreement

was protected as personal information under their access statute, for similar reasons as described above.

42. As part of our research, we also looked at other Canadian universities' websites and found that a number of them across the country have made their respective Presidents' employment contracts available in full, including:

- Memorial University of Newfoundland
- University of Ottawa
- University of Saskatchewan
- University of Regina
- University of Calgary

43. These universities have taken the step to ensure that the employment contracts of their Presidents are readily available to the public as part of their efforts to be more transparent about the administration of their affairs and how they compensate their senior administrator.

RECOMMENDATION

44. Based on all of the above, we recommend pursuant to subsection 73(1) of the *Act* that the University release to the Applicant the President's employment contracts in full, except for the exact salary amounts, and except for the information about retirement allowance contributions that would reveal the exact salary of the current President.

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

Anne E. Bertrand, Q.C.
Commissioner