Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 173-2018

Meewasin Valley Authority

October 22, 2019

Summary: The Applicant requested records from the Meewasin Valley Authority (the MVA). The MVA provided a response to the Applicant indicating that access was granted to the salary of the current Chief Executive Officer. However, it indicated that access to the amount of the severance package for another employee was denied pursuant to subsection 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review by the Office of the Information and Privacy Commissioner (IPC). Upon review, the Commissioner found that the amount of the severance package was personal information pursuant to subsection 24(1)(b) of FOIP. However, the Commissioner recommended that MVA exercise its discretion and consider subsection 29(2)(o) of FOIP.

I BACKGROUND

[1] On June 18, 2018, Meewasin Valley Authority (MVA) received the following access to information request from the Applicant:

> Amount of severance package (if any) that Lloyd Isaak received from MVA when he was let go.
>
> Salary of current CEO (Lafond)
> …

[2] By letter dated July 19, 2018, MVA provided its response to the Applicant. The letter included the salary for the current Chief Executive Officer (CEO). The letter also indicated that access to the amount of the severance package was being withheld pursuant to subsection 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On August 31, 2018, my office received a request for review from the Applicant.

[4] On September 14, 2018, my office notified MVA of my office's intent to undertake a review and requested a copy of the records involved and MVA's submission in support of subsection 29(1) of FOIP. My office also notified the Applicant by way of letter dated September 14, 2018.

II RECORDS AT ISSUE

[5] The amount of severance paid to Lloyd Isaak is contained within two documents titled, *Minutes of Settlement* and *Full and Final Release*. The *Minutes of Settlement* and *Full and Final Release* set out the terms of severance and other matters between Lloyd Isaak and MVA. The documents total four pages. The amount of the severance is mentioned in two places. MVA withheld the severance amount citing subsection 29(1) of FOIP.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[6] In Review Report LA-2010-001, my office established that MVA was a "*government institution*" pursuant to subsection 2(1)(d)(ii) of FOIP (see footnote 12). Therefore, I have jurisdiction to conduct this review.

2. Did MVA properly apply subsection 29(1) of FOIP?

[7] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to subsection 24(1) of FOIP. Part of that consideration involves assessing if the information has the following two elements:

1. An identifiable individual; and
2. Information that is personal in nature.

[8] Once identified as personal information, the government institution needs to consider subsection 29(1) of FOIP. Subsection 29(1) of FOIP is a mandatory section of FOIP that directs the head of a government institution to refuse to disclose personal information without the consent of the individual or unless one of the exceptions at subsection 29(2) or section 30 of FOIP apply. Subsection 29(1) provides:

> **29**(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[9] MVA withheld the amount of Lloyd Isaak's severance citing subsection 29(1) of FOIP. In its letter to the Applicant, it indicated that the information constituted personal information pursuant to subsection 24(1)(b) and (k) of FOIP. These provisions provide:

> **24**(1) Subject to subsections (1.1) and (2), **"personal information"** means personal information about an identifiable individual that is recorded in any form, and includes:
> …
> (b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
> …
> (k) the name of the individual where:
> (i) it appears with other personal information that relates to the individual;

[10] In considering whether the severance amount constituted personal information, I first must consider whether severance payments constitute "*discretionary benefits*" pursuant to subsection 24(2)(a) of FOIP which provides:

> **24**(2) "**Personal information**" does not include information that discloses:
>
> (a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a government institution or a member of the staff of a member of the Executive Council;

[11] I have found that the decision of the New Brunswick Court of Queen's Bench in *Hans v. STU*, 2016 NBQB 49 (CanLII) and the Supreme Court of the Northwest Territories decision in *CBC et al v. The Commissioner of the NWT*, 2006 NWTSC 33 (CanLII) applies to the resolution of whether severance amounts constitute "*discretionary benefits"*.

[12] In *Hans v. STU*, 2016, Morrison, J. reviewed provisions under New Brunswick's *Right to Information and Protection of Privacy Act*, S.N.B. 2009 c. R-10.6 that are somewhat similar to subsection 29(2)(a) of Saskatchewan's Act. Morrison J. found that severance payments did not constitute "*discretionary benefits*". The following is instructive:

> [27] Severance payments arise in contemplation of the termination of employment. They arise in one of three ways: contractual provision, negotiated settlement or court-ordered. Regardless of their origin all three types are intended to address the issue of termination of employment without cause. Severance payments are either actual (court-ordered) or estimated (contractual provision) damages for breach of contract. They are characterized and calculated as "pay in lieu of notice" but their essential character is that of damages. Their purpose is to place the terminated party in the position he or she would have been in but for the breach of contract (*Jean v. Pêcheries Roger L. Ltée* 2010 NBCA 10 (CanLII) at paras. 49-55). In David Harris, *Wrongful Dismissal* (Toronto: Thomson Reuters, 1989) it states at pages 4-5 – 4-6:
>
> > An employer's failure to provide reasonable (or any) notice of dismissal is a **breach of the contract** of employment. It will in virtually every case give rise to **damages** at the instance of the prematurely dismissed employee, absent any significant breach of the employment relationship by the employee. **The general measure of such damages is the amount required to put the employee in the position he or she would have been in had the employment contract been performed** (…)
> > **…**
> > There is a subtle but real distinction between (1) an employer's duty at common law to give proper notice of termination and (2) an employer's liability to compensate the employee in lieu of giving such notice. The employer's duty to give notice is an implied term of the employment contract. The employer's liability is not such an implied term. As stated by Lambert, J.A. in *Dunlop v. British Columbia Hydro & Power Authority* (1988), 1988 CanLII 3217 (BC CA), 32 B.C.L.R. (2d) 334, 23 C.C.B.L. 96, [1989] 2 W.W.R. 518, 1988 CarswellBC 414 (B.C.C.A.) at pp. 338-39, **payment in lieu of notice amounts to "an attempt to compensate for [the employer's] breach of the contract of**

> **employment, [rather than] an attempt to comply with an implied term of the contract of employment."**
> …
> As with any other type of contractual liability, the party in breach may avoid liability by making an appropriate pre-payment. As the Ontario Court of Appeal observed in *Taylor v. Dyer Brown*, 2005 C.L.L.C. 210-001, 2004 CanLII 39004 (ON CA), 36 C.C.E.L. (3d) 221, 192 O.A.C. 91, 73 O.R. (3d) 358, 2004 CarswellOnt 4703 (Ont.C.A.), the payment of damages for wrongful dismissal "is a means by which an employer may terminate an employee contrary to its common law duty to give reasonable notice of termination, without incurring any liability."
>
> [Emphasis in original]

[13] *Benefit* connotes some advantage or betterment. Severance payments cannot be considered as bestowing any advantage or betterment on the recipient. They are intended to place the employee in the position he or she would have been in but for the breach of contract. Unlike a bonus or employer pension contribution, there is no advantage bestowed (*Hans v. STU*, 2016 at [29]).

[14] In the event of termination of employment without cause, the employee is entitled by law to recover damages. Absent an agreement or settlement, the employee's only recourse is to commence an action for wrongful dismissal. Severance payments made either to avoid litigation or to settle actual or contemplated litigation cannot be said to be *discretionary (Hans v. STU*, 2016 at [30]).

[15] In a letter to my office dated June 20, 2019, MVA indicated that the amount of severance was a "fundamental term to a negotiated resolution of the employment contract."

[16] In Alberta Information and Privacy Commissioner Order 2001-020, former Commissioner, Robert C. Clark, found that a severance package was a discretionary benefit because the City of Calgary exercised its discretion to negotiate mutually acceptable compensation with each third party. This, the Commissioner said, created the necessary element of a degree of discretion (see paragraph [22]).

[17] In *CBC et al v. The Commissioner of the NWT*, 2006, Justice J.Z. Vertes considered the Alberta Commissioner's finding and stated:

> [41] In the present case, the mere fact that the severance agreement was the subject of negotiation does not derogate from the essential fact that the agreement was contemplated in a pre-existing employment contract and that the terms negotiated were pursuant to the terms of that pre-existing contract. This removes the severance agreement from the discretionary category. There was a contractual obligation on the employer. Their conferral of the benefit of the lump sum payment was not an unfettered decision on their part.

[18] Now that I have established that severance amounts do not constitute *discretionary benefits* pursuant to subsection 24(2)(a) of FOIP, I now turn to whether severance amounts qualify as personal information pursuant to subsection 24(1)(b) of FOIP.

[19] Subsection 24(1)(b) of FOIP provides that "*financial transactions*" in which an individual has been involved are personal information. Black's Law defines *transaction* as "the act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract. Something performed or carried out; a business agreement or exchange". Black's Law further defines *finance* as the raising or providing of funds. (*Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 1802 and 774)

[20] Based on the above, I agree with MVA and find that the severance amount paid to Lloyd Isaak constitutes a financial transaction involving Lloyd Isaak. As such, it is Lloyd Isaak's personal information pursuant to subsection 24(1)(b) of FOIP.

[21] Despite this conclusion, the discussion does not end there. FOIP provides a government institution the ability to exercise its discretion and disclose personal information. Two provisions which may be relevant in this case are subsections 29(2)(o)(i) of FOIP and 16(g)(ii) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). These provisions provide:

> **29**(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:
>
> …
>
> (o) for any purpose where, in the opinion of the head:

> …
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure;
>
> **16** For purposes of clause 29(2)(u) of the Act, personal information may be disclosed:
> …
> (g) to any person where the information pertains to:
> …
> (ii) the terms or circumstances under which a person ceased to be an employee of a government institution including the terms of any settlement or award resulting from the termination of employment.

[22] My office considered the equivalent provision of 29(2)(o) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) in Review Report 082-2017. In that Report, I established a three-part test that can be applied when determining the provision:

1. Is the information "*personal information*"?
2. Is there a public interest in the information?
3. Does the public interest outweigh any invasion of privacy?

[23] In order to determine whether there is a public interest in the information, there must be a relationship between the information and the Act's central purpose of shedding light on the operations of the government institution. In Alberta Information and Privacy Commissioner Order 2006-032, criteria were established for assessing whether there was a public interest in information that could justify granting a fee waiver. I first adopted these criteria for purposes of an investigation of a breach of privacy in Investigation Report 092-2015 to 095-2015 at paragraph [66]. I adopted these criteria for purposes of a fee waiver in Review Report 145-2014 at paragraph [12]. I adopt them now for purposes of a review for subsections 29(2)(o) of FOIP and 28(2)(o) of LA FOIP. The criteria are as follows:

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:

- Have others besides the applicant sought or expressed an interest in the records?
- Are there other indicators that the public has or would have an interest in the records?

2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:
    - Do the records relate to a personal conflict between the applicant and the government institution?
    - What is the likelihood the applicant will disseminate the contents of the records in a manner that will benefit the public?

3. If the records are about the process or functioning of the government institution, will they contribute to open, transparent and accountable government? The following may be relevant:
    - Do the records contain information that will show how the government institution reached or will reach a decision?
    - Are the records desirable for subjecting the activities of the government institution to scrutiny?
    - Will the records shed light on an activity of the government institution that have been called into question?

[24] The Applicant asserted that severance amounts should be readily available as are the salaries of public service employees. Further, the Applicant asserted that as a taxpayer he should be given this information.

[25] In British Columbia Information and Privacy Commissioner's Order No. 24-1994, former Commissioner David Flaherty highlighted the fundamental purposes of that province's access and privacy legislation. It is relevant for Saskatchewan's Act also. Former Commissioner Flaherty stated, "One of the fundamental purposes of the Act is to promote scrutiny of expenditures from the public purse and, thereby, seek to ensure accountability to the taxpayers."

[26] Based on the submissions received from MVA, it appears MVA may not have considered subsection 29(2)(o) of FOIP. I recommend MVA consider subsection 29(2)(o) of FOIP.

[27] The other relevant provision enabling a government institution to disclose personal information is subsection 16(g)(ii) of the FOIP Regulations. Subsection 16(g)(ii) is enabled by subsection 29(2)(u) of FOIP. I have not considered this provision before. However, I first considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Regulations* (LA FOIP Regulations) in Investigation Report 296-2017. In that report, I established at paragraph [17] that for subsection 10(g)(ii) of the LA FOIP Regulations to apply, two criteria must be met. I adopt and adjust these criteria for subsection 16(g)(ii) of the FOIP Regulations. The personal information must either be:

i) Terms under which a person ceased to be an employee of a government institution; or

ii) Circumstances under which a person ceased to be an employee of a government institution.

[28] *Terms* means any contractual obligation of the government institution or the employee related to a termination of employment. This includes the terms of any settlement or award resulting from the termination of employment (Investigation Report 296-2017 at [19]).

[29] *Settlement* means the action or process of settling; an official agreement intended to resolve a dispute or conflict (Pearsall, Judy, *Concise Oxford Dictionary*, 10th Ed. at p. 1312, (Oxford University Press).

[30] In its submission to my office, MVA appears to have considered subsection 16(g)(ii) of the FOIP Regulations. It indicated that in exercising its discretion, it decided to take a cautious and conservative approach to publicly releasing information related to the terms of a settlement agreement, as it may not be in the best interests of MVA to release such information. For instance, it stated, it may raise expectations with regards to an automatic release of this type of information in the future without the MVA being able to clarify or

make a distinction between the two different situations. Further, it stated, releasing the information could also have the effect of making parties uncomfortable with conducting negotiations of a sensitive nature with MVA in the future. Finally, it stated that by choosing not to make such disclosures automatic, it facilitates greater flexibility in negotiating future severance agreements.

[31] A discretion conferred by statute must be exercised consistently with the purposes underlying its grant. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at [46]. Some factors that should be taken into account when exercising discretion include:

- the general purposes of the Act (i.e. government institutions should make information available to the public, and individuals should have access to personal information about themselves);
- the wording of the discretionary exemption and the interests which the exemption attempts to protect or balance;
- whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
- the historical practice of the government institution with respect to the release of similar types of records;
- the nature of the record and the extent to which the record is significant or sensitive to the government institution;
- whether the disclosure of the information will increase public confidence in the operation of the government institution;
- the age of the record;
- whether there is a definite and compelling need to release the record; and

- whether the Commissioner's recommendations have ruled that similar types of records or information should be released.[1]

[32] The Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, (2010) SCC 23, confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exemption and to return the matter for reconsideration to the head of the government institution. The Court also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith;
- the decision was made for an improper purpose;
- the decision took into account irrelevant considerations; or
- the decision failed to take into account relevant considerations.[2]

[33] During a review of a discretionary exemption, I may recommend that the head of the government institution reconsider its exercise of discretion if I feel that one of these factors played a part in the original decision to withhold information. However, I will not substitute my discretion for that of the head.

[34] In this case, I do not have concerns with any of the four factors playing a role in the exercise of discretion exercised by MVA for subsection 16(g)(ii) of the FOIP Regulations.

IV FINDINGS

[35] I find that the severance amount constitutes the personal information of Lloyd Isaak pursuant to subsection 24(1)(b) of FOIP.

[1] SK OIPC Review Report 305-2016 at [35], Office of the Privacy Commissioner of Canada Resource, *Access to Information and Privacy, Process and Compliance Manual* at pp. 62-63.
[2] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at [71], referenced in SK OIPC Review Report 305-2016 at [37]. The Offices of the Information and Privacy Commissioners of British Columbia, Alberta and Ontario have also relied on these four factors.

[36] I find that MVA did not consider subsection 29(2)(o) of FOIP.

[37] I find that MVA appropriately exercised its discretion in terms of subsection 16(g)(ii) of the FOIP Regulations.

V RECOMMENDATION

[38] I recommend MVA consider subsection 29(2)(o) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 22nd day of October 2019.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy Commissioner