Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2641

Appeal PA07-97

McMaster University

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NATURE OF THE APPEAL:

McMaster University (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "…access to the current contract and terms of employment for [a named individual] as President of McMaster, including salary, benefits, pension and a list of all other entitlements (for example a list of allowable expenses such as housing, terms of travel whether first class, business class, memberships in clubs and associations and other perquisites and benefits)."

The University identified the Renewal Employment Agreement (REA) and the Supplementary Retirement Plan (SRP) of the President as responsive records. The University notified the President of the request and its intention to release the SRP in full and the REA, in part. It then issued a decision to the requester granting access in full to the SRP and partial access to the REA. Access to the severed portions of the REA was denied pursuant to sections 21(1) (personal privacy) and 22 (information available to the public) of the *Act.*

The requester (now the appellant) appealed the University's decision to deny access to the severed portions of the REA.

During mediation, the appellant raised section 23 (public interest override). As a result, I made section 23 an issue in the appeal. No further mediation was possible and this appeal was moved to the inquiry stage of the appeal process.

I began my inquiry by inviting the University and the President, as an affected party, to submit representations on the issues in the appeal. I received representations from both of these parties. In their representations, the University and the President stated that upon further review of the issues, they decided to release additional portions of the REA to the appellant.

Following my review of the representations, I decided that it was not necessary to seek representations from the appellant.

RECORDS:

The portions of the REA that remain at issue following mediation are:

Article 1: 1.3 (except for the preamble), and 1.7
Article 2: 2.4
Article 3: 3.1, 3.3, 3.7, 3.8, 3.9, 3.10, 3.11 and 3.12
Article 4: 4.1
Article 5: 5.2
Article 6: 6.1 (paragraphs (a) and (b) only)

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether section 21 of the *Act* applies, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in

section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> …
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Both the University and the President submit that the information at issue in this appeal is personal information as that term is defined in section 2(1) of the *Act.*

I have reviewed the REA and find that the severed portions of the REA that are at issue in this appeal contain the personal information of the President. In particular, the information contained in the withheld portions includes information about the compensation package for the President (paragraph (b)) and his name along with other information the disclosure of which would reveal other personal information about him including information about his rights, benefits and obligations under the agreement (paragraph (h)).

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. Therefore, if the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21(1).

Section 21(1)(f)

I will begin my analysis with a consideration of section 21(1)(f) and section 21(4) of the *Act*. Section 21(1)(f) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

> if the disclosure does not constitute an unjustified invasion of personal privacy.

The effect of section 21(1)(f) is that personal information is exempt from disclosure except where the disclosure "does not constitute an unjustified invasion of personal privacy." The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21. Therefore, if section 21(4) applies it is not necessary to refer to the provisions in sections 21(2) or (3) [See PO-1763 and *John Doe v. Ontario (Information and Privacy Commissioner* (1993), 13 O.R. (3d) 767 (Div. Ct.)].

The University submits that the disclosure of the personal information in the REA would be an unjustified invasion of privacy after applying the factors set out in section 21(2) and the presumptions found in section 21(3).

The President, as the affected party, takes the position that some of the personal information at issue falls within the presumption against disclosure created by sections 21(3)(d) and (f) of the *Act*, while the remaining severed portions are exempt from disclosure because of the factors set out in sections 21(2)(f) and (h) of the *Act.*

In determining whether disclosure of the severed information would constitute an unjustified invasion of personal privacy, I will first consider the application of section 21(4) of the *Act* to the severed portions of the REA.

Section 21(4)

As noted, section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. Sections 21(4)(a) and (b) are relevant to this appeal. They state:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;
>
> (b) discloses financial or other details of a contract for personal services between an individual and an institution;

Representations

The University provided representations on the application of section 21(4). With respect to the application of section 21(4)(a) to the severed portions of the REA, the University agrees that section 21(4)(a) applies but argues that Articles 3.1, 3.3 and 5.2 include information relating to the specific salary of the President and do not reveal a "salary range." Therefore, they argue that section 21(4)(a), which only refers to "salary range", does not apply to these portions of the REA.

The University states:

> As the Contract relates specifically to [the President's] specific salary figures and only one person is a member of the class of employee described therein, no salary range exists or can be compiled. Accordingly, it is submitted that this part of the exception to the exemption is inapplicable to the facts at hand and, subject to the applicability of section 22 of the Act (discussed below) only the classification, benefits and employment responsibilities are subject to release pursuant to Section 21(4). In particular, McMaster submits that section 21(4) does not apply to the income figures provided in Articles 3.1, 3.3 and 5.2. Disclosure of these provisions would therefore, constitute an unjustified invasion of personal privacy.

With respect to the other withheld portions of the REA, the University argues that in considering whether these portions fall within section 21(4)(a), I should apply a narrower interpretation of "benefits" than has been applied in previous orders of this office. The essence of its argument appears to be that the position of the President of a university is unique and not analogous to the position of "an officer or employee of an institution or a member of the staff of a minister" and that the application of section 21(4)(a) to this unique position requires re-consideration of the term "benefits" as it is used in section 21(4)(a). In particular, the University states:

> With respect to the release of information relating to benefits, the Commissioner has addressed the definition of the term "benefits" with respect to a college president in the Algonquin Decision and, in Order M-23 (Town of Gravenhurst, hereinafter referred to as the "Gravenhurst Decision"), with respect to the Chief Administrative Officer and Clerk of the Town of Gravenhurst.

After quoting a passage from Order M-23, the University proceeds to argue that the order does not apply to the circumstances of this appeal. The University states:

> However, the case at hand is distinguishable from the Algonquin and Gravenhurst Decisions based on one significant factor, which warrants re-consideration of the term "benefits" as it applies to universities. The Supreme Court of Canada in *McKinney v University of Guelph*, [1990] 3 S.C.R. 229 ("*McKinney*") and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (*Douglas*, released concurrently with *McKinney*), distinguished between Universities and Colleges by recognizing that Universities function as

> autonomous bodies and the Government has no direct power to control them. Whereas Colleges, Ministries, Agencies, Boards and Commissions are public institutions, Universities are private institutions reliant in part on public funds from various levels of government and not exclusively the Province of Ontario. The Supreme Court held that although the legislature may determine much of the environment in which universities operate, the reality is that universities function as autonomous bodies within that environment.
>
> Accordingly it is submitted that an expansive interpretation of the term "benefits" is inappropriate in this case and a narrower interpretation of the term is necessary based on the unique facts at hand. The term "benefits" should in fact be interpreted in accordance with the [Public Sector Salary Disclosure Act (the *PSSDA*)], which defines "benefits" as:
>
> > the amount of benefits reported to Revenue Canada, Taxation, under the Income Tax Act (Canada) by the employer for the employee in the year.

In conclusion, the University submits:

> Given the private and autonomous nature of universities, it is submitted that, subject to the application of Section 22, only the amounts of taxable benefits, if indicated, should be disclosed pursuant to Section 21(4), but descriptions of the nature of those benefits by virtue of the directed recipient should remain undisclosed.

The President takes the position that section 21(4)(a) does not apply to a university President. He states:

> It is submitted that subsection 21(4)(a) cannot apply to a university President. The President of a university does not have a specified job "classification" as that term is used in the employment or labour relations context. The President's position is established by statute. Nor is there a "salary range" or stipulated "benefits" associated with the job. Salary and benefits are negotiated. Similarly, job responsibilities of a President of a university are outlined by a Committee of the Board of a university. There is no job description as there typically is for staff of a ministry, for example. The position of President of the University is very different from the types of positions noted in subsection 21(4)(a) of [the *Act*].
>
> R. Sullivan, in "Statutory Interpretation", described the "Associated Words Rule" of interpretation as follows: "[w]hen two or more words or phrases perform a parallel function within a provision and are linked by 'and' or 'or' the meaning of each is presumed to be influenced by the others. The interpreter looks for a pattern or a common theme in the words or phrases, which may be relied on to resolve ambiguity or to fix the scope of the provision."

> Sullivan notes however that this rule, to be effective must be supplemented by a textual and purposive analysis. Accordingly, the context of subsection 21(4) and its exceptional nature within the privacy scheme of [the *Act*] must be considered.
>
> As indicated, subsection 21(4)(a) applies to employees or officers of an institution or a member of the staff of a minister and in respect of these individuals it applies to "the classification, salary range and benefits, or employment responsibilities".
>
> It is submitted that the meaning of the words denoting the types of personal information listed is informed by their commonality. Accordingly, the word "benefits" is informed by the types of other information listed.
>
> It is submitted that the types of personal information listed are not ones that are negotiated on an individual basis, rather, classification, salary range and employment responsibilities are determined and specified typically in the employment context by management.
>
> In deducing the legislative intent and meaning of the word "benefits" it is significant that it is used within the phrase "salary range and benefits". The disclosure of precise salary is not contemplated, rather only a "range". Similarly, it is submitted that "benefits" are intended to refer to standard benefits applicable to the particular job classification and not those negotiated on an individual basis.
>
> The [named individual], as President of the University, is considered the CEO by the University's constating statute. The position of CEO is not a "classification" as that word has been used in the employment and labour relations context. There is no "salary range" for the position of President, salary is negotiated. As well, there are no standard benefits for the position of University President, benefits are negotiated. Moreover, there is no job description per se for the position of University President; the employment responsibilities are generally indicated by statute and specifically provided by the Board.

In further support of his position that the provisions of section 21(4) should be interpreted narrowly, the President states:

> The types of personal information listed in subsection 21(4)(a) of [the *Act*] are referable to those instances where classifications, salary ranges, benefits and employment responsibilities have been established for officers, employees or ministers' staff of institutions. When subsection 21(4)(a) is considered in light of the types of personal information listed and the positions to which the information is referable, it is submitted that the intent of the provision is to apply it to the types of officers or employees for whom classifications, salary ranges, benefits and articulated employment responsibilities exist.

For example, in a government ministry, positions are classified for most staff and salary ranges and benefits as well as job descriptions are stipulated in relation to the positions. Disclosure of this type of information is not intrusive from a privacy perspective since the information applies to the class of employees. To interpret subsection 21(4)(a) of [the *Act*] to include this narrow type of personal information comports with the legislative intent. To the extent that subsection 21(4)(a) is interpreted broadly, it eviscerates the presumed invasion in subsection 21(3). Put another way, the broader the interpretation that is given to subsection 21(4)(a), the weaker the protection that is offered by subsection 21(3).

Previous orders of the IPC have interpreted subsection 21(4)(a) to include incentives and assistance given as inducements to enter into a contract of employment (Order PO-1885) and all entitlements provided as part of employment or upon conclusion of employment (Order P-1212). The IPC has also held the negotiated entitlements as part of a retirement or termination package are not within subsection 21(4)(a) except where the information reflects benefits to which the individual was entitled as a result of being employed (Order MO-2174). As noted in MO-2174, "section [21](4)(a) applies to benefits negotiated as part of a retirement or termination agreement, so long as they are benefits the individual received while employed and are continuing post-employment." With respect, the distinctions made and the broad interpretation given to subsection 21(4)(a) is not reflected in the language of the exception nor in the intent of the Legislature regarding [the *Act's*] privacy provisions. Moreover, contexts in which these decisions were made did not include that of a university President.

…

As noted, previous orders of the IPC have given "benefits" an expansive meaning to include even those that were negotiated in employment contracts. In PO-2536, the IPC referred with approval to an earlier order, M-23, in which the explanation for the expanded meaning of the word "benefit" was stated as follows:

> Since the 'benefits' that are available to officers or employees of an institution are paid from the 'public purse', either directly or indirectly, I believe that it is consistent with the intent of section [21](4)(a) and the purposes of the Act that 'benefits' be given a fairly expansive interpretation.

Section 21 engages only one purpose of [the *Act*], that is, the protection of privacy. An expanded definition of benefits neither comports with the privacy protection purpose of the Act nor with the types of information listed in subsection 21(4)(a).

> Further, the university is not wholly dependent on public funds, rather a significant amount of its funding comes from other sources. Accordingly, the origin of the funding for the "benefits" as a factor in interpreting subsection 21(4)(a) is irrelevant for the position of President of a university. It is submitted it is inappropriate to interpret "benefits" broadly so as to encourage access to personal information contained in the record at issue.

Findings and Analysis

Employee or Officer

The threshold question raised by the application of section 21(4)(a) is whether or not the President is an "officer or employee of an institution or a member of the staff of a minister". I have carefully reviewed the REA and the representations of the parties. Contrary to the position taken by the President, I find that the agreement between the President and the University establishes an employment relationship and that the President is an "employee" of the University within the meaning of section 21(4)(a).

I have considered the President's argument that section 21(4)(a) does not apply to the position of a university President. The President argues that section 21(4)(a) only applies to the types of officers or employees for whom classifications, salary ranges, benefits, and articulated employment responsibilities exist. The essence of the argument is that the section does not apply because he does not have a job "classification", "salary range", or "stipulated benefits". He argues that his salary and benefits are negotiated, his job responsibilities are outlined by a Committee of the Board of the University and he does not have a job description that is typical for staff of a ministry. In summary, the President states that his position is very different from the types of positions intended to be excepted pursuant to section 21(4)(a).

With respect, the fact that the President's contract and position is a result of a negotiation process does not change the characterization of his position. Nor does the fact that his position does not have a "job classification" or "salary range" affect the characterization of his position. To find otherwise would mean that all senior employees of institutions under the *Act* whose positions, responsibilities, and salary and benefits are unique and subject to negotiation would not be considered employees and potentially not be covered by the *Act.*

With respect to the argument that, in effect, section 21(4)(a) should only apply to groups of employees rather than individually negotiated employment items, I note that the section expressly refers to "an *individual* who is or was an officer or employee." I therefore reject this argument.

Similar negotiated contracts of employment for senior executives of the Ontario Energy Board were considered by me in Order PO-2536 where I found that the senior staff members were employees of the Board. This approach followed that taken by the former Assistant Commissioner Tom Mitchinson in Order P-380 where he considered the question of whether the term "benefits" applied to benefits negotiated by senior employees.

He stated:

> In my view, in defining what constitutes a "benefit" under section 21(4)(a), the distinction between standard benefits and negotiated benefits is artificial. In many positions in the public service, particularly those at a senior level, it is reasonable to expect that there will be a certain element of negotiation involved in establishing salary and benefit packages.

In arriving at my conclusions, I have considered the definition of "employee" found in Black's Law Dictionary (6th. ed.). "Employee" is defined as:

> A person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed . . . One who works for an employer; a person working for salary or wages. Generally when person for whom the services are performed has right to control and direct the individual who performs the services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an "employee".

Order P-244 set out relevant factors that may be considered in deciding whether or not a person is an employee or an independent contractor. These include:

- the level of control and supervision exercised by the person requiring the work to be done, with respect to how the work is to be performed, in what setting and under what conditions, the hours of work, as well as the results of the work; and

- whether the work was part of the essential ongoing operation of the employer.

Section 9 of the *McMaster University Act* sets out the powers of the Board and establishes a level of control and supervision of the President that is characteristic of that of an "employee." The Board's powers over the position of the President are set out in section 9(a) which states:

> Except in such matters as are assigned by this Act to the Senate, the government, conduct, management and control of the University and of its property, revenues, business and affairs shall be vested in the Board and the Board shall have all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University including, without limiting the generality of the foregoing, power to,
>
> (a) subject to subsection 3 of 16, appoint, suspend or remove the President, and whenever there is a vacancy in that

> office appoint an acting President to hold office during the pleasure of the Board or until a President is appointed;

I also note that the agreement itself is referred to as a *Renewal Employment Agreement* and that it includes all of the features of a typical employment contract including termination provisions, job responsibilities, reimbursement for expenses, performance review rights and obligations, salary, bonuses, statutory deductions and remittances, and benefits including health, pension, vacation and other leave benefits. Article 5.2 of the agreement references the President's "prior employment agreement". I also note that Paragraph 3.01 of the President's Supplementary Retirement Plan, which was disclosed in full to the appellant at the request stage, states that the President shall remain a Member of the plan "while he remains employed by the University." In my view, this evidence is persuasive and supports a finding that the parties intended that the President's position be that of an "employee."

Applying the definition referred to and the criteria set out above, I find that the President is an employee as that term is used in section 21(4)(a) and that section 21(4)(a) must be considered with regard to the withheld portions of the record at issue.

Salary Range, Benefits or Employment Responsibilities

The second issue raised by the application of section 21(4)(a) is whether or not the disclosure of the severed portions of the REA would disclose the "classification, salary range and benefits, or employment responsibilities" of the President.

Salary Range

The University submits that the provisions of Articles 3.1, 3.3 and 5.2 relate to the President's "income" or "specific salary" and therefore do not fall within the exception to the exemption in section 21(4)(a).

Section 21(4)(a) does not use the term "income". It creates an exception for information relating to the "salary range" and information relating to "benefits", among other things. Having read the REA and in particular the Articles noted above, I find that the information in Article 3.1 relates to the salary of the President. As it does not refer to a salary range, section 21(4)(a) does not apply to that provision [see Order M-1026 and MO-1749]. As a result, I must consider the possible application of other exceptions to section 21(1) and the presumptions in section 21(3) with respect to the information in Article 3.1.

However, I do not agree that the information contained in Articles 3.3 and 5.2 relates to the President's "salary". In my opinion, the information in these articles falls within the term "benefits". Article 3.3 speaks of a one-time bonus payment to the President. Neither the University nor the President in their representations have provided any information linking this payment to the salary of the President. Similarly, Article 5.2 speaks of a limited series of payments to be made to the President. The context of those payments supports the conclusion

that Article 5.2 relates to a benefit. Again, there is nothing in the parties' representations, or in the REA, to indicate any link to the President's salary.

I now turn to consider the definition of "benefits" and its application to the other severed portions of the REA, including Articles 3.3 and 5.2.

Benefits

Contrary to what has been suggested by the University and the President, I find that the information contained in the remaining severed portions of the REA discloses "benefits" as they has been defined in previous orders of this office. In arriving at this conclusion, I reject the position taken by the University and the President that the appropriate definition of "benefits" applicable to the university sector should be narrower than that which was applied in previous orders of this office.

As noted by the University and the President in their representations, previous orders of this office have given a broad meaning to the term "benefits" in section 21(4)(a).

The following definition of "benefits" was articulated by former Commissioner Wright in Order M-23:

> Since the "benefits" that are available to officers or employees of an institution are paid from the "public purse", either directly or indirectly, 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". Therefore, clause 10, as well as clauses 7 and 11-16 of the record would fall within the meaning of "benefits". In my view, the disclosure of these clauses would not constitute an unjustified invasion of personal privacy.

Former Assistant Commissioner Mitchinson considered and applied Order M-23 in Order P-1212 which involved a request for access to the "benefits" of the President of Algonquin College pursuant to his contract of employment. In that order, the former Assistant Commissioner stated:

> It is clear from a reading of Order M-23 that Commissioner Wright did not intend the list of enumerated benefits in that order to be exhaustive or that the meaning of "benefits" should be restricted to a dollar value only. In my view, the list of enumerated benefits in Order M-23 were merely provided as examples, and I

> agree that the term "benefits" should be given an expansive definition, in order to be consistent with the intent of both section 21 and the *Act* as a whole.

After referring to Order P-380, the former Assistant Commissioner stated:

> Therefore, in my view, all of the entitlements provided to the former President as part of his employment or upon conclusion of his employment as an officer and/or employee of the College are properly characterized as "benefits" for the purpose of section 21(4)(a).
>
> I find that the benefits provided to the former President under the terms of his employment agreement, fall within the scope of section 21(4)(a) of the *Act* and, therefore, release of the parts of the record which would disclose this information would not constitute an unjustified invasion of his personal privacy. This information is found in clauses 6(a) and (b), 7, 8(a) and (b), 9(a) and (b), 12(a), (b) and (c) of the agreement and Schedule A in its entirety.

Adjudicator Steven Faughnan reviewed the definition of benefits applied in previous orders of this office in Order PO-2519 where he stated:

> The Commissioner's office has interpreted "benefits" to include entitlements, in addition to base salary, that an employee receives as a result of being employed by the institution (Order M-23). Order M-23 lists the following as examples of "benefits":
>
> - insurance-related benefits
> - sick leave, vacation
> - leaves of absence
> - termination allowance
> - death and pension benefits
> - right to reimbursement for moving expenses
>
> In subsequent orders, adjudicators have found that "benefits" can include:
>
> - incentives and assistance given as inducements to enter into a contract of employment [Order PO-1885]
> - all entitlements provided as part of employment or upon conclusion of employment [Order P-1212]
>
> These principles and this reasoning have been applied in previous orders issued by this office including MO-1749 and MO-1796.

The President argues that this approach is inconsistent with the language of the section and the intent of the Legislature. In the alternative, he argues that the context in which previous

decisions were made did not include that of a university President. He argues that it would be inappropriate to apply those decisions to what he argues is a different context.

The University submits that the definition of the term "benefits" should be reconsidered as it applies to Universities. They refer to a decision of the Supreme Court of Canada in *McKinney v. University of Guelph*, [1990] 3 SCR 229 where the court distinguished between universities and colleges by recognizing that universities function as autonomous bodies and the government has no direct power over them. They argue that universities are private institutions that only partially rely on public funds and that these public funds come from various levels of government. They argue that the term "benefits" should be interpreted in accordance with the narrower definition found in the *PSSDA.*

I have carefully considered the President's arguments regarding the interpretation of section 21(4) and the intent of the *Act.* I reject the argument that the position taken by this office in previous orders was contrary to the language and intent of the *Act.* I adopt the reasoning consistently set out in the series of orders quoted above. In my opinion, that approach is consistent with the language of section 21(4) and the intent of the Legislature.

I also reject the arguments of both the University and the President that suggest that a narrower interpretation of the term "benefits" is appropriate in the circumstances of this appeal. In particular, I reject the position of the President regarding the characterization of benefits that may not be standard benefits and that have been negotiated as part of his compensation package for the same reasons that argument was not accepted in Order P-1212 referred to above.

Both the University and the President argue that the fact that the University is not entirely or solely funded by public funds is a factor that I should take into account in determining the appropriate scope and interpretation of section 21(4)(a) of the *Act*. I do not agree with this position. The University was made an institution under the *Act* by government regulation. At the same time, amendments were made to the *Act* to accommodate the new status of universities by the enactment of Bill 197, *The Budget Measures Act*. These changes were designed to accommodate the unique status of universities. The amendments made included an amendment to the definition of "educational institution" in section 2(1) of the *Act* to include universities; an amendment to section 18 of the *Act* to give universities discretion to refuse to disclose "information relating to specific tests or testing procedures"; an amendment relating to the fundraising activities of universities; and, an amendment to section 65 relating to research activities. No amendments were made by the Legislature to the provisions of the *Act* that relate to personal privacy in connection with the addition of universities as institutions.

During third reading debates on the Bill 197, Mr. Wayne Arthurs, MPP, in speaking for the government in support of the bill, made the following comment regarding the amendments to accommodate universities:

> This bill proposes to make universities subject to the provisions of the Freedom of Information and Protection of Privacy Act, and *ensure that Ontario's publicly funded post-secondary institutions are transparent and accountable to the people*

> *of Ontario.* So as not to jeopardize the work being done at these institutions, the freedom of information provisions would take into account and respect academic freedom and competitiveness. Clearly, we understand the importance of the university post-secondary sector when it comes to doing research and innovative study programs. Thus, we wouldn't want to jeopardize that academic freedom, or the competitive environment that is created accordingly. (emphasis added)

In my view, the intention of the Legislature in making universities subject to the *Act* was to ensure that Ontario's universities are subject to the same degree of transparency and accountability as other government institutions, with the exceptions noted above. The argument that the universities warrant a differential treatment because the source of their funding is not wholly derived from public funds is not consistent with the legislative intent described above, namely, that the same standards of transparency and accountability found in the *Act* should be applied to these institutions. Had the Legislature intended to adopt a different standard of openness for universities in terms of accountability for financial transactions or expenditures, amendments to the *Act* would have been made to reflect that.

I also reject the position taken by the President that a broader interpretation of "benefits" in section 21(4)(a) "eviscerates the presumed invasion in subsection 21(3)." Section 21 sets out a balance between the privacy rights of individuals and the need for transparency and accountability when dealing with the monetary compensation received by public servants. Originally, the Legislature determined that disclosure of the "salary range" of a public servant was sufficient to meet the needs of public accountability. However, as noted by the University and the President, the Legislature subsequently enacted the *PSSDA* which required the publication of the exact salary of public servants over an identified amount on an annual basis. In my view, the Legislature determined that the need for transparency and accountability for these public servants required that their privacy interests receive less protection. The interpretation that this office has given to section 21(4)(a) is consistent with this approach.

Finally, I do not accept the argument of the University that the decisions of the Supreme Court of Canada in *McKinney v. University of Guelph*, [1990] 3 SCR 229 and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 stand for the proposition that universities require different treatment under the *Act* from other institutions covered by the *Act.* Although those decisions differentiated between the position of colleges and universities on the basis that universities are more autonomous than colleges who are wholly funded by the government, the cases are distinguishable. The issue before the court in *McKinney* and *Douglas/Kwantlen Faculty Assn.* related to the application of the *Canadian Charter of Rights and Freedoms* (the *Charter)* to universities and in particular the interpretation of section 32(1) of the *Charter* which states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province." By contrast, in this appeal, there is no dispute regarding the *Act's* application to universities. As discussed above, the University was made subject to the *Act* by virtue of a government regulation and concomitant amendments to the *Act* made by Bill 197. The Legislature has the ability to create special provisions for specific institutions, as noted above. However, to the extent that such provisions do not exist, institutions under the *Act* are all subject to the same rules and provisions. The

position that, in the absence of specific legislative language, a particular sector covered by the *Act* should receive differential treatment is untenable. The province's access to information regime could potentially be rendered inoperable as various sectors expended their efforts and resources on demonstrating that they are worthy of special treatment.

The President argues that section 7 of the *Charter* mandates that the *Act*'s provisions should be interpreted in such a fashion so as to conform to the *Charter*. I agree that in some situations, the *Charter* may require that a statute be interpreted "consistently with *Charter* values". The Supreme Court of Canada discussed this principle in *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43 (at paras. 62-64):

> Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not" […], it must be stressed that, to the extent this Court has recognized a "Charter values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.
>
> This Court has striven to make this point clear on many occasions [citations omitted].
>
> These cases recognize that a blanket presumption of Charter consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the "Charter values" rule was expressed in Symes v. Canada, [1993] 4 S.C.R. 695, at p. 752:
>
> > [T]o consult the Charter in the absence of such ambiguity is to deprive the Charter of a more powerful purpose, namely, the determination of a statute's constitutional validity. If statutory meanings must be made congruent with the Charter even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the Charter. …

I am not persuaded that section 21(4)(a) is ambiguous in the sense discussed in *Bell ExpressVu*. Nor have the parties provided me with any representations that support a finding that section 21(4)(a) is ambiguous in the sense expressed in that decision. Accordingly, I am not in a position to consider "Charter values". Moreover, in my opinion, the approach taken to the application of this section in previous orders, and adopted here, is reasonable and is consistent with the legislative intent.

I now turn to a paragraph by paragraph analysis of all of the severed portions of the REA, with the exception of Article 3.1, which I have already found does not fall within section 21(4)(a).

Articles 1.3 (a) through to (g), 3.3, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 4.1, 5.2, 6.1(a), 6.1(b)

These portions of the agreement include information relating to the President's termination allowance, bonus payments, benefits due upon retirement, benefits relating to estate planning, legal advice, leased vehicles, membership dues at social and sporting clubs, entitlement to reimbursement for health care costs, research allowances, right to reimbursement for reasonable and identifiable expenses, payments made in lieu of accumulated leaves of absences, and the right to renegotiate identified terms of the contract relating to benefits. Some of the information in these articles explains the circumstances surrounding the payment of the benefits and other particulars of the benefit payments. I reject the argument of the President that any of this information relates to "employment or employment history" (section 21(3)(d)). In any event, all of this information relates to the "benefits" that the President is entitled to under the REA. Accordingly, I find that section 21(4)(a) applies to all of the information in these provisions.

Article 1.7

The information in this paragraph relates to the President's benefits upon retirement and to his responsibilities regarding the timing of his retirement. The President has taken the position that this information is not a benefit, but rather relates to his "employment or employment history" and as such falls within the presumption in section 21(3)(d). With respect, I disagree. I find that some of this information is a "benefit" and the other portions relate to the President's "employment responsibilities" as described in section 21(4)(a) of the *Act*.

Article 2.4

This paragraph includes information relating to the responsibilities of the President for his performance appraisal and therefore falls within section 21(4)(a) of the *Act* as part of his employment responsibilities. I do not accept the President's position that this paragraph relates to his "employment or employment history" and is therefore exempt from disclosure under section 21(3)(d) of the *Act.*

Section 21(1)(d)

The only information remaining at issue is the salary information set out in Article 3.1 of the REA to which section 21(4)(a) did not apply. I now turn to consider the possible application of section 21(1)(d) to this article. Section 21(1)(d) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

> under an Act of Ontario or Canada that expressly authorizes the disclosure;

In order for section 21(1)(d) to apply, there must either be specific authorization in the statute for the disclosure of the specific type of personal information at issue, or there must be a general reference to the possibility of such disclosure in the statute together with a specific reference to the type of personal information to be disclosed in regulation (Compliance Investigation Report 190-29P, Order M-292, MO-2030).

Both the University and the President acknowledge that the *PSSDA* applies to the "salary" and "benefit" amounts received by the President. The University also submits that the amounts in Articles 3.8, 3.10, 3.11. 3.12 and 4.1 of the REA are also subject to disclosure under the *PSSDA*. However, it is not necessary for me to comment on that as I have already found that these provisions are excepted from the exemption pursuant to section 21(4)(a). Neither party submitted any representations on the application of section 21(1)(d).

Findings and Analysis

For section 21(1)(d) to apply there must be specific authorization in the statute for disclosure of the information at issue. Section 3 of the *PSSDA* states, in part:

> (1) Not later than March 31 of each year beginning with the year 1996, every employer shall make available for inspection by the public without charge a written record of the amount of salary and benefits paid in the previous year by the employer to or in respect of an employee to whom the employer paid at least $100,000 as salary.
>
> (2) The record shall indicate the year to which the information on it relates, shall list employees alphabetically by surname, and shall show for each employee,
>
> (a) the employee's name as shown on the employer's payroll records;
>
> (b) the office or position last held by the employee with the employer in the year;
>
> (c) the amount of salary paid by the employer to the employee in the year;
>
> (d) the amount of benefits reported to Revenue Canada, Taxation, under the Income Tax Act (Canada) by the employer for the employee in the year.
>
> …

> (4) An employer required by this section to make a record or statement available to the public by March 31 in a given year shall allow the public to inspect it without charge at a suitable location on the employer's premises at any time during the employer's normal working hours throughout the period beginning on March 31 and ending on December 31 of the same year.

These provisions raise the question of whether, in the context of a request for the employment contract under the *Act*, disclosure of the salary is "expressly authorized" by the *PSSDA*. Two previous decisions of the Divisional Court are of assistance in making this determination.

In *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773, [2002] O.J. No. 1776 (Div. Ct.), the Court quashed a decision by this office that denied access to electronic records of municipal election donations prepared by the municipal clerk. Records prepared by the clerk "under" the *Municipal Elections Act* (*MEA*) are deemed to be public documents by section 88(5) of that statute. Former Assistant Commissioner Tom Mitchinson had found that, since the *MEA* did not require the electronic version to be prepared, it was not done "under" that statute, with the result that section 88(5) did not apply and, accordingly, neither did section 14(1)(d) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*), which is the equivalent of section 21(1)(d) of the *Act*.

The Court rejected this analysis, finding that whether or not the *MEA* required the electronic database to be prepared, it was done "under" that statute. The Court went on to find that the equivalent of section 21(1)(d) therefore applied, resulting in disclosure of the entire database. The Court made this finding notwithstanding that section 88(5) of the *MEA* only provides for in-person inspection by members of the public during normal business hours. Like section 3 of the *PSSDA*, section 88(5) of the *MEA* does not expressly contemplate disclosure in the context of an access request; rather, both of these sections provide a broad indication that the kinds of information they describe are intended to be available to the public. In section 88(5) of the *MEA*, public availability of the records by the municipal clerk during normal business hours was found sufficient to justify a conclusion that disclosure of the database in the quite different context of an access request was "expressly authorized" by the *MEA*.

In my view, section 3 of the *PSSDA* is analogous to section 88(5) of the *MEA*. Both sections provide that the information is available to the public, and the fact that the mechanism of disclosure in section 3 of the *PSSDA* is somewhat different than an access request should not prevent the application of section 21(1)(d) any more than it did in *Gombu*.

The second case considering section 21(1)(d) was *Municipal Property Assessment Corp. v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 71 O.R. (3d) 303, [2004] O.J. No. 2118 (Div. Ct.). The record at issue in that case was the entire assessment roll database for Ontario. Former Assistant Commissioner Mitchinson had found that section 39 of the *Assessment Act*, which requires that the Municipal Property Assessment Corporation (MPAC)

provide each municipal clerk with the assessment roll for that municipality, and that the clerk make this publicly available during business hours, provided a sufficient basis for applying section 14(1)(d) of the municipal *Act*. On that basis, he found the information was not exempt and ordered it disclosed. Again, this order was quashed by the Divisional Court, which distinguished *Gombu* because "[t]he Assessment Act neither obligates nor authorizes MPAC to do anything besides making the municipal rolls available to the municipal clerk." In effect, because the *Assessment Act* did not direct MPAC itself to make the information public, section 14(1)(d) of the municipal *Act* did not apply.

Applying this to the facts of the present case, I observe that the *PSSDA* authorizes public availability of salary and benefit information by the employer, and in this case, the employer that is directed to make disclosure under the *PSSDA* is also the institution. This is analogous to the situation under the *MEA* (as addressed in *Gombu*). Under section 3 of the *PSSDA*, I find that the University itself *is* both "obligated and authorized" to make the information public under the *PSSDA*. As well, I find that this situation does not resemble the facts in *Municipal Property Assessment Corp.*, where public disclosure of the requested information by MPAC itself was not authorized under the *Assessment Act*. I therefore adopt the approach in *Gombu* and I conclude that the *Municipal Property Assessment Corp.* case is distinguishable.

Accordingly, I find that section 3(1) of the *PSSDA* "expressly authorizes the disclosure" of the "salary" and "benefit" amounts of the President of the University. Section 3(1) of the *PSSDA* indicates that the obligation to disclose the "salary" and "benefit" information lies with the employer. It prescribes with specificity the manner in which the information should be disclosed, and states that disclosure should be made to members of the public. Salary is defined in section 2 of the *PSSDA*, in part, as follows:

> "salary" means the total of each amount received by an employee that is,
>
> (a) an amount required by section 5 of the Income Tax Act (Canada) to be included in the employee's income from an office or employment,
>
> …

In these circumstances, I find that the exception to the personal privacy exemption created by section 21(1)(d) applies to the President's "salary" in Article 3.1 of the REA. As I have already found that information that relates to the President's benefits should be disclosed pursuant to section 21(4) of the *Act*, it is not necessary for me to consider the application of section 21(1)(d) to that information. Accordingly, I find that the salary referenced in Article 3.1 of the REA should be disclosed to the appellant as it falls within the exception created by section 21(1)(d) of the *Act*.

INFORMATION AVAILABLE TO THE PUBLIC

The University claimed in its decision letter that the salary and benefits paid to the President in the REA are exempt pursuant to section 22(a) of the *Act* because the information has been disclosed and published as required under the *PSSDA*. However, the University did not submit any representations relating to the President's "salary" amount. In its representations, the University claims that Articles 3.8, 3.10, 3.11, 3.12 and 4.1 are exempt pursuant to section 22. These provisions relate to some of the President's benefits only.

Section 22(a) of the *Act* states, in part:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a "regularized system of access" exists, the institution must demonstrate that:

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include:

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411, MO-1573].

However, the cost of accessing a record outside the *Act* may so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply [Order MO-1573].

Representations

The University states:

> Pursuant to this provision, McMaster discloses on a yearly basis, [the President's] salary and taxable benefits. Accordingly, certain information in the contract is published and available to the public and, is therefore excepted from disclosure pursuant to Section 22. In particular, the material information contained in following sections of the Contract is publicly available pursuant to the PSSDA:
>
> - Article 3.8
> - Article 3.10
> - Article 3.11
> - Article 3.12
> - Article 4.1
>
> Given the material financial information already available to the public pursuant to the PSSDA, McMaster submits that the public interest is sufficiently protected and there was no reason for McMaster to exercise its discretion in Section 22. Accordingly, McMaster did not exercise its discretion in withholding any such information.

The President did not submit any representations on the application of section 22 to the withheld information.

Analysis and Findings

As noted above, the University has claimed the application of section 22(a) to the information contained in Articles 3.8, 3.10, 3.11, 3.12, and 4.1. I have already found that these articles contain information that relates to the benefits that the President is entitled to under his contract of employment.

The "salary" and "benefit" information available to the public pursuant to the *PSSDA* is the amount of the "salary" and "benefits" paid in the calendar year. I find that the information contained in these articles of the REA, which relate to certain "benefits", is not available pursuant to a regularized system of access and, in particular, this information is not publicly disclosed pursuant to the provisions of the *PSSDA*. Article 3.8 states that the President is entitled to be reimbursed for specified expenses to a maximum amount. Article 3.10 sets out the details of benefits payable that relate to the President's social and sporting club memberships however, the value of the benefit is not specified. Article 3.11 relates to expenses for health care and sets a maximum amount for which the President is entitled to be reimbursed. Article 3.12 provides for

an allowance for research and sets a maximum amount payable per year. Article 4.1 gives the President the right to recover travel expenses, membership dues and other expenses. Other than to set a maximum amount recoverable under some of these provisions, these articles of the REA do not include information relating to the annual value of the benefit. Therefore, I find that the information in these articles is not available to the public pursuant to a regularized system of access.

In a more general sense, I also disagree with the University's claim that the information in the REA that relates to "salary" and "benefits" is exempt pursuant to section 22. The purpose of section 22 was reviewed in Order P-1114 where former Assistant Commissioner Tom Mitchinson stated:

> In Order 170, Inquiry Officer John McCamus discussed the purpose of the discretion conferred by section 22(a). On Page 108 of that order, Mr. McCamus stated:
>
> > In general terms, the Ministry appears to be correct in suggesting that the purpose of the discretion conferred by section 22(a) relates to questions of convenience. Obviously, there is no other public interest to be served by withholding disclosure of information which is readily available elsewhere. Accordingly, the discretion to disclose is conferred for the evident purpose of enabling a head to avoid disclosure where that process merely involves expending the resources of the Ministry on the photocopying of material which is otherwise readily available and, from the Ministry's point of view, more conveniently available to the requester in another form. It would, on the other hand, be an abuse of the discretion conferred by section 22(a) if the head were to refuse disclosure of information otherwise publicly available where the refusal does not rest on a balance of convenience of this kind and/or where the refusal to disclose will have the effect of refusing to disclose the nature of the information contained in the Ministry's records which is thought by the Ministry to be responsive to the request.
>
> I applied this line of reasoning in Order P-327, where I made the following statement regarding section 22(a):
>
> > In my view, the section 22(a) exemption is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access; it is not intended to be used in order to avoid an institution's obligations under the Act.

> In my view, if the requested information is otherwise available from a public library, government publications centre or other similar system, then access rights under the Act are not diminished by requiring members of the public to utilize these alternative sources (Order P-327). However, I feel that section 22(a) should only be invoked in situations where the request can be satisfied through the alternative source.

The request in this appeal is for the current contract and terms of employment of the President. The responsive record is the President's contract of employment, and a regularized system of access to this record is not available to the appellant. However, some small portions of the information in the record are publicly available pursuant to the *PSSDA*. The issue before me therefore is whether or not the University is entitled to sever these "salary" and "benefit" amounts from the contract of employment on the grounds that these amounts are publicly available pursuant to the *PSSDA* in circumstances where that information is not otherwise exempt under the *Act*.

The impact of a finding that section 22(a) applies is that the appellant would be entitled to access to the record, but the University would be entitled to sever the amounts from the record that are available pursuant to the disclosure requirements under the *PSSDA*. In my opinion, this would be an inappropriate application of the exemption, which is clearly intended to apply to comprehensive information that is available from other sources. In my view, the section does not give rise to a right to sever a small amount of information from a much larger record, particularly where the entire contents of that record are otherwise subject to disclosure under the *Act*. It would be absurd, and contrary to the access purpose clearly articulated in section 1 of the *Act*, to require requesters to gather and compile small snippets of information from a variety of sources in order to obtain a complete version of a record, rather than simply disclosing it.

This issue was considered by former Assistant Commissioner Tom Mitchinson in Order MO-1693. In that order, a requester sought access to the Tax Assessment Roll for the province of Ontario from MPAC. MPAC denied access to the portions of the database that related to commercial, industrial and multi-residential properties on the basis that section 15(a) of the municipal *Act* (the equivalent of section 22(a) of the *Act*).

The former Assistant Commissioner did not uphold MPAC's section 15(a) claim. He stated:

> *In my view, barring exceptional circumstances that are not present here, a requester should not be required to utilize an alternative access scheme for information responsive to only a portion of a responsive record where the entire record is readily accessible under the Act.*
>
> In the circumstances of this appeal, the appellant has asked for an electronic version of the entire Assessment Roll. I have determined that no portions of this record should be withheld. If I were to accept MPAC's section 15(a) exemption claim (and assuming without deciding that MPAC has the requisite authority to sell data from the Assessment Roll through its Business Development Group), the

> appellant would be required to purchase some of the requested data under MPAC's alternative access scheme, and then receive the rest of it through the regular access process under the *Act.* He would then have to merge these two partial records in order to create the very record he asked for in the first place. In my view, this cannot have been the legislative intent of section 15(a). It is not reasonable for an institution to direct a requester to an alternative access source, particularly one that exists within the institution itself, in order to obtain partial access to a record that is otherwise fully accessible through the regular access process. To permit a section 15(a) claim in these circumstances would, in effect, allow an institution to sever a record under section 4(2) in circumstances where all of the record is in fact disclosable. In my view, section 4(2) does not contemplate two separate partial disclosures, one under the *Act* and the other under an alternate access scheme. (emphasis added)

Order MO-1693 was the subject of a judicial review application (*Municipal Property Assessment Corp.*, cited above), where the Divisional Court found that the Assistant Commissioner erred in not applying section 15(a) of the municipal *Act* (the equivalent of section 22(a) of the *Act*). The Court stated:

> The Commissioner held that the record in question in this case does not qualify for exemption under s. 15(a) of [the municipal *Act*]. Although the electronic record itself is not available to the public, the information contained in the record is available in paper form for the public to inspect. We are of the view that in these circumstances, s. 15(a) confers authority upon the head to prohibit disclosure under [the municipal *Act*].

From this analysis, it is clear that the Court adopted a different basis for applying section 15(a) than that originally advocated by MPAC. Rather than applying the exemption to the portion of the database that relates to commercial, industrial and multi-residential properties, which is sold by MPAC, and which MPAC sought to exempt under section 15(a), the Court apparently applied it to the whole record on the basis of availability in paper form. Accordingly, the Court did not address the question of whether small portions of a record can be exempted under this provision, and the decision does not provide guidance on this question.

In this appeal, the University is claiming the application of section 22(a) to the amounts payable in relation to "salary" and "benefits" in the President's REA. For the reasons outlined above, I have concluded that the University is not entitled to sever the dollar amounts that relate to the President's "salary" and "benefits" from the REA as these amounts represent a small portion of a record that is otherwise disclosable under the *Act*.

Accordingly, I find that section 22(a) does not apply to the information severed from the REA.

Section 23 – Compelling Public Interest

The appellant has taken the position that, pursuant to section 23 of the *Act*, there is a compelling public interest in the disclosure of the severed portions of the REA. Given my findings that those severed portions should be disclosed, there is no need for me to consider the application of section 23 in this appeal.

ORDER:

1. I order the University to disclose the President's Renewal Employment Agreement, in its entirety, to the appellant by **February 29, 2008** but not before **February 25, 2008**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the University to provide me with a copy of the record disclosed to the appellant.

Original signed by: January 31, 2008
Brian Beamish
Assistant Commissioner