COURT OF APPEAL FOR ONTARIO

CITATION: Barker v. Ontario (Information and Privacy Commissioner),2019 ONCA 275
DATE: 20190409
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Rouleau, van Rensburg and Roberts JJ.A.

BETWEEN

Dr. Kim Barker

Applicant
(Respondent)

and

Ontario (Information and Privacy Commissioner of Ontario) and Algoma Public Health

Respondents
(Appellant and Respondent)

Linda Hsiao-Chia Chen, for the appellant

Alexandra V. Mayeski, for the respondent Algoma Public Health

Marvin J. Huberman and Anita Fineberg, for the respondent Dr. Kim Barker

Heard: December 11, 2018

On appeal from the judgment of the Divisional Court (Justices Frances P. Kiteley, E. Ria Tzimas and Wendy M. Matheson), dated December 18, 2017, with reasons reported at 2017 ONSC 7564, quashing two decisions of the Information and Privacy Commissioner of Ontario, dated March 10, 2016 and June 8, 2016.

Rouleau J.A.:

A. OVERVIEW

[1] This appeal arises from a request under the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 ("MFIPPA" or the "Act"), for access to a report, dated March 27, 2015, that KPMG prepared (the "KPMG Report" or the "Report") at the request of Algoma Public Health ("APH").

[2] APH, as record holder, determined that while the personal information in the KPMG Report would normally be exempt from disclosure under s. 14(1) of MFIPPA, the entire Report should be released based on the public interest override under s. 16 of the Act.

[3] The KPMG Report includes personal information concerning Dr. Kim Barker, APH's former Medical Officer of Health and Chief Executive Officer. She unsuccessfully appealed APH's decision to release the KPMG Report to the Information and Privacy Commissioner of Ontario (the "Commissioner"). The Commissioner found that there existed a compelling public interest in the disclosure of the record that clearly outweighed the purpose underlying the personal privacy exemption of the Act.

[4] The Commissioner subsequently dismissed Dr. Barker's request for reconsideration.

[5] The Divisional Court quashed both of the Commissioner's decisions on the basis that his reasons for decision did not permit the court to conclude that his decisions fell within a range of reasonable outcomes.

[6] This court granted the Commissioner's motion for leave to appeal the Divisional Court's decision. The focus of the appeal is the reasonableness of the Commissioner's decision ordering disclosure of the KPMG Report pursuant to s. 16 of MFIPPA.

[7] As I will explain, I conclude that the Commissioner's decisions were reasonable and, accordingly, I would allow the appeal.

B. BACKGROUND

(1) Statutory Scheme

[8] Before turning to the facts of the case, it is important to understand the statutory context in which they arise.

[9] Section 1 of MFIPPA sets out its dual purposes:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
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> > (i) information should be available to the public,
> >
> > (ii) necessary exemptions from the right of access should be limited and specific, and

> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
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> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[10] Section 1 highlights the competing interests that the Act addresses and that require balancing: the right to access information and the protection of the privacy of individuals with respect to personal information.

[11] "[P]ersonal information" is defined in s. 2 of the Act. Its definition provides a non-exhaustive list of recorded information about an identifiable individual that qualifies as "personal information". In this case, the Commissioner found that the KPMG Report contained personal information of Dr. Barker falling within the following categories:

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
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> (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,
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> ...
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if 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.

[12] Section 4(1) of MFIPPA guarantees a right of access to records held by an institution but carves out exceptions to that right:

> 4 (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
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> > (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[13] Under s. 4(2), the head (and, on appeal, the Commissioner) is, as a general rule, required to disclose as much of a record that includes exempted personal information as possible:

> (2) If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[14] In this case, the parties agreed that personal information contained in the KPMG Report was exempt from disclosure under s. 14.

[15] Section 14, which concerns personal privacy, has four subsections.

[16] Section 14(1) of the Act prohibits disclosure of personal information unless one of the enumerated exceptions applies. In this case, the most relevant exception was s. 14(1)(f):

> 14(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> ...
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> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[17] Turning to s. 14(2), it provides statutory guidance in determining whether disclosure of personal information would constitute an unjustified invasion of privacy. Some of the factors under s. 14(2) weigh in favour of disclosure, while others weigh against it. Dr. Barker argues that subsections (e), (f), (g), (h), and (i) apply and weigh against disclosure in this case:

> 14(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
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> (b) access to the personal information may promote public health and safety;
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> (c) access to the personal information will promote informed choice in the purchase of goods and services;

> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
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> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
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> (f) the personal information is highly sensitive;
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> (g) the personal information is unlikely to be accurate or reliable;
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> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
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> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[18] Under s. 14(3), the disclosure of certain categories of personal information "is presumed to constitute an unjustified invasion of personal privacy". This includes, for example, medical information, information relating to an individual's employment history, and information regarding an individual's personal finances.

[19] Subsection 14(4) provides three exceptions to the presumptions against disclosure under subsection (3). For instance, s. 14(4)(a) permits the disclosure of "the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution".

[20] Once the various subsections of s. 14 have been applied and a determination is made as to which personal information is protected from

disclosure, that information must be redacted from the record before its release, unless s. 16 applies.

[21] Section 16, which is central to this appeal, provides as follows:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[22] Thus, under s. 16, which establishes a very high threshold for disclosure, the Commissioner must balance competing considerations – an exercise which engages the Commissioner's expertise under the Act.

[23] With that context in mind, I now turn to the facts of this case.

(2) Events Giving Rise to Legal Proceedings

[24] The events in question date back to 2013, when APH hired Shaun Rootenberg as its interim Chief Financial Officer ("CFO"). He held that role from November 25, 2013 to May 31, 2014.

[25] In January 2015, the media reported that Mr. Rootenberg had a criminal record for multiple counts of fraud. Questions arose thereafter as to how he could have been hired given his criminal record and whether APH had suffered any losses as a result. The public's concern about his hiring was heightened due to the fact that APH's previous CFO had been charged with breach of trust and theft over $5,000.

[26] These concerns led APH to retain KPMG to conduct a forensic investigation into potential conflicts of interest in the hiring of Mr. Rootenberg and whether APH had suffered any financial losses as a consequence of his tenure with APH. KPMG's report was provided to APH in March 2015.

[27] On May 8, 2015, a journalist requested disclosure of the KPMG Report pursuant to MFIPPA. This request gave rise to this appeal.

(3) Legal Proceedings

(a) Decision by APH

[28] APH, as record holder, determined that the KPMG Report contained personal information concerning several individuals, including Dr. Barker, who had been involved in the CFO hiring process.

[29] Pursuant to the provisions of MFIPPA, APH provided notice of the access request to the parties whose personal information was contained in the KPMG Report and invited them to make submissions.

[30] Dr. Barker opposed the requested disclosure, arguing that her personal information in the KPMG Report was exempt from disclosure under s. 14 of MFIPPA.

[31] APH determined that, despite the inclusion of personal information, access to the entire KPMG Report should be granted. It considered that, pursuant to s. 16 of the Act, a compelling public interest in disclosure of the KPMG Report clearly

outweighed the purpose of the s. 14 exemption, as disclosure of the Report would "shed light on the operations of APH" and would be in accordance with MFIPPA's purpose.

(b) Appeal to the Commissioner and Reconsideration Request

(i) Appeal to the Commissioner

[32] Dr. Barker appealed to the Commissioner, who upheld APH's decision to release the entire KPMG Report.

[33] In his reasons, the Commissioner explained that large portions of the Report contained KPMG's opinions about Dr. Barker and included her name alongside other personal information, within the meaning of s. 2(1)(g) and s. 2(1)(h) of MFIPPA, as well as other personal information as defined by ss. 2(1)(a) and (b) of the Act.

[34] The Commissioner found that "the majority of the personal information [was] highly sensitive, as contemplated by section 14(2)(f)": at para. 35. He also noted that "some of the information was supplied with the reasonable expectation that the information would be treated confidentially, as required for the factor at section 14(2)(h) to apply": at para. 35. The Commissioner therefore concluded that the test in s. 14 had been met: disclosure of the personal information would constitute an unjustified invasion of privacy.

[35] He went on, however, to determine that there was a compelling public interest in disclosure of the full KPMG Report. In his view, the public had an interest in knowing whether there had been a conflict of interest in the appointment of the former interim CFO and whether public funds had been lost or misappropriated by APH during his tenure. The public interest was heightened given the ongoing controversy surrounding financial management at APH.

[36] Although the s. 14 protection against unjustified invasions of personal privacy was important, the individuals whose personal information appeared in the KPMG Report held positions requiring them to be accountable to the community, the board of APH, and the Ministry of Health and Long-Term Care. As Dr. Barker's "personal information [was] inextricably linked to whether a conflict of interest existed in relation to the appointment of the former interim CFO", the Commissioner concluded that "the important public policy basis for the personal privacy exemption must yield to a stronger and more compelling public interest in disclosure of the record which directly speaks to the effectiveness and integrity of APH and its former officers": at para. 71.

[37] The Commissioner also considered whether any portions of the record ought to be redacted but concluded that there was a compelling public interest in disclosure of the entire KPMG Report. Given his conclusion that the s. 16 public interest override applied, he determined that it was "not necessary to identify exactly which portions of the Report constitute[d] personal information": at para.

28. He noted that Dr. Barker did not make any submissions on the application of s. 14.

(ii) Reconsideration Request

[38] Following receipt of the decision, Dr. Barker requested that the Commissioner reconsider his decision.

[39] In her reconsideration request, Dr. Barker argued that the Commissioner's reasons for decision ought to have identified each portion of the KPMG Report that constituted personal information. In her submission, without such an explicit identification, the Commissioner was unable to analyze whether the s. 14 exemption, as it applied to each piece of personal information, was overridden by the public's interest in disclosure of each of these pieces of protected information. This, in her view, constituted a fundamental defect in the adjudication process and a failure of the Commissioner "to exercise [his] jurisdiction in accordance with *MFIPPA*": at p. 4.

[40] The Commissioner found that no valid grounds for reconsideration had been made out. He stated that he had "specifically considered the purpose of the personal privacy exemption and whether or not the public interest in disclosure clearly outweighed the purpose of that exemption in the specific circumstances": at p. 5.

[41] The Commissioner cautioned that his "decision not to describe the portions of the record which contain[ed] personal information should not be confused for a lack of consideration" of such portions: at p. 5. He had specifically considered whether any portions ought to be withheld but found a compelling interest in disclosure of the entire KPMG Report. As such, the failure to specify in his reasons which portions of the record included personal information did not constitute a fundamental defect warranting reconsideration. He stated that the inclusion of such information in the reasons "would have been redundant in light of the application of the public interest override": at p. 6.

(c) Judicial Review Application to the Divisional Court

[42] Dr. Barker sought judicial review of both the Commissioner's decisions. She alleged that there were a number of reviewable errors, including the Commissioner's failure to identify the personal information that qualified for exemption from disclosure under s.14.

[43] The Divisional Court allowed the application, quashed the Commissioner's decisions, and remitted the matter to the Commissioner to undertake the process afresh.

[44] In the Divisional Court's view, the Commissioner's reasons did not permit the court to conclude that the decisions fell within a range of reasonable outcomes. According to the Divisional Court, the Commissioner was required to identify each

piece of personal information that was exempted from disclosure under s. 14, and then balance each piece of exempted information under s. 16:

> The determination of what portions of the Report fall within the s. 14 exemption is not a simple matter. The statutory regime under MFIPPA requires that the decision-maker apply a series of statutory provisions that serve to include and exclude information at each step, and then balance the information that is exempted against the public interest under s. 16. This must be done for each piece of personal information in the Report: at para. 44.

[45] Only those portions of the exempted information that met the high threshold in s. 16 – where a compelling public interest "clearly outweighs" the purpose of the exemption – would be disclosed. The portions that did not meet this high threshold would be redacted before disclosure of the Report.

[46] As the Commissioner's reasons did not contain this detailed analysis, the Divisional Court could not assess whether the outcome was reasonable. The Commissioner's decisions were therefore found to be unreasonable.

C. ANALYSIS

(1) Issues

[47] The key issue on appeal is the reasonableness of the Commissioner's decision, on the appeal from the APH decision, ordering the release of the entire KPMG Report. A secondary issue is the reasonableness of his reconsideration

decision, in which he concluded that the necessary grounds for reconsideration had not been established.

[48] In arguing that the Divisional Court's decision should be overturned, the Commissioner makes a number of arguments, including that the Divisional Court improperly applied the reasonableness standard. The Commissioner also argues that his application of s. 16 was reasonable in the circumstances, and that it was unnecessary to identify and separately weigh each and every piece of protected personal information in the KPMG Report in the assessment of whether the s. 16 override should apply. APH supports the Commissioner's position and relies on his arguments on the appeal.

[49] As I will explain, Dr. Barker takes issue with the Commissioner's decision to release the Report on a number of grounds. She submits that the Commissioner erred in failing to identify and weigh each piece of her protected personal information and that he gave insufficient weight to the purpose of s. 14 in his s. 16 balancing. At the Divisional Court, she had also submitted that the Commissioner's decision was unreasonable because he failed to refer to and apply subsections (e), (g), and (i) of s. 14(2) and to consider that adequate information regarding Mr. Rootenberg's employment with APH was already in the public domain. She had also argued that the Commissioner could have redacted some of the personal information in the KPMG Report instead of ordering the release of the entire report.

[50] Before turning to these issues, I will first discuss the standard of review applicable in this case.

(2) Reasonableness Standard

[51] The parties agree that the standard of review is reasonableness. This court explained, in *Ontario (Ministry of Finance) v. Higgins et al.* (1999), 118 O.A.C. 108, leave to appeal refused, [1999] S.C.C.A. No. 134, that deference was owed to the Commissioner's application of an equivalent public interest override provision in the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. The court expressed it this way, at para. 2:

> The legislature has entrusted the application of s. 23 [public interest override] to the issue of disclosure of any particular record first to the head, and then to the inquiry officer. Both the application of the section and therefore its interpretation are within the expertise of the inquiry officer under the Act whose decision must be accorded deference by the courts.

[52] The Supreme Court confirmed that decisions "regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness": *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 70.

[53] Central to this appeal is the application of the reasonableness standard in the circumstances of this case. It is thus helpful to review how it should be applied.

[54] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court stated that reasonableness is concerned with "the existence of justification, transparency and intelligibility within the decision-making process", as well as with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": at para. 47.

[55] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the court clarified that adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, the exercise is "more organic", as "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes": at para. 14.

[56] When they engage in this exercise, "courts must show 'respect for the decision-making process of adjudicative bodies with regard to both the facts and the law'": at para. 15. As Abella J. explained at paras. 16 and 18, reasons do not have to be comprehensive or "perfect" to satisfy the reasonableness standard. Indeed, "[a] decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion": at para. 16. The reasons only need to "adequately explain the bases of [the] decision": at para. 18. Assessing a decision on a reasonableness standard is a contextual exercise, which includes the nature of the statutory task, the evidence, the parties' submissions, and the process.

[57] Applying the relevant principles in this case, I am satisfied that the Commissioner's decision to release the KPMG Report, as well as his reconsideration decision, were both reasonable.

(3) APPEAL DECISION

(a) Adequacy of the Reasons

[58] As I have explained, the Divisional Court allowed Dr. Barker's application for judicial review because it found that the Commissioner's reasons did not permit the court to conclude that his decisions fell within a range of reasonable outcomes.

[59] The Divisional Court went further. It found that there had been a "refusal" by the Commissioner to disclose the portions of the record protected from disclosure under s. 14. It was the absence of that information in the reasons that prevented the Divisional Court from assessing the reasonableness of the Commissioner's application of the s. 16 test.

[60] The court identified the deficiency in the Commissioner's reasons as follows:

> Given the acknowledged need to disclose only that portion of the exempted information that meets the s. 16 "clearly outweighs" balancing test, each piece of personal information that is exempted under s. 14 must form part of the analysis that the section requires. In this case, we do not know what the Commissioner was weighing as against the public interest. This is not a matter of considering what reasons could be offered in support of the decision; it is a matter of not knowing what his decision was on that complex issue, which is prerequisite to the application of s. 16: at para. 68.

[61] As I will explain, I respectfully disagree with the Divisional Court that the Commissioner's reasons do not permit the court to conclude that his decision falls within a range of reasonable outcomes.

[62] In assessing the Commissioner's reasons and decision, I begin by considering the statutory task before him and the parties' submissions.

(i) Statutory Task

[63] Reasons must be responsive to the statutory task before the court.

[64] Where s. 14 is engaged but there is no s. 16 issue, the Commissioner will apply s. 14 and identify the personal information that is protected from disclosure. In this exercise, the Commissioner will necessarily have to identify each piece of personal information protected from disclosure because each of these pieces will have to be redacted from the record before it is disclosed: MFIPPA, s. 4(2).

[65] It follows, therefore, that the reasons will set out the Commissioner's s. 14 analysis as it relates to the various pieces of personal information that should be redacted. This analysis may invoke consideration of various parts of s. 14(1) to determine whether any of subsections (a) to (f) apply, as well as consideration of ss. 14(2) to (4) where relevant. The reasons will typically identify the personal information, explain the basis for making the redactions, and, if applicable, why other information was not redacted.

[66] In this case, the key issue before the Commissioner was the application of s. 16 in a case where, as detailed below, the parties agreed that the Report contained Dr. Barker's personal information, that s. 14(1)(f) did not apply because disclosure of the information would be an unjustified invasion of personal privacy, and that this personal information was protected from disclosure under s. 14.

[67] When s. 16 comes into play, an additional level of analysis is required. As explained by the Divisional Court, the application of s. 16 involves a two-step process. "First, there must be a compelling public interest in the disclosure of the record. ... Second, that public interest must 'clearly outweigh' the purpose of the exemption": at para. 56.

[68] When s. 16 must be considered, the two broad purposes of the Act are, in essence, in conflict. As explained above, s. 1 of the Act specifies the Act's two purposes: (1) to provide access to information under the control of institutions, and (2) to protect the privacy of individuals with respect to personal information about themselves held by the institution. A determination under s.16 involves a balancing of these competing purposes with regard to the particular circumstances of the case.

[69] In my view, there is no set formula that the Commissioner must follow in drafting reasons engaging with these issues. The level of specificity that may be required will depend on the circumstances, including the nature of the personal

information and the provisions of the Act that are at play. The reasons should, however, be responsive to the issues raised and the positions advanced by the affected parties. This is not meant to suggest that if a party fails to raise an issue, such failure will absolve the Commissioner of his duty to ensure the statute is properly applied.

[70] I now turn to the positions advanced in this case.

(ii) Submissions to the Commissioner

[71] Dr. Barker's submissions to the Commissioner provide important and necessary background to understand what is and what is not contained in the Commissioner's reasons.

[72] In her submissions, Dr. Barker commented that "[a] review of section 14(2) and (3) assist in understanding the purpose of the exemption", but then added in a footnote that "section 14(2) and (3) need not be applied in this case as APH has acknowledged the mandatory exemption applies": at para. 32, n. 10. Given APH's concession, Dr. Barker told the Commissioner that her representations would "focus only on whether the section 14 exemption should not apply under section 16 of the Act": at para. 18.

[73] Dr. Barker's submissions made only minimal reference to the provisions of s. 14. She focused her representations on the fact that KPMG prepared its report on the clear understanding that it would be confidential and not be made public.

She further explained that she gave an interview and shared personal information with KPMG – which was included in the Report – as a result of that specific assurance. She submits that she otherwise would not have participated in the process.

[74] Dr. Barker also explained that a significant amount of information regarding the employment of Mr. Rootenberg had already been made public and that the availability of this information adequately addressed, or at least attenuated, any public interest considerations in the release of the Report. Additionally, Dr. Barker made extensive submissions concerning the potential application of s. 8(2)(c) of the Act,[1] raising concerns about the possible impact on APH's interests and the possibility of exposure to civil liability if the Report was made public. These considerations weighed against disclosure. The submissions on s. 8(2)(c) were not repeated on appeal.

[75] Dr. Barker made no submissions as to what parts of the KPMG Report contained personal information or which provisions in s. 14 operated to protect that information from disclosure. Her submissions simply cited the general purpose of s. 14: to ensure that personal information is protected. The submissions focused

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[1] Section 8(2)(c) provides that a head may refuse to disclose a record "that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability".

on the s. 16 considerations: what constitutes a compelling public interest and how the fact that other information is already in the public domain operates to satisfy the public interest, or at least make it less compelling.

[76] Dr. Barker obviously saw no need to identify or list the parts of the Report she believed contain personal information, nor to explain or discuss the specific provisions within s. 14 that provide protection from disclosure. In that regard, she made the important point that the personal information she provided and that is contained in the Report was given on the clear understanding and undertaking that the Report would remain confidential.

[77] With that context in mind, I turn now to address whether the failure to identify and weigh each individual piece of protected personal information undermined the reasonableness of the Commissioner's decision.

(iii) Reasonableness of Commissioner's Decision

[78] As I have explained, the Divisional Court took issue with the sufficiency of the Commissioner's reasons, given its view of the nature of the statutory exercise. For ease of reference, I repeat para. 44, where the court explained its view on the matter:

> The determination of what portions of the Report fall within the s. 14 exemption is not a simple matter. The statutory regime under MFIPPA requires that the decision-maker apply a series of statutory provisions that serve to include and exclude information at each step, and then balance the information that is exempted

> against the public interest under s. 16. This must be done for each piece of personal information in the Report. [Emphasis added.]

[79] The Commissioner takes issue with this piece-by-piece approach. On this appeal, the Commissioner submits that, in applying s. 16, there is one weighing, one decision: whether a compelling public interest clearly outweighs the purpose of the exemption, that is, the protection of personal privacy. There is no need, in the Commissioner's view, to carry out a separate analysis with respect to each piece of personal information, nor is there a need to consider the impact or harm that the release of the information may have on the person whose personal information it is at the s. 16 stage. Once a determination is made that personal information is exempt from disclosure under s. 14, there is no need to consider the s. 14 factors any further.

[80] Dr. Barker takes a very different view of how s. 16 is to be applied. She argues that the series of statutory provisions in s. 14 are applied to determine whether personal information is protected under the Act. If personal information is protected and s. 16 is invoked, then the same s. 14 provisions are reviewed a second time and a determination is made whether the s. 16 override applies to each piece of personal information. It is only through a consideration of the various factors in s. 14 applying to each piece of personal information that a determination can be made of the importance of the personal privacy interest being protected. After that assessment, it is possible to determine the appropriate weight to be given

to the privacy interests and a decision can be made as to whether the public interest in disclosure of each piece of personal information "clearly outweighs" the purpose of the exemption.

[81] In effect, Dr. Barker argues that what is required is a combined s. 14 and s. 16 analysis of each piece of personal information, with the public interest consideration becoming an additional factor in the list of factors set out in s. 14 for, or against, disclosure. In Dr. Barker's submission, the reasons of the Commissioner must demonstrate that this point-by-point assessment has been carried out and allow the reviewing court to assess the reasonableness of the decision to disclose or not disclose each piece of personal information.

[82] In my view, the role of this court is not to determine which approach is correct, but rather to consider whether the decision of the Commissioner, who has expertise in the interpretation and application of MFIPPA, was reasonable in the circumstances of this case.

[83] As I have explained, there was no dispute that the KPMG Report contained personal information and that it was exempt from disclosure under s. 14. The Commissioner nonetheless addressed those issues, albeit not in the level of detail that the Divisional Court would have preferred.

[84] The Commissioner noted that substantial parts of the Report consist of Dr. Barker's personal information, as defined in s. 2(1) of the Act. In particular, he

observed that substantial portions of the Report contained KPMG's opinion of Dr. Barker and of another individual, such that the information fell within s. 2(1)(g) of the Act. He also observed that Dr. Barker's name appeared alongside other personal information within the meaning of s. 2(1)(h). Additionally, he found that certain portions of the Report contained information relating to Dr. Barker that fell within the scope of subsections (a) and (b) of s. 2(1).

[85] The Commissioner considered whether the disclosure of the personal information he had identified would constitute an unjustified invasion of personal privacy. After reviewing how the section operates and noting that neither APH nor Dr. Barker had made submissions on the applicability of the various factors listed in s. 14(2), the Commissioner singled out two of the s. 14(2) factors as being relevant:

- Dr. Barker's personal information contained in the record was highly sensitive (s. 14(2)(f)); and
- Dr. Barker supplied the personal information in confidence (s. 14(2)(h)).

[86] The Commissioner concluded, on the s. 14 question, that disclosure of the information would constitute an unjustified invasion of privacy:

> Having reviewed the Report and the nature of the personal information it contains, I find that the majority of the personal information is highly sensitive, as contemplated by section 14(2)(f). In addition, based on my review of the Report and the circumstances within which it was prepared, I am satisfied that some of the

> information was supplied with the reasonable expectation that the information would be treated confidentially, as required for the factor at section 14(2)(h) to apply.
>
> Neither APH nor the requester have provided representations on any factors which may weigh against a finding that disclosure of the personal information in the Report would constitute an unjustified invasion of privacy. Given the highly sensitive nature of the personal information in the record, and the confidential manner in which it was supplied, I find that disclosure of the information would constitute an unjustified invasion of privacy of the two individuals named therein, pursuant to section 14(1) subject to my review of the "public interest override" below: at paras. 35-36. [footnote omitted.]

[87] Thus, it is apparent that the Commissioner carefully reviewed the record and that he identified the personal information contained in the KPMG Report. He focused, in his reasons, on the subsections of s. 2(1) that were most relevant in identifying the portions of the Report where Dr. Barker's personal information appeared.

[88] He also identified the critical s. 14 provisions that protected this information from release. (Below, I will address Dr. Barker's argument that he erred in failing to advert to s. 14(2)(e), (g) and (i).) He understood the nature and significance to Dr. Barker of the personal information whose release was being sought. He would also have understood the importance of respecting the assurance of confidentiality, as Dr. Barker and others would understandably be reluctant to

cooperate with the type of investigation undertaken by KPMG without it. His treatment of s. 14 was responsive to the submissions of the parties.

[89] The Commissioner determined that, although s. 14 applied to protect the personal information from disclosure, the s. 16 public interest override applied to all of the personal information. Accordingly, he saw no need to set out in his reasons "exactly" which portions of the Report constituted personal information. As he noted in his reconsideration decision, his "decision not to describe the portions of the record which contain personal information should not be confused for a lack of consideration of which portions of the record contain personal information": at p. 5.

[90] On my reading of his reasons, the Commissioner did not approach his statutory task in the manner advocated by his counsel on appeal. As I have noted, counsel for the Commissioner submitted that, in considering whether s. 16 override should apply, there is no need to consider the impact or harm that the release of protected personal information may have on the person whose personal information it is. However, the Commissioner's reasons demonstrate he considered the different privacy interests at play and the s. 14 factors that supported his finding that the disclosure of the personal information would constitute an unjustified invasion of privacy. In other words, he was alive to the impact the release of the protected personal information could have on Dr. Barker when he engaged in the s. 16 balancing.

[91] In my view, the Commissioner's approach was reasonable. I do not accept that, in the circumstances, the failure to identify each piece of protected information or to balance each piece of protected information separately undermined the reasonableness of the Commissioner's decision. In this regard, I disagree with the Divisional Court that without a piece-by-piece analysis, one could not know "what the Commissioner was weighing as against the public interest": at para. 68.

[92] While a piece-by-piece analysis may well be required in some circumstances, in other cases, such as this one, a piece-by-piece analysis in the reasons is not required. In this case, it is the story told when the whole of the protected information is disclosed that sheds light on the operations of APH and, more specifically, whether a conflict of interest existed in the hiring of the former interim CFO and whether APH suffered any losses as a result of his hiring. Viewed individually, each piece of protected information reveals little of the underlying story and, on its own, holds little public interest, let alone a compelling public interest in disclosure that would outweigh the s. 14 protection. The public interest in disclosure is of the information as a whole and it is when this interest is weighed against the purpose of the s. 14 protections at issue that the s. 14 protection must yield.

[93] This is not to say that each case must be treated in the same way for the decision to satisfy the reasonableness standard. There may be more than one compelling public interest at play and there may be different parts or aspects of a

record raising very different, separate, and important personal privacy interests. This may require assigning a different weight to different parts of a record sought to be disclosed in the balancing.

[94] There may also be elements of personal information so sensitive or whose disclosure is so damaging that they need to be redacted before the public interest in disclosure of the record will clearly outweigh the purpose of the s. 14 privacy interest. Similarly, there may be elements of personal information that are unrelated to the public interest at play and whose redaction should therefore be made despite the s. 16 override.

[95] The exercise is therefore a nuanced and contextual one, requiring a weighing and balancing of interests. This weighing and balancing under s. 16 is a task that the legislature has entrusted to the Commissioner. The application and interpretation of s. 16 are "at the heart of the Commissioner's specialized expertise", and he is in the best position to make these determinations: *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.), at para. 1, leave to appeal refused, [1997] O.J. No. 694 (C.A.); see also *Higgins*, at para. 2.

[96] In conclusion, I am not satisfied that the failure to identify and separately weigh each piece of personal information protected by s. 14 undermined the reasonableness of the Commissioner's decision. I would also note that I do not

agree with the Divisional Court's observation that the Commissioner refused to disclose the portions of the record protected under s. 14.

[97] I now turn to Dr. Barker's other reasons for arguing that the Commissioner's decision to order release of the KPMG Report was unreasonable.

(b) Weight Assigned to the Purpose of s. 14

[98] Dr. Barker argues that the Commissioner's decision was unreasonable because he failed to refer to ss. 14(2)(e), (g), and (i) in his reasons. These provisions read as follows:

> 14(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> ...
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> ....
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> ...
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[99] In Dr. Barker's submission, the absence of any reference to those provisions in the Commissioner's reasons suggests that he failed to undertake a proper

analysis of the relevant s. 14(2) factors and gave inadequate weight to the purpose of the s. 14 exemption.

[100] I disagree.

[101] At the outset, it is important to recall that Dr. Barker made no reference to these subsections in her submissions to the Commissioner.

[102] Despite her failure to specifically rely on those provisions, it is apparent from a reading of the Commissioner's reasons that he was alive to legitimate concerns raised by s. 14(2)(e), the possibility of unfair pecuniary or other harm, and s. 14(2)(i), the possibility of unfair damage to her reputation.

[103] With respect to pecuniary harm, Dr. Barker made submissions relating to possible pecuniary harm to herself and to APH, not on the basis of s. 14(2)(e) but rather in support of her submission that disclosure ought to be refused pursuant to s. 8(2)(c) of the Act. This section provides that a head may refuse to disclose a record that is a law enforcement record if the disclosure "could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability."

[104] The Commissioner responded to this concern, explaining that he did not accept Dr. Barker's submission that s. 8(2)(c) applied. He went on, however, to indicate that "[his] consideration of the application of section 14 will address [Dr. Barker's] interests." In other words, the concern that there might be pecuniary harm

due to potential civil liability was taken into account by the Commissioner in his s. 14 analysis. The failure to specifically cite that concern or to make specific reference to potential s. 14(2)(e) harm does not, in my view, render the Commissioner's decision unreasonable.

[105] As for the concern about the damage to Dr. Barker's reputation, this concern was, in a very real sense, addressed by the Commissioner's acknowledgement that the information was highly sensitive. The Commissioner described highly sensitive information as information that, if released, would give rise to a reasonable expectation of significant personal distress. Having read the unredacted version of the KPMG Report, it is clear to me that the Commissioner found much of the personal information sensitive because of its potential impact on Dr. Barker's reputation. Although reputation is not specifically mentioned, it was, in my view, encompassed within the concern identified by the Commissioner.

[106] Finally, I do not fault the Commissioner for not referring to s. 14(2)(g). Although Dr. Barker had pointed out that the Report "contains a number of errors and inaccuracies" in her submissions to APH, she added that they would "be addressed, if considered appropriate, directly with KPMG." In her submissions to the Commissioner on her appeal, Dr. Barker did not raise any concern as to the accuracy of the information in the KPMG Report. It was only in her submissions in support of her reconsideration request that concerns over accuracy were raised.

In these circumstances, there was no reason for the Commissioner to refer to s. 14(2)(g) in his decision on the appeal.

[107] Further, I would note that it was open to Dr. Barker to take steps to address the alleged inaccuracies. As she herself noted in her submissions to APH, she had the option of addressing the matter with KPMG, although there is no suggestion that she has done so. The Act also provides options for addressing alleged inaccuracies in personal information. For example, under s. 36(2), it is possible to request a correction or require that a statement of disagreement be attached to the record, reflecting any correction that was requested but not made.

(c) Weight Assigned to Public Interest in Disclosure

[108] In her representations to the Commissioner on the compelling public interest in disclosure of the KPMG Report, Dr. Barker argued that adequate information regarding Mr. Rootenberg's employment with APH was already in the public domain, which reduced the public interest in disclosing the Report. In particular, she referenced the Scott Report, a report commissioned by the Ministry of Health and Long-Term Care that addressed issues that overlap with those addressed by the KPMG Report.

[109] On the reconsideration request, Dr. Barker submitted that the Commissioner, in his original decision, had given undue weight to APH's assessment of the compelling public interest in disclosure.

[110] I do not accept these submissions, as the Commissioner adequately addressed these concerns.

[111] The Commissioner took into account the fact that the Scott Report had been made public. He found that the KPMG Report contained new information:

> [T]here is substantial information contained within the record which does not appear in the public version of the Scott Report, particularly in relation to whether a conflict of interest existed in relation to the interim CFO's appointment. I also find that [Dr. Barker's] personal information is essential to the determination of whether a conflict of interest existed. Both of these factors point to the existence of a compelling public interest in disclosure: at para. 58.

There is no basis to interfere with the Commissioner on this point, as it is not for this court to second-guess the Commissioner's findings or to reweigh particular factors.

[112] Nor am I convinced that it was unreasonable for the Commissioner to take into account APH's assessment of the public interest in disclosure and give it the weight he did. As he explained:

> [APH] is in a strong position to assess whether there is a compelling public interest in disclosure, given its familiarity with the issues considered in the Report, its knowledge of the local community and the fact that it sought and received the views of the affected parties prior to making its decision: at para. 57.

[113] While it was open to the Commissioner to make that assessment, I would add the following. In light of the exceptional nature of the s. 16 override, the

Commissioner should, in my view, be alive to the possible benefit of disclosure to the record holder when he relies on the record holder's own assessment of whether disclosure is warranted under s. 16. In this case, for instance, one could imagine that APH, which had commissioned the Report and agreed that it remain confidential, may consider it beneficial if the Report were to be disclosed, as it could possibly shift some of the public attention away from the problems raised in the Scott Report about the functioning of APH's board. This point was not expressly raised before the Commissioner, although the Commissioner noted in his reasons that APH did say it had been urged to disclose the Report to "establish public confidence in APH": at para. 41.

[114] In considering the weight to be assigned to the compelling public interest in disclosure, the Commissioner noted that he had considered Dr. Barker's submissions in support of a public interest in non-disclosure. Dr. Barker argued that disclosure of an employee's personal information would make recruitment of a new CFO more difficult. The Commissioner was not persuaded by this submission. He explained that the information concerning a possible conflict of interest and possible financial loss or misappropriation was "inextricably tied to the responsibilities generally carried out by officers of public bodies, and for which officers are accountable to their respective board or governing body": at para. 59.

(d) Failure to Redact Portions of the Personal Information

[115] The final point to address is the argument that, even if there was a compelling public interest in the release of the Report and the public interest clearly outweighed the purpose of the s. 14 exemptions, the Commissioner, after reaching this conclusion, ought to have then gone through the Report to identify any protected personal information that was not responsive to the public interest and that could be redacted. Any elements of personal information contained in the Report that the public had little or no need to know could be removed before disclosure.

[116] The Commissioner adequately addressed this issue. After concluding that the record should be released, he specifically indicated that he had "considered whether any portions of the record ought to be withheld": at para. 70. In her submissions, Dr. Barker has not pointed to any personal information that, despite the finding that s. 16 applied, should nonetheless have been redacted. The Commissioner's conclusion that the whole Report had to be released is entitled to deference, and I see no basis to interfere with this assessment.

(e) Conclusion on the Appeal Decision

[117] It was never seriously disputed that the public had an interest in knowing the circumstances surrounding Mr. Rootenberg's hiring and whether APH suffered losses as a result. The Commissioner accepted APH's submission that disclosure

of the report would "inform the citizenry about the activities of the institution during a time when its integrity was in question": at para. 56.

[118] As I have explained, it is also apparent that the Commissioner fully understood the s. 14 privacy interests of Dr. Barker at play, including the fact that the personal information was "highly sensitive" and that much of it had been provided only after Dr. Barker had received an assurance of confidentiality. As noted by the Commissioner, Dr. Barker was a senior public official who was accountable to the community, the APH board and the Ministry of Health and Long-Term Care. Disclosing the KPMG report absent Dr. Barker's personal information would not be responsive to the public interest he found to be compelling. This personal information was essential to the determination of whether a conflict of interest existed.

[119] Ultimately, the weight to be assigned to the important competing interests outlined in the Act is at the heart of the Commissioner's role. The Commissioner's conclusion that Dr. Barker's privacy interests should yield, as they were clearly outweighed by the compelling public interest in disclosure, is reasonable. It fell within the range of acceptable outcomes and is thus entitled to deference.

(4) RECONSIDERATION REQUEST

[120] Finally, I briefly address the reconsideration decision, which the Divisional Court quashed for the same reason it quashed the Commissioner's initial decision.

[121] In this case, Dr. Barker's reconsideration submissions were much more extensive than the submissions she made to the Commissioner prior to his original decision. In her reconsideration submissions, Dr. Barker, for the first time, argued that:

> 1. The Commissioner ought to have explicitly identified each portion of the KPMG Report that constituted personal information. Absent such an explicit identification, it was, in Dr. Barker's submission, impossible to determine whether the public interest override applied to each of these individual pieces of information.
>
> 2. The Commissioner only considered factors in subsections 14(2)(f) and (h) and he ought to have also considered factors in subsections 14(2)(e), (g), and (i), as well as the presumptions in s. 14(3) in his analysis.
>
> 3. The Commissioner should have taken into account the fact that this was the first appeal in which the institution itself claimed that the s. 16 public interest override applied.
>
> 4. The Commissioner ought to have appointed a mediator rather than go directly to rendering a decision.

[122] Dr. Barker also raised concerns with aspects of the Commissioner's reasons. She maintained that the Commission's analysis of s. 14(2)(h) was not fulsome, and that the Commissioner ought not to have treated APH's decision to disclose the Report pursuant to the public interest override as "an important consideration". Finally, Dr. Barker argued that the Commissioner erred in his approach to the issue of public interest. Based on the information that had already been made public and the public interest in non-disclosure, the Commissioner should have concluded that there was no compelling public interest in the release of Dr. Barker's protected personal information and that the release of the

information was not truly responsive to the information being sought by the requester.

[123] I have already addressed most of these concerns in my reasons for concluding that the Commissioner's original decision was reasonable and ought not to have been set aside. In this portion of my reasons, I consider only the reasonableness of the Commissioner's decision not to reconsider.

[124] Under the Commissioner's Code of Procedure for appeals under the *Freedom of Information and Protection of Privacy* Act and the *Municipal Freedom of Information and Protection of Privacy Act* (the "Code of Procedure"), the grounds for reconsideration are limited. The Commissioner may reconsider a decision if one of three circumstances is made out:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> > (a) a fundamental defect in the adjudication process;
> >
> > (b) some other jurisdictional defect in the decision; or
> >
> > (c) a clerical error, accidental error or omission or other similar error in the decision.

[125] New evidence is not a sufficient basis for reconsideration:

> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[126] In this case, the Divisional Court quashed the Commissioner's decision not to reconsider because it did not correct the defect it had identified in the Commissioner's original decision, namely the inadequacy of the reasons. As I have determined that the Commissioner's reasons in support of his original decision were adequate, there is not a valid reason to set aside the Commissioner's reconsideration decision.

[127] I note at the outset that the decision whether or not to grant a reconsideration request is discretionary and is thus entitled to deference. In my view, the Commissioner's reasons show that he exercised his discretion in accordance with ss. 18.01 and 18.02 of the Code of Procedure. He noted that the reconsideration request contained several new arguments and new supporting documentation, which was not a basis for reconsideration.

[128] On the central issue of whether he erred in failing to explicitly identify the portion of the KPMG Report containing Dr. Barker's personal information as well as the applicable ss. 14(2), (3), and (4) provisions, the Commissioner responded that the information he had included in his reasons was "aligned with the position advanced by [Dr. Barker's] former counsel": at p. 5. In their original submissions, neither party had disputed or questioned the fact that the Report contained personal information and that disclosure of that personal information would constitute an unjustified invasion of privacy pursuant to s. 14(1). It is for this reason that the Commissioner concluded as follows:

> Once this office has made a determination that disclosure of the personal information at issue would constitute an unjustified invasion of privacy, this office is not required to engage in an exhaustive written analysis of every possible factor or presumption that may also apply to protect the privacy of personal information. As I determined that the factors at sections 14(2)(f) and (h) apply to the personal information in the Report, it was not necessary to then discuss every other possible factor or presumption that could also apply in favour of the same outcome, particularly in the absence of representations on the applicability of other factors or presumptions.

[129] As the Commissioner's reasons explain, the concerns raised by Dr. Barker on the reconsideration do not demonstrate a "fundamental defect in the adjudication process, or some jurisdictional defect in the decision, in relation to [the] analysis of the mandatory exemption at section 14(1)": at p. 6. There is therefore no reason to interfere with the Commissioner's reconsideration decision.

D. CONCLUSION

[130] For these reasons, I would allow the appeal and set aside the Divisional Court's decision quashing the Commissioner's decisions. The Commissioner does not seek costs. As a result, I would make no order as to costs.

Released: APR 0 9 2019

Paul Rouleau J.A.

I agree. K. van Rensburg J.A.

I agree. J.B. Roberts J.A.