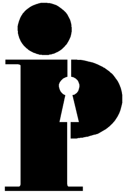

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 188

Appeal 890265

Ministry of Correctional Services

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Information and Privacy
Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The facts of this case and the procedures employed in making this Order are as follows:

1. By letter dated June 29, 1989, a request was made to the Ministry of Correctional Services (the "institution") for the following information:

> Provide any 1988, 1989 briefing notes/analysis of media reports or departmental analysis/ review of public inspection panel reports for this [sic] above facility (Ottawa Carleton Regional Detention Centre) as they relate to perceived or actual crowding in the facility. Please provide informally the 1988, 1989 public inspection panel reports for this facility (you have provided me with 1986_87 panel reports in the past).

2. On August 10, 1989, the institution wrote to the requester and disclosed the public inspection panel reports he had

requested. Two other records were withheld from disclosure in their entirety. These records are:

A two page briefing response, which was prepared for the Minister of Correctional Services in anticipation of questions relating to the death of an inmate at the named facility,
withheld pursuant to subsections 13(1), 14(1)(a), 14(1)(f), 14(2)(a), 14(2)(d) and 21(1) of the Act.

A two page briefing note on the topic of the Ottawa-Carleton Detention Centre - Young Offender Unit withheld pursuant to subsection 13(1) of the Act.

3. On August 16, 1989, the requester appealed the head's decision to this office. Notice of the appeal was given to the appellant and the institution.

4. The two records at issue in this appeal were obtained and examined by the Appeals Officer assigned to the case and efforts were made to mediate a settlement.

5. During the course of mediation, the institution amended its reasons for refusing access to the briefing note by advising that it was now also relying on subsection 12(1) of the Act to deny access to the appellant.

6. Mediation efforts were not successful, and by letter dated January 23, 1990, all parties were notified that an inquiry was being conducted to review the decision of the head. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in

making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

7. Representations were received from the institution only. In its representations, the institution indicated they were also relying on subsections 14(1)(e), 14(1)(j), 14(1)(k) and section 20 of the Act as additional exemptions for withholding

the briefing response. The institution did not make submissions on subsection 13(1) as it relates to the briefing note, hence indicating it was no longer relying on subsection 13(1) to exempt the briefing note from disclosure. I have considered these representations in making my Order.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter_balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to information about themselves held by

institutions, and should provide individuals with a right of access to their information.

Section 53 of the Act provides that the burden of proof that a record falls within one of the specified exemptions in this Act lies with the head of the institution (the "head").

The issues arising in this appeal are as follows:

A. Whether the briefing note is properly exempt from disclosure pursuant to subsection 12(1) of the Act.

B. Whether the briefing response is properly exempt from disclosure pursuant to subsection 13(1) of the Act.

C. Whether the briefing response is properly exempt from disclosure pursuant to subsections 14(1)(a), 14(1)(e), 14(1)(f), 14(1)(j), 14(1)(k), 14(2)(a) and 14(2)(d) of the Act.

D. Whether the briefing response is properly exempt from disclosure pursuant to section 20 of the Act.

E. Whether the briefing response contains personal information as defined in subsection 2(1) of the Act.

F. Whether the briefing response is properly exempt from disclosure pursuant to subsection 21(1) of the Act.

ISSUE A: Whether the briefing note is properly exempt from disclosure pursuant to subsection 12(1) of the Act.

In its representations, the institution relied on subsection 12(1)(c) as the ground for exempting the briefing note.

Subsection 12(1)(c) contains two criteria which must be satisfied in order for a record to qualify for exemption:

(a) it must contain background explanations or analyses of problems; and

(b) it must have been submitted or prepared for submission to the Executive Council or its committees for their consideration in making decisions before those decisions are made and implemented.

The institution submitted that:

> The Ministry of Correctional Services prepared the briefing note to provide an explanation and analysis of an accommodation problem at the Ottawa_Carleton Detention Centre. The briefing note was submitted to the Management Board of Cabinet for its consideration in making a decision regarding funding for expansion of the facility. A decision has not been implemented in this matter. At present, the female offenders at the Ottawa_Carleton Detention Centre have not been returned to their individual living units, and the institution continues to utilize interim measures to accommodate them. In light of the above, it is this ministry's position that the briefing note subject to this appeal is clearly within subsection 12(1)(c) of the Act.

Having reviewed the briefing note, I am in agreement with the institution's submission that it contains background explanations of an accommodation problem at the Ottawa_Carleton Detention Centre. Therefore, the first criterion has been satisfied.

With respect to the second criterion, the institution submitted that the "...briefing note was submitted to the Management Board of
Cabinet...". The Appeals Officer contacted the institution's Freedom of Information and Privacy Co_ordinator to obtain details as to when the briefing note was submitted; in what form it was submitted; and if a decision on the accommodation problem had yet to be made by the Executive Council or its committees.

The Appeals Officer was informed that, in fact, the briefing note had not been submitted to the Executive Council or its committees. However, the institution suggested that the briefing note could possibly be used to prepare a submission to the Executive Council or its committees. In this connection, the institution did not know if the briefing note would be appended to the submission, or if parts of it would be incorporated into the submission or if it would be used at all. It should also be noted that the record is over two years old. Finally, having reviewed the record, I find nothing which leads me to conclude that it was prepared for submission to the Executive Council or its committees.

In light of the above, I find that the second criterion has not been satisfied and therefore the briefing note fails to meet the requirements for exemption under subsection 12(1)(c) of the Act. Even though I have found that the briefing note does not qualify for exemption under subsection 12(1)(c), this finding is not determinative of the issue of disclosure of this record; consideration must be given to the introductory wording of subsection 12(1).

In considering the applicability of subsection 12(1), I must determine whether the release of the records at issue in this appeal "...would reveal the substance of deliberations of the Executive Council or its committees." I concur with Commissioner Linden's view that "...it would only be in rare and exceptional circumstances that a record which has never been placed before the Executive Council or its committees, if disclosed, would reveal the "substance of deliberations" of Cabinet, as required by the wording

of subsection 12(1) of the Act". [Order 72, (Appeal Number 880159), dated July 11, 1989 at page 8].

As previously indicated, the briefing note has not been submitted to the Executive Council or its committees. Furthermore, the institution's representations have not established that there are any exceptional circumstances surrounding this record. Accordingly, I find that the briefing note does not meet the requirements for exemption under subsection 12(1) of the Act and I order that it be disclosed to the appellant.

ISSUE B: Whether the briefing response is properly exempt from disclosure pursuant to subsection 13(1) of the Act.

The head has claimed exemption under subsection 13(1) with respect to the briefing response. Subsection 13(1) of the Act provides:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the services of an institution or a consultant retained by an institution.

As previously mentioned, the briefing response is two pages in length, and deals with the death of an inmate at the Ottawa_ Carleton Detention Centre. The briefing response is divided into three parts. The first part entitled "topic" sets out the subject of the briefing response. The second part is entitled "background" and sets out the facts of the matter. The third

part is entitled "response", and suggests a response that should be made if questions arise.

Commissioner Linden considered the application of subsection 13(1) to the response sections of Minister's issue notes in Order 92 (Appeal Numbers 880193 and 880194), dated September 21, 1989. In that Order, Commissioner Linden agreed with the institution's
submission that the response section of the issue notes contained "advice and recommendations of a public servant" and therefore clearly fell within the scope of subsection 13(1).

I similarly find that the "response" section of the briefing response at issue in this appeal contains "advice and recommendations of a public servant" and therefore this section of the briefing response clearly falls within the scope of subsection 13(1).

I have considered the exceptions enumerated under subsection 13(2) of the Act, with respect to the "response" section of the briefing response and I find that none of the exceptions apply in the circumstances of this appeal.

Regarding the "topic" and "background" sections of the briefing response, I find that the subsection 13(1) exemption is not applicable. These sections do not contain advice or recommendations. In particular, the "background" section is a compilation of facts relating to the topic addressed in the briefing response.

As the section 13 exemption is discretionary, it is my responsibility to ensure that the head of an institution has

properly exercised his or her discretion when deciding to not grant access to a record. In the circumstances of this appeal, I have found nothing to indicate that the head's exercise of discretion in favour of refusing to disclose the "response" section of the briefing response was improper.

While I have found that the "response" section of the briefing response qualifies for exemption under subsection 13(1) of the Act, I have also reviewed the "response" section with a view to determining whether any severances can reasonably be made pursuant to subsection 10(2) of the Act.

Subsection 10(2) of the Act reads as follows:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, 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.

In my view, it is not possible to sever any part of the "response" section of the briefing response without disclosing the information that falls under the subsection 13(1) exemption.

Accordingly, I uphold the institution's decision to exempt the "response" section from disclosure. However, I order the institution to disclose the balance of the briefing response to the appellant subject to my findings under Issues C, D, E and F.

ISSUE C: Whether the briefing response is properly exempt from disclosure pursuant to subsections 14(1)(a), 14(1)(e), 14(1)(f), 14(1)(j), 14(1)(k), 14(2)(a) and 14(2)(d) of the Act.

As I found under Issue B, that the "response" section of the briefing response was properly exempt under subsection 13(1), I will only discuss the applicability of Issue C with respect to the "topic" and "background" sections of this record.

Section 14 of the Act reads, in part, as follows:

> 14.__(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> ...
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;
>
> ...
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention;
>
> ...
>
> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
>
> ...
>
> (d) that contains information about the history, supervision or release of a

> person under the control or supervision of a correctional authority.

The words "law enforcement" are defined in subsection 2(1) of the Act as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b);

With respect to subsection 14(1)(a) the institution submitted that release of the:

> ...ministry's record of facts to any body other than the investigating police forces, the provincial coroner and our own investigators would interfere with a law enforcement matter. The ability of the investigating bodies to conduct an investigation without interference is vital to the administration of justice.

With respect to subsection 14(2)(a) the institution submitted that:

> ...a murder investigation certainly fits within the definition of law enforcement in section 2 of the Act. It is the function of the Ministry of Correctional Services to enforce compliance with the Ministry of Correctional Services Act. As well, institutional staff are peace officers and part of their function is to ensure that those inmates believed to have committed offenses under the Canadian Criminal Code

> are charged by the proper authorities. During the course of all law enforcement investigations in which the Ministry of Correctional Services is involved, a report is prepared to brief the Minister. It is the ministry's position that the record at issue is a report as defined in subsection 14(2)(a) of the Act and, therefore, exempt in its entirety.

I agree that a murder investigation is a law enforcement activity, although the exact role of the institution in the investigation has not been made clear to me by the institution. It is also possible that some of the institution's responsibilities under the Ministry of Correctional Services Act, R.S.O. 1980, Chap. 275, as amended and the Regulations thereto as they relate to correctional facilities might amount to "law enforcement". However, I do not agree that the disclosure of the "topic" and "background" sections of the record in issue could "interfere" with those matters, nor do I feel that any of the other exemptions cited by the institution apply.

Section 14 of the Act provides that an institution may refuse to disclose a record where doing so could reasonably be expected to [emphasis added] result in specified types of harms. A decision of the Australian Administrative Appeals Tribunal in Re Actors' Equity Association of Australia and Australian Broadcasting Tribunal (1986) 7 A.L.D. 584 offers guidance as to the meaning of the term "could reasonably be expected to" as used in section 14 of the Ontario Act. In the Australian case, the tribunal, in considering subparagraph 43(1)(c)(i) of the Australian Freedom of Information Act, 1982, dealt with the meaning of the phrase "which would, or could reasonably be expected to unreasonably affect..." At page 590, the Tribunal stated:

> ...we are in the field of predictive opinion. The question is whether there is a reasonable expectation of adverse effect. It is to that question that the witnesses' evidence had to be directed, and their assertions are incapable of proof in the ordinary way. What there must be is a foundation for a finding that there is an expectation of adverse effect that is not fanciful, imaginary or contrived, but rather is reasonable, that is to say based on reason, namely "agreeable to reason; not irrational, absurd or ridiculous" (shorter Oxford dictionary).

It is my view that section 14 of the Ontario Act similarly requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the section 14 exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 53 of the Act.

In my opinion the institution has not provided sufficient evidence to establish that disclosure of the "topic" and "background" sections of the briefing response could reasonably be expected to interfere with a law enforcement matter; endanger the life or physical safety of a law enforcement officer or any other persons; deprive a person of the right to a fair trial or impartial adjudication; facilitate the escape from custody of a person who is under lawful detention; or jeopardize the security of a centre for lawful detention. Finally, these two sections of the briefing response do not contain information about the history, supervision or release of a person under the control or supervision of a correctional authority.

I am also of the view that this record is not a "report prepared in the course of [emphasis added] law enforcement, inspections or investigations..." as contemplated by subsection 14(2)(a) of the Act. I feel that the use of the words "...report prepared in the course of..." contemplates a report which is prepared as part of the actual investigation, inspection or law enforcement activity. The record at issue does not contain the type of information one would expect to see in such a report. This is not surprising, given that according to the institution's submissions, the "briefing response was prepared for the minister of correctional services by an operational policy analyst".

A review of the briefing response leads me to conclude that it was prepared to brief the minister as to the "background" surrounding a specific topic i.e. the death of an inmate at the Ottawa-Carleton Detention Centre. As such, in my view, the briefing response is not a "report" for the purposes of subsection 14(2)(a). That a variety of police forces were involved in a murder investigation with respect to this incident does not alter the view I have taken with respect to this record.

In conclusion, I find that the "topic" and "background" sections of the briefing response do not qualify for exemption under section 14 of the Act. Therefore, I order the institution to disclose these sections of the briefing response to the appellant subject to my findings under Issues D, E and F.

ISSUE D: Whether the briefing response is properly exempt from disclosure pursuant to section 20 of the Act.

Section 20 of the Act states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The head raised the section 20 exemption, stating that disclosure of the briefing response could reveal the location of witnesses, which in turn would jeopardize their safety.

As in section 14, section 20 stipulates that the institution may refuse to disclose a record where doing so could reasonably be expected to [emphasis added] result in a specified type of harm. In my view, section 20 similarly requires that the expectation of a serious threat to the safety or health of an individual, should a record be disclosed, must not be fanciful, imaginary or contrived, but rather one which is based on reason.

After reviewing the institution's representations, I find that the head has not offered sufficient evidence to support the position that the record could reasonably be expected to seriously threaten the safety or health of the witnesses. There are no witnesses referred to in the briefing response, hence their identity and location could not be revealed if the record were to be disclosed.

Thus, it is my view that the "topic" and "background" sections of the briefing response do not contain information which would trigger the application of the section 20 exemption.

ISSUE E: Whether the briefing response contains personal information as defined in subsection 2(1) of the Act.

In all cases where a request may involve access to personal information, it is my responsibility, before deciding whether the section 21 exemption applies, to determine whether the information contained in the record falls within the definition of "personal

information" under subsection 2(1) of the Act. "Personal information" is defined under subsection 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (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;

After applying this definition to the information contained in the "topic" and "background" sections of the briefing response, I am of the view that each contains "personal information".

Specifically, the names of individuals appear with other personal information relating to the individual and disclosure of the name would reveal "other" personal information about the individual.

ISSUE F: Whether the briefing response is properly exempt from disclosure pursuant to subsection 21(1) of the Act.

Once it has been determined that a record or part of a record contains personal information, subsection 21(1) of the Act prohibits the disclosure of this information, except in certain circumstances. One such circumstance is contained in subsection 21(1)(f) of the Act which reads as follows:

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

Subsection 21(2) of the Act sets out some criteria to be considered by the head when determining if disclosure of personal information constitutes an unjustified invasion of personal privacy.

Subsection 21(2) of the Act states that:

> 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,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(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;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

I have carefully considered the institution's representations in the context of those subparagraphs of subsection 21(2) of the Act that favour the disclosure of personal information as well as those subparagraphs which favour the protection of personal privacy. In my view, the disclosure of the personal information contained in the "topic" and "background" sections of the briefing response would constitute an unjustified invasion of the personal privacy of the individuals to whom the information relates.

Accordingly, I uphold the head's decision to withhold the personal information contained in the "topic" and "background" sections of the briefing response. I order the head to sever this information from the record in accordance with the highlighted copy of the record attached hereto.

In summary, my Order is as follows:

1. I order the head to disclose the briefing note to the appellant.

2. I uphold the head's decision to exempt from disclosure the "response" section of the briefing response, pursuant to section 13 of the Act.

3. I uphold the head's decision to exempt from disclosure the personal information contained in the "topic" and "background" sections of the briefing response as identified in the highlighted copy of the record and I order that the balance be disclosed to the appellant.

4. I order the head to disclose the briefing note and portions of the briefing response to the appellant within 20 days following the date of this Order. I further order the head to advise me in writing within five (5) days of the date of disclosure, of the date on which disclosure was made. Said notice should be forwarded to the attention of Maureen Murphy, Registrar of Appeals, Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:	July 19, 1990
Tom A. Wright Assistant Commissioner	Date