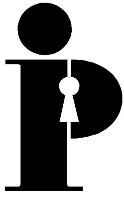

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-597

Appeal P-9200784

Ministry of the Solicitor General and Correctional Services

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ORDER

BACKGROUND:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to:

1. A self-defence manual used by the staff training and development branch of the Ministry in 1986.

2. The report of an internal investigation surrounding an incident where a member of the management staff of a correctional facility was found to have used excessive force to subdue an inmate.

The Ministry advised the requester, pursuant to section 29(1)(a) of the Act, that copies of the 1986 manual do not exist. In response to the second part of the request, the Ministry located an 11 page report to which was appended a "List of Attachments" and the 26 actual attachments. The Ministry denied the requester access to these records in full pursuant to the exemptions provided by sections 14(2)(a) and (d), 21, and 49(a) and (b) of the Act. The requester appealed the decision.

During mediation, the appellant agreed not to pursue the first part of the request and the Ministry disclosed Attachments 4 and 15 of the records to the appellant. Further mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, and the 13 affected persons whose names were contained in the record. Representations were received from the Ministry only.

In its representations, the Ministry withdrew the section 14(2)(a) exemption, but added sections 13(1) and 14(1)(j) of the Act to the list of exemptions claimed.

RECORDS AT ISSUE:

The records at issue in this appeal may be more fully described as follows:

(a) The Investigation Report, part one of which is a "Summary" followed by a "Findings/Recommendations/Conclusion" section. Part two consists of two subsections entitled "Inmate Background" and "Sequence of Events";

(b) A "List of Attachments" which identifies the author of the attachment and the date it was submitted;

(c) Twenty-four attachments consisting of a four page "Custody Client Profile" dealing with one affected person, and statements and

> occurrence reports submitted by inmates and Ministry staff concerning the incident which gave rise to the investigation.

ISSUES:

The issues arising in this appeal are as follows:

A. Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

B. If the answer to Issue A is yes, and the records contain the personal information of the appellant and other identifiable individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to the records.

C. If the answer to Issue A is yes, and the records contain the personal information of persons other than the appellant, whether the mandatory exemption provided by section 21 of the Act applies to the records.

D. Whether the discretionary exemption provided by section 13(1) of the Act applies to the records.

E. Whether the discretionary exemption provided by section 14(1)(j) of the Act applies to the records.

F. Whether the discretionary exemption provided by section 14(2)(d) of the Act applies to the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

> "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,

...

(e) the personal opinions or views of the individual except where they relate to another individual,

...

(g) the views or opinions of another individual about the individual, and

(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;

I have considered the submissions of the Ministry, and carefully examined the statements and occurrence reports which form part of the records. It is my view that those affected persons referred to in the reports which form part of the records who are Ministry staff or law enforcement officers and who provided statements or completed occurrence reports did so as part of their employment responsibilities, rather than in their personal capacity. In my view, the information provided by these individuals was supplied in the course of their employment and cannot be characterized as their personal information.

Accordingly, information about these individuals which appears in the "List of Attachments", and the witness statements and occurrence reports which comprise Attachments 2, 3, 5, 6, 8, 11, 12, 13, 14, 16, 17, 20 and 21, furnished in their capacity as employees, does not qualify as the personal information of these individuals. However, information contained in Attachments 7, 9, 18, 19, 22, 23 and 24, completed by those affected persons who are not Ministry employees or law enforcement officers qualifies as the personal information of those persons, within the meaning of sections 2(1)(b) and (h) of the Act.

I also find that the Investigation Report, with the exception of the "Recommendations" section, and the "List of Attachments" contain the personal information of both the appellant and those individuals referred to in the document who are neither employees of the Ministry nor law enforcement officers.

Turning to the twenty-four attachments, I find that Attachments 1, 10, 11, 17, 19, 20, 21 and 24 contain only the personal information of identifiable individuals other than the appellant. I also find that Attachments 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 16, 18, 22 and 23 contain the personal information of both the appellant and other persons, who are not Ministry staff or law enforcement officers. None of the attachments at issue contain only the personal information of the appellant. Attachment 25 contains no personal information relating to any identifiable individual.

ISSUE B: If the answer to Issue A is yes, and the records contain the personal information of the appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to the records.

Under Issue A, I found that the Investigation Report (with the exception of the "Recommendations" section), the List of Attachments and Attachments 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 16, 18, 22 and 23 contain the personal information of the appellant and other identifiable individuals who are not Ministry staff members. Section 47(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access to personal information by the person to whom it relates. One such exception is found in section 49(b) of the Act, which reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her personal privacy. If the Ministry determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the Ministry the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the requester. Section 21(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy.

In its representations, the Ministry submits that, in deciding not to release the information, it has relied upon the presumptions outlined in sections 21(3)(a), (b) and (h) of the Act.

These provisions state that:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

I am unable to agree that the presumption provided by section 21(3)(b) has any application to the records at issue. The investigation undertaken pursuant to section 22 of the Corrections Act was not a "law enforcement" investigation. Rather, the investigation was undertaken with a view to possible disciplinary action being taken against the appellant. Any possible law enforcement investigation would be undertaken by the appropriate police authorities, not by Ministry personnel.

In my view, the presumptions provided by sections 21(3)(a) and (h) of the Act properly apply to prevent the disclosure of those parts of the records which refer to the medical condition and the ethnic origin of one of the affected persons involved in this appeal. This information appears on pages 2, 5, 6, 7 and 11 of the Investigation Report, pages 3 and 4 of Attachment 6, pages 2 and 3 of Attachment 16, page 3 of Attachment 18, and pages 2 and 3 of Attachment 22. I find, therefore, that the presumption of an unjustified invasion of personal privacy has been established under section 21(3) for those portions of the records described above.

The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption (Order M_170).

I have considered section 21(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 23 of the Act applies. Accordingly, I find that as the presumptions described in sections 21(3)(a) and (h) of the Act have not been rebutted, the disclosure of the personal information contained in the portions of the records described above would constitute an unjustified invasion of the personal privacy of persons other than the appellant. This information is, therefore, properly exempt from disclosure.

The remaining documents which comprise the records, being the "List of Attachments", those portions of the Investigation Report not disposed of above, and those portions of the attachments not addressed above which contain the personal information of both the appellant and other identifiable individuals, were produced as a result of an incident involving the appellant and one of the affected persons to this appeal in the context of the appellant's employment with the

Ministry. At the time of the incident described in the records, the appellant was a staff member at the Toronto West Detention Centre. The report and statements describe the appellant's involvement in the incident, and constitute information which was collected during the course of an internal investigation by the Ministry, pursuant to section 22 of The Corrections Act.

In its representations, the Ministry makes reference to the circumstances described in sections 21(2)(e), (f) and (h) of the Act as being relevant in determining, on balance, whether the disclosure of the remaining personal information would constitute an unjustified invasion of the personal privacy of an individual.

Sections 21(2)(e), (f) and (h) provide as follows:

> 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;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

I will now consider the application of each of these factors individually.

Section 21(2)(e)

The Ministry submits that this section is particularly relevant to those affected persons under the supervision and control of a correctional institution when those individuals complain about correctional staff, or agree to be formal witnesses to occurrences. Further, the Ministry expresses its views in the following fashion:

> Inmates must feel secure in communicating to senior ministry staff, without fear of repercussion from correctional staff or other inmates and without fear of threats to health an safety of themselves and others ...
>
> The Ministry believes that any resulting harm from the disclosure of the statements and witness accounts of these inmates would be unfair as there is no evidence that any of these individuals acted in bad faith with respect to their reporting of the April 3, 1992 incident.

It is my opinion that individuals under the custody and control of a correctional facility are in a particularly vulnerable position with respect to those who monitor their incarceration.

I believe that it is reasonable to assume that inmates might experience fear of repercussion from staff members or other inmates when they provide signed witness statements about occurrences within a correctional facility, whether or not there is an explicit threat to their health or safety.

Accordingly, this factor is a relevant consideration favouring privacy protection when balancing the circumstances described in section 21(2) of the Act.

Section 21(2)(f)

The Ministry also argues that the information contained in the records which was provided by, and relates to, inmates is "highly sensitive" and, if disclosed, could cause extreme personal distress. This position is expressed as follows:

> With regard to the various inmates referenced in the report, it is the view of this ministry that disclosure of their names along with the fact that they were incarcerated at the Metro Toronto West Detention Centre, is nearly tantamount to confirming their criminal history. Such information may be considered highly sensitive.

I agree with the position put forward by the Ministry. Personal information contained in those records not dealt with above which includes the names of inmates may properly be considered to be "highly sensitive". Persons incarcerated at this facility are often awaiting trial and have yet to be convicted of an offence. The confirmation that an individual has been detained in the Toronto West Detention Centre, regardless of whether they have been convicted, could cause to that individual extreme personal distress. Accordingly, I find section 21(2)(f) of the Act to be a relevant consideration favouring privacy protection as well.

Section 21(2)(h)

With respect to the inmates mentioned in the records, the Ministry states that the inspector in charge of the investigation assured them that if they co-operated, "any information they provided would be kept as confidential as circumstances permit".

Although I find that the expectation of confidentiality is a consideration weighing in favour of privacy protection, it is difficult to see how a promise of absolute confidentiality could be held out in the circumstances of an investigation into an incident such as this, particularly where the results of the investigation could have serious disciplinary consequences for the person who was the subject of the investigation.

In summary, I find that three of the factors enumerated in section 21(2) of the Act which weigh in favour of privacy protection are present in the circumstances of this appeal. In interpreting section 21(2), however, all of the relevant circumstances, not only those enumerated in the section, must be considered.

Other Considerations

A further consideration which weighs in favour of disclosure must also be considered. In Order 37, former Commissioner Sidney Linden considered the question of fairness to the appellant when considering application of the section 49(b) discretionary exemption:

> In applying the subsection 49(b) balancing test to the circumstances of this appeal, it should be noted that the records under consideration were originally produced in the course of an employment-related complaint concerning the appellant. In such situations, fairness demands that the person complained against be given as much disclosure of the substance of the allegations as is possible. The degree of disclosure would depend on the circumstances of each particular case, but should be more extensive if the complaint is likely to result in discipline.

In balancing the section 21(2) considerations, and in view of the fact that the appellant submitted no representations in favour of disclosure, I find that the release of the names of individuals who are neither Ministry staff nor police officers contained in the "List of Attachments", the Investigation Report with the exception of the "Recommendations" section, and Attachments 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 16, 18, 22 and 23 would constitute an unjustified invasion of the personal privacy of other identifiable individuals mentioned therein and, accordingly, should not be released to the appellant.

I have reviewed the Ministry's representations regarding the exercise of its discretion in favour of denying access. I find nothing improper in the exercise of discretion and, accordingly, I would not alter this determination on appeal.

ISSUE C: If the answer to Issue A is yes, and the records contain the personal information of persons other than the appellant, whether the mandatory exemption provided by section 21 of the Act applies to the records.

Under Issue A, I found that Attachments 1, 10, 11, 17, 19, 20, 21 and 24 contain the personal information of individuals other than the requester. Section 21(1) of the Act is a mandatory exemption which prohibits the disclosure of personal information to any person other than the individual to whom the information relates, except in the circumstances listed in sections 21(1)(a) through (f) of the Act.

In my view, the only exception to the mandatory exemption contained in section 21(1) of the Act which has potential application in the circumstances of this appeal is section 21(1)(f). This section 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.

Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The appellant has failed to describe any circumstances which might weigh in favour of disclosure. Having found that the information at issue qualifies as personal information, and in the absence of any evidence or argument weighing in favour of finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that the exception provided by section 21(1)(f) of the Act does not apply to these attachments and that they should not be disclosed.

ISSUE D: Whether the discretionary exemption provided by section 13(1) of the Act applies to the records.

The Ministry has claimed the application of section 13(1) of the Act to the "Recommendations" portion of the Investigation Report.

Section 13(1) of the Act reads as follows:

> 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 service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-304, P-348, P-356 and P-529).

In its representations, the Ministry submits:

> It is the view of this ministry that disclosure of the 3 recommendations contained on page 7 of the investigation report would reveal the advice of a public servant.

I agree that the information contained in this portion of the Investigation Report properly falls within the exemption provided by section 13(1) of the Act. I have carefully reviewed the Ministry's representations on the exercise of its discretion and would not alter this determination on appeal.

ISSUE E: Whether the discretionary exemption provided by section 14(1)(j) of the Act applies to the records.

The Ministry submits that section 14(1)(j) of the Act applies to Attachment 26, a hand-drawn diagram of the search area of a maximum security detention centre. This section reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
>> facilitate the escape from custody of a person who is under lawful detention;

In its representations, the Ministry states that this type of information is not generally available to members of the general public. It adds that detailed knowledge of the layout of the search area of the institution would be beneficial to anyone contemplating escape from custody.

In Order 187, Commissioner Tom Wright considered the interpretation of section 14(1)(j) as follows:

> The word **"facilitate"** is defined in the Black's Law Dictionary as: **"to free from difficulty or impediment...To make easier or less difficult; free more or less completely from obstruction or hinderance; lessen the labour of..."**. The appropriate meaning to ascribe to the word facilitate as it is used in subsection 14(1)(j) is **"to make easier or less difficult"**. [emphasis added]

The records at issue in Order 187 are described as construction plans, including drawings for new windows for the facility, the materials to be used in construction, a list of the type of construction work required, and a general description of the facility's grounds. Commissioner Wright found that should records containing this type of information be disclosed, an escape could be facilitated. Accordingly, he held that records of this nature qualified for exemption under section 14(1)(j) of the Act.

In my view, the exception to access set out in section 14(1)(j) of the Act requires that there exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the Ministry must establish a clear and direct linkage between the disclosure of the specific information and the harm which is alleged and in my view, the Ministry discharges this onus by establishing a clear and direct linkage between the disclosure of the specific information and the harm alleged (Orders P-557, P-589 and M-202).

For the purposes of this appeal I am not satisfied that Attachment 26 is sufficiently detailed such that its disclosure would reasonably compromise the security of the facility or facilitate the escape from custody of an inmate of the facility. The Ministry has failed to establish a clear and

direct linkage between the disclosure of the information contained in Attachment 26 and the harm alleged. In my view, section 14(1)(j) of the Act cannot be used to exempt Attachment 26 from disclosure.

ISSUE F: Whether the discretionary exemption provided by section 14(2)(d) of the Act applies to the records.

The remaining information in the records which has not been addressed in this appeal consists of the indexed names of Ministry staff members along with the dates of their statements and/or occurrence reports which appear on the "List of Attachments".

The Ministry has claimed that section 14(2)(d) of the Act applies to this material. This provision states that:

> A head may refuse to disclose a record,
>
> > that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

In my view, the remaining information contained in the "List of Attachments", which consists solely of the names of Ministry staff and the dates upon which they submitted their statements or occurrence reports, does not directly contain sufficient detail regarding the history, supervision, or release of an individual under the control or supervision of a correctional authority to attract the application of the exemption. Accordingly, I find that section 14(2)(d) does not apply this portion of the list.

ORDER:

1. I uphold the Ministry's decision not to disclose the Investigation Report, those portions of the "List of Attachments" which are highlighted in the copy I have provided to the Ministry and the 24 attachments at issue in this appeal, with the exception of Attachments 25 and 26.

2. I order the Ministry to disclose Attachments 25 and 26 and a severed version of the "List of Attachments" which I have provided with this order to the Freedom of Information and Protection of Privacy Co-ordinator at the Ministry within 35 days from the date of this order, and **not** earlier than the thirtieth (30th) day following the date of this order. Those parts of the records which should **not** be disclosed to the appellant are highlighted in yellow.

3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: December 8, 1993
Donald Hale
Inquiry Officer