



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

ORDER P-1193

Appeal P-9500641

Ministry of the Solicitor General and Correctional Services



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NATURE OF THE APPEAL:

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 copies of any notes taken by probation officers who were assigned to supervise the appellant's eighteen month, court-ordered probation period following his conviction on several charges under the Criminal Code. The Ministry identified a number of records which were responsive to the request and denied access to them in their entirety, claiming the application of the following exemptions contained in the Act:

- endanger life or safety - section 14(1)(e)
- discretion to refuse requester's own information - section 49(a)
- invasion of privacy - section 49(b)
- danger to mental or physical health of requester - section 49(d)
- confidential correctional record - section 49(e)

The appellant appealed the Ministry's decision. A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from both parties. The Ministry has not made any submissions with regard to the application of section 49(d) to the records and I will not, accordingly, be considering the application of this exemption to the records. The Ministry has also raised the possible application of section 14(2)(d) of the Act. I will address the lateness of this exemption claim as a preliminary issue.

The records at issue in this appeal consist of the following:

1. A one-page computer-generated Referral Intake Report dated March 26, 1993 upon which additional notes were hand written.
2. A one-page record entitled "Red Flag" dated May 5, 1993.
3. A four-page document entitled "London Centre Intake Form" dated March 24, 1993.
4. A two-page "Assessment and Plan" dated May 20, 1993.
5. Thirty-seven pages of notes entitled "Record of Case Supervision" dated between March, 1993 and July, 1995.

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTION

Upon receipt of the appeal, this office provided the Ministry with a Confirmation of Appeal notice. This notice indicated that the Ministry had 35 days from the date of the notice to raise additional discretionary exemptions not claimed in the decision letter. No additional exemptions were raised during this period.

Subsequently, in its representations dated May 9, 1996, the Ministry raised the application of the discretionary exemption provided by section 14(2)(d) of the Act to the records. The deadline for raising additional discretionary exemptions had expired on December 8, 1995.

It has been determined in previous orders that the Commissioner has the power to control the process by which the inquiry is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in its original decision letter.

The Ministry has not made any submissions as to why this exemption was not raised at an earlier stage in the appeal.

In Order P-685, Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption is claimed late in the appeals process, a decision-maker has the authority to decline to consider the discretionary exemption. I agree with Inquiry Officer Fineberg's reasoning and adopt it for the purposes of this appeal.

In the circumstances of this appeal, I am not persuaded that a departure from the 35-day time frame is justified. Accordingly, I decline to consider the application of section 14(2)(d) to the records.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed each of the five records at issue and find that all of them contain the personal information of the appellant, within the meaning of section 2(1) of the Act. In addition, Records 1, 2 and 4 also contain the personal information of another identifiable individual (the primary affected person). Finally, Records 3 and 5 contain the personal information of the appellant, the primary affected person and a number of other identifiable individuals.

None of the information contained in the records may be characterized as the personal information of the probation officers, police, counsellors or medical personnel who are mentioned therein. Rather, I find that this information refers to these individuals only in their professional capacities.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information. In this situation, the requester is not required to prove that the 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 own information, the only situation under section 49(b) in which he can be denied access to the information is if it can be demonstrated that the disclosure of this information **would** constitute an unjustified invasion of another individual's privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies.

If none of the presumptions in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations which are relevant in the circumstances of the case.

The Ministry argues that the disclosure of certain information contained in Record 5 would result in a presumed unjustified invasion of the personal privacy of two affected persons under section 21(3)(b) as this information was compiled and is identifiable as part of an investigation into a possible violation of law. I have reviewed this information and find that it is merely a recitation of the criminal histories of these individuals and was not compiled as part of an investigation. As such, it does not meet the requirements of a presumed unjustified invasion under section 21(3)(b).

The Ministry also submits that the considerations listed in sections 21(2)(e) (the disclosure of the information will unfairly expose the individual to whom it relates to pecuniary or other harm) and 21(2)(f) (the information is highly sensitive) are factors weighing against the disclosure of the information contained in all of the records. The Ministry's submissions explain in detail the history of the offences for which the appellant was convicted. They also describe in detail the extraordinary measures taken for the protection of the primary affected person following the appellant's conviction. It is the view of the Ministry that the appellant is a threat to the primary affected person and that the disclosure of the information contained in the records could reasonably be expected to result in the unfair exposure of the primary affected person to pecuniary or other harm in the form of reprisals.

The appellant submits that the disclosure of the information contained in the records will assist him in pursuing legal action against the primary affected person and generally will allow him the opportunity to clear his name.

I find that the information contained in Records 2, 4 and 5 may properly be considered to be highly sensitive, within the meaning of section 21(2)(f). In addition, I find that it is reasonably likely that the disclosure of the information contained in these records will result in the primary affected person being unfairly exposed to pecuniary or other harm as contemplated by section 21(2)(e). In balancing the right of the appellant to the disclosure of Records 2, 4 and 5 against the right of the affected persons to privacy protection, I find that the affected persons privacy interests must prevail over the appellant's right of access. Accordingly, I find that Records 2, 4 and 5, in their entirety, are properly exempt from disclosure under section 49(b) of the Act.

The information in Records 1 and 3 is not highly sensitive and its disclosure cannot reasonably be expected to expose the primary affected person to harm. Accordingly, these records are not exempt under section 49(b) of the Act.

ENDANGER LIFE OR SAFETY/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in situations where certain exemptions, including section 14(1)(e), would otherwise apply to that information.

I will now review the application of section 14(1)(e) of the Act to Records 1 and 3, which represent the remaining records at issue in this appeal. Section 14(1)(e) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

endanger the life or physical safety of a law enforcement officer or any other person;

The Ministry submits that the disclosure of all of the information contained in each of the records may seriously jeopardize the physical safety of the primary affected person. The Ministry argues that the records and certain notations made on them demonstrate conclusively the fact that the appellant is a danger to the primary affected person.

I find that the disclosure of Records 1 and 3 to the appellant cannot reasonably be expected to endanger the physical safety of the primary affected person. Record 1 contains background information relating almost exclusively to the appellant. Record 3 contains only information which was supplied by the appellant to the probation officer who made the notes which constitute this record. For this reason, I am unable to find that it is reasonable to expect that the disclosure of these records would endanger the physical safety of the primary affected person within the meaning of section 14(1)(e) of the Act.

CONFIDENTIAL CORRECTIONAL RECORD

The Ministry submits that the records are exempt from disclosure under section 49(e) of the Act which reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence;

In Order 64, former Commissioner Sidney B. Linden made the following statement regarding the application of section 49(e) to a record:

Subsection 49(e) of the Act allows an institution to deny you access to your personal information in situations where the information is a correctional record and release of the information could reasonably be expected to reveal information that was supplied in confidence.

I have reviewed the records which remain at issue in this appeal and find that both may properly be characterized as correctional records because they were compiled by Ministry probation officers in the course of their supervision of the appellant. However, neither Record 1 nor Record 3 contain any information whose disclosure would reveal information which was supplied to the probation officers in confidence. As a result, I find that section 49(e) has no application to these records.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 2, 4 and 5.
2. I order the Ministry to disclose to the appellant Records 1 and 3 in their entirety by sending him a copy by **July 3, 1996** but not before **June 28, 1996**.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ May 29, 1996