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

ORDER P-1332

Appeal P_9600242

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

The requester asked the Ministry of the Solicitor General and Correctional Services (the Ministry) to obtain access to information about himself contained in certain Parole Board files. The requester is currently on probation. He specifically sought access to seven categories of records which may be summarized as follows:

(1) All information pertaining to his living arrangements which the Commissioner's office denied to another appellant in the appeal which resulted in Order P-972.

(2) A letter purportedly received from a health care professional who had previously treated the requester.

(3) All information received from other health care professionals.

(4) Copies of all "Post Suspension Reading Information Sheets" filled out by (or for) all members of the Parole Board for the purposes of an August 1994 hearing.

(5) Any records which set out the reasons for a particular "opinion" expressed on a tape recording to the effect that a named place of residence was not suitable for him.

(6) All information maintained in the files of the requester's Parole Officer. (This aspect of the request was to include community assessments filled out by two named parties; records obtained from various health care professionals, counsellors and another named individual; and all handwritten notes made by the Parole Officer regarding the requester and another named individual).

(7) All information relating to the requester's parole status in the possession of the Ministry up to the date that he was released to a named social agency.

The requester also provided the Ministry with a "Release of Information" form signed by two individuals whose personal information appears in the records. In this form, the two individuals (whom I will refer to as the consenting affected parties) have consented to the disclosure of their personal information to the requester.

The Ministry indicates that, following discussions with its staff, the requester agreed to limit the scope of his request to information in the possession of the Ministry since his August 1994 parole hearing. This would include such records as transcripts, audio tapes and notes.

According to the Ministry, the appellant also confirmed that he was not seeking access to any information which the Ministry had already disclosed to him under previous access requests, or to any records submitted by his present physician.

The Ministry identified a number of records that were responsive to the request and granted the requester access to many of these documents either in whole or in part. The Ministry withheld

seven records, either fully or partially, under the following exemptions contained in the Freedom of Information and Protection of Privacy Act (the Act):

- invasion of privacy - sections 21 and 49(a) and (b)
- correctional records - section 14(2)(d) and 49(e)

The requester (now the appellant) appealed the Ministry's decision of the Commissioner's office.

During the mediation stage of the appeal, the appellant advised the Commissioner's office that he had engaged the services of an individual to represent his interests in the appeal. The representative subsequently took the position that the Ministry had failed to identify all of the records which were responsive to the appellant's request. She also claimed that the records produced by the requester's current physician were inappropriately excluded from the scope of the appeal.

Further mediation was not successful and a Notice of Inquiry was provided to the Ministry, the appellant's representative and two individuals mentioned in the records (whom I will refer to as the affected parties).

The Notice of Inquiry also made reference to the statutory provisions which are relevant to the disposition of this appeal. These included section 2 (the definition of personal information), sections 21, 49(a) and (b) (the invasion of privacy exemptions) and sections 14(2)(d) and 49(e) (the correctional records exemptions). Where applicable, the Notice of Inquiry also described the manner in which the Commissioner's office had interpreted these provisions in the past.

The Ministry, the appellant's representative and one of the affected parties provided submissions in response to the Notice of Inquiry. In his representations, this affected party consented to the disclosure of two letters which he had sent to the Ministry dated November 3, 1993 and March 5, 1994 (Records 6 and 7), as well as to his home address and telephone number. In addition, the Ministry decided to disclose an additional 36 pages of records to the appellant.

On November 22, 1996, the Ministry forwarded these documents directly to the appellant.

The two records which remain at issue in this appeal consist of a Record of Case Supervision (Record 1) and a memorandum (Record 3). The Ministry has exempted a total of eight pages of these records, either in whole or in part. For ease of reference, I will adopt the Ministry's numbering scheme and refer to the pages in question as Pages 6, 7, 10, 11, 12, 14, 15 and 21.

DISCUSSION:

THE SCOPE OF THE APPELLANT'S REQUEST

In her submissions, the appellant's representative takes the position that the appellant never agreed to limit the scope of his original request. She indicates, in particular, that he did not receive a letter from the Ministry which confirmed that he had narrowed his application.

The Ministry, for its part, states that, during a telephone conversation which took place on November 30, 1995, the appellant confirmed that he only wished to receive an update of information since his August 1994 parole hearing. According to the Ministry, the appellant also stated that he did not wish to obtain access to records which had previously been disclosed to him.

The Ministry then submits that, in a subsequent telephone conversation which occurred on January 5, 1996, the appellant confirmed that he only wished to receive an update of his parole release records. The Ministry further states that, on February 2, 1996, it forwarded a confirmation to the appellant at his new address respecting the narrowed scope of his request.

The Ministry also notes that, on February 14, 1996, the appellant wrote to its Freedom of Information (FOI) office to request an update on the status of his request. It points out that, in this correspondence, the appellant made reference to his several telephone conversations with Ministry staff.

Finally, the Ministry indicates that, in early May 1996, the appellant contacted its FOI office to indicate that he did not require access to the records which a particular physician had provided to the Ministry.

Based on my review of the file, there does not appear to exist a signed confirmation from the appellant to indicate that he has agreed to narrow the scope of his request. Such a confirmation would represent the best evidence that an appellant and an institution had reached an agreement to vary the ambit of an original request.

Based on the preponderance of evidence, however, I am prepared to find that the appellant did narrow his request in the manner indicated by the Ministry. I also find that the Ministry made reasonable efforts to communicate the relevant changes to him.

Subject to my evaluation of the Ministry's search efforts, the result is that the Ministry has properly identified the records which are responsive to the appellant's narrowed request.

On this basis, I find that the withheld sentence on Page 21 of the records, which relates to a communication from a named physician (and which I have highlighted in yellow), is not responsive to the appellant's request.
Should the appellant wish to receive all or part of the information which has been excluded from the scope of the present appeal, he is free to file a new access request.

PERSONAL INFORMATION

The first step in my analysis of the exemptions claimed by the Ministry is to determine which portions of the Record of Case Supervision constitute the personal information of the appellant and/or other identifiable individuals.

Following a careful review of the relevant statutory provisions, the representations of the parties, and previous orders issued by the Commissioner's office, I have reached the following conclusions on this subject:

(1) Since the record monitors the appellant's activities while on parole, I find that it generally contains his personal information. There are also passages in the record which constitute the personal information of two consenting affected parties who have agreed that their information can be disclosed to the appellant.

(2) I find, however that the passage on Page 10 of the records which I have highlighted in yellow involves personal matters which relate exclusively to two of the other affected parties. On this basis, I find that this excerpt is not responsive to the appellant's request.

(3) I find that the information which appears in the first and fourth bullet points on Page 6, the last five lines of Page 6, the first bullet point on Page 7, the fourth bullet point on Page 11 of the records, as well as the four lines on Page 10, the 14 lines on Page 12 and the 12 lines on Page 14 of the record which I have highlighted in green constitute information provided by the individuals in question in their *employment or professional capacities*.

Based on previous orders issued by the Commissioner's office, such information does not constitute the personal information of these individuals for the purposes of the Act.

(4) I further find that the information which appears in the last two lines of Page 10, the first six lines of Page 11, the last three lines on Page 11 and the last seven lines of Page 14 of the records constitute the views or opinions of an affected party about the appellant or the consenting affected parties.

Under section 2(1)(g) of the Act, these passages constitute the personal information of the appellant or the consenting affected parties only. I have highlighted the information in question in blue.

To conclude, therefore, I find that the responsive portions of the record constitute the personal information of the appellant and/or the consenting affected parties only.
I also find that part of the last line on Page 14 and the first paragraph on Page 15 of the record as well as the 12 lines on Page 12 of the record which I have highlighted in pink may contain the personal information of an individual who has not been notified of this appeal by the Commissioner's office. I believe that, prior to deciding on whether these passages should be disclosed, it would be appropriate to canvass the views of this party.

CORRECTIONAL RECORDS CONTAINING THE APPELLANT'S PERSONAL INFORMATION

The Ministry claims that the information contained in the Record of Case Supervision is exempt from disclosure under sections 14(2)(d) and 49(a) of the Act. These provisions allow a Ministry to 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 its representations, the Ministry confirms that, while the appellant is not currently incarcerated, he is on probation. The Ministry points out that he will remain under its

supervision in this capacity until May 1998. It then submits that the disclosure of the information contained in the records will hamper its efforts to appropriately supervise him.

The appellant's representative relies on the provisions of Order 98, and submits that because the appellant is no longer under the control or supervision of a correctional facility, the Ministry is precluded from relying on section 14(2)(d) of the Act as the basis for exempting these records.

In Order 98, former Commissioner Sidney B. Linden interpreted the wording of section 14(2)(d) in the following fashion:

> In my view, the purpose of subsection 14(2)(d) is to allow an appropriate level of security with respect to the records of individuals in custody. I am not prepared to extend the application of this provision so far as to allow it to be used to deny access to information simply on the basis that the requester, no longer in custody, is seeking information about himself.

In Order P-460, Inquiry Officer Holly Big Canoe built on this interpretation in the following manner:

> ... At its broadest, the wording of section 14(2)(d) could be interpreted to deny an individual in custody access to virtually all of his or her own personal information. In my view, the overall purposes of the Act should be considered in interpreting this exemption. Section 1(a) of the Act provides the right of access to information under the control of institutions in accordance with the principle that information should be available to the public and that necessary exemptions from this general right of access should be limited and specific. When an individual is seeking access to his or her own personal information, this principle is particularly important.

I agree with these interpretations and adopt them for the purposes of this appeal.

Following a careful review of the record at issue, the representations of the parties and the contents of previous orders, I conclude that the Record of Case Supervision does not contain sufficient detail regarding the history, supervision or release of the appellant to attract the application of the section 14(2)(d) exemption. In making this determination, I have also taken into account that the appellant is now on probation and is no longer a resident of a correctional facility.

CORRECTIONAL RECORDS THAT REVEAL INFORMATION SUPPLIED IN CONFIDENCE

The Ministry also claims that the personal information passages in the Record of Case Supervision are exempt from disclosure under section 49(e) of the Act. This provision permits the Ministry to withhold personal information from an individual to whom this information relates where the information is contained in a correctional record and where the disclosure of this information could reasonably be expected to reveal information supplied in confidence.

In its submissions, the Ministry indicates that some of the information which it has withheld from disclosure was provided to a Ministry Probation and Parole Officer (PPO) by an affected

party implicitly in confidence. The affected party confirms that it was his understanding that the information which he provided to the PPO, both in writing or over the telephone, would be held in confidence.

The Ministry goes on to indicate that, in order to effectively supervise clients, it is essential for its staff to be able to freely communicate with what it refers to as collateral clients. The Ministry further asserts that the ability of a PPO to maintain the confidentiality of information, where necessary, is of critical importance to its programs.

While both the Ministry and the affected party have asserted that the information provided by the affected party was supplied in confidence, I have not been persuaded that such an expectation was reasonable in the circumstances of the appeal.

I base this conclusion on the following considerations. First, while the affected party provided both a letter and note to the Ministry, there was no indication in these communications that their contents had been provided in confidence. In addition, the Ministry has not provided me with any operational guidelines, which it shares with its collateral clients, that confirm that comments received from third parties will be held in confidence.

For these reasons, I find that the section 49(e) exemption does not apply on the facts of this appeal.

INVASION OF PRIVACY

The Ministry also claims that the personal information found in the Record of Case Supervision qualifies for protection under the invasion of privacy exemptions found in sections 21 and 49(b) of the Act.

I have previously determined that the responsive portions of this record contains the personal information of the appellant or the consenting affected parties *only*. On this basis, the information is not subject to either the section 21 or 49(b) exemptions. The result is that these portions of the record must be disclosed to the appellant.

REASONABLENESS OF SEARCH

In her submissions, the appellant's representative points out that, while there were four members on the Parole Board who reviewed the appellant's case, the Ministry has only located two Post Suspension Information Sheets for one hearing. On this basis, she believes that two additional information sheets should exist.

She also contends, based on information obtained from a third party, that the Ministry ought to have located two additional tapes of the appellant's August 1994 Parole Board hearing. Finally, the representative believes that the Ministry has not disclosed all of the records received from a particular health care professional to the appellant.

The Notice of Inquiry which was sent to the parties to the appeal asked that the Ministry provide details of its search for responsive records.

In its representations, the Ministry indicates that its FOI Office obtained nine pages of records from the Kitchener Probation and Parole Office of the Ontario Board of Parole - Western Region (Pages 1-18 of the records) and an additional 18 pages from the Ontario Board of Parole - Western Region (Pages 19-36 of the records), as well as an audiotape of the appellant's June 28, 1994 parole hearing.

The Ministry indicates that the appellant was involved in four parole hearings which were conducted on May 6, June 28, July 26 and August 9, 1994. It further points out that the appellant has not sought access to the tape of the May 6 hearing and that the July 26 and August 9 hearings were likely transcribed on the same tape.

The Ministry then points out that parole hearings are relatively short in duration and that they can typically be recorded on one tape. It further states that the tapes of the June 28 and August 9, 1994 hearings were disclosed to the appellant on June 3, 1996 and November 17, 1995, respectively.

The Ministry has also provided the Commissioner's office with two affidavits sworn by a member of the Ontario Parole Board - Western Region and a Probation and Parole Officer, respectively, to support its contention that no additional responsive records exist.

In her affidavit, the Parole Board member indicates that the Ontario Board of Parole does not maintain four-member quorums. She speculates that, if the appellant believes that a fourth person was present at his hearing, this individual could have been an observer. She further points out that an observer has no input into the decision making process and that a parolee must consent to the presence of an observer at his or her hearing.

She then indicates that one of the Parole Board members who attended at the appellant's August 9 hearing recorded his notes in Braille. She further notes that, in response to a previous access request, the Ministry disclosed two sets of post suspension reading information forms to the appellant.

The Parole Board member goes on to indicate that the third set was subsequently transcribed from Braille and that the Ministry will shortly make an access decision regarding this document.

Finally, the Parole Board member states that it is the Board's policy to erase all audio tapes one year after an individual's period of parole has been completed, which for this appellant occurred on May 22, 1995. This means that the tapes would have been erased on or about May 1996.

For the reasons specified, the Ministry submits that it has located all of the relevant records in the appellant's Ontario Board of Parole and Probation and Parole case files which are responsive to his request.

Where a requester provides sufficient details about the records which he or she is seeking and a Ministry indicates that additional records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that a Ministry prove to the degree of absolute certainty

that such records do not exist, the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

I have carefully reviewed the evidence provided by the appellant and the Ministry. I am satisfied that the search for responsive documents was undertaken by knowledgable staff in locations where the records in question might reasonably be located. On this basis, I conclude that the Ministry's search for the records at issue was reasonable in the circumstances of this appeal.

CORRECTION OF PERSONAL INFORMATION

In her submissions, the appellant's representative asks that the Commissioner's office order that a statement of disagreement respecting the personal information of an affected party be placed on the appellant's parole file.
If the affected party wishes to pursue this remedy, he must make such a request directly to the Ministry under section 47(2) of the Act. It would then be up to the Ministry to determine how to process this application.

ORDER:

1. I order the Ministry to disclose the Record of Case Supervision to the appellant with the exception of the portions of the record which I have highlighted in yellow and pink by **February 21, 1997** but not earlier than **February 17, 1997**. I have provided a copy of the highlighted record to the Ministry's Freedom of Information and Privacy Co-ordinator.

2. I uphold the Ministry's decision to deny access to the excerpts in the records which I have highlighted in yellow.

3. In order to verify compliance with this order, I reserve the right to require that the Ministry provide me with a copy of the record which is disclosed to the appellant under Provision 1.

4. I order the Ministry to provide the appellant with an access decision respecting the transcribed notes of the Braille tape of his August 9, 1994 Parole Board hearing by **February 7, 1997.**

5. I continue to remain seized of the issue of whether the appellant is entitled to obtain access to the portions of the Record of Case Supervision which I have highlighted in pink.

Original signed by: January 17, 1997
Irwin Glasberg

Assistant Commissioner